

No. 17-

IN THE
Supreme Court of the United States

WILLIAM T. ESREY AND RONALD T. LEMAY
Petitioners,

v.
UNITED STATES OF AMERICA,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the “misrepresentation exception,” 28 U.S.C. § 2680(h), of the Federal Tort Claims Act bars claims for aiding and abetting a breach of fiduciary duty where the government’s conduct involves communications, but does not satisfy the elements of a claim for misrepresentation under state law.

(2) Whether the misrepresentation exception of the Federal Tort Claims Act bars claims for aiding and abetting a breach of fiduciary duty because the government’s conduct aided a third party in committing the tort of misrepresentation.

PARTIES TO THE PROCEEDING

Petitioners are William T. Esrey and Ronald T. LeMay. Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioners William T. Esrey and Ronald T. LeMay respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The January 5, 2018 unpublished summary order of the United States Court of Appeals for the Second Circuit is available at 707 Fed. Appx. 749 (2d Cir. 2018). A copy is included in the appendix below. Appendix A (App.1–App.6). The March 23, 2017 unpublished opinion and order of the United States District Court for the Southern District of New York is available at No. 16-3019, 2017 U.S. Dist. LEXIS 42300 (S.D.N.Y. March 23, 2017). A copy is included in the appendix below. Appendix B (App.7–App.17).

JURISDICTION

The United States District Court for the Southern District of New York entered its judgment on March 23, 2017. The United States Court of Appeals for the Second Circuit entered its summary order and judgment affirming that decision on January 5, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

28 U.S.C. § 1346(b)(1) provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680 provides, in pertinent part:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

. . .

(h) Any claim arising out of assault, battery, false imprisonment, false

arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT OF THE CASE

A. Factual Background.

William T. Esrey joined Sprint Corporation in 1980. App.21. He served as the company’s Chief Executive Officer from 1985 to 2003, and as Chairman from 1990 to 2003. App.8, App.21. Ronald T. LeMay joined Sprint in 1985 and served as the company’s President and Chief Operating Officer, with the exception of a brief period, from 1996 to 2003. App.8, App.21.

Ernst & Young LLP (“EY”), one of the country’s largest accounting firms, was Sprint’s auditor while Esrey and LeMay were employed by Sprint. App.8, App.21. EY also served as Esrey’s and LeMay’s personal tax and financial advisor. App.8, App.21. EY advised LeMay for more than ten years, and Esrey for more than twenty. App.8, App.21. As a result, EY and Esrey and LeMay developed a fiduciary relationship, and EY owed the two various duties, including the duties of candor, loyalty, and performance. App.19, App.22.

From 1999 to 2001, EY promoted several types of tax shelter transactions to its clients, including the Contingent Deferred Swap (“CDS”) and CDS Add-On transactions. App.8, App.22. EY recommended that Esrey and LeMay enter into these transactions to help minimize their taxes. App.8, App.22. Pursuant to EY’s advice, Esrey and LeMay engaged in the CDS transaction in 1999 and 2000, and the CDS Add-On transaction in 2000 and 2001. App.8, App.22.

In 2002, the government began investigating EY’s promotion of tax shelters. App.9, App.18, App.22–App.23. In March 2002, the Internal Revenue Service launched a civil audit of EY’s promotion of certain tax shelters (the “Promoter Audit”), including CDS and CDS Add-On. App.9, App.18, App.22. The same year, the IRS Criminal Investigation Division (“CID”) and the United States Attorney’s Office for the Southern District of New York (“SDNY”) also initiated criminal investigations of EY’s conduct with respect to these tax shelters.

App.9, App.18, App.23. In June 2002, the United States Attorney's Office for the SDNY advised EY of its investigation. App.9, App.18, App.23–App.24. At that time, EY retained Gerald Feffer, an esteemed criminal tax lawyer with the law firm of Williams & Connolly. App.23. As instructed by the United States Attorney's Office, EY concurrently implemented a litigation hold on all materials related to EY's promotion of tax shelter transactions. App.23–App.24.

