No. 24-510

In the Supreme Court of the United States

KEVIN ABBEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the misrepresentation exception in the Federal Tort Claims Act, 28 U.S.C. 2680(h), bars a suit brought by plaintiffs who allege they were injured by misrepresentations made to third parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 112 F.4th 1141. The order of the district court (Pet. App. 31a-41a) is not published in the Federal Supplement but is available at 2023 WL 218960.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2024. The petition for a writ of certiorari was filed on November 1, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA or Act), 28 U.S.C. 1346(b), 2671, *et seq.*, generally waives the sovereign immunity of the United States and creates a cause of action for damages against the United States with respect to certain torts of federal employees, acting within the scope of their employment, under circumstances in which a private individual would be liable

under state law. See 28 U.S.C. 1346(b)(1). The FTCA contains various exceptions that limit the waiver of sovereign immunity and the substantive scope of the United States' liability. As relevant here, the Act excludes from its waiver of sovereign immunity "[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." 28 U.S.C. 2680(h).

As this Court has explained, the exception for claims arising out of "misrepresentation" or "deceit" bars all "claims arising out of negligent, as well as willful, misrepresentation." *United States* v. *Neustadt*, 366 U.S. 696, 702 (1961). The exception bars not only express misrepresentation claims, but also claims regarding the "negligence underlying [an] inaccurate representation," "i.e., when the claim is phrased as one 'arising out of' negligence rather than 'misrepresentation'"; otherwise, a plaintiff could "circumvent" Section 2680(h)'s retention of sovereign immunity over claims arising from negligent misrepresentation. *Id.* at 703 (emphases omitted). Courts thus must "look beyond the literal meaning of the language to ascertain the real cause of complaint." *Ibid.* (quoting *Hall* v. *United States*, 274 F.2d 69, 71 (10th Cir. 1959)); see *Block* v. *Neal*, 460 U.S. 289, 296-297 (1983) (considering the "gravamen" of the complaint).

2. This case arises from the United States Navy's lease of property at Hunters Point Naval Shipyard to the City of San Francisco. C.A. E.R. 16-17. Petitioners are former or current employees of the San Francisco Police Department, representatives of such employees, and other persons who allege injuries arising from hazardous substances at the Shipyard. *Id.* at 19, 22.

Petitioners allege that the Navy was aware of "the widespread release of large quantities of radiological and non-radiological hazardous substances throughout" the Shipyard when the Navy leased the property to the City, but that "the Navy so negligently performed its inspection, investigation, and record review that it told the City that" it could use the property "without exposing * * * employees to health risk from exposure to hazardous substances." C.A. E.R. 17-18, 29-33. According to the complaint, the City leased an area of the Shipyard in 1996 because it "relied" on the Navy's "false statements * * * misrepresenting the history of" the Shipyard "and misrepresenting the type and quantity of hazardous substances released at and about the" Shipyard. *Id.* at 35-36. And "[r]elying on [the Navy's] representations and omissions," the San Francisco Police Department "relocated hundreds of its police employees to begin working at" the Shipyard in 1997. *Id.* at 19.

Petitioners allege that in subsequent years, a contractor that the Navy hired to clean up the site fraudulently concealed the extent of contamination, and that the Navy itself "concealed from the City and Plaintiffs the actual extent of contamination they knew or suspected was present throughout" the Shipyard, "understat[ing] the human risk" and "fail[ing] to warn the City of the risk to its employees." C.A. E.R. 20-21. Petitioners allege that "[a]s a result of these misrepresentations, concealments, omissions, and failures to warn by the Navy and by" the contractor "under the Navy's negligent supervision," "the City continued to have [police officers] work at" the Shipyard. *Id.* at 21.

3. Petitioners sued the United States and the Navy under the FTCA seeking damages allegedly arising, according to their complaint, from "misrepresentations,

concealments, omissions, and failures to warn by the Navy." C.A. E.R. 21. The first amended complaint asserted claims of negligent undertaking, negligent failure to warn, negligent supervision, negligence per se, negligent misrepresentation, public nuisance, loss of consortium, wrongful death, negligent infliction of emotional distress, and intentional infliction of emotional distress. Pet. App. 32a; C.A. E.R. 86-163.

