No. 04-759

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH OLSON, MONICA OLSON, AND JAVIER VARGAS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. When private persons do not regularly perform the type of conduct complained of, courts may look to an analogous state actor under like circumstances so long as the Court does not import state governmental immunities or make the United States liable to a greater extent than a private person 6

A. Looking to a state actor is permissible under the FTCA so long as governmental immunities are not imported into the liability analysis 12

B. Looking to a state actor does not make the liability of the United States greater than that of a private person in Arizona because Arizona law equates the tort duties of public and private entities 15

C. The United States would be liable under Arizona law for its negligent inspection 17

II. The FTCA provides for liability when the United States negligently performs its statutory and regulatory duties 19

TABLE OF CONTENTS – Continued

Page

A. The text of 28 U.S.C. § 1280(a) demonstrates that Congress intended the United States to be liable for negligence in the course of carrying out statutory and regulatory duties 21

B. This Court's discretionary function exception jurisprudence demonstrates that the United States may be liable under the FTCA for violation of federal statutes and regulations 23

C. The United States is liable under the FTCA pursuant to Arizona's negligence per se doctrine 24

1. The FTCA permits negligence per se liability for violations of federal laws if state laws would impose such liability in like circumstances 24

2. The Mine Safety and Health Act is the type of statute to which Arizona's negligence per se doctrine applies 26

III. The hypothetical "private person" must be an individual with a duty to inspect and not be on a mere frolic 28

A. In Arizona, duty is broadly construed 29

B. The Good Samaritan doctrine should not be mechanically applied to all negligent inspection cases 31

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES:

Aguilar v. United States, 920 F.2d 1475 (9th Cir. 1990)..... 10, 14

Berkovitz v. United States, 486 U.S. 531 (1988)..... 3, 6, 23

Cecile Indus., Inc. v. United States, 793 F.2d 97 (3d Cir. 1986)..... 24

Cox v. May Dept. Store Co., 903 P.2d 1119 (Ariz. App. 1995)..... 31

Crider v. United States, 885 F.2d 294 (5th Cir. 1989)..... 11, 13, 14, 15

Daggett v. County of Maricopa, 770 P.2d 384 (Ariz. App. 1989)..... 17, 18, 30

Dalehite v. United States, 346 U.S. 15 (1953)..... 8, 9

De la Cruz v. State of Arizona, 961 P.2d 1070 (Ariz. App. 1998)..... 4, 18

Delta Savings v. United States, 265 F.3d 1017 (9th Cir. 2001)..... 24, 25

Diaz v. Magma Copper Co., 950 P.2d 1165 (Ariz. App. 1997)..... 4, 18

Donohue v. United States, 437 F.Supp. 836 (E.D. Mich. 1977)..... 22

Dupree v. United States, 247 F.2d 819 (3d Cir. 1957)..... 22

Estate of Hernandez v. Ariz. Bd. of Regents, 866 P.2d 1330 (Ariz. 1994)..... 26

Florida Auto Auction of Orlando, Inc. v. United States, 74 F.3d 498 (4th Cir. 1996)..... 19

Gill v. United States, 429 F.2d 1072 (5th Cir. 1970)..... 24

TABLE OF AUTHORITIES – Continued

Page

Good v. City of Glendale, 722 P.2d 386 (Ariz. App. 1986)..... 26

Hatahley v. United States, 351 U.S. 173 (1956)..... 22

Hines v. United States, 60 F.3d 1442 (9th Cir. 1995)..... 22

Indian Towing Co. v. United States, 350 U.S. 61 (1955) .....*passim*

Knauss v. DND Neffson Co., 963 P.2d 271 (Ariz. App. 1997)..... 30

Lombardo v. Albu, 14 P.3d 288 (Ariz. 2000)..... 26

Louie v. United States, 776 F.2d 819 (9th Cir. 1985)..... 3, 4, 14, 17

Martin v. Schroeder, 105 P.3d 577 (Ariz. App. 2005)..... 4, 5, 25, 26, 28

Martinez v. State, 866 P.2d 1356 (Ariz. App. 1993)..... 30

Moody v. United States, 774 F.2d 150 (6th Cir. 1985)..... 3, 24

Ontiveros v. Borak, 667 P.2d 200 (Ariz. 1983)..... 30

Papastathis v. Beall, 723 P.2d 97 (Ariz. App. 1986)..... 5, 31

Phillips v. United States, 956 F.2d 1071 (11th Cir. 1992)..... 23

Raymer v. United States., 660 F.2d 1136 (6th Cir. 1981)..... 10

Rayonier, Inc. v. United States, 352 U.S. 315 (1957)... 7, 9, 12

Rhoden v. United States, 55 F.3d 428 (9th Cir. 1995)..... 25

Richards v. United States, 369 U.S. 1 (1962)..... 13

Ryan v. State, 656 P.2d 597 (Ariz. 1982)..... 4, 15, 16, 19

TABLE OF AUTHORITIES – Continued

Page

Sabin Oral Polio Vaccine Products Liability Litigation v. United States, 984 F.2d 124 (4th Cir. 1993)..... 24

Sanchez v. City of Tucson, 953 P.2d 168 (Ariz. 1998)..... 30

Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004)..... 8

Stone v. Arizona Highway Comm'n, 381 P.2d 107 (Ariz. 1963)..... 17, 19

Tellez v. Saban, 933 P.2d 1233 (Ariz. App. 1996)..... 26

United States v. Gaubert, 499 U.S. 315 (1991)..... 23

United States v. Muniz, 374 U.S. 150 (1963).....*passim*

United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797 (1984)..... 18

United States v. Yellow Cab Co., 340 U.S. 543 (1951)..... 6, 13

STATUTES:

18 U.S.C. § 4042..... 20, 22

28 U.S.C. § 1280(a)..... 21

28 U.S.C. § 1346..... 7, 9, 20

28 U.S.C. § 1346(b)(1)..... 5, 8, 11, 12

28 U.S.C. § 2674..... 5, 7, 29

28 U.S.C. § 2680(a)..... 21, 23

30 U.S.C. § 801(g)..... 27

30 U.S.C. § 813(a)..... 1, 28

30 U.S.C. § 813(g)(1)..... 28

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS:

