

## **APPENDIX**

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**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

KEVIN ABBEY; et al. \*

*Plaintiffs-Appellants,*

v.

UNITED STATES OF  
AMERICA; UNITED  
STATES DEPARTMENT OF  
THE NAVY,

*Defendants-Appellees,*

and

TETRA TECH, INC.,

*Defendant.*

No. 23-15170

D.C. No. 3:20-cv-  
06443-JD

OPINION

Appeal from the United States District Court  
for the Northern District of California  
James Donato, District Judge, Presiding

Argued and Submitted May 15, 2024  
San Francisco, California

Filed August 20, 2024

Before: Kenneth K. Lee and Daniel A. Bress, Circuit  
Judges, and Gloria M. Navarro, \* District Judge.

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\* The court is not listing herein all of the numerous individual plaintiffs in this appeal.

\*\* The Honorable Gloria M. Navarro, United States District Judge for the District of Nevada, sitting by designation.

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**SUMMARY**<sup>\*\*\*</sup>

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**Federal Tort Claims Act**

The panel affirmed the district court's dismissal for lack of subject matter jurisdiction of a Federal Tort Claims Act (FTCA) action, brought by current and former San Francisco Police Department (SFPD) employees, alleging that the United States misled the City of San Francisco and the SFPD about the safety of a contaminated former Naval shipyard that the City leased to use as a facility for SFPD employees.

The panel held that the FTCA's misrepresentation exception to the sovereign immunity waiver applied because it precludes any claims "arising out of" a misrepresentation. Plaintiffs' claims arose out of the Navy's alleged misrepresentations, even if the Navy did not directly make them to plaintiffs.

The panel rejected plaintiffs' argument that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) implicitly limited or suspended the misrepresentation exception because neither the statutory text nor canons of statutory construction suggest that Congress intended CERCLA to override the FTCA's misrepresentation exception.

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<sup>\*\*\*</sup> This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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**OPINION**

LEE, Circuit Judge:

This case addresses the scope of the misrepresentation exception to the sovereign immunity waiver under the Federal Tort Claims Act (FTCA). While sovereign immunity generally shields the United States from lawsuits, Congress waived it for most tort claims. But the FTCA also carved out several exceptions to that sovereign immunity waiver, including for claims “arising out of,” among other things, “misrepresentation.” 28 U.S.C. § 2680(h).

Here, the City of San Francisco leased a former Naval shipyard to use as a facility for San Francisco Police Department (SFPD) employees. The plaintiffs—current and former SFPD employees, along with their family members—sued the United States, claiming that it had

misled the City and the SFPD about the safety of the contaminated shipyard. The key question before us is whether the FTCA's misrepresentation exception requires the federal government to have made the alleged misrepresentations directly to the plaintiffs—or if making allegedly false statements to the City or the SFPD is enough to invoke this exception and bar the plaintiffs' claims.

We hold that the FTCA's misrepresentation exception to the sovereign immunity waiver applies because it precludes any claims “arising out of” a misrepresentation. 28 U.S.C. § 2680(h). And in our case, the plaintiffs' claims “arise” out of the Navy's alleged misrepresentations, even if the Navy did not directly make them to the plaintiffs. Our precedent—which directs courts to look at the “gravamen” of the complaint—confirms our reading of the FTCA's misrepresentation exception.

We also reject the plaintiffs' argument that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) has implicitly limited or suspended the misrepresentation exception. 42 U.S.C. § 9620(h)(1). While CERCLA imposes a duty of disclosure about environmental health hazards on federally owned property, neither the statutory text nor canons of statutory construction suggest that Congress intended CERCLA to override the FTCA's misrepresentation exception. We thus affirm the district court's dismissal of the lawsuit for lack of subject matter jurisdiction.

## **I. Factual Background**

Hunters Point Naval Shipyard is a 965-acre former naval base located along the San Francisco Bay. During

the Cold War, the Naval Radiological Defense Laboratory operated there, undertaking research and decontamination of radioactive vessels used in nuclear weapon tests.

In 1989, the Environmental Protection Agency (EPA) determined that the shipyard qualified under CERCLA as a “Superfund” site, requiring the Navy to remediate it before it could be reused. 42 U.S.C. § 9601 *et seq.* The Navy signed an agreement with EPA and California governmental entities setting a schedule for environmental remediation. The Navy also contracted with Tetra Tech, Inc. to plan and oversee testing, investigation, and cleanup activities.

The plaintiffs allege that the Navy negligently supervised Tetra Tech and that Tetra Tech perpetrated extensive fraud. Despite these alleged failures, the Navy began negotiating a lease of the Building 606 Property at the shipyard to the City for use by the SFPD. According to the plaintiffs, the Navy “negligently performed its inspection, investigation, and record review, and negligently told the City that there was no history of any radioactive substances at the Building 606 Property.”

In particular, the plaintiffs assert that the Navy misrepresented the safety of the site in two 1996 lease documents prepared under CERCLA § 120(h)(1)’s disclosure requirement. Relying on these alleged misrepresentations, the City agreed to lease the site for use by the SFPD. The SFPD, too, relied on the Navy’s misrepresentations in these two documents. And, as the plaintiffs tell it, the Navy and Tetra Tech continued to misrepresent the safety of the shipyard to the City and the SFPD.

As a result of these misrepresentations, SFPD employees claim that they were exposed to “radiological and non-radiological contamination” at the site, causing health problems and elevating their risk of developing life-threatening diseases.

## II. Procedural History

In 2020, the plaintiffs sued the United States. The government moved to dismiss for lack of subject matter jurisdiction, contending that the claims fall outside the United States’ waiver of sovereign immunity. *See* 28 U.S.C. §§ 1346(b), 2671, 2680(a), 2680(h). The district court dismissed the First Amended Complaint without prejudice and advised the plaintiffs that the FTCA’s “misrepresentation exception . . . appears likely to bar at least some portion” of their claims.

The plaintiffs then filed their Second Amended Complaint (SAC), asserting, among other things, negligent undertaking, negligent failure to warn, negligent supervision, negligence per se, negligent misrepresentation, and negligent infliction of emotional distress. The government once again moved to dismiss for lack of subject matter jurisdiction. And the district court again dismissed the complaint on that basis. It concluded that the plaintiffs had “doubled down on the misrepresentation theory” in the SAC. The court reasoned that the “alleged misrepresentations in this case are by no means ‘collateral to the gravamen’ of the SAC.” *See Esquivel v. United States*, 21 F.4th 565, 578 (9th Cir. 2021). Rather, the court stressed, “[m]isrepresentation is at the heart of all of the claims in the SAC.”

The district court rejected the plaintiffs’ contention that the misrepresentation exception did not apply. The



plaintiffs argued that because the misstatements were made to the City and their employer (SFPD)—and not to SFPD employees—they did not detrimentally rely on the false information, as required under the common law tort of misrepresentation. The district court reasoned that the “plain language of 28 U.S.C. § 2680(h) exempts from the FTCA’s waiver of sovereign immunity ‘[a]ny claim arising out of . . . misrepresentation.’” The court also rejected the argument that CERCLA has limited or suspended the misrepresentation exception. The district court dismissed the SAC with prejudice, and the plaintiffs timely appealed.