The district court initially dismissed the complaint with leave to amend for petitioners to clarify their claims. Pet. App. 33a. In doing so, the court explained that "the misrepresentation exception appears likely to bar at least some portion of [petitioners'] allegations as currently pleaded." *Ibid.* (citation omitted). The court thus "directed" petitioners to "clearly identify those aspects of the government's conduct other than alleged misrepresentations that form the basis of plaintiffs' claims." *Ibid.* The court further warned that "[t]his will most likely be plaintiffs' last opportunity to amend." C.A. E.R. 84-85.

Petitioners' second amended complaint again asserted claims of negligent undertaking, negligent failure to warn, negligent supervision, negligence per se, negligent misrepresentation, public nuisance, loss of consortium, wrongful death, negligent infliction of emotional distress, and intentional infliction of emotional distress. C.A. E.R. 12-81. The district court dismissed the complaint for lack of jurisdiction, holding that the claims as amended were barred by the misrepresentation exception. Pet. App. 35a. The court noted that petitioners "did not defend their claims with any degree of specificity" and instead "doubled down on the misrepresentation theory," which remained "at the heart of all of the claims." *Id.* at 35a, 40a. The second amended

complaint, the court explained, only "underscores the centrality of the government's ostensible misrepresentations and omissions to plaintiffs' claims." *Id.* at 39a. The court concluded that "[t]his is the bed plaintiffs have chosen to lie in, and they cannot avoid the consequences of their decision." *Ibid.*

4. The court of appeals affirmed. Pet. App. 4a. The court explained that the misrepresentation exception "bars negligent misrepresentation claims, no matter how a plaintiff characterizes them." *Id.* at 14a. Accordingly, courts look to "the gravamen or essence of the claim" so that plaintiffs do not "creatively plead around the FTCA's misrepresentation exception." *Id.* at 11a (internal quotation marks omitted). "[H]ere," the court of appeals agreed with the district court that petitioners' claims "plainly 'arise out of' the Navy's alleged misrepresentations to the City and the SFPD about hazardous substances at the shipyard." *Id.* at 10a.

The court of appeals rejected petitioners' "argument that only claims for misrepresentations personally relied upon by the plaintiff are expressly barred," reasoning that petitioners' claims "'arise' out of the Navy's alleged misrepresentations, even if the Navy did not directly make [the misrepresentations] to the plaintiffs." Pet. App. 4a, 13a (emphasis omitted). And because petitioners' claims were based on the City's alleged reliance on the Navy's misrepresentations, the court concluded that the claims arise from misrepresentations, not "'the Government's breach of a different duty.'" *Id.* at 13a (quoting *Block*, 460 U.S. at 297).

ARGUMENT

Petitioners contend (Pet. 22-25) that the court of appeals erred in holding that the FTCA's misrepresentation exception applies to claims arising from misrepresenta-

tions made to a third party, on which that third party relied. The decision below is correct and does not conflict with any decision of this Court or another court of appeals. And petitioners' disagreement with the court of appeals' factbound application of the exception to the claims at issue here does not warrant this Court's review. The petition for a writ of certiorari should be denied.

1. a. The court of appeals correctly held that the FTCA's misrepresentation exception bars petitioners' claims. Section 2680(h) retains the United States' sovereign immunity from "[a]ny claim arising out of * * * misrepresentation" or "deceit." 28 U.S.C. 2680(h). That provision bars "claims arising out of negligent, as well as willful, misrepresentation." *United States* v. *Neustadt*, 366 U.S. 696, 702 (1961). And that bar applies "when the gist of the claim lies in negligence underlying the inaccurate representation, i.e., when the claim is phrased as one 'arising out of' negligence rather than 'misrepresentation.'" *Id.* at 703 (emphases omitted). Accordingly, a court must look to the "gravamen" of a claim to determine whether "the Government's misstatements are * * * essential to plaintiff's negligence claim." *Block* v. *Neal*, 460 U.S. 289, 296-297 (1983).