In June 2003, IRS agents engaged in the Promoter Audit informed EY that they were sharing documents with CID. App.9, App.24. This prompted EY to seek a settlement of the Promoter Audit. App.24. The IRS and EY reached an agreement to settle the Promoter Audit for \$13 million, but tensions arose over the use of the word "penalty" in the press release that would announce the settlement. App.19, App.24. The IRS initially insisted that the word "penalty" be used in the press release. App.15, App.24. EY objected because it was sensibly concerned that clients would learn that it paid a penalty and use this fact against it in litigation, and it communicated these concerns to the IRS. App. 15, App.24. The IRS offered to change its position if EY would "sweeten the deal." App.15, App.24. EY offered, and the IRS accepted, \$1.4 million above the statutorily-calculated penalties to remove the word penalty from the press release. App.15, App.19, App.24–App.25.

In addition to auditing EY's promotion of tax shelters, the IRS also began auditing the taxpayers

who entered into these transactions (the “Investor Audits”). App.22. In 2002, the IRS began auditing Esrey and LeMay because they engaged in the CDS and CDS Add-On transactions. App.9, App.22. EY represented both men in these audits, but did not reveal that it was also under investigation. App.9, App.22–App.23, App.26. The IRS, knowing about both investigations, was aware that a conflict of interest existed between EY and its clients, including Esrey and LeMay. App.20, App.27. Treasury Department Circular No. 230, 31 C.F.R. §§ 10.0–10.93—a set of rules enforced by the IRS to ensure that taxpayers are fairly represented by tax advisers—prohibits advisors with an undisclosed conflict of interest from representing taxpayers before the IRS. *See* App.20. Despite these regulations, the IRS allowed EY to represent Esrey and LeMay. App.20.

Because Esrey and LeMay had appropriately disclosed the Investor Audits to Sprint, beginning in 2002, the men were required to certify each quarter that they had no present intention to sue EY. App.10, App.29. At the end of that year, while still unaware EY was itself being investigated, Esrey and LeMay recommended that EY be replaced as Sprint’s auditor due to the potential for conflicts of interest. App.10, App.29. Sprint, concerned that firing its long-time auditor would damage its reputation, instead asked Esrey and LeMay to resign. App.10, App.30. Throughout these discussions, EY did not disclose the criminal investigations and continued to represent to Esrey, LeMay, and Sprint that its advice had been proper. App.10, App.29.

Esrey and LeMay were unaware of the EY criminal inquiry until May 25, 2004, when the Wall Street Journal published an article about the SDNY grand jury investigation. App.10, App.27. In May 2007, the grand jury indicted four EY employees for participating in a scheme to defraud the IRS by designing, marketing, implementing, and defending fraudulent tax shelters. App.9, App.25. On May 8, 2009, the four employees were convicted of multiple charges, including tax evasion in connection with the tax shelters. App.9, App.25. In 2012, the Second Circuit affirmed two of the convictions and reversed the other two. App.9, App.25. For its part, on February 28, 2013, EY entered into a non-prosecution agreement with the United States Attorney's Office for the SDNY and paid \$123 million. App.25.

On January 31, 2008, the IRS issued Notices of Final Partnership Administrative Adjustments ("FPAAs") to Esrey and LeMay as a result of the Investor Audits. App.28. Both men filed petitions in the United States Tax Court to challenge those FPAAs. App.28. The IRS breached its discovery obligations throughout the Tax Court case. App.28. It failed to disclose information relevant to the case and it misrepresented that documents were destroyed or did not exist. App.28. Just five days before trial, the IRS produced the documents showing that EY told the IRS it was concerned clients would learn that it paid a penalty to settle the Promoter Audit and that the IRS removed the word "penalty" in exchange for a \$1.4 million "sweetener." App.28.

In 2011, Esrey and LeMay initiated an arbitration proceeding against EY. App.11, App.28. The arbitration panel issued an interim award in Esrey's and LeMay's favor on November 11, 2013, and a final award was made on February 17, 2014. App.28. Esrey and LeMay incurred substantial attorneys' and expert fees in connection with the arbitration action. App.28–App.29. These fees were increased because of the delay in learning of the extent of EY's breaches of its fiduciary duties. App.29.