19 C.F.R. § 192.2(b) 20

OTHER AUTHORITIES:

MSHA General Inspection Handbook 28

MSHA Program Policy Manual, Vol. III 28

Restatement (Second) of Torts § 286 26

Restatement (Second) of Torts § 323 30

Restatement (Second) of Torts § 324A 30, 31, 33

William L. Prosser, *Handbook of the Law of Torts* (4th ed. 1971) 30

STATEMENT

This case arises out of an accident at the Mission Mine, an underground copper mine operated by ASARCO, Inc., several miles south of Tucson, Arizona. J.A. 30. On January 31, 2000, Respondents Joseph Olson and Javier Vargas were working with another miner, Jose Villanueva, packing explosives into holes drilled into the ceiling to blast loose ore-bearing rock. J.A. 22-23, 30. Because of ASARCO's failure to provide adequate support for the mine ceiling, a nine-ton slab of rock fell on Olson, Vargas, and Villanueva. Villanueva was crushed to death, and Olson and Vargas suffered severe, disabling, and permanent injuries. J.A. 23, 25-26, 30.

Beginning about a year before the accident, James Kirk, a field supervisor for the Mine Safety and Health Administration (MSHA) in Mesa, Arizona, received a series of six anonymous complaints alerting him that the Mission Mine employed inadequate measures to prevent rock falls. J.A. 49-50. Although MSHA policy required him to evaluate all such complaints, later investigations by MSHA and by the Labor Department's Office of Inspector General concluded that Kirk had effectively failed to evaluate the complaints because of his mistaken belief that only signed, written complaints required evaluation. J.A. 55-57.

On September 28, 1999, after Kirk had received the complaints, MSHA mine inspector Alan Varland visited the Mission Mine to conduct an inspection. J.A. 25. MSHA is required by statute to inspect each underground mine "in its entirety" at least four times a year. 30 U.S.C. § 813(a). But despite this requirement – and even though a miner told him during the inspection that ASARCO was

not taking sufficient steps to prevent rock falls – Varland did not inspect all of the mine. J.A. 25, 61. In particular, he did not inspect parts of the mine that management had barricaded. J.A. 61. The complaints received by Kirk stated that ASARCO would barricade the dangerous areas when MSHA inspectors showed up and then re-open them after the inspectors left. J.A. 61. The accident that killed Villanueva and injured respondents Olson and Vargas occurred in one of the areas that Varland did not inspect. J.A. 25, 56, 61. Joseph Vargas, Javier Olson and his wife Monica Olson brought this action against the United States in the United States District Court for the District of Arizona to recover for their injuries suffered as a result of the accident. J.A. 22-23. The complaint alleged that the United States was liable under the FTCA because the plaintiffs' injuries were the proximate result of the negligence of MSHA employees Kirk and Varland in carrying out their mandatory duties to evaluate mine safety complaints and to inspect underground mines. J.A. 26-27.

SUMMARY OF ARGUMENT

The United States is seeking to drastically limit the Federal Tort Claims Act's (FTCA or Act) waiver of sovereign immunity. It urges two restrictions on the FTCA's scope, which are not in the Act's text or consistent with the Act's purpose. The United States contends: (1) that sovereign immunity still protects the United States from liability when its employees conduct activities that private persons do not perform, Brief for the Petitioner at 23 ("[I]f there is no private individual in like circumstances, the United States is simply not liable under the FTCA."); and (2) that sovereign immunity still protects the United

States from liability when its employees violate federal standards and regulations, Brief for the Petitioner at 28 ("It is virtually axiomatic that the FTCA does not apply where the claimed negligence arises out of the failure of the United States to carry out a federal statutory duty in the conduct of its own affairs.") (brackets and internal quotations marks omitted).

But the FTCA was intended to broadly waive sovereign immunity. *Berkovitz v. United States*, 486 U.S. 531, 535 (1988). This waiver includes circumstances where the United States' employees conduct activities that private persons do not generally perform, *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955), and where the United States' employees violate the statutes and regulations that govern their conduct, *Moody v. United States*, 774 F.2d 150, 157 (6th Cir. 1985).

The FTCA does not fully explain what courts should do when the wrongful act committed by the federal employee is not one which a private person has the authority or occasion to commit. The best solution to fill that gap – and the one most consistent with the intent of the Act – is to look to a state actor under like circumstances. *See, e.g,. Louie v. United States*, 776 F.2d 819, 824-25 (9th Cir. 1985). If that state actor would be liable under the law of the state, then the United States would be liable under the FTCA so long as: (1) state governmental immunities are not imported into the analysis, and (2) the United States is not subject to any greater liability than that of a private person. Respondents agree with the United States that importing state immunities or subjecting the United States to greater liability than that of a private person is inconsistent with the intent of the Act.

In many states, including Arizona, government actors are treated like private persons for tort liability purposes. *Ryan v. State*, 656 P.2d 597, 599 (Ariz. 1982). When that is the case, looking to a state actor to find the most analogous factual circumstance is consistent with, even required by, the FTCA. *See*, *e.g.*, *Louie*, 776 F.2d at 824-25. Refusing to look to a state actor violates the "like circumstances" requirement and forces courts to compare apples to oranges – an analysis that frequently causes confusion and results inconsistent with Congress's intent to broadly waive sovereign immunity and to compensate the victims of federal actors' negligence.

Without a doubt, a state mine inspector would be subject to liability in Arizona for negligent inspection. *See De la Cruz v. State of Arizona*, 961 P.2d 1070 (Ariz. App. 1998); *Diaz v. Magma Copper Co*., 950 P.2d 1165 (Ariz. App. 1997). That liability does not depend on a mine inspector's status as a state actor, but rather on liability principles that apply equally to private persons and state actors. The United States should therefore be subject to liability for the same conduct under the FTCA. Doing so would not subject the United States to liability greater than that of a private person.