Here, the crux of petitioners' complaint is that they were injured because the City of San Francisco leased property on Hunters Point Naval Shipyard and relocated employees to the Shipyard allegedly in reliance on "false statements" made by the Navy and a Navy contractor "misrepresenting the type and quantity of hazardous substances released at and about the" Shipyard. C.A. E.R. 35-36. As the district court observed, "[t]he misrepresentation theme is repeated throughout" each of petitioners' claims in the second amended

complaint. Pet. App. 34a; see, *e.g.*, C.A. E.R. 18 (alleging that the Navy "negligently told the City that there was no history of any radioactive substances" at the property); C.A. E.R. 18 (alleging that the Navy "told the City that the [police department] could use [the shipyard property] without exposing * * * employees to health risk from exposure to hazardous substances"); *id.* at 40 (alleging that the lease "negligently and materially misrepresented and failed to warn"); *id.* at 41 (alleging that the Navy's statements were "false when made"); *id.* at 42-44 (same); *id.* at 47 (same); *id.* at 48-49 (alleging that the Navy "continued to make false representations to the City and the [police department] regarding contamination"); *id.* at 49 (alleging that the contractor provided "false results"); *ibid.* ("[T]he Navy did, in fact, negligently convey these misrepresentations to the City."); *ibid.* ("[T]he Navy knew that these misrepresentations * * * were being relied upon by the City"); *id.* at 50 (alleging that the contractor "falsified chain-of-custody forms"); *id.* at 68 (alleging harms "[a]s a result of the Navy's negligence, negligent supervision of [the contractor], fraudulent concealment, and misrepresentations"); *id.* at 69 (alleging harms "[a]s a result of the Navy's negligence, fraudulent concealment, and misrepresentations"); *id.* at 70-79 (basing each of petitioners' claims on "misrepresentation[]" or failure "to accurately and thoroughly communicate that past use and current condition to the City").

Petitioners' claims, on their face, thus assert injuries based on the government's alleged failure "to use due care in communicating information," rather than "the Government's breach of a different duty." *Block*, 460 U.S. at 297. Accordingly, the courts below correctly concluded that petitioners' "claims plainly 'arise out of' the

Navy's alleged misrepresentations to the City and the [police department] about hazardous substances at the shipyard." Pet. App. 10a; see *id.* at 34a.

b. Petitioners did not dispute below that the government's alleged misrepresentations to the City of San Francisco are essential to all of their claims. See Pet. C.A. Br. 2, 4, 16, 20, 23; see Pet. App. 40a. Instead, petitioners argued that the FTCA's misrepresentation exception does not apply to claims arising from misrepresentations to a third party (here, the City), on which that third party relied. See, *e.g.*, Pet. C.A. Br. 20 (arguing that "the misrepresentation exception simply does not apply in this case" because "the false statements that ultimately caused [petitioners'] harm were not made to [petitioners] directly"; "[r]ather, the statements were made to [petitioners'] employer, the City and County of San Francisco, and it is [petitioners'] employer that acted in reliance on those statements"); see also *id.* at 2, 4, 16-23. On that theory—which petitioners renew here, *e.g.*, Pet. 3-4, 11, 22-23—the misrepresentation exception bars only claims brought by persons who directly relied on the misrepresentation, but not identical claims brought by downstream entities harmed by the misrepresentations.

The court of appeals correctly rejected that contention. As this Court has recognized, Congress's use of the word "arising" in the FTCA exceptions makes clear that the exceptions extend to claims that "stem from" the specified conduct, not merely claims "for" the specified conduct. *United States* v. *Shearer*, 473 U.S. 52, 55 (1985) (holding that the exception for claims "arising out of" assault or battery under 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," and thus "cover[s] claims * * * that sound in negligence but stem from a battery committed by a Government employee"); see, *e.g.*, *Kosak* v. *United States*, 465 U.S. 848, 852-853 (1984) (holding that the exception for "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs" under Section 2680(c) encompasses all claims for "injuries to property sustained during its detention" and not "only claims 'for damage caused by the detention itself'").

Accordingly, as the court of appeals recognized, "by its plain text, section 2680(h) does not merely preclude claims *for* misrepresentation"; "[r]ather, it bars any claim 'arising out of' misrepresentation." Pet. App. 10a. And here, "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." *Ibid.*; see pp. 6-8, *supra*.

Petitioners emphasize (Pet. 23) that common law misrepresentation generally imposes a "reliance requirement." But petitioners expressly allege that the Navy made misrepresentations *to the City* on which *the City* relied, and that petitioners' injuries stem from those misrepresentations. See pp. 6-8, *supra*; see also, *e.g.*, Pet. 8; Pet. C.A. Br. 2, 4, 20, 23; C.A. E.R. 49, 75. Petitioners do not deny that the misrepresentation exception would bar such claims if the City of San Francisco had sued the federal government based on the same misrepresentations. Petitioners' claims thus "'arise' out of the Navy's alleged misrepresentations, even if the Navy did not directly make [the misrepresentations] to the plaintiffs." Pet. App. 4a. Indeed, "[n]othing" in the statute's "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." *Id.* at 37a-38a.