B. Procedural Background.

On April 29, 2015, Esrey and LeMay presented the IRS with a claim for aiding and abetting a breach of fiduciary duty pursuant to 28 U.S.C. § 2675(a). App.30. On October 22, 2015, the IRS denied their claims. App.30.

On April 22, 2016, Esrey and LeMay filed a complaint in the United States District Court for the Southern District of New York against the United States. App.7. On June 30, 2016, the United States filed a motion to dismiss. The motion to dismiss alleged that the complaint should be dismissed for lack of subject matter jurisdiction because claims were barred by the misrepresentation (28 U.S.C. § 2680(h)) and tax (28 U.S.C. § 2680(c)) exceptions to the Federal Tort Claims Act. App.7–App.8, App.13. The motion to dismiss also alleged that the complaint failed to state an aiding and abetting claim, and that the claim was untimely. App.7–App.8. On March 23, 2017, the United States District Court for the Southern District of New York

granted the United States' motion to dismiss solely based on the misrepresentation exception to the FTCA. App.16.

On May 17, 2017, Esrey and LeMay filed a Notice of Appeal and the United States Court of Appeals for the Second Circuit docketed the case. Oral argument was heard on November 30, 2017. On January 5, 2018, the Second Circuit issued a summary order and judgment affirming the district court's decision. App.1.

REASONS FOR GRANTING THE PETITION

- I. The Second Circuit's focus solely on whether the government's conduct involved communication in order to decide whether a suit is barred by the misrepresentation exception conflicts with the decisions of this Court and other circuit courts.**

The Federal Tort Claims Act ("FTCA") waives the United States' sovereign immunity and subjects it to liability for certain torts committed by its employees. *See* 28 U.S.C. §§ 1346(b)(1), 2674; *Kosak v. United States*, 465 U.S. 848, 852 (1984). The law of the state where the tort occurred supplies the substantive cause of action against the United States. 28 U.S.C. § 1346(b)(1); *Makarova v. United States*, 201 F.3d 110, 114 (2d Cir. 2000).

In this case, the IRS's actions aided and abetted a breach of fiduciary duty by the petitioners' advisor, EY. Under New York law, a claim of aiding and

abetting a breach of fiduciary duty requires three elements: (i) a breach by a fiduciary of obligations to another; (ii) that a third-party knowingly induced or participated in the breach; and (iii) that the plaintiff suffered damages as a result of the breach. *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 847–48 (2d Cir. 1987).

The FTCA’s waiver of sovereign immunity is subject to specific statutory exceptions. 28 U.S.C. § 2680(a)–(f), (h)–(n); *Kosak*, 465 U.S. at 852. One such exception, set forth in 28 U.S.C. § 2680(h), bars claims against the United States for 11 enumerated torts (the “intentional torts exception”), including claims for “misrepresentation” and “deceit” (the “misrepresentation exception”).

This Court has confined the misrepresentation exception to only bar claims that “fall[] within the commonly understood definition of a misrepresentation claim.” *Block v. Neal*, 460 U.S. 289, 296 n.5 (1983). Misrepresentation claims are limited “to the invasion of interests of a financial or commercial character, in the course of business dealings.” *Id.* (quoting *United States v. Neustadt*, 366 U.S. 696, 711 n.26 (1961)). The misrepresentation exception applies to both willful and negligent misrepresentation claims. *Neustadt*, 366 U.S. at 702.

The misrepresentation exception does not bar claims that focus on the government’s breach of a duty other than the duty to use due care in communicating information. *Block*, 460 U.S. at 297. As a result, government conduct merely involving

communication of information is not barred by the misrepresentation exception. This is because many types of negligent conduct involve elements of “misrepresentation” and communication. Restatement (Second) of Torts, c. 22, Misrepresentation and Nondisclosure Causing Pecuniary Loss, scope note (1977) (“Misrepresentations run all through the law of torts as a method of accomplishing various types of tortious conduct . . .”).