The United States further contends it is immune from liability when its employees violate federal statutes and regulations. But private persons do not enjoy such immunity in Arizona. In Arizona, violations of even federal statutes and regulations subject a private person to liability under to the doctrine of negligence per se. *Martin v. Schroeder*, 105 P.3d 577, 582 (Ariz. App. 2005). The federal statutes and regulations provide a source of duty and standard of care under Arizona law. *Id*. Subjecting the United States to liability is not based on the federal

statutes and regulations "standing alone." Rather, the violations also constitute violations of duties analogous to those imposed under Arizona law. *Id*.

Finally, while the United States would be liable under the Good Samaritan doctrine in Arizona, it is not necessary, and even contrary to the "like circumstances" requirement of the FTCA, to resort to that doctrine. The Good Samaritan doctrine is a source of duty under Arizona law. *See Papastathis v. Beall*, 723 P.2d 97 (Ariz. App. 1986). But it is generally applied in those situations where the actor was not required to act, but did so anyway – a voluntary undertaking. Here, the federal mine inspectors did not voluntarily undertake to inspect the mine; they were required to do so by the federal statutes and regulations. Thus, when looking to state law for a private person "under like circumstances," that private person must be required to inspect. The question becomes would a private person who was required to inspect be liable under Arizona law for negligently inspecting? Comparing the mine inspectors' conduct to a voluntary undertaking is a legal fiction and not a "like circumstance."

ARGUMENT

The Federal Tort Claims Act (FTCA or Act) waives the United States' sovereign immunity "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 United States will be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The FTCA

has three generally recognized purposes: (1) to broadly waive the sovereign immunity of the United States; (2) to compensate the victims of federal actors' negligence; and (3) to relieve Congress of the legislative burden of enacting private laws for the relief of victims. *Berkovitz v. United States*, 486 U.S. 531, 535 (1988); *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955); *United States v. Yellow Cab Co*., 340 U.S. 543, 550 (1951). The United States is asking this Court to significantly narrow the extent of its liability under the FTCA by offering two restrictions on the Act's reach. It contends that: (1) it is not liable when there is no identifiable private individual under like circumstances, and (2) it is not liable for violations of its statutes and regulations. Brief for the Petitioner at 23, 28. As demonstrated below, both interpretations are contrary to the FTCA's text and purpose, as well as the case law interpreting the Act.

I. When private persons do not regularly perform the type of conduct complained of, courts may look to an analogous state actor under like circumstances so long as the Court does not import state governmental immunities or make the United States liable to a greater extent than a private person.

The United States attempts to limit the FTCA's waiver of sovereign immunity by arguing that "if there is no private individual in like circumstances, the United States is simply not liable under the FTCA." Brief for the Petitioner at 23. It contends: "In circumstances . . . that involve a uniquely governmental function with no private-liability analog . . . the FTCA does not impose liability." Brief for the Petitioner at 25. The United States has been

arguing for years – unsuccessfully – that it is not liable for "uniquely governmental functions." *See Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955) (government argues that the FTCA "must be read as excluding liability in the performance of activities which private persons do not perform"); *Rayonier, Inc. v. United States*, 352 U.S. 315, 318-19 (1957) (government argues that the FTCA does not impose liability for negligence of its agents in uniquely governmental capacity). The United States' position finds no support in the FTCA's text or purpose and has been repeatedly rejected by this Court. Even where no private analogue exists, the United States will be liable for the wrongful conduct of its agents who commit torts that no private individual would possess the authority and opportunity to commit. *See*, *e.g.*, *United States v. Muniz,* 374 U.S. 150 (1963); *Indian Towing,* 350 U.S. at 64-69.

The FTCA's text does not limit liability to the *activities* that private persons perform. The Act refers to a "private person" in relation to the *liability* of a private person, not the *activities* of a private person. In fact, the Act speaks of a government employee "acting within the scope of his office or employment," which presumably would, more often than not, involve governmental actors performing governmental duties. Section 1346 vests federal courts with exclusive jurisdiction for injury "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." (Emphasis added.) Similarly, section 2674 provides that the "United States *shall be*

liable . . . in the same manner and the same extent as a private individual under like circumstances." All conduct of the government is inescapably "uniquely governmental" in that it is performed by the government. *Indian Towing*, 350 U.S. at 67. Limiting the FTCA's liability to activities that private persons perform – such as "negligent driving" – is not supported by its language.

The United States attempts to support its assertion that no liability exists for activities private persons do not perform by looking to the legislative history of the Act. It quotes: "[u]ppermost in the collective mind of Congress were the ordinary common-law torts." Brief for the Petitioner at 18, *quoting Dalehite v. United States*, 346 U.S. 15, 26 n.10, 28 (1953). It suggests that Congress had "only garden-variety torts" in mind. Brief for the Petitioner at 18-19, *quoting Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2751 n.4 (2004). From that, the United States concludes that "it was natural that Congress would choose to waive the United States' sovereign immunity for tort liability only '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.'" Brief for the Petitioner at 19, *quoting* 28 U.S.C. § 1346(b)(1).

But the United States' argument is a non sequitur. It does not follow from the United State's interpretation of the FTCA's legislative history that Congress intended to immunize the United States for those activities for which there is no direct private person analogue. First, the United States' conclusion that Congress was only concerned with "garden-variety torts" is open to question. The FTCA "extends to novel and unprecedented forms of liability as well." *Muniz*, 374 U.S. at 159, *citing Indian*

Towing Co. v. United States, 350 U.S. 61; *Rayonier, Inc. v. United States*, 352 U.S. 315.

Second, Congress created the FTCA, in part, because it thought "the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite*, 346 U.S. at 24. Had Congress intended that the Government be liable only for "garden-variety torts" such as "negligence in the operation of vehicles," Brief for the Petitioner at 18, it could have easily excluded all regulatory activity from the FTCA's reach. It did not do so. Rather, the legislative history demonstrates that Congress intended to provide a remedy to those injured by the negligence of governmental employees "carrying out [the United States'] work." *Id.* at 24. The Act provides that the United States is liable for the negligence "of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346. "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of *governmental activities* in circumstances like unto those in which a private person *would be liable*. . . . " *Indian Towing*, 350 U.S. at 68 (emphasis added).