For similar reasons, petitioners' reliance (Pet. 23) on this Court's decisions in *Neustadt* and *Block* is misplaced. To be sure, the Court in those decisions "emphasized the traditional tort of misrepresentation" in interpreting the FTCA's misrepresentation exception. Pet. App. 13a. But the Court did so in service of distinguishing "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)." *Ibid.* (quoting *Block*, 460 U.S. at 297); see *id.* at 13a-16a; *Neustadt*, 366 U.S. at 703. Critically, "neither case addressed" petitioners' contention here: "whether the misrepresentation exception applies when a third-party, rather than the plaintiff, relies on the government's misrepresentations that allegedly injured the plaintiff." Pet. App. 13a. And neither decision "supports the plaintiffs' argument that the misrepresentation must be made directly to the plaintiffs for section 2680(h) to apply." *Id.* at 14a.

Petitioners also assert for the first time (Pet. 9) that they brought "claims that have nothing to do with misrepresentation." Petitioners did not raise that argument in the district court or court of appeals, instead arguing that the misrepresentation exception does not apply when the claims arise from misrepresentations to a third party. Pet. C.A. Br. 2, 4, 20, 23. Indeed, as the district court noted, petitioners did not try to

distinguish among their various claims "with any degree of specificity, and made for all of them the same arguments against the misrepresentation exception." Pet. App. 40a. Petitioners have thus failed to preserve any such argument.

In any event, as already explained, see pp. 4-5, 6-8, *supra*, petitioners' amended complaint "doubled down on the misrepresentation theory" as the basis for all of their claims, despite the district court's admonition to "clearly identify those aspects of the government's conduct other than alleged misrepresentations that form the basis of plaintiffs' claims." Pet. App. 12a, 33a, 35a. The court of appeals thus concluded that the government's alleged misrepresentations were "essential to each claim" based on petitioners' own pleading choices. *Id.* at 12a (internal quotation marks omitted). That fact-bound conclusion is correct and would not in any event warrant further review.

2. This case does not implicate any disagreement among the courts of appeals. Petitioners contend (Pet. 11) that there is "an acknowledged, growing circuit split over whether the FTCA's misrepresentation exception applies to plaintiffs who were not a party to, and therefore did not rely on, a misleading government communication." But as the court of appeals explained, see Pet. App. 19a-23a, petitioners have not identified any court of appeals that has declined to apply the misrepresentation exception where (as here) the claims are based on alleged misrepresentations by the government to a third party outside the government on which that third party relied.

To the contrary, courts of appeals consistently apply the misrepresentation exception when a misrepresentation is essential to a plaintiff's claim, including where

the misrepresentation was made to a third party. In *Baroni* v. *United States*, 662 F.2d 287 (1981) (per curiam), cert. denied, 460 U.S. 1036 (1983), for example, the Fifth Circuit rejected the plaintiffs' argument that their claims "did not involve the tort of misrepresentation" because "the alleged negligent action of the [federal agency] could not have been communicated to any plaintiff in this action." *Id.* at 289. The court explained that "the damages complained of by the plaintiffs still result solely from the fact that the government communicated its miscalculation to the developer who relied on it, and that reliance eventually caused the plaintiffs' damage." *Ibid.* Accordingly, "[t]o find that the plaintiffs would be barred from recovering their damages under a direct theory of misrepresentation but to allow them to recover under a theory of 'general tort' liability for damages which stem from an indirect reliance on the same acts by the government would undermine the misrepresentation exception to the Federal Tort Claims Act." *Ibid.*[*]