### STANDARD OF REVIEW

We review *de novo* a district court’s dismissal for lack of subject matter jurisdiction under the FTCA. *Leuthauser v. United States*, 71 F.4th 1189, 1193 (9th Cir. 2023) (citing *Foster v. United States*, 522 F.3d 1071, 1074 (9th Cir. 2008)).

### ANALYSIS

#### **I. The FTCA waived sovereign immunity for certain tort claims, but not for those arising out of misrepresentation.**

Although not explicitly mentioned in the Constitution, the principle of sovereign immunity long predates the American Founding. *See Alden v. Maine*, 527 U.S. 706, 715–16 (1999) (surveying English common law on sovereign immunity). The Framers accepted this long-held view and thus “considered immunity from private suits central to sovereign dignity.” *Id.* at 715; *see also* The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*” (emphasis in original)). And given this historical

backdrop, the Supreme Court has recognized that federal courts lack jurisdiction over suits against the United States unless “it consents to be sued.” *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

Congress, though, enacted the FTCA in 1946, which as amended waives immunity for tort claims alleging:

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. § 1346(b)(1).

The FTCA, however, clawed back certain classes of tort suits from its broad sovereign immunity waiver. It excludes from its scope “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation*, *deceit*, or interference with contract rights . . . .” *Id.* § 2680(h) (emphasis added). The Supreme Court has long held that based on the inclusion of both “misrepresentation” and “deceit,” section 2680(h) bars claims “arising out of negligent, as well as willful, misrepresentation.” *United States v. Neustadt*, 366 U.S. 696, 702 (1961). And the misrepresentation exception also encompasses omissions. *City & Cnty. of S.F. v. United States*, 615 F.2d 498, 504–05 (9th Cir. 1980).

The “plaintiff bears the burden of persuading the court that it has subject matter jurisdiction under the FTCA’s

general waiver of immunity,” and the United States bears the burden of proving that a waiver exception applies. *Prescott v. United States*, 973 F.2d 696, 701–02 (9th Cir. 1992) (citing 28 U.S.C. § 1346(b)).

**II. The district court properly dismissed the lawsuit for lack of subject matter jurisdiction under the FTCA’s misrepresentation exception.**

**A. Under the plain text of section 2680(h), the claims “arise out of” misrepresentation and thus fall within the waiver exception.**

Our analysis begins, as it must, with the statutory text. *Leuthauser*, 71 F.4th at 1194. The plain language of 28 U.S.C. § 2680(h) exempts from the FTCA’s waiver of sovereign immunity “[a]ny claim arising out of . . . misrepresentation.” The Supreme Court has held that “the essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies.” *Block v. Neal*, 460 U.S. 289, 296 (1983). The question before us is thus whether the plaintiffs’ claims “arise out of” the Navy’s alleged misrepresentations about the safety of the shipyard. We hold that they do.

We have generally given “arising out of” or “arising from”—terms commonly used by Congress—a broad construction in other statutory contexts. *See, e.g., In re Tristar Esperanza Props., LLC*, 782 F.3d 492, 497 (9th Cir. 2015); *In re Border Infrastructure Env’t Litig.*, 915 F.3d 1213, 1220 (9th Cir. 2019). We have held that “arising out of” generally means “‘originating from,’ . . . ‘growing out of,’ or . . . ‘incident to, or having connection with.’” *In re Tristar*, 782 F.3d at 497 (quoting *Underwriters at Lloyd’s of London v. Cordova Airlines, Inc.*, 283 F.2d 659,

664 (9th Cir. 1960)).

So by its plain text, section 2680(h) does not merely preclude claims *for* misrepresentation. Rather, it bars any claim “arising out of” misrepresentation. *Cf. id.*; see *United States v. Shearer*, 473 U.S. 52, 55 (1985) (plurality opinion) (“Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery.”); *Life Partners Inc. v. United States*, 650 F.3d 1026, 1032 (5th Cir. 2011) (“The FTCA’s misrepresentation exception is broad: it bars any claim arising out of a misrepresentation—even if the conduct underlying the claim may also constitute a tort not barred by section 2680(h).”). And here, the claims plainly “arise out of” the Navy’s alleged misrepresentations to the City and the SFPD about hazardous substances at the shipyard. The complaint alleges that the Navy’s misrepresentations to “the City . . . about the hazardous substances used and released at [the site] was a substantial factor in causing the Plaintiffs” injuries. And the plaintiffs further allege that the SFPD expressly relied on these alleged misrepresentations “first in relocating hundreds of employees . . . to [the shipyard]” and then in “continuing to have [them] work there during Tetra Tech’s remediation activities.” In sum, the complaint makes clear that the claims arise out of the Navy’s misrepresentations—and that they thus fall within the FTCA’s misrepresentation exception.

This reading of the FTCA’s “arising out of” language dovetails with our case law providing that courts should determine whether the government’s misrepresentation constitutes the “essence” or “gravamen” of a plaintiff’s complaint. See *Esquivel*, 21 F.4th at 578 (applying the misrepresentation exception where the “alleged

misrepresentation . . . [was] not collateral to the gravamen of the complaint”); *Sabow v. United States*, 93 F.3d 1445, 1456 (9th Cir. 1996), *as amended* (Sept. 26, 1996) (“We focus our § 2680(h) inquiry on whether conduct that constitutes an enumerated tort is ‘essential’ to a plaintiff’s claim.”); *see also Mt. Homes, Inc. v. United States*, 912 F.2d 352, 355 (9th Cir. 1990); *Block*, 460 U.S. at 296; *Neustadt*, 366 U.S. at 704.

Put another way, our case law indicates that a claim is barred as “arising out of” misrepresentation if its “gravamen” or “essence” is the government’s communication of false information. Conversely, a claim can proceed under the FTCA if it is predicated on “the Government’s breach of a different duty”—even if false information is collaterally involved. *Block*, 460 U.S. at 297 (holding that section 2680(h) was inapplicable because “the Government’s misstatements [were] not essential to plaintiff’s negligence claim”); *see also Esquivel*, 21 F.4th at 578.

In determining the “gravamen” or “essence” of the claim, we must “look[] beyond the labels,” and appraise “the alleged ‘conduct on which the claim is based.’” *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1123 (9th Cir. 2019) (citations omitted). Otherwise, plaintiffs could creatively plead around the FTCA’s misrepresentation exception. *Id.* (“[I]f the governmental conduct underlying a claim falls within an exception outlined in section 2680, the claim is barred, no matter how the tort is characterized.”); *see also, e.g., Thomas-Lazear v. F.B.I.*, 851 F.2d 1202, 1207 (9th Cir. 1988) (reasoning that a “claim for negligent infliction of emotional distress is nothing more than a restatement of the slander claim, which is barred by section 2680(h)”).