The United States' argument is also contradicted by this Court's prior interpretations of the FTCA. In *Indian Towing*, this Court held that excluding liability for activities that private persons do not perform would "be attributing bizarre motives to Congress." 350 U.S. at 62. This Court refused to predicate "liability on such a completely fortuitous circumstance – the presence or absence of identical private activity." *Id.* at 67. No private person analogy was available in *Indian Towing* because private persons were not allowed to operate lighthouses. *Id*. at 67

n.2. This Court explained the bizarre result that would follow if liability were limited to those acts that private persons perform: "[I]f the United States were to permit the operation of private lighthouses . . . the Government's basis of differentiation would be gone and the negligence charged in this case would be actionable. Yet there would be no change in the character of the Government's activity. . . . " *Id*. at 66-67. "There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Id*. at 67. *See also Raymer v. United States*., 660 F.2d 1136, 1140 (6th Cir. 1981) ("it is not determinative that private individuals do not engage in regulatory inspection and enforcement activities").

While the United States contends that the FTCA language is "plain," Brief for the Petitioner at 14, the Act does not fully explain what to do when the conduct complained of is conduct that private persons do not regularly perform. "A gap in the law exists if the tort complained of is performed by a federal agent carrying out a governmental function that no private individual could perform." *Aguilar v. United States*, 920 F.2d 1475, 1479 (9th Cir. 1990) (Noonan, J., dissent). Courts have typically filled this gap in one of two ways: imagine a private person and apply the Good Samaritan doctrine (which is not always the most "like circumstances") or look to a state actor under the law of the place. Respondents contend that the solution that best effectuates Congress's intent is looking to a state actor under the law of the place so long as doing so does not import state governmental immunities or make the United States liable to a greater extent than a private person. This solution is preferable because a state

actor in a factually analogous situation is in the most "like circumstances."

"Like circumstances" are those that "best articulate the state's negligence laws" under a case's particular facts. *Crider v. United States*, 885 F.2d 294, 296 (5th Cir. 1989). Here, the state mine inspector provides the most "like circumstances" available to judge whether the United States, if a private person, would be liable under the law of Arizona for the negligent conduct of an MSHA inspector. By looking to Arizona state entity law, the Ninth Circuit carried out in the most precise way possible Congress's intent to impose liability on the United States "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

The United States is concerned about the "inevitable chaos" that would ensue if courts look to an analogous state actor under like circumstances to determine its liability under the FTCA. It made a similar argument in *Muniz*, which this Court rejected. There, the government complained that it would be subject to too many varying state laws if the United States were held liable to prisoners for the negligence of its employees. *Muniz,* 374 U.S. at 161. This Court responded: "Without more definite indication of the risks of harm from diversity, we conclude that the prison system will not be disrupted by the application of Connecticut law in one case and Indiana law in another to decide whether the Government should be liable to a prisoner for the negligence of its employees." *Id*. at 162. Congress incorporated the substantive laws of the fifty states into the FTCA by requiring waiving immunity "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 United States' fear is unwarranted.

Courts should look to a state actor in like circumstances to determine whether the United States would be liable under the FTCA. Any other result would violate the "like circumstances" requirement because private persons simply do not perform regulatory inspections. If a state governmental entity would be liable, so, too, would the United States, as long as that liability is not based on a principle unique to governmental entities. In other words, if the principle of law which makes the governmental entity liable under like circumstances is equally applicable to a private person, the United States is exposed to liability under the FTCA.

A. Looking to a state actor is permissible under the FTCA so long as governmental immunities are not imported into the liability analysis.

The cases that prohibit looking to a state actor under like circumstances to determine liability under the FTCA do so to avoid importing a state's governmental immunities. *See*, *e.g.*, *Indian Towing*, 350 U.S. at 65; *Rayonier*, 352 U.S. at 376 ("United States liability is not *restricted* to the liability of a municipal corporation or other public body and [ ] the injured party cannot be deprived of his rights under the Act by resort to an alleged distinction [ ] imported from the law of municipal corporations") (emphasis added); *Muniz*, 374 U.S. at 164-65. The FTCA "cuts the ground from" the doctrine of sovereign immunity. *Indian Towing*, 350 U.S. at 65. It would be "self-defeating" to allow the United States to use state immunities to revive

the governmental immunity the FTCA was designed to eliminate. *Id*.

Here, the United States is again attempting to make the FTCA self-defeating, this time by using the "private person" language to severely narrow its liability under the FTCA. It is attempting to give the words "private person" a meaning never intended by Congress. This Court has cautioned against "whittl[ing the FTCA] down by refinements" because such an approach is "inconsistent" with the Act's "breadth of purpose" and "general trend toward increasing the scope" of the United States' waiver of immunity. *United States v. Yellow Cab*, 340 U.S. 543, 549 (1951). "[I]t is fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law, and to its object and policy.'" *Richards v. United States*, 369 U.S. 1, 11 (1962) (holding that courts must consider a state's conflict of laws provisions when determining the United States' FTCA liability under state law). The United States' narrow focus on the words "private person" creates an interpretation inconsistent with the FTCA's purpose and effectively immunizes the United States from liability in a host of circumstances not intended by Congress. The FTCA was intended to broadly waive sovereign immunity, not further immunize the United States.

The United States' interpretation is that if the tort committed is a type that a private person would not have the authority and opportunity to commit, then it is immune from liability. The government made the same argument in *Crider*, but the Fifth Circuit rejected it,

finding the Ninth Circuit's analysis more in line with the purposes of the FTCA.

> The government contends that the FTCA, in abrogating sovereign immunity where a "private individual" would be liable "under like circumstances," precludes us from considering whether Texas recognizes some duty on the part of law enforcement officers. By contrast in *Louie v. United States,* 776 F.2d 819, 825 (9th Cir.1985), a case closely analogous to this one, the government prevailed in its assertion that "reference to Washington law, setting forth the liability of state and municipal entities to establish the government's standard of liability under the FTCA, is both necessary and proper." *Id*. Under the special circumstances involved, we think the government got it right in *Louie.* We are not looking to state law insofar as it immunizes a public entity from liability; rather, we are seeking "like circumstances" which best articulate a state's negligence law.