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[*] Petitioners assert (Pet. 16-17) that the Fifth Circuit's decision in *Saraw Partnership* v. *United States*, 67 F.3d 567 (1995), is "inconsistent" with that court's decision in *Baroni*, *supra*. This Court "usually allow[s] the courts of appeals to clean up intra-circuit divisions on their own." *Joseph* v. *United States*, 574 U.S. 1038, 1040 (2014) (Kagan, J., statement respecting the denial of certiorari). In any event, *Saraw* is not inconsistent with *Baroni*. In *Saraw*, a government agency made a "keypunch[ing]" error that caused it to foreclose on the plaintiff's property. 67 F.3d at 571. The Fifth Circuit held that "any lack of communication on the government's part seems collateral to the fact of the mishandling of [the plaintiff's] payments." *Ibid.* And the court discussed the element of reliance only to explain that no misrepresentation was essential to the plaintiff's claims. *Ibid.* ("This 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 [the plaintiff's] loan

Similarly, in *JBP Acquisitions, LP* v. *United States*, 224 F.3d 1260 (11th Cir. 2000), the plaintiff argued "that its claims against the Government [we]re not barred by the misrepresentation exception" because it did not "allege that the Government directly misrepresented any facts to [the plaintiff]." *Id.* at 1266. The Eleventh Circuit rejected that argument, explaining that "it does not matter for purposes of the misrepresentation exception whether the misrepresentations causing [the plaintiff's] claims were made directly to it or to some third party." *Ibid.* Rather, "even if the Government's misrepresentations were only to [a third party] and not to [the plaintiff], this fact is legally irrelevant to the determination of whether [the plaintiff's] claims against the Government are barred by the FTCA." *Ibid.*

Likewise, in *Schneider* v. *United States*, 936 F.2d 956 (1991), cert. denied, 502 U.S. 1071 (1992), the Seventh Circuit held that the plaintiffs' claims—which were premised on the government's misrepresentation to the private builder from whom plaintiffs bought their homes—were barred by the misrepresentation exception. *Id.* at 960. The court explained that "had [the third-party private builder] not relied on [the government's] misrepresentations, the plaintiffs would not have been injured by purchasing the defective homes." *Id.* at 961.

Petitioners assert (Pet. 12) that the First and Tenth Circuits have held that "the misrepresentation exception does not bar FTCA claims unless the plaintiff relied on the government's misrepresentation," diverging from the Fifth, Seventh, Ninth, and Eleventh Circuits. See

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payments."). *Saraw* thus does not conflict with *Baroni*'s holding that the misrepresentation exception can bar claims arising from misrepresentations to a third party.

Pet. 12-19. That is incorrect. As the court of appeals recognized, the First and Tenth Circuit decisions on which petitioners rely did not address application of the misrepresentation exception to claims arising from misrepresentations on which a third party relied. See Pet. App. 19a (explaining that none of the cited authorities "addresses the issue of third-party reliance implicated here"). Rather, the cited decisions "distin[guished] between negligence claims in which the misstatements are collateral to the suit's gravamen and those truly premised on the government's misrepresentations." *Id.* at 19a-20a.

Specifically, in *Jimenez-Nieves* v. *United States*, 682 F.2d 1 (1st Cir. 1982), the plaintiff brought suit under the FTCA after the Social Security Administration stopped paying her benefits because of a "keypunching error" by a government employee. *Id.* at 4. The First Circuit held that the plaintiffs' claims centered on the government's stop-payment orders that resulted in several banks' "failure to honor the checks" rather than on any "false statement." *Ibid.* *Jimenez-Nieves* thus did not address a claim involving reliance by a third party outside the government on a misrepresentation: "[B]y definition, the government's misrepresentations could not have been relied on by the plaintiff—*or by anyone else outside the agency*, for that matter." Pet. App. 20a (emphasis added). Rather, the court concluded that the plaintiff's claims were not premised on a misrepresentation *at all*. See *Jimenez-Nieves*, 682 F.2d at 4-5 (noting that the typographical error "was simply the internal bureaucratic cause of other agency action," and so the plaintiff's claims did not present "the core, or traditional, view of 'misrepresentation' " but instead involved "false statements" that "are happenstance causal

elements of other torts"). As the court of appeals explained below, *Jimenez-Nieves* thus "turn[ed] 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)." Pet. App. 20a.

Petitioners emphasize (Pet. 12-13) that the First Circuit's opinion in *Jimenez-Nieves* contains statements observing that one element of the tort of misrepresentation is reliance by the plaintiff, and that a misrepresentation to a third party is not actionable unless the plaintiff relied upon it. But those statements, as explained above, were not necessary to the court's judgment or rationale. And petitioners' reliance on those statements ignores that the FTCA exception bars claims not only *for* the tort of misrepresentation itself, but also claims "arising out of" misrepresentation. 28 U.S.C. 2680(h). That text bars claims arising out of misrepresentations that were made to and relied upon by a third party, and that in turn injured the plaintiff. See pp. 8-10, *supra*.