Here, the Navy’s alleged misrepresentations are not “collateral to the gravamen” of the complaint, *Esquivel*, 21 F.4th at 578, but rather “essential” to each claim, *see Sabow*, 93 F.3d at 1456; *Thomas-Lazeur*, 851 F.2d at 1207. As the district court pointed out, the plaintiffs had “doubled down on the misrepresentation theory” in their complaint. And because the “gravamen” or “essence” of the claims is rooted in misrepresentation, they “arise out of” the Navy’s allegedly false statements and fall within the FTCA’s misrepresentation exception.

**B. The Supreme Court has not required a misrepresentation to be made to the plaintiffs for the FTCA’s waiver exception to apply.**

Faced with the FTCA’s text and our case law supporting that plain meaning construction, the plaintiffs argue that the misrepresentation exception does not apply if the false information was neither made directly to nor relied on by the plaintiffs. Here, they contend, the Navy misrepresented the safety of the shipyard to third parties—the City and their employer, SFPD—and the plaintiffs themselves did not detrimentally rely on those false statements. As the plaintiffs have it, they were merely “unfortunate and foreseeable victims of the misrepresentations that were made” to and relied on by the City in leasing the contaminated property from United States.

The plaintiffs hitch this theory on out-of-context language from a pair of Supreme Court cases—*Neustadt* and *Block*—that observed that Congress contemplated the “traditional and commonly understood legal definition of the tort of ‘negligent misrepresentation’” in drafting the FTCA exceptions. *Neustadt*, 366 U.S. at 706–07; *see also*

*Block*, 460 U.S. at 296. Under the traditional tort of negligent misrepresentation, detrimental reliance by a plaintiff is an “essential element” of the claim. And because the City and SFPD—not the plaintiffs—detrimentally relied on Navy’s misrepresentations, the plaintiffs argue that their claims do not fall within the common law definition of the tort of negligent misrepresentation.

We reject the plaintiffs’ argument for several reasons.

First, neither *Neustadt* nor *Block* squarely addressed section 2680(h)’s “arising out of” language, so neither decision supports—as a matter of statutory construction—the plaintiffs’ argument that only claims *for* misrepresentations personally relied upon by the plaintiff are expressly barred. *Cf. Shearer*, 473 U.S. at 55 (plurality stating that assault and battery exception does not just bar claims for assault and battery but those arising out of the same).

Second, neither case addressed the question before us—whether the misrepresentation exception applies when a third-party, rather than the plaintiff, relies on the government’s misrepresentations that allegedly injured the plaintiff. Rather, in both *Neustadt* and *Block*, the Court emphasized the traditional tort of misrepresentation to distinguish between (1) claims grounded in the government’s failure “to use due care in communicating information” (which are barred by section 2680(h)), and (2) negligence claims which may collaterally involve misstatements but ultimately center upon “the Government’s breach of a different duty” (which are not barred). *Block*, 460 U.S. at 297.

In *Neustadt*, the Court stressed that section 2680(h)

bars negligent misrepresentation claims, no matter how a plaintiff characterizes them. *See* 366 U.S. at 703. The Neustadts had relied on an appraisal conducted by the Federal Housing Administration (FHA) for mortgage insurance purposes. *Id.* at 699–701. But the FHA had failed to identify latent structural defects, and the Neustadts later noticed cracks forming in the ceilings and walls of their house. *Id.* at 700. They sued under the FTCA, alleging that the FHA negligently inspected and appraised the property and that they justifiably relied on the faulty appraisal. *Id.*

The Court held that the claim was barred by section 2680(h), rejecting the Neustadts’ argument that it arose out of the FHA’s negligence, not a misrepresentation. *Id.* at 706–07. Rather, the Court reasoned, the Neustadts’ claim amounted to “the traditional and commonly understood legal definition of the tort of ‘negligent misrepresentation,’” *id.* at 706. The Court explained that to characterize the Neustadts’ claims as “‘arising out of negligence rather than ‘misrepresentation,’ . . . is nothing more than an attempt to circumvent [section] 2680(h) by denying that it applies to negligent misrepresentation.” *Id.* at 703. So neither *Neustadt*’s holding nor its analysis supports the plaintiffs’ argument that the misrepresentation must be made directly to the plaintiffs for section 2680(h) to apply.

Likewise, *Block* does not add much to the plaintiffs’ argument. In that case, the plaintiff, Neal, had secured a loan from the Farmers Home Administration (FmHA) for the construction of a prefabricated house. *Block*, 460 U.S. at 290–91. Neal then entered a contract with a builder requiring the construction to conform to FmHA-approved plans and granting FmHA the right to inspect and



supervise construction. *Id.* at 291. A FmHA supervisor inspected the home and issued a report confirming that it met FmHA's specifications. *Id.* at 292. Neal later discovered substantial defects and sued under the FTCA. *Id.* The government contended that the claim arose out of her reliance on the inspection reports containing misrepresentations about the house's construction. *Id.* at 297.

Noting that "the essence of an action for misrepresentation . . . is the communication of misinformation on which the *recipient* relies," the Court explained that the misrepresentation exception "does not bar negligence actions which focus not on the Government's failure to use due care in communicating information, but rather on the Government's breach of a different duty," *id.* at 296–97 (emphasis added). Distinguishing *Neustadt*, the *Block* Court held that Neal's claim was not barred by section 2680(h) because she "d[id] not seek to recover on the basis of misstatements made by FmHA officials." *Id.* at 299. The Court reasoned that while the FmHA "may have undertaken both to supervise construction of Neal's house and to provide Neal information regarding the progress of construction, Neal's action is based *solely on the former conduct.*" *Id.* (emphasis added). That is, "the FmHA's duty to use due care to ensure that the builder adhered to the approved plans and cured all defects before completing construction was distinct from any duty to use due care in communicating information to [Neal]." *Id.* at 297.

In both cases, the Supreme Court referenced the common law tort of negligent misrepresentation to distinguish between (1) claims in which the government's misstatements are "essential" (which are barred by the

FTCA) and (2) “negligence actions which focus not on the Government’s failure to use due care in communicating information, but rather on the Government’s breach of a different duty” (which are not precluded by the FTCA). *Id.* And here, as explained earlier, the Navy’s alleged misrepresentations are “essential” to the complaint.

Ignoring this broader context of the decisions, the plaintiffs pluck out language from *Neustadt* and *Block* discussing a plaintiff’s detrimental reliance as an element of the traditional tort of negligent misrepresentation. But “the language of an opinion is not always to be parsed as though we [are] dealing with [the] language of a statute.” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). Rather, as the Supreme Court has stressed, “opinions dispose of discrete cases and controversies[,] and they must be read with a careful eye to context” and the specific facts at bar. *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 373–74 (2023) (citing *Cohens v. State of Virginia*, 19 U.S. 264, 399–400 (1821) (Marshall, C.J.)); *see also Cohens*, 19 U.S. at 399 (“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.”). We thus reject the plaintiffs’ reading of *Block* and *Neustadt* as requiring detrimental reliance by the plaintiff for the FTCA’s misrepresentation exception to apply.