Under New York law, to sustain a claim for fraudulent misrepresentation, a plaintiff must allege that (1) the defendant made “a misrepresentation or a material omission of fact which was false and known to be false by defendant,” (2) “for the purpose of inducing the other party to rely upon it,” (3) “justifiable reliance of the other party on the misrepresentation or material omission,” and (4) “injury.” *Mandarin Trading Ltd. v. Wildenstein*, 944 N.E.2d 1104, 1108 (N.Y. 2011) (quoting *Lama Holding Co. v. Smith Barney, Inc.*, 668 N.E.2d 1370, 1373 (N.Y. 1996)). In a claim for negligent misrepresentation, the plaintiff must show “(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information . . .” *Mandarin Trading*, 944 N.E.2d at 1109 (quoting *J.A.O. Acquisition Corp. v. Stavitsky*, 863 N.E.2d 585, 587 (N.Y. 2007)).

Likewise, the partial overlap between two tort claims—one that is barred by the misrepresentation exception and one that is not—does not

automatically mean that both claims are barred. *Block*, 460 U.S. at 298. Thus, as here, the misrepresentation exception does not per se bar the petitioners' claim for aiding and abetting a breach of fiduciary duty simply because the government's conduct involves communication. Instead, the misrepresentation exception only applies if the government's misstatements are essential to the plaintiff's claim, and the plaintiff suffers financial injuries that are "*wholly* attributable" to reliance on those misstatements. *Id.* (emphasis added). "So long as some aspect of the conduct upon which a plaintiff bases a tort claim does not constitute a tort listed in section 2680(h), the suit is not barred." *Truman v. United States*, 26 F.3d 592, 595 (5th Cir. 1994).

A. The Second Circuit's focus on the government's communication of information conflicts with the decisions of other circuit courts.

In this case, the Second Circuit held that Esrey's and LeMay's aiding and abetting claim was barred because the IRS's actions at issue "concern[] communicating information to the [petitioners]." App.6. The court recharacterized each IRS action as a misrepresentation to the petitioners. App.5–App.6. First, the court dismissed the IRS's acceptance of a bribe from EY to remove the word "penalty" from the promoter audit settlement press release as "amount[ing] to an allegation that the IRS misrepresented to the public the nature of the IRS's concern with EY's tax shelter practices." App.5. Second, the court dismissed the IRS's failure to enforce its tax practitioner regulations to prevent EY

from representing Esrey and LeMay because this action “helped EY to hide information” from them and thus also “concerns communicating information to the [petitioners].” App.6. The court made these findings despite the fact that Esrey and LeMay did not allege that the IRS had a duty to communicate any information to them, but rather had a duty to refrain from accepting bribes, a duty to enforce its own regulations, and a duty to refrain from aiding and abetting breaches of fiduciary duty.

The Second Circuit did not analyze (i) whether the IRS’s actions “fall[] within the commonly understood definition of a misrepresentation claim” or (ii) whether Esrey’s and LeMay’s claim focuses on a breach of a duty other than the duty to use due care in communicating information. *See Block v. Neal*, 460 U.S. 289, 296 n.5, 297 (1983). There is no mention—let alone discussion—of the elements of a claim for either misrepresentation or aiding and abetting a breach of fiduciary duty in the Second Circuit’s summary order. In essence, the Second Circuit’s decision inoculates a federal agency from claims under the FTCA so long as it “add[s] misrepresentations to whatever otherwise actionable torts it commits.” *Block*, 460 U.S. at 298.

1. **The Second Circuit’s decision conflicts with the Ninth Circuit’s recent decision in *Snyder & Assocs. Acquisitions LLC v. United States*, 859 F.3d 1152 (9th Cir. 2017).**

In *Snyder & Assocs. Acquisitions LLC v. United States*, 859 F.3d 1152 (9th Cir. 2017), the Ninth Circuit properly applied this Court’s decision in *Block* to determine whether the plaintiffs’ claims were barred by the misrepresentation exception by looking to whether they had alleged that the government breached a duty separate from the duty to use due care in communicating information. *Snyder*, 859 F.3d at 1160. In *Snyder*, the plaintiffs were in the tax return preparation business and the refund anticipation loan business, and assisted the IRS in a sting operation to catch people making fraudulent claims for tax refunds. *Snyder*, 859 F.3d at 1155–56. Despite the IRS’s representations to the plaintiffs that it would reimburse funds that they advanced during the operation and that the plaintiffs “would be made whole,” *id.* at 1155–56, the IRS never reimbursed the plaintiffs or compensated them for their other losses. *Id.* at 1156.