Likewise, in *Limone* v. *United States*, 579 F.3d 79 (2009), the First Circuit focused on whether a misrepresentation was collateral or central to the plaintiff's claims, examining whether there was "merely a loose connection" between the alleged misrepresentation and the claims. *Id.* at 92. The court did not suggest—let alone hold—that claims premised on a misrepresentation to a third party would categorically fall outside the exception.

Petitioners similarly err in relying on decisions from the Tenth Circuit. In *Trentadue ex rel. Aguilar* v.

United States, 397 F.3d 840 (10th Cir. 2005), the plaintiffs brought emotional distress claims after a prison shipped a prisoner's "battered remains to unsuspecting family members." *Id.* at 855. The Tenth Circuit held that the claims "ar[ose] from the government's callous treatment of the family," rather than any misrepresentation. *Ibid.*; see Pet. 14 n. 3 (acknowledging as much). Again, nothing in *Trentadue* suggested that the misrepresentation exception would not apply to a claim that *did* arise from a misrepresentation if the misrepresentation were communicated to and relied on by a third party rather than the plaintiff himself.

Ecco Plains, LLC v. *United States*, 728 F.3d 1190 (10th Cir. 2013), cert. denied, 571 U.S. 1176 (2014), is even further afield. There, the Tenth Circuit considered an interference with contract claim, not a misrepresentation claim. *Id.* at 1197. And the court simply explained that "[t]o the extent our analysis requires us to determine whether [the plaintiffs' complaint contains the essential elements of an interference with contract claim, we conclude it does." *Ibid.*

3. Petitioners' remaining contentions lack merit.

Petitioners argue that the misrepresentation exception should be "narrowly construed" to avoid "defeating the central purpose of the [FTCA]." Pet. 24 (quoting *Dolan* v. *United States Postal Serv.*, 546 U.S. 481, 492 (2006)). But this Court has already instructed courts to consider the "gravamen" of a plaintiff's claims to determine whether a misrepresentation is "essential" to the claims—and to treat only those claims as barred. *Block*, 460 U.S. at 296-297; accord *Neustadt*, 366 U.S. at 703. On the other side of the ledger, moreover, this Court has cautioned against adopting a construction that would undermine the FTCA's plain text. *Neustadt*, 366

U.S. at 710-711 ("While we do not condone carelessness * * * neither can we justifiably ignore the plain words Congress has used in limiting the scope of the Government's tort liability."); see *JBP Acquisitions, LP*, 224 F.3d at 1264-1265 (cautioning against allowing plaintiffs to "circumvent the misrepresentation exception simply through the artful pleading of [their] claims"); Pet. App. 11a (similar). Petitioners' proposed approach poses just such risk.

Petitioners contend (Pet. 20) that the decision below "threatens to let the FTCA's misrepresentation exception swallow Congress' purposeful waiver of sovereign immunity." But as even petitioners acknowledge, the Fifth, Seventh, and Eleventh Circuits have applied the misrepresentation exception in similar circumstances for decades. See Pet. 15-16; pp. 11-13, *supra*. There is no indication that such approach has led to "bizarre results"—let alone "gut[ted]" the FTCA. Pet. 4 (citation omitted).

Further review by this Court is unwarranted for the additional reason that even if petitioners' claims were not barred by the misrepresentation exception, they would still be barred on other grounds—specifically, the FTCA's discretionary function and independent contractor exceptions. See 28 U.S.C. 2680(a); 28 U.S.C. 1346(b), 2671. The district court had no occasion to consider application of those provisions because it held that the misrepresentation exception plainly barred petitioners' claims. Pet. App. 40a. But as the government explained below, the discretionary-function exception bars petitioners' claims because the challenged conduct—representations about exposure risks and supervision of the contractor's work—is discretionary and subject to policy considerations. See D. Ct. Doc. 91, at

7-15 (May 27, 2022). And the contractor exception further bars petitioners' claims insofar as they are premised on the conduct of the Navy's contractor. D. Ct. Doc. 91, at 6-7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2025