Crider, 885 F.2d at 296.

The courts have struggled to reach consistent results when confronted with situations in which there is no analogous private activity. *Compare Crider*, 885 F.2d at 296-97 (standards applicable to state or local law enforcement officers apply, but immunities do not), *with Aguilar*, 920 F.2d at 1477 (statutes limiting state law enforcement officers' liability to $50,000 applied to United States). The United States attempts to explain the inconsistency this way: "Often such privileges or prerogatives are part of broader principles of state law that encompass actions by private individuals as well." Brief for the Petitioner at 24-25 n.7. In other words, the government tries to distinguish

those cases that have applied state entity law in law enforcement cases because, on a broader level, the state tort principles applicable to governmental entities are also applied to private persons. That point, now conceded by the government, is Respondents' whole argument. In some situations, it is appropriate to consider the liability of a state government actor when his job is more analogous to the job of the federal employee whose conduct gave rise to the FTCA claim, as long as the state actor's liability flows from principles that "encompass actions by private individuals as well," to use the government's phrase.

B. Looking to a state actor does not make the liability of the United States greater than that of a private person in Arizona because Arizona law equates the tort duties of public and private entities.

Perhaps part of the problem and the inherent confusion it engenders is in the terminology used. What exactly does "looking to state entity law" mean? Respondents are not arguing, and this Court does not have to hold, that the proper test is to apply a state's "governmental entity law." Respondents are arguing, however, that when the most analogous circumstances involve conduct generally performed by state actors, the proper analysis under the FTCA is to look to state law that applies to that state actor. "Like circumstances" are those "that best articulate the state's negligence laws" under a case's particular facts. *Crider*, 885 F.2d 294. An analysis of state law liability in such circumstances has nothing to do with "state entity law" because in Arizona, "a state actor is liable to the same extent as a private person." *Ryan v. State*, 656 P.2d 597, 599 (Ariz. 1982). If the principle of law which causes the

governmental entity to be liable under like circumstances is equally applicable to a private person, which it is in Arizona, the United States is exposed to liability under the FTCA.

The United States asserts that the FTCA does not encompass *additional* liability that a State may choose to impose on its own governmental entities. Brief for the Petitioner at 19. (Emphasis in original). We agree. The FTCA was intended to waive sovereign immunity and make the United States liable for the negligence of its employees just like private persons.

Although regulatory inspections are generally not performed by private persons, looking to a state actor for the most "like circumstances" will not subject the United States to any greater liability than that of a private person under Arizona law. Regulatory inspections are inherently governmental functions. It follows that the cases in Arizona discussing persons who negligently conducted inspections they were required to conduct would involve governmental entities. But looking to those cases to determine whether the United States would be liable for like conduct in Arizona does not expose the United States to any greater liability than that of a private person because in Arizona "the parameters of duty owed by the state will ordinarily be coextensive with those owed by others." *Ryan*, 656 P.2d at 599. Liability does not turn on the status of the actor.

In Arizona, the law applied to a state actor is the same as the law applied to a private individual, and a state actor is treated like a private litigant for tort purposes. *See Ryan*, 656 P.2d at 599-600. It has long been the law in

Arizona that "employers or principals, *individual, corporate or governmental*, are responsible for the tortious wrongdoing when committed by agents and employees acting within the scope of their employment." *Stone v. Arizona Highway Comm'n*, 381 P.2d 107 (Ariz. 1963) (emphasis added).

To the extent a state government entity and a private person are equally liable under state law in like circumstances, imposing liability on the United States necessarily comports with the FTCA's requirement that immunity be waived only when a private person would be liable under like circumstances. The Ninth Circuit's decision in this case is thus both permitted by and consistent with the FTCA's "private person" language. *See also Louie v. United States*, 776 F.2d 819, 825 (1985) (applying state entity liability because municipal entities are treated as private persons for tort liability purposes under Washington law).

C. The United States would be liable under Arizona law for its negligent inspection.

Arizona law imposes liability on entities for negligent inspection whether the actor is a public or private individual. In *Daggett v. County of Maricopa*, 770 P.2d 384 (Ariz. App. 1989), for example, the plaintiff was injured when he dove into a shallow pool at a water park. State and county regulations required the county health department to review and approve construction plans for the pool. The county health department was required to inspect the pool to enforce those regulations. *Id*. at 385. The *Daggett* court found that Maricopa County owed a duty to a swimmer who was injured because of negligent inspection of the public pool: "[N]egligence by a governmental entity in

performing inspections required by statute or regulation will support a claim by a person injured as a result of the entity's negligence." *Id*.

While it is true that in *Daggett* the negligent individual was a government employee, nothing in the *Daggett* analysis suggests a different result if the negligent individual were a private employee. Liability was not imposed on the defendant because of its government status, but rather because the individual inspector failed to act reasonably in performing required inspections.

In *Diaz v. Magma Copper Co*., 950 P.2d 1165 (Ariz. App. 1997), the Arizona Court of Appeals allowed a wrongful death claim to proceed against the state mine inspector for negligent inspection. The state mine inspector argued that it was not liable, *citing United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797 (1984), which held that the United States was immune from liability for regulatory inspections and enforcement under the discretionary function exception of the FTCA. *Diaz,* 950 P.2d at 1176. The Arizona court found that argument unpersuasive because "it conflicts with Arizona precedent rejecting governmental immunity when required inspections are alleged to have been negligently performed and a cause of personal injury." *Id*. Thus, in Arizona, one who negligently performs a required inspection is liable. That liability is the same whether the actor is a state actor or a private individual. *See also De la Cruz v. State of Arizona*, 961 P.2d 1070 (Ariz. App. 1998) (State of Arizona liable to plaintiff for negligent inspection).