The Ninth Circuit held that “§ 2680(h) does not shield the government because [the plaintiffs] do not allege that the IRS obtained their money through deceit.” *Id.* at 1160. Instead, the plaintiffs alleged that “the IRS wrongfully obtained use of their money during the sting operation and failed to return it.” *Id.* Accordingly, the court held that the plaintiffs’ claim was based on the IRS’s “negligent failure to

‘take due care to see that Plaintiff[s] were reimbursed and indemnified for any monies which they advanced to persons involved in the sting, or allowed Defendant to use at their request, or which they otherwise lost’” and not on a breach in the duty to use due care in communicating information. *Id.*

Thus, the Ninth Circuit properly held that because the plaintiffs alleged that the IRS had breached a duty distinct from the duty to use due care in communicating information, their claim was not barred by the misrepresentation exception. *Id.* at 1160. The Ninth Circuit reached this result despite the fact that the IRS’s conduct involved misrepresentations to the plaintiffs that they would be reimbursed for their expenses.

The Ninth Circuit’s holding stands in direct conflict with the Second Circuit’s decision in this case. Notwithstanding that Esrey’s and LeMay’s claim does not focus “on the [IRS’s] failure to use due care in communicating information, but rather on the [IRS’s] breach of a different duty[.]” *Block*, 460 U.S. at 297, the Second Circuit held it was barred by section 2680(h). Unlike the Ninth Circuit, the Second Circuit found that government actions involving the communication of information to the petitioners—even though not part of the claim—were enough to fall afoul of the misrepresentation exception.

2. **The Second Circuit’s decision also conflicts with the First and Tenth Circuits, which have held that a claim must contain the essential elements of a section 2680(h) tort to come within the exception.**

The Second Circuit’s decision in this case similarly cannot be reconciled with decisions in the First and Tenth Circuits, which focus on whether the government’s conduct meets the elements of a section 2680(h) tort to determine whether a plaintiff’s claim is barred by that provision.

For example, in *Limone v. United States*, 579 F.3d 79, 92–93 (1st Cir. 2009), the First Circuit held that “when an element of an excepted tort is missing from the factual scenario, the claim is not pretermitted.” 579 F.3d at 92–93. In that case, the court held that the plaintiffs’ claim was not barred by the “malicious prosecution” exception of section 2680(h) because the plaintiffs had not proven “that the FBI instituted criminal proceedings against the scapegoats[,] . . . an essential element of the tort of malicious prosecution.” *Id.* at 93.

Similarly, in *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 855 (10th Cir. 2005), the Tenth Circuit held that the misrepresentation exception did not apply to bar the plaintiffs’ intentional infliction of emotion distress claim because “[t]wo essential components of negligent misrepresentation—reliance and pecuniary loss—

[were] not present on the record before [the court].” 397 F.3d at 855.

B. The Second Circuit’s improper focus on whether the government’s conduct involved communication, rather than on whether Esrey and LeMay alleged that the government breached a duty other than a duty to use due care in communicating information, conflicts with this Court’s decision in *Block v. Neal*, 460 U.S. 289 (1983).

In *Block v. Neal*, 460 U.S. 289 (1983), this Court made clear that government conduct involving communications is not necessarily barred by the misrepresentation exception. In that case, the plaintiff, Neal, contracted with Home Marketing Associates, Inc. for the construction of a house that was required to conform to plans approved by the Farmers Home Administration (“FmHA”). 460 U.S. at 291. The FmHA inspected the house during and after construction, and issued a final report indicating that construction accorded with the drawings and specifications approved by the FmHA. *Id.* at 292. Despite these inspections, Neal later discovered 14 defects throughout the home, including deviations from FmHA plans and from applicable Minimum Property Standards. *Id.* Neal brought suit against the government under the FTCA, claiming that the FmHA had negligently inspected the house. *Id.* at 293.