**C. The Ninth Circuit, along with two other circuits, has applied the misrepresentation exception even without detrimental reliance by the plaintiff.**

Our decision today is consistent with circuit precedent: our circuit has taken a broad view of the FTCA’s misrepresentation exception and applied it even if the allegedly false statement was not made directly to the

plaintiff. See *Alexander v. United States*, 787 F.2d 1349, 1350–51 (9th Cir. 1986); *Lawrence v. United States*, 340 F.3d 952, 958 (9th Cir. 2003).

In *Alexander*, the plaintiff received a conditional job offer from the Pacific Stock Exchange, which solicited a background check from the FBI. 787 F.2d at 1350. The FBI sent his “rap sheet,” which “purportedly contained two arrest items that should not have been released because they had been ordered sealed by a California court.” *Id.* at 1350. The plaintiff then sued the United States, alleging that the government negligently failed to excise the information from his record. *Id.*

We held that the plaintiff’s negligence claim was barred by section 2680(h). See *id.* at 1350–51. In so doing, we stressed the “broad reach of the ‘misrepresentation’ exception of section 2680(h),” holding that the plaintiff’s “claim . . . fits squarely into the category of ‘negligent misrepresentation,’” *id.* at 1351. Although we did not directly address the question before us today, the facts of the case made clear that the alleged misrepresentation was not made to the plaintiff but to a third-party, his employer; yet, we still held that the exception applied. See *id.* at 1350–51. The plaintiffs’ argument is at odds with the result in *Alexander*.

Similarly, we adopted a more expansive view of the misrepresentation exception in *Lawrence*, where a minor plaintiff was sexually abused by her foster parent, a felon. 340 F.3d at 953–54. The plaintiff alleged that a federal marshal and probation officer failed to provide complete and accurate information to a state licensing agency about the felon’s criminal history. *Id.* at 958. We held that the plaintiff’s FTCA claim was barred by the misrepresentation exception, stating that the “claim was

based on [the federal officers'] alleged failure to communicate certain information at the exemption hearing.” *Id.*

The plaintiffs urge that these cases are not controlling because neither *Alexander* nor *Lawrence* “squarely address[ed]” the reliance issue and thus did not explicitly reject the argument that they advance here. *United States v. Kirilyuk*, 29 F.4th 1128, 1134 (9th Cir. 2022) (citation omitted). Even so, we merely note that our holding today tracks our earlier decisions applying section 2680(h) even absent personal detrimental reliance by the plaintiff.

We are also not alone in our interpretation of the FTCA’s misrepresentation exception. The Eleventh Circuit has squarely held that the misrepresentation exception applies even if the alleged misrepresentation was neither received nor relied on by the plaintiff. *JBP Acquisitions, LP v. United States ex rel. FDIC*, 224 F.3d 1260, 1266 (11th Cir. 2000); *see also Zelaya v. United States*, 781 F.3d 1315, 1333 (11th Cir. 2015) (explaining that the “phrase ‘arising out of’ is interpreted broadly to include all injuries that are dependent upon one of the listed torts having been committed”).

In *JBP Acquisitions*, the United States had sold plaintiff JPB, a real estate investment company, a loan secured by a low-income housing project. 224 F.3d at 1262. But, at the same time, the government acted as if it still owned the loan and negotiated with another entity, which condemned and bulldozed the property. *Id.* The court held that JBP’s claims were barred by section 2680(h) because the lawsuit was based on the “[g]overnment’s misrepresentation to [the bulldozing purchaser] regarding [the government’s] current

ownership of the loan.” *Id.* at 1265 (emphasis deleted). The court held that “it does not matter for purposes of the misrepresentation exception whether the misrepresentations causing JBP’s claims were made directly to it or to some third party.” *Id.* at 1266.<sup>1</sup>

The Fifth Circuit, too, has similarly applied the misrepresentation exception to bar FTCA claims when a plaintiff’s alleged injury results from third-party reliance on the government’s misrepresentations. *See, e.g., Baroni v. United States*, 662 F.2d 287, 288–89 (5th Cir. 1981) (applying the misrepresentation exception to bar plaintiff homeowners’ claims, even though the government’s miscalculation of the flood level was communicated to the real estate developer); *Williamson v. U.S. Dep’t of Agric.*, 815 F.2d 368, 377–78 (5th Cir. 1987).

**D. Out-of-circuit precedents do not support the plaintiffs’ narrow view of the misrepresentation exception.**

The plaintiffs respond by citing other out-of-circuit authority. But each case is distinguishable, and none addresses the issue of third-party reliance implicated here. As with *Neustadt* and *Block*, each case focuses on the distinction between negligence claims in which the misstatements are collateral to the suit’s gravamen and those truly premised on the government’s

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<sup>1</sup> The court “emphasize[d] that at its core the negligent ‘act’ is the Government’s misrepresentation” both to the bulldozing purchaser “regarding its ownership interest in the Property and its misrepresentation to *JBP* regarding its continued negotiation in the condemnation proceedings.” *Id.* (emphasis added). The court stressed that without the government’s misrepresentation to the third-party purchaser, the condemnation and the demolition would not have occurred. *See id.* at 1265.

misrepresentations.

First, the plaintiffs rely on *Jimenez-Nieves v. United States*, 682 F.2d 1 (1st Cir. 1982), in which the Social Security Administration (SSA) ceased paying benefit checks because of a government clerk's typographical error. *Id.* at 2. The First Circuit held that the FTCA's misrepresentation exception did not apply because the alleged false statement—the typo—“did not directly injure the plaintiff; it was simply the internal bureaucratic cause of other agency action—dishonoring the checks.” *Id.* at 4. In making this point, the First Circuit cited *Neustadt's* reference to “the ‘traditional and commonly understood definition of the tort’” when the FTCA was enacted. *Id.* at 3–4 (quoting *Neustadt*, 366 U.S. at 706). The court then observed that “one essential element of misrepresentation remains reliance by the plaintiff himself upon the false information that has been provided.” *Id.* at 4 (citations omitted). Because the false statement “was not made to the plaintiff and he did not rely upon it,” the misrepresentation exception did not bar the plaintiff's claims. *Id.* at 5.

Although *Jimenez-Nieves* does include some language that facially supports the plaintiffs, the case again turns on the distinction between claims premised on the government's communication of false information (which fall within the misrepresentation exception) and those premised on the government's breach of some alternate duty (which do not fall within the misrepresentation exception). The “false statement” at issue in *Jimenez-Nieves* was a clerical error by the SSA in intra-agency communications. *Id.* at 2. So, by definition, the government's misrepresentations could not have been relied on by the plaintiff—or by anyone else outside the

agency, for that matter. The First Circuit referred to *Neustadt* only to underscore that the “false statement” (the typo) did not harm the plaintiff and that other governmental action caused the injury.