Although it is true the defendants in these cases were governmental entities, liability did not rest on that fact. These Arizona cases exemplify the well-established

Arizona policy that abolished most governmental immunity and treats public and private actors alike for tort liability purpose. "'There is perhaps no doctrine more firmly established than the principle that liability follows tortious wrongdoing; that where negligence is the proximate cause of injury, the rule is liability and immunity is the exception.'" *Ryan,* 656 P.2d at 598, *quoting Stone*, 381 P.2d 107.

Arizona imposes liability on individuals who are required to inspect and who do so negligently, regardless of their status as a private or public individual. When the most "like circumstances" involve a state actor, the FTCA permits examining the liability of that actor to determine whether the United States would be liable under the law of the place. The Ninth Circuit's decision to evaluate liability from the standpoint of the Arizona State Mine Inspector is the most precise way available to affect Congress' intent to consider liability of a private individual under "like circumstances."

II. The FTCA provides for liability when the United States negligently performs its statutory and regulatory duties.

The United States claims: "It is virtually axiomatic that the FTCA does not apply where the claimed negligence arises out of the failure of the United States to carry out a federal statutory duty in the conduct of its own affairs." Brief for the Petitioner at 28 (brackets and internal quotation marks omitted). The United States attempts to immunize itself from liability in the performance of its statutes and regulations. This attempt is contrary to the explicit text of the FTCA, as well as cases interpreting the Act. *See, e.g., Florida Auto Auction of Orlando, Inc. v.*

United States, 74 F.3d 498 (4th Cir. 1996) ("[T]he Government insisted that breach of any duty imposed by 19 C.F.R. § 192.2(b) could not give rise to a state-law claim of negligence. . . . The Government's argument (an argument from which it attempted to distance itself during oral arguments) is wholly without merit.").

While our focus has primarily been on the language in the second part of 28 U.S.C. § 1346, the first part is relevant here as well. Section 1346 vests federal courts with exclusive jurisdiction for injury "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." Federal statutes and regulations often govern and set the standard of care for employees of the Government acting within the scope of their employment. *See*, *e.g.*, *United States v. Muniz*, 374 U.S. 150, 164-65 (1963) (In a FTCA claim, the "duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 U.S.C. § 4042").

The United States complains that if it were held to the standard of care imposed by its statutes and regulations, liability would be imposed "only with respect to the actions of federal officials." Brief for the Petitioner at 27 n.9. But its argument misses the mark. The FTCA, by definition, imposes liability only with respect to the actions of federal officials. But this observation does not mean that a private person would not be liable under like circumstances. Requiring the United States to perform its mandatory directives with reasonable care is not imposing any more liability on it than would be imposed on private persons. On the other hand, allowing the United States to escape liability for failing to follow its mandatory directives is vesting the United States with an immunity not enjoyed

by private persons – the result the FTCA was enacted to avoid.

The United States complains of the "immense burden" that would be imposed on it were it held to the standard of care contained in its own statutes and regulations. Brief for the Petitioner at 30. But such a burden is illusive. Congress created numerous exceptions to FTCA liability designed to alleviate any unjustified burden liability would impose. If the government's conduct does not fall within one of those exceptions, Congress intended for the United States to be liable for its negligence, just like private persons.

A. The text of 28 U.S.C. § 1280(a) demonstrates that Congress intended the United States to be liable for negligence in the course of carrying out statutory and regulatory duties.

The FTCA excludes from liability "[a]ny 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." 28 U.S.C. § 2680(a) (emphasis added). By excluding liability for government employees *exercising due care* in executing statutes or regulations, the Act necessarily includes liability for government employees *not* exercising due care in executing those statutes or regulations. Congress could have easily excluded liability for all violations of federal statutes or regulations, but it did not. Interpreting the FTCA to immunize the United States from all liability while performing acts required by statutes or regulations would impose a result clearly unintended by Congress.

Courts have countless times found the United States liable for the negligence of its employees falling below the standard of care imposed by federal statutes or regulations. Harm caused by the United State's failure to exercise due care when acting pursuant to statutes and regulations is compensable under the FTCA. *See*, *e.g.*, *United States v. Muniz,* 374 U.S. 150, 164 (1963) ("the duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 U.S.C. § 4042"); *Hatahley v. United States*, 351 U.S. 173, 178-82 (1956) (United States can be liable under FTCA for its failure to follow procedures established in federal regulations requiring written notice before removing livestock); *Hines v. United States*, 60 F.3d 1442, 1448 (9th Cir. 1995) ("Under California law, a public entity can be held liable for injury when it fails to discharge a 'mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury,' and the entity's failure proximately causes that injury."); *Dupree v. United States*, 247 F.2d 819, 824 (3d Cir. 1957) ("When the government employees act pursuant to and in furtherance of regulations, resulting harm is not compensable under the act, *except where they do not exercise due care*.") (Emphasis added; internal citations omitted); *Donohue v. United States*, 437 F.Supp. 836 (E.D. Mich. 1977) (plaintiff stated valid cause of action under the FTCA against the United States for its failure to follow its own procedural regulations in suspending plaintiff's insurance license).

B. This Court's discretionary function exception jurisprudence demonstrates that the United States may be liable under the FTCA for violation of federal statutes and regulations.

The weakness of the United States' argument becomes crystal clear when one considers the discretionary function exception to the FTCA waiver of sovereign immunity. The United States enjoys immunity to FTCA liability when it exercises a discretionary function. The FTCA does not waive sovereign immunity for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function." 28 U.S.C. § 2680(a). It is well-settled that no discretion is involved when a federal statute or regulation prescribes a course of action because the employee has no option but to follow the directive. *United States v. Gaubert*, 499 U.S. 315, 323 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988); *Phillips v. United States*, 956 F.2d 1071, 1077 (11th Cir. 1992) (discretionary exception did not apply because United States failed to use ordinary care in carrying out mandatory safety obligations).

In other words, it has long been the law that the United States is *immune* from liability when it performs discretionary functions, but is *exposed* to liability when it performs pursuant to a federal statute or regulation that mandates a course of action. *Gaubert*, 499 U.S. at 323, *Berkovitz*, 486 U.S. at 536, *Phillips*, 956 F.2d at 1077. Now, the United States is arguing that it also cannot be liable for its violations of these mandatory statutes and regulations. Congress did not intend such a result.