This Court distinguished the case from its prior decision in *United States v. Neustadt*, 366 U.S. 696 (1961), which similarly involved negligent inspection, but in which the only claim alleged by Neustadt was that the government had breached its duty to use due care in communicating to him. *Block*, 460 U.S. at 296. Because Neustadt’s claim was “in essence” a claim for negligent misrepresentation, it was barred by the misrepresentation exception. *Id.* at 296–97.

But, unlike in *Neustadt*, this Court in *Block* held that Neal’s claim was not barred by the misrepresentation exception, even though the government’s conduct involved misrepresentations to Neal. *Id.* at 298. This is because Neal’s claim alleged the breach of a different duty, namely the duty to use due care to ensure that the builder adhere to previously approved plans and cure all defects before completing construction. This duty was “distinct from any duty to use due care in communicating information to [Neal].” *Id.* at 297. The fact that the government’s conduct could also have supported a claim for negligent misrepresentation did not cause Neal’s claim for negligent inspection to be barred by the misrepresentation exception. *Id.* at 298. “[T]he partial overlap between these two tort actions does not support the conclusion that if one is excepted under the Tort Claims Act, the other must be as well.” *Id.*

The Second Circuit’s holding that claims involving communications are barred by section 2680(h) squarely conflicts with *Block*’s prescription

that the partial overlap of a misrepresentation claim and another claim does not cause the latter claim to be barred by the misrepresentation exception. This case is like *Block* in that the government's conduct involves elements of misrepresentation, as well as a separate tort that is not barred by the intentional torts exception: here, aiding and abetting a breach of fiduciary duty. Because the claim actually brought is premised on this latter tort, and not a breach of the duty to use due care in communicating information, it is not barred by the misrepresentation exception.

II. The Second Circuit's improper focus on a third party's misrepresentation, rather than on the government's conduct, conflicts with the decisions of this Court.

A. The intentional torts exception only applies in cases arising out of intentional torts committed by government employees.

The FTCA allows claims against the government based on the tortious conduct of its employees. 28 U.S.C. § 1346(b)(1). Likewise, in determining whether a claim is barred by the misrepresentation exception in section 2680(h), the conduct at issue is the government's: "[s]ection 2680(h) . . . relieves the Government of tort liability for pecuniary injuries which are wholly attributable to reliance on the *Government's* negligent misstatements." *Block v. Neal*, 460 U.S. 289, 297 (1983) (emphasis added).

Contributory conduct by third parties that constitutes an intentional tort covered by section 2680(h) does not necessarily bar a claim against the government. “[I]t is both settled and undisputed that in at least some situations the fact that an injury was directly caused by [a section 2680(h) tort] will not preclude liability against the [g]overnment for negligently allowing the [tort] to occur.” *Sheridan v. United States*, 487 U.S. 392, 398 (1988). This standard implicitly recognizes that a suit involving both a misrepresentation by a third party and another tort committed by the government is not automatically barred by section 2680(h).

This is because “the phrase ‘arising out of’ refers to claims, not suits. Congress did not bar any *suit* arising out of intentional torts; it barred only *claims* arising out of such wrongs.” *Sheridan*, 487 U.S. at 406 (Kennedy, J., concurring in the judgment) (emphasis in original). This standard is consistent with this Court’s decision in *Block*, which involved misrepresentations made to the plaintiff.

For example, in *Sheridan*, this Court held that the plaintiffs’ suit was not barred even though their injuries were directly caused by section 2680(h) torts (assault and battery). In that case, “an obviously intoxicated off-duty serviceman named Carr fired several rifle shots into an automobile being driven by [the plaintiffs, the Sheridans] on a public street near the Bethesda Naval Hospital.” 487 U.S. at 393–94. The Sheridans filed suit alleging that the government had negligently allowed Carr to leave the hospital with a loaded firearm in violation of its regulations. *Id.* at 394.