The plaintiffs next cite *Saraw Partnership v. United States*, 67 F.3d 567 (5th Cir. 1995), in which the Fifth Circuit held that a negligence claim was not barred where the Veterans Administration (VA) incorrectly entered a plaintiff’s loan payments, resulting in foreclosure of his property. *Id.* at 571. There, the government contended that the plaintiff’s alleged injury was caused by the VA’s failure to tell the plaintiff that it had not received his loan payments. *Id.* at 570. The *Saraw Partnership* court first relied on Ninth Circuit case law distinguishing between “misrepresentation” and the negligent “performance of operational tasks.” *Id.* at 570–71 (citing *Mundy v. United States*, 983 F.2d 950, 952 (9th Cir. 1993)). The Fifth Circuit reasoned that the “case is not about reliance on faulty information or on the lack of proper information; rather, the gist of this case is the government’s careless handling of Saraw’s loan payments.” *Id.* at 571. The claim centered on the government’s operational negligence, and any lack of communication was “collateral” to the mishandling of loan payments. *Id.*

The *Saraw Partnership* court then concluded that the misrepresentation exception was further inapplicable because Saraw did not detrimentally rely on any lack of communication by the government. *Id.* The appellants rely on this snippet, but the Fifth Circuit did not address the issue of third-party reliance. *See generally id.* And, in any event, the case is distinguishable along the same lines as *Jimenez-Nieves*: the crux of the dispute similarly revolved around the intra-agency clerical error, not any

misrepresentation. See *Est. of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 854–55 (10th Cir. 2005) (describing *Saraw Partnership* as a case refusing to apply the misrepresentation exception to a claim for which a misrepresentation was only “collaterally involved”).

Finally, the plaintiffs cite *Estate of Trentadue*, where the Tenth Circuit observed that both “reliance by the plaintiff . . . upon the false information that has been provided,” and “pecuniary loss” are the twin essential elements of misrepresentation. 397 F.3d at 854 (quoting *Jimenez–Nieves*, 682 F.2d at 5); see also *id.* at 855. There, family members of a deceased prisoner brought a claim for intentional infliction of emotional distress for, among other things, the government’s failure to inform the family members of the battered condition of the prisoner’s body before sending them the remains. *Id.* The government invoked the FTCA’s misrepresentation exception, contending that the family alleged “no conduct independent of a failure to communicate” information about the remains. *Id.* at 854.

The Tenth Circuit disagreed, concluding that “even acknowledging that the government failed to inform the Trentadues of certain facts,” their “emotional distress arises from the government’s callous treatment of the family in the aftermath of Trentadue’s death, including its shipping of Trentadue’s battered remains to unsuspecting family members.” *Id.* at 855. *Estate of Trentadue* is distinguishable for two reasons. First, the misrepresentation was made directly to the Trentadues, so the court had no occasion to consider the issue of third-party reliance. See *id.* And second, the central issue was whether the government’s false statements and nondisclosure were “more than collaterally involved and



constitute the very conduct giving rise to plaintiffs’ emotional distress claim.” *Id.* Here, in contrast, the Navy’s alleged misrepresentations to the City are the precise conduct giving rise to the claims. There can be no argument that the misrepresentations are merely “collaterally involved” in the plaintiffs’ claims.

\* \* \* \*

To recap: Our interpretation of the misrepresentation exception—focusing on the “gist,” “gravamen,” or “essence” of plaintiffs’ claims—reflects the reasoning of *Neustadt*, *Block*, and longstanding Ninth Circuit precedent. *See, e.g., Esquivel*, 21 F.4th at 578; *cf. Mt. Homes, Inc.*, 912 F.2d at 355. The Navy’s alleged misrepresentations are “essential” to the plaintiffs’ negligence claims. *Block*, 460 U.S. at 297. We thus hold that the claims “arise out of” misrepresentation and fall within the FTCA waiver exception. *Cf. Esquivel*, 21 F.4th at 578; *Shearer*, 473 U.S. at 55.

### **III. CERCLA § 120(h)(1) does not “limit or suspend” the FTCA’s misrepresentation exception.**

The plaintiffs also contend that even if the FTCA’s misrepresentation exception applies, section 120(h) of CERCLA imposes a “specific and mandatory duty of accurate disclosure on the Navy,” thus implicitly “limit[ing] or suspend[ing]” the misrepresentation exception in this case. *See* 42 U.S.C. §§ 9620(h)(1), 9620(h)(3)(A)(ii).

This is a question of first impression in this circuit, and it appears that no other court has addressed the issue. Section 120(h) is silent as to its effect not only on the FTCA’s misrepresentation exception but also on potential tort liability under CERCLA more generally. Using

ordinary principles of statutory construction, we conclude that Congress did not silently waive sovereign immunity for certain misrepresentation claims under CERCLA section 120(h).

Section 120(h)(1)'s disclosure provision states that

whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality *shall include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place*, to the extent such information is available on the basis of a complete search of agency files.

42 U.S.C. § 9620(h)(1) (emphasis added). Section 120(h)(3)(A), in turn, requires that “each deed entered into for the transfer of such property by the United States to any other person or entity shall contain . . .

(ii) a covenant *warranting* that—

(I) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer, and

(II) any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States . . . .

*Id.* § 9620(h)(3)(A)(ii) (emphasis added).

The plaintiffs insist that section 120(h)'s disclosure requirement shows that Congress intended it as a guarantee to buyers and lessees about the safety of the federal property. And so, their argument goes, by adopting CERCLA section 120(h), Congress intended to limit or suspend the FTCA's misrepresentation exception. This argument fails.

**A. Congress did not silently limit or suspend application of the misrepresentation exception through CERCLA § 120(h).**

As a matter of statutory interpretation, we presume that Congress was aware of the FTCA's misrepresentation exception and its judicial construction when enacting CERCLA section 120(h). *See Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1018 (9th Cir. 2007) (“Faced with statutory silence . . . , we presume that Congress is aware of the legal context in which it is legislating.” (alteration in original) (quoting *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 683–84 (9th Cir. 2006) (per curiam))). CERCLA was enacted decades after the FTCA, an oft-litigated statute that should be familiar to Congress. Nothing in CERCLA references the FTCA or even implies that it intended to supersede the FTCA or its exceptions. Confronted with statutory silence, we presume that Congress did not displace the FTCA's misrepresentation exception in enacting CERCLA section 120(h).