C. The United States is liable under the FTCA pursuant to Arizona's negligence per se doctrine.

1. The FTCA permits negligence per se liability for violations of federal laws if state laws would impose such liability in like circumstances.

For the purposes of the FTCA, the failure to follow federal regulations may be negligence per se if, under state law, the regulation is the type of regulation whose violation would constitute negligence per se. *See Sabin Oral Polio Vaccine Products Liability Litigation v. United States*, 984 F.2d 124, 127-28 (4th Cir. 1993) (United States can be liable under the FTCA for violation of federal regulation regarding issuing a license for live polio vaccine because under Florida law, violations of regulations constitute negligence per se, and under Maryland law, violations of regulations are unreasonable and a breach of the duty of care); *Cecile Indus., Inc. v. United States*, 793 F.2d 97, 99 (3d Cir. 1986); *Moody v. United States*, 774 F.2d 150, 157 (6th Cir. 1985) (United States can be liable under the FTCA for violation of federal regulation because under Tennessee law, a private individual can be liable for violation of a federal regulation); *Gill v. United States*, 429 F.2d 1072, 1075 (5th Cir. 1970) (while principles of state law control, federal regulations may impose duties and standards of conduct upon the actors).

It is true that some courts have refused to apply the doctrine of negligence per se in FTCA claims. *See*, *e.g.*, *Delta Savings v. United States*, 265 F.3d 1017 (9th Cir. 2001). But the critical distinction between those cases that have refused the claims and those that have allowed the claims is whether, under state law, a private individual would be

liable in like circumstances. In *Delta Savings*, for example, the court noted that "plaintiffs have not cited any California cases which suggest that negligence per se actions can be premised on alleged violations of any of the federal civil rights statutes." *Id*. at 1026. The *Delta Savings* court acknowledged that "FTCA violations can be premised on state negligence per se causes of action," but reiterated that "plaintiffs in this case have not shown that the United States was bound by a duty under California law to support such a theory." *Id.*

In Arizona, negligence per se actions can be premised on violations of federal law. In *Martin v. Schroeder*, 105 P.3d 577 (Ariz. App. 2005), the Arizona Court of Appeals recently held that a violation of the Federal Gun Control Act's prohibition against transferring a firearm to a drug addict constitutes negligence per se, even though the federal statute at issue was silent on the issue of civil liability. *Id*. at 582. In fact, Arizona permits federal law to provide both a source of duty and a standard of care. *Id*. (Federal Gun Control Act supports imposing a duty and standard of care). For FTCA purposes, it is appropriate to look to federal law as a source of a duty and standard of care if the state would look to federal law to determine the existence of a duty and standard of care. *See*, *e.g.*, *Rhoden v. United States*, 55 F.3d 428, 431 (9th Cir. 1995) ("In an action under the FTCA, a court must apply the law state courts would apply in the analogous tort action, including federal law."). Because a private individual can be liable under the doctrine of negligence per se for violating a federal statute or regulation under Arizona law, the United States may be liable under the FTCA for its violations of federal statutes and regulations.

2. The Mine Safety and Health Act is the type of statute to which Arizona's negligence per se doctrine applies.

In Arizona, a person who violates a statute or regulation enacted for the safety and protection of the public or the injured person is negligent per se. *Good v. City of Glendale*, 722 P.2d 386, 389 (Ariz. App. 1986). "The court may derive a standard of care from a statute 'if it first determines that the statute's purpose is in part to protect a class of persons that includes the plaintiff and the specific interest at issue from the type of harm that occurred and against the particular action that caused the harm,'" *Martin*, 105 P.3d at 582, *citing Tellez v. Saban*, 933 P.2d 1233, 1237 (Ariz. App. 1996); *see also Estate of Hernandez v. Ariz. Bd. of Regents*, 866 P.2d 1330, 1339 (Ariz. 1994). Arizona has adopted the Restatement (Second) of Torts § 286 to define when a statute or regulation will be adopted as the standard of care. *See Lombardo v. Albu*, 14 P.3d 288, 291-92 (Ariz. 2000). Section 286 provides:

> **When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted**
>
> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

The Mine Safety and Health Act (Mine Act) and its implementing regulations are laws of the type that would give rise to a negligence per se claim under Arizona law. Congress enacted the Mine Act, at least in part, to protect miners.[1] The United States concedes this point: "The Federal Mine Safety and Health Act of 1977 . . . 30 U.S.C. 801 *et seq*., established a comprehensive scheme designed to promote the health and safety of the Nation's miners and improve working conditions in the Nation's mines." (Brief for the Petitioner at 2).

Because the Mine Act's purpose (even if only "in part"), was to "protect a class of persons [miners] which includes the one whose interest is invaded [Respondents Olson and Vargas]," it can set the standard of care in a negligence claim against the inspectors. The other requirements are also easily met. The Mine Act was designed to protect the particular interest which is invaded (mine safety); to protect that interest against the kind of harm which has resulted (injured miners); and to protect that interest against the particular hazard from which the harm results (unsafe conditions in the mine).

The Mine Act directs the Secretary of Health and Human Services and the Secretary of Labor to promulgate mandatory standards to protect the health and safety of miners. 30 U.S.C. § 801(g). It directs that MSHA "shall

[1] While the United States contends that the Mine Act places "primary responsibility" for compliance with safety regulations on the mine operators, Brief for the Petitioner at 2, the Restatement only requires that the purpose of the legislative enactment be "in part" for the safety of the miners.

make inspections of each . . . mine in its entirety at least four times a year." 30 U.S.C. § 813(a).

If a miner has reasonable grounds to believe that a violation of the safety standards has occurred or an imminent danger exists, he has a right to an immediate inspection if he provides a written and signed notice to an inspector. 30 U.S.C. § 813(g)(1). Upon receipt of the notice, the inspector is required to conduct a special inspection as soon as possible. *Id*.