This Court focused on the conduct of the government employees to determine whether the Sheridans' suit was barred: prior to the shooting, three naval corpsmen had found Carr lying face down in a drunken stupor and saw that he was in possession of a rifle. *Id.* at 395. "They neither took further action to subdue Carr, nor alerted the appropriate authorities that he was heavily intoxicated and brandishing a weapon." *Id.* Later that night, Carr fired shots at the Sheridans. The naval corpsmen's conduct violated federal regulations that prohibited the possession of firearms on the naval base and that required all personnel to report the presence of any firearms. *Id.* at 401.

This Court explained that the intentional torts exception did not bar the plaintiffs' claim because it "should . . . be construed to apply only to claims that would otherwise be authorized by the basic waiver of sovereign immunity." *Id.* at 400. Thus, "since [a section 2680(h) tort committed] by a person who was not employed by the Government could not provide the basis for a claim under the FTCA, the exception [cannot] apply to such [a tort] . . . the exception only applies in cases arising out of [intentional torts] by federal employees." *Id.* In other words, because Carr was off-duty at the time of the shooting, his actions could not provide the basis for liability against the government, and thus could not be excepted by section 2680(h). The negligence of the naval corpsmen could, however, furnish a separate basis for government liability. *Id.* at 401.

B. The Second Circuit’s failure to analyze the government’s conduct conflicts with this Court’s decision in *Sheridan v. United States*, 487 U.S. 392, 398 (1988).

The Second Circuit summarily concluded that the IRS’s failure to follow its tax representative regulations could not provide the basis for liability against the government because this conduct “helped EY to hide information from [Esrey and LeMay]” and, as such, “concerns communicating information to [them]” App.6. Based on this finding, the Second Circuit held that petitioners had failed to allege the breach of a duty distinct from any duty to use due care in communicating information and that, as a result, their claim was barred by the misrepresentation exception.

The Second Circuit’s opinion conflicts with this Court’s holding in *Sheridan v. United States*, 487 U.S. 392, 398 (1988), that the intentional torts exception does not apply if the section 2680(h) tort was committed by a person who was not employed by the federal government. Here, the misrepresentations were made by EY, not by the IRS. That the IRS’s actions may have helped EY make misrepresentations to Esrey and LeMay has no bearing on whether their claim is barred by section 2680(h). This is the case even if the ultimate harm was caused by the misrepresentation, just as the ultimate harm in *Sheridan* was caused by the bullets striking the Sheridans’ car. Because EY’s actions cannot provide the basis for government liability under the FTCA, their misrepresentations

cannot provide the basis to dismiss petitioners' claim.

The Second Circuit should have determined whether the IRS's actions provide an independent basis for liability against the government apart from EY's misrepresentations. By failing to do so, the decision "obliterates the legal significance of any negligence that precedes or follows [a tort covered by section 2680(h)]." *Sheridan*, 487 U.S. at 406 (Kennedy, J., concurring in the judgment). Further, the Second Circuit's conclusion that Esrey's and LeMay's claim was automatically barred by the misrepresentation exception because EY committed a misrepresentation flatly contradicts *Sheridan*'s holding that the plaintiffs' claim was not barred despite their injury being caused by a section 2680(h) tort.

III. The extensiveness of the IRS's dealings with the public make it particularly important for this Court to clarify the appropriate application of the misrepresentation exception with respect to the types of misconduct alleged in this case.

The IRS had a duty to do its job without taking bribes. Yet, under the Second Circuit's reasoning, by accepting a "sweetener" and then lying about the nature of the promoter settlement, it protected itself from suit. Similarly, the IRS had a duty to enforce its tax advisor regulations to bar the conflicted tax advisor, EY, from representing Esrey and LeMay. But helping EY hide that conflict from the men also

supposedly triggered the misrepresentation exception and protected the agency from being sued for that failure. At its heart, the Second Circuit's decision thus holds that the IRS can breach a duty and then lie about it as a defense. The impact of such a decision in the context of a federal agency that is omnipresent in American life should be carefully considered in deciding whether to grant this writ.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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