Further, we “strictly construe waivers of sovereign immunity, which must be ‘unequivocally expressed in the statutory text’” in favor of the United States. *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 840 (9th Cir. 2012) (citation omitted). This principle of statutory construction is sometimes called the “presumption against the waiver of sovereign immunity” or the “sovereign immunity canon.” See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 281 (2012) (“a federal statute does not eliminate state sovereign immunity—unless that disposition is unequivocally clear”); see also *Plaskett v. Wormuth*, 18 F.4th 1072, 1087 (9th Cir. 2021) (holding that scope of waiver is also “strictly construed” in the government’s favor (citation omitted)). This longstanding rule was part of the legal backdrop at the time of CERCLA’s enactment—and Congress said nothing to suggest that it intended to curtail the misrepresentation exception.

The statutory silence about the FTCA—or tort claims more generally—takes on added significance given that CERCLA actually does waive sovereign immunity for certain claims. Section 120(a)(1) unambiguously waives sovereign immunity for CERCLA suits—at least to recover for clean-up costs. See *United States v. Shell Oil Co.*, 294 F.3d 1045, 1053 (9th Cir. 2002) (allowing clean-up suits against the United States under 42 U.S.C. § 9607). So, although Congress expressly waived sovereign immunity for clean-up lawsuits in CERCLA, it remained silent about suspending or limiting waiver exceptions for tort lawsuits against the United States. This circumscribed waiver in CERCLA suggests that Congress did not disturb the FTCA’s sovereign immunity

waiver framework. In short, there is simply no indication from the text of section 120 that Congress intended to suspend the FTCA’s misrepresentation exception *sub silentio*. Cf. *Neustadt*, 366 U.S. at 710–11 (stating that courts cannot “justifiably ignore the plain words Congress has used in limiting the scope of the Government’s tort liability”).

**B. Neither *Neustadt* nor its out-of-circuit progeny supplants ordinary principles of statutory construction.**

In arguing that CERCLA section 120(h) displaces the misrepresentation exception, the plaintiffs return to *Neustadt* in which the Supreme Court held that the exception was not limited or suspended by the government’s duty to provide accurate appraisals under the National Housing Act. 366 U.S. at 708–09. They also rely on *City of Garland v. Zurn Industries, Inc.*, 870 F.2d 320, 325 (5th Cir. 1989), in which the Fifth Circuit similarly concluded that the obligations imposed on the EPA under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, did not limit or suspend the FTCA’s misrepresentation exception.

Notably, neither of these cases actually held that another federal statute has impliedly displaced the FTCA’s misrepresentation exception, and the plaintiffs do not identify any case so holding. Rather, the plaintiffs primarily focus on distinctions between CERCLA and the laws that courts have found *not* to displace the misrepresentation exception, arguing that CERCLA presents a stronger case for displacement. The plaintiffs insist that—unlike the provisions of the National Housing Act or the Clean Water Act in *Neustadt* and *Zurn Industries*, respectively—“CERCLA’s plain language imposes a specific and mandatory duty of accurate

disclosure on the United States,” evidencing Congressional intent to override the misrepresentation exception.

The plaintiffs read too much into too little. *Neustadt* mentioned two considerations in determining whether a statute evinces a congressional intent to “limit or suspend” the misrepresentation exception: (1) whether the government intended to warrant the accuracy of the information disclosed, and (2) whether the disclosure requirement is central to the primary purpose of the statutory scheme. *See Neustadt*, 366 U.S. at 708–11; *see also Zurn Indus.*, 870 F.2d at 324–26. The plaintiffs may well be correct that the first guidepost favors them: the statutory disclosure requirements in *Neustadt* and *Zurn Industries* may not be as ironclad in promising accuracy as the one in CERCLA.<sup>2</sup>

But that is largely beside the point here. The two-

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<sup>2</sup> The second guidepost, however, does not clearly favor either side. On the one hand, this circuit has observed that “CERCLA was enacted to protect and preserve *public health* and the environment . . . .” *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (internal quotation marks and citation omitted) (emphasis added). On the other hand, the same could be said of any environmental legislation, including the Clean Water Act, which was at issue in *Zurn Industries*. *See* 40 C.F.R. § 131.3(i) (Clean Water Act regulation stating that the purpose of “water quality standards are to *protect the public health or welfare*, enhance the quality of water and serve the purposes of the Act” (emphasis added)). Indeed, we might just as easily conclude that, as with the Clean Water Act, “the environment itself was the intended beneficiary of” CERCLA section 120(h)’s mandatory disclosure regime. *Zurn Indus.*, 870 F.2d at 325. CERCLA’s twin overriding purposes—common to nearly all landmark environmental legislation—do not indicate Congressional intent to silently create a right of redress against the government in tort for violating section 120(h).

pronged analysis in *Neustadt* did not establish an exclusive or dispositive test for determining whether Congress has suspended or limited exceptions to the sovereign immunity waiver; at most, it merely sets interpretive guideposts to consider in construing a statute. Ultimately *Neustadt*'s inquiry cannot supplant our duty to interpret statutes based on the text, its context, and general principles of statutory construction. *Cf. Kisor v. Wilkie*, 588 U.S. 558, 575 (2019) (court must “empty” its “legal toolkit” containing all the “traditional tools” of interpretation used to “carefully consider the text, structure, history, and purpose” of the statute or regulation (internal quotation marks and alteration omitted)).

To sum things up, neither *Neustadt* nor its out-of-circuit progeny dictates displacement of our ordinary rules of statutory construction. As explained, we both (a) presume that Congress was aware of the FTCA's misrepresentation exception in enacting CERCLA, *see Neustadt*, 366 U.S. at 710, and (b) construe any ambiguity in the scope of a waiver of sovereign immunity in the government's favor, *Hunsaker v. United States*, 902 F.3d 963, 967 (9th Cir. 2018). The plaintiffs have pointed to no authority showing that, by enacting CERCLA section 120(h), Congress intended to limit or suspend the FTCA's misrepresentation exception. Because we “presum[e] that Congress legislates with knowledge of our basic rules of statutory construction,” *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991), we decline the plaintiffs' invitation to infer such intent out of thin air.

## CONCLUSION

We do not diminish the gravity of Navy's supposed negligence in failing to disclose the environmental health

hazards at the shipyard. But we are not at liberty to “ignore the plain words Congress has used in limiting the scope of the Government’s tort liability.” *Neustadt*, 366 U.S. at 710–11. The claims here against the United States “aris[e] out of” misrepresentation and thus are barred by the plain language of 28 U.S.C. § 2680(h). We affirm the district court’s dismissal of the complaint for lack of subject matter jurisdiction.

**AFFIRMED.**





a second amended complaint (SAC), Dkt. No. 88, which is now the operative complaint. The SAC alleges that the Navy “fail[ed] to warn the City and County of San Francisco about the hazardous substances used and released at HPNS,” and that this “failure to warn” was “a substantial factor in causing the plaintiffs’ acute symptoms and elevated risk of developing life-threatening cancers and other diseases.” SAC ¶ 1. As before, plaintiffs allege claims against the United States for (1) negligent undertaking, negligent failure to warn, negligent supervision, negligence per se, and negligent misrepresentation; (2) public nuisance; (3) loss of consortium; (4) wrongful death; (5) negligent infliction of emotional distress -- fear of cancer; and (6) intentional infliction of emotional distress. *Id.* ¶¶ 219-87.