Because some complaints might not meet the technical requirements of 30 U.S.C. § 813(g)(1), the MSHA General Inspection Procedures Handbook in use at the time of the events at issue here required that "all complaints . . . must be evaluated." MSHA General Inspection Handbook at 27 (emphasis added). In addition, the MSHA Program Policy Manual required that the inspector "must evaluate and determine a course of action." MSHA Program Policy Manual, Vol. III at 42-1 (emphasis added). The Mine Act and its implementing regulations and policies are plainly intended to protect miners, including Respondents. Arizona courts would thus recognize a duty and standard of care based on the Mine Act pursuant to Arizona's negligence per se doctrine. *Martin*, 105 P.3d at 582.

III. The hypothetical "private person" must be an individual with a duty to inspect and not be on a mere frolic.

The confusion stemming from the "private person under like circumstances" analysis is compounded when courts look to a "private person," but ignore the "under like circumstances" requirement. The hypothetical private person used to determine liability under state law must be

a private person with a duty to inspect, whether contractual or otherwise, to satisfy the "like circumstances" requirement. The FTCA provides that the United States will be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. "Under like circumstances" should mean an inspector that was required to inspect with due care. Any analogy to a private person without a duty to inspect with due care falls short, and courts that rely on such an analogy are comparing apples to oranges.

The United States correctly points out that private people do perform inspections – "insurance companies, labor unions, consultants, employers, and landowners." Brief for the Petitioner at 32. But whether the private person in those examples is subject to liability is generally not dependent on the Good Samaritan doctrine. In those examples, as here, the inspector has a duty to inspect, whether imposed by statute, contract, or common law. There is thus no need to find an *additional* duty in the Good Samaritan doctrine. Similarly, under our facts, the United States had a duty to inspect the mine. The "like circumstances" analysis should properly be to an individual with a duty to inspect with reasonable care. Would a private person with a duty to inspect be liable for negligently performing that inspection under Arizona law? The answer is yes. The United States is therefore liable under the FTCA for the same conduct.

A. In Arizona, duty is broadly construed.

The United States' arguments appear to be an attempt to avoid a duty between the MSHA inspectors and the injured miners. Even if we ignore the statutes and

regulations that govern the United State's conduct, Arizona would still impose a duty on the inspectors. Once a party assumes a duty, even if not imposed by common law, the party must discharge that duty with reasonable care. *See Knauss v. DND Neffson Co*., 963 P.2d 271, 277 (Ariz. App. 1997); *Martinez v. State*, 866 P.2d 1356 (Ariz. App. 1993). In Arizona, "courts will find a duty, where, in general, reasonable men would recognize it and agree that it exists." *Sanchez v. City of Tucson*, 953 P.2d 168, 173 (Ariz. 1998) *quoting Ontiveros v. Borak*, 667 P.2d 200, 208 (Ariz. 1983) (*citing* William L. Prosser, *Handbook of the Law of Torts*, § 53, at 324-27 (4th ed. 1971)).

Duty is a concept that arises out of the recognition that a relationship between persons may impose upon one a legal obligation for the benefit of the other. *Ontiveros*, 667 P.2d at 208 (finding a duty between tavern owner and innocent third party who was injured when intoxicated patron caused car accident). "[I]t should be recognized that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection." *Id*. *quoting* Prosser, § 42, at 324-27; *see also Daggett v. County of Maricopa*, 770 P.2d 384 (Ariz. App. 1989) (finding it unnecessary to look to Restatement §§ 323 and 324A for duty because a duty would be found in county regulations requiring county employees to inspect). Arizona no longer recognizes a public/private duty distinction, so state and county regulations can be source of duty regardless of whether a negligent actor is a private individual or state entity. *Id.*

B. The Good Samaritan doctrine should not be mechanically applied to all negligent inspection cases.

The Good Samaritan doctrine should not be automatically applied in all negligent inspection cases under the FTCA because it does not provide the most "like circumstances." While it is true that in Arizona, as in many other states, the Good Samaritan doctrine *can* provide a source of duty and liability for FTCA purposes, in many cases there is a better analogy. Here, for example, the most analogous person is a state mine inspector. As explained above, looking to Arizona law as it applies to a state mine inspector would not import immunities into the FTCA analysis, nor make the United States liable where a private person would not be liable. It simply provides the most "like circumstances" available to determine liability under Arizona law.

Nevertheless, if this Court decides to look to the Good Samaritan doctrine, the United States would be liable under this doctrine as incorporated in Arizona law. Arizona has adopted the Restatement (Second) of Torts § 324A. *See*, *e.g.*, *Papastathis v. Beall*, 723 P.2d 97 (Ariz. App. 1986); *Cox v. May Dept. Store Co.*, 903 P.2d 1119 (Ariz. App. 1995). It provides:

> **Liability to Third Person for Negligent Performance of Undertaking**
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The requirements of the doctrine are stated in the disjunctive, so only one of the requirements needs to be met. Respondents Olson and Vargas relied on MSHA both to effectively monitor the safety conditions of the mine and to require ASARCO to comply with the safety provisions.[2] J.A. 98-99. In sworn statements, both miners testified:

> I went to work each day with the understanding that the MSHA inspectors were supposed to inspect the Asarco Mine with the goal of making the mine a safe place for me and other miners to work. I relied on that fact, as well as the assumption that the inspectors had expertise and would use it to exercise reasonable safety practices.

J.A. 98-99. The illustration in the comments to the Restatement makes the liability of the United States even clearer.

> A Company employs B Company to inspect the elevator in its office building. B Company sends a workman, who makes a negligent inspection and reports that the elevator is in good condition. Due to defects in the elevator, which a proper inspection would have disclosed, the elevator falls

[2] The District Court unexplainably made no reference to the reliance prong of the Restatement. Pet. App. 24a.

> and injures C, a workman employed by A Company. B Company is subject to liability to C.

Restatement (Second) of Torts § 324A, cmt. e, illus. 4. Consequently, even under the Good Samaritan doctrine, the United States would be liable under Arizona law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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