The United States asks to dismiss plaintiffs’ complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Dkt. No. 91. The United States contends that plaintiffs’ claims are not within the United States’ waiver of sovereign immunity under the Federal Tort Claims Act because they are subject to several waiver exceptions, 28 U.S.C. §§ 1346(b), 2671-80. *Id.* The parties’ familiarity with the facts is assumed, and the complaint is dismissed with prejudice.

### DISCUSSION

The United States may be sued only to the extent that it has waived its sovereign immunity. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). In the absence of an express waiver, the Court has no jurisdiction over tort claims against the federal government. *Id.* The United States has waived immunity for a broad category of claims under the Federal Tort Claims Act (FTCA). In pertinent part, the United States has consented to be sued in civil

actions for money damages for “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. § 1346(b)(1).

There are exceptions to this broad waiver of immunity, several of which the government has invoked here. Dkt. No. 91. The first of these is the “misrepresentation exception” under 28 U.S.C. § 2680(h). *Id.* at 3-6. This section carves out from waiver “[a]ny claim arising out of . . . misrepresentation,” subject to qualifications for “acts or omissions of investigative or law enforcement officers of the United States Government” that are not applicable here.

Consequently, a claim based on an alleged misrepresentation is barred by sovereign immunity. This principle should be of no surprise because the Court expressly advised plaintiffs in the prior dismissal order that “the misrepresentation exception, 28 U.S.C. § 2680(h), appears likely to bar at least some portion of plaintiffs’ allegations as currently pleaded in the FAC.” Dkt. No. 87 at 3. The Court noted that “the exception applies -- and bars the government’s liability -- when plaintiff’s claim is one ‘arising out of misrepresentation,’” and that that characterization appeared to “fit the allegations based directly on statements made by the Navy.” *Id.* (citations omitted). Plaintiffs were directed in any amended complaint to “clearly identify those aspects of the government’s conduct other than alleged misrepresentations that form the basis of plaintiffs’ claims. *See Block v. Neal*, 460 U.S. 289, 298 (1983).” *Id.*

Even so, plaintiffs in effect doubled down on the misrepresentation theory in the SAC. The lead paragraph of the SAC makes this abundantly clear. Plaintiffs say that the United States’ “failure to warn the City and County of San Francisco about the hazardous substances used and released at HPNS was a substantial factor in causing the plaintiffs’ acute symptoms and elevated risk of developing life-threatening cancers and other diseases.” SAC ¶ 1. The misrepresentation theme is repeated throughout the SAC. *See, e.g., id.* ¶ 11 (the Navy “negligently told the City that there was no history of any radioactive substances at the Building 606 Property”); ¶ 12 (the Navy “told the City that the SFPD could use the Building 606 Property without exposing SFPD employees to health risk from exposure to hazardous substances”); ¶ 13 (the Navy “provided the City with a Finding of Suitability to Lease and property-specific environmental baseline survey results that included numerous material misrepresentations” and “false statements and failures to warn”); ¶ 24 (“As a result of these misrepresentations, concealments, omissions, and failures to warn by the Navy and by Tetra Tech, under the Navy’s negligent supervision, the City continued to have plaintiffs work at HPNS during Tetra Tech’s remediation activities”); ¶ 93 (the Navy “made false, misleading, and incomplete disclosures to the City, and failed to warn the City and its employees, related to and regarding the release and use of hazardous substances at the Subject Leased Property”); p. 37 (“After 1996, . . . the Navy continued to misrepresent the true extent of hazardous contamination affecting plaintiffs’ safety”); ¶¶ 243-44 (the Navy “negligently failed to warn the City and its employees” and “negligently misrepresented [the] facts”).

As the Court cautioned last time, this will not do. The alleged misrepresentations in this case are by no means “collateral to the gravamen” of the SAC. *Esquivel v. United States*, 21 F.4th 565, 578 (9th Cir. 2021). “By [plaintiffs’] own account, the alleged misrepresentations are within the chain of causative events upon which plaintiffs’ claim is founded.” *Id.* (quotations and citation omitted). This is readily apparent in allegations that the Navy’s failure to warn “was a substantial factor in causing” plaintiffs’ injuries, and that “[r]elying on [the Navy’s] representations and omissions, the SFPD relocated hundreds of its police employees to begin working at HPNS in 1997,” thereby exposing plaintiffs to the harms they are complaining of. SAC ¶¶ 1, 15. Misrepresentation is at the heart of all of the claims in the SAC. Consequently, the misrepresentation exception to waiver of immunity applies, and the Court lacks jurisdiction over the SAC. *See Esquivel*, 21 F.4th at 578.

The same holds for omissions. A “negligent failure to inform,” namely an omission, “is misrepresentation within the meaning of 28 U.S.C. § 2680(h),” and “[t]he intent of the section is to except from the Act cases where mere ‘talk’ or failure to ‘talk’ on the part of a government employee is asserted as a proximate cause of the damage sought to be recovered from the United States.” *City and Cnty. of San Francisco v. United States*, 615 F.2d 498, 505 (9th Cir. 1980) (quotations and citations omitted); *see also Lawrence v. United States*, 340 F.3d 952, 958 (9th Cir. 2003) (“The misrepresentation exception shields government employees from tort liability for failure to communicate information, whether negligent, or intentional.”) (citation omitted).

Plaintiffs’ efforts to sidestep this conclusion are

unavailing. They say that the exception should not apply because they did not personally rely on false statements, and were the “unfortunate and foreseeable victims of the misrepresentations that were made to the City.” Dkt. No. 94 at 4-5. But as plaintiffs acknowledge, our circuit has “found that the exception applied, even though there had been no reliance by the plaintiffs.” *Id.* at 6 (citing *Lawrence*, 340 F.3d 952, and *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009)). This applies here, as our circuit has signaled in an unpublished decision. In *Andrade v. United States*, 845 F. App’x. 594, 595 (9th Cir. 2021), plaintiff Andrade went to CVS to pick up her opioid prescription, only to have a federally funded clinic, San Ysidro Health, “incorrectly claim[] that Andrade was not a patient” both to CVS staff as well as to the police, leading to Andrade’s arrest. Andrade argued that the FTCA’s misrepresentation exception did not apply to her negligence claim against the United States because “misrepresentation requires reliance and . . . there was no reliance here” by plaintiff or her daughter. *Andrade*, 845 F. App’x. at 595-56. The circuit stated that “we already rejected this argument in *Alexander v. United States*, 787 F.2d 1349, 1350-51 (9th Cir. 1986).” *Id.* The panel concluded that “[i]t does not matter whether the federal clinic negligently misinformed Andrade, a CVS pharmacist, or a San Diego Police officer. The ‘gravamen of the claim’ is still misrepresentation.” *Id.* (citing *United States v. Neustadt*, 366 U.S. 696, 704 (1961)). The district court consequently lacked jurisdiction over Andrade’s negligence claim. *Id.* at 596.

In *Alexander*, 787 F.2d 1349, the case cited by the *Andrade* panel, the circuit held that plaintiff Alexander’s negligence claim against the United States was barred by

the FTCA's misrepresentation exception even though the alleged misrepresentation had not been made directly to the plaintiff and thus he was not the one who had relied on it. Alexander had conditionally been hired by the Pacific Stock Exchange to work as a security officer, but his employment was terminated after the FBI provided to Pacific Stock Exchange a background check that "contained two arrest items that should not have been released because they had been ordered sealed by a California court." *Alexander*, 787 F.2d at 1350. Alexander did not himself rely on the erroneous "rap sheet." Nevertheless, noting the "broad reach of the 'misrepresentation' exception of section 2680(h)," the circuit held that "Alexander's claim . . . fits squarely into the category of 'negligent misrepresentation'" covered by that section, and was consequently barred. *Id.* at 1351 (citing *Neustadt*, 366 U.S. 696).

So too, here. These cases stand for the principle that the misrepresentation at the heart of the claim need not have been made directly to plaintiffs, and plaintiffs need not have directly relied, in order for the misrepresentation exception to apply and bar the claims. In *Neustadt*, 366 U.S. 696, the Supreme Court held that "§ 2680(h) comprehends claims arising out of negligent, as well as willful, misrepresentation," and that "[w]hile we do not condone carelessness by government employees in gathering and promulgating . . . information, neither can we justifiably ignore the plain words Congress has used in limiting the scope of the Government's tort liability." *Neustadt*, 366 U.S. at 702, 710-11. The plain language of 28 U.S.C. § 2680(h) excepts from the United States' waiver of sovereign immunity "[a]ny claim arising out of . . . misrepresentation." Nothing in this language nor

common sense supports the view that the government is immunized when sued directly by the party to which it makes a misrepresentation, but not when it is sued by downstream third parties who allege they were indirectly harmed by the alleged misrepresentation. The government is immunized from all claims “arising out of . . . misrepresentations,” and plaintiffs’ allegations show that their claims are such claims.

Plaintiffs say that the misrepresentation exception is “limit[ed] or suspend[ed]” in this case because “CERCLA imposes a specific and mandatory duty of disclosure on the Navy.” Dkt. No. 94 at 6. This point is also unpersuasive. Plaintiffs did not present controlling authority for this theory, and instead draw largely irrelevant distinctions between CERCLA § 120(h)(1) and the National Housing Act section that was at issue in *Neustadt*. In *Neustadt*, the Supreme Court rejected the argument that the FTCA’s misrepresentation exception was limited or suspended because of the government’s “specific duty’ to make and communicate an[] accurate appraisal of the property” under Section 226 of the National Housing Act. *Neustadt*, 366 U.S. at 708. Textual variations between National Housing Act § 226 and CERCLA § 120(h)(1) hardly demonstrate that the misrepresentation exception does not apply here, all the more so in light of plaintiffs’ cursory CERCLA argument that is unburdened by any case law. Dkt. No. 94 at 7. Moreover, in finding the misrepresentation exception to apply in *Neustadt*, the Supreme Court noted that Section 226 of the National Housing Act was added in 1954, when it could reasonably be supposed that Congress “was aware of the ‘misrepresentation’ exception in the Tort Claims Act, and that it had been construed by the courts to include



‘negligent misrepresentation.’” *Neustadt*, 366 U.S. at 710. The same is true of CERCLA § 120(h)(1), as the government observes, *see* Dkt. No. 96 at 4 n.2, and CERCLA also lacks any express statutory language that violations of its “duty of disclosure” are to fall outside the FTCA’s misrepresentation exception.

Plaintiffs’ closing suggestion that their “injuries were caused by the Navy’s negligent performance of an operational task,” Dkt. No. 94 at 8, are of no moment. Plaintiffs say that their allegations focus on the Navy’s “duty as a landowner to exercise ordinary care or skill in the management of its property.” *Id.* That is not a fair characterization of the allegations in the SAC. As discussed, the SAC underscores the centrality of the government’s ostensible misrepresentations and omissions to plaintiffs’ claims. That is so even though the Court directed plaintiffs to make clear “those aspects of the government’s conduct other than alleged misrepresentations that form the basis of [their] claims.” Dkt. No. 87 at 3. Plaintiffs’ opposition brief also emphasizes the theory that “the Navy breached a specific and mandatory statutory duty to disclose when and where hazardous substances were stored, released, or disposed of at HPNS,” and the Navy’s breach of a “duty to warn.” Dkt. No. 94 at 9. Such alleged failures to disclose and warn are claims that are encompassed by the misrepresentation exception. *Neustadt*, 366 U.S. at 710-11; *City and Cnty. of San Francisco*, 615 F.2d at 505; *Lawrence*, 340 F.3d at 958.

This is the bed plaintiffs have chosen to lie in, and they cannot avoid the consequences of their decision. The government seeks dismissal of all six of the claims in the SAC on the basis of the misrepresentation exception,

including the claims for public nuisance, intentional and negligent infliction of emotional distress, loss of consortium, and wrongful death. Dkt. No. 91 at 5-6. Plaintiffs did not defend their claims with any degree of specificity, and made for all of them the same arguments against the misrepresentation exception. Dkt. No. 94 at 4-9. Consequently, the Court lacks jurisdiction over the SAC *in toto*. The Court finds it unnecessary to reach the government's additional arguments that plaintiffs' claims are barred by the FTCA's "contractor exception" and "discretionary function exception" as well. Dkt. No. 91 at 6-15.

### CONCLUSION

The United States' motion to dismiss is granted, Dkt. No. 91, and plaintiffs' second amended complaint is dismissed in its entirety for lack of subject matter jurisdiction.

The Court's prior order not only flagged the misrepresentation exception issue that now serves as the basis for dismissal, but also advised plaintiffs that they likely would not be given any further opportunities to amend. Dkt. No. 87 at 3-4. Plaintiffs have shown no reason to believe further amendment might be fruitful, nor have they requested another chance to amend. Dkt. No. 94. The dismissal is consequently with prejudice. *See Chodos v. W. Publishing Co.*, 292 F.3d 992, 1003 (9th Cir. 2002).

The case is closed, and judgment will be entered against plaintiffs.

**IT IS SO ORDERED.**

Dated: January 17, 2023

41a

*James Donato*  
JAMES DONATO  
United States District Judge

## APPENDIX C

### **28 U.S.C. § 1346. United States as defendant**

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws;

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the

United States.

(b)(1) 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.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia)

or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

**APPENDIX D****28 U.S.C. § 2680. Exceptions**

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

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture);

and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.<sup>1</sup>

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.<sup>2</sup>

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]

(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

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<sup>1</sup> So in original.

<sup>2</sup> [footnote omitted]



execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.