No. 04-759

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH OLSON, ET AL.

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

BRIEF FOR THE PETITIONER

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DEANNE E. MAYNARD
Assistant to the Solicitor General

MARK B. STERN
DANA J. MARTIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the liability of the United States under the Federal Tort Claims Act with respect to safety inspections is the same as that of private individuals under like circumstances or, as the Ninth Circuit held, the same as that of state and municipal entities under like circumstances.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America. Respondents are Joseph Olson, Monica Olson, and Javier Vargas.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

In the Supreme Court of the United States

NO. 04-759

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH OLSON, ET AL.

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

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 362 F.3d 1236. The opinion of the district court (Pet. App. 8a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2004. A petition for rehearing was denied on July 21, 2004 (Pet. App. 34a-35a). On October 7, 2004, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 18, 2004, and on November 9, 2004, Justice O'Connor further extended the time to and including December 3, 2004. The petition for a writ of certiorari was filed on December 3, 2004, and the petition was

granted on March 7, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in the appendix to the petition. Pet. App. 36a-41a.

STATEMENT

1. a. The Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States for torts of federal employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Congress vested the federal district courts with exclusive jurisdiction to hear such tort claims, *ibid.*, and provided that the United States shall 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 contains several exceptions to this limited waiver of sovereign immunity. See 28 U.S.C. 2680(a)-(n); 28 U.S.C. 1346(b)(1) (incorporating "the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671 *et seq.*).

b. The Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. 801 *et seq.*, establishes a comprehensive scheme designed to promote the health and safety of the Nation's miners and improve working conditions in the Nation's mines. Pursuant to the Mine Act, the Secretary of Labor, through the Mine Safety and Health Administration (MSHA), promulgates health and safety standards for coal and other mines. See 30 U.S.C. 811(a). The Mine Act places responsibility for compliance with health and safety regulations upon the mine operator. See 30 U.S.C. 801(e) (providing that "the operators of such mines with the

assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines"); 30 U.S.C. 801(g)(2) ("[I]t is the purpose of this chapter * * * to require that each operator of a coal or other mine and every miner in such mine comply with such [mandatory health or safety] standards.").

The Mine Act requires MSHA to perform "frequent inspections and investigations in coal or other mines each year" for several purposes, including to determine whether an imminent danger exists and whether the mine operator is complying with the Act. 30 U.S.C. 813(a). MSHA is required to make inspections of each underground mine "in its entirety at least four times a year." *Ibid.* The Act also provides for "an immediate inspection" by MSHA when a miner or a representative of miners provides a written and signed notice that there are "reasonable grounds to believe that a violation of [the Mine Act] or a mandatory health or safety standard exists, or an imminent danger exists." 30 U.S.C. 813(g)(1).

2. a. According to the allegations in the complaint filed in federal district court, respondent miners Joseph Olson and Javier Vargas were seriously injured on January 31, 2000, in a mining accident at the Mission Underground Mine, a copper mine in Arizona that is owned and operated by Asarco Mining Company. J.A. 22-23; Pet. App. 9a. The respondent miners were loading explosives in an area of the mine known as "Stope 215 North." J.A. 25. Stope 215 North was being mined by a "fan back stoping" method, which involved drilling holes in the ceiling of an underground room, then placing explosives in the holes to blast loose pieces from the ceiling. *Ibid.*; Pet. App. 9a. The method used in

Stope 215 North "required miners to work beneath unsupported and unstable rock ceilings." J.A. 25.

On the date of the accident, Asarco had instructed Olson and Vargas to work below unstable rock from which artificial ground support had been removed. J.A. 25. That ceiling had been subjected to drilling, blasting, and a second round of drilling. It could not be properly supported because the ore from the previous mining cycle had been removed and the back was too high for ground support to be installed. *Ibid.* The respondent miners were injured when a slab of rock weighing nine tons fell from the ceiling of Stope 215 North. J.A. 25-26.

Respondents allege that, about a year before the accident, in January 1999, MSHA Supervisor James Kirk, who was stationed in the Mesa, Arizona Field Office, received an anonymous written complaint alleging that Asarco used inadequate ground support and roof bolting in its Mission Mine. J.A. 23-24. That complaint asserted that the company barricaded areas to prevent federal inspectors from observing unsafe conditions. J.A. 24. Between May and September of 1999, Kirk also received five anonymous telephone calls complaining about safety conditions at the Mission Mine. J.A. 23. The callers asked that the mine be inspected for several conditions, including lack of roof bolting to prevent rock falls. *Ibid.* The callers also asserted that Asarco had retaliated against miners who complained about unsafe conditions. *Ibid.* Respondents allege that despite those complaints, Kirk did not order or conduct "an immediate and thorough inspection" of the mine. J.A. 24.

During a regularly scheduled inspection of the Mission Mine in September 1999, MSHA inspector Alan Varland was approached by a miner who complained about unsafe conditions. J.A. 24-25. Respondents

allege that, although the miner asserted that Asarco did not use sufficient measures to prevent rock falls, the inspector did not conduct a thorough inspection for those conditions. J.A. 25.

b. In June 2002, Olson, his wife Monica Olson, and Vargas (respondents) sued the United States under the Federal Tort Claims Act, alleging that MSHA had been negligent in its inspection of the mine and that the United States therefore is liable for the injuries the miners suffered in the January 2000 accident. Pet. App. 1a-2a. Respondents' claims for negligence were based on the allegations that (1) Kirk failed to evaluate and act sufficiently upon the six anonymous complaints he received between May and September 1999 regarding safety hazards at the mine; and (2) Varland failed to inspect the mine thoroughly in September 1999. *Id.* at 2a. The United States moved, under Federal Rules of Civil Procedure 12(b)(1) and (6), to dismiss respondents' complaint for lack of subject matter jurisdiction and failure to state a claim. Pet. App. 8a.

3. The district court granted the government's motion to dismiss for two independent reasons.

a. The district court held that respondents' allegations failed to state a claim for tort liability under the law of the place where the allegedly tortious acts or omissions occurred, *i.e.*, under Arizona law. Pet. App. 22a-25a. The court noted that the liability of the United States under the FTCA is defined by the liability imposed by state law upon a private person in like circumstances, and that "even if a specific behavior is statutorily required of a federal employee, the government is not liable under the FTCA unless state law recognizes comparable liability for private persons." *Id.* at 13a (citing *Zabala Clemente* v. *United States*, 567 F.2d

1140, 1149 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978)).

The court determined that negligent inspection claims in Arizona are governed by Sections 323 and 324A of the Restatement (Second) of Torts (1965) (Restatement), which set forth the "Good Samaritan" doctrine. That doctrine describes the contours of the tort liability of one "who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection" of the other person or a third person. Pet. App. 23a-24a. Under the Restatement, such a person is liable to another or a third person for his negligence only if "his failure to exercise [reasonable] care increases the risk of [physical] harm," or "the harm is suffered because of reliance of the other or the third person upon the undertaking," or, with respect to an injured third person, "he has undertaken to perform a duty owed by the other to the third person." *Ibid.* (quoting Restatement § 324A, at 142). Applying those principles, the district court held that respondents failed to state a claim under the Good Samaritan doctrine, because respondents alleged "no facts that could support a finding that MSHA's decisions increased the risk of harm to them or that MSHA undertook a duty that Asarco owed to them." *Id.* at 24a. In so holding, the district court relied upon decisions of two courts of appeals that had reached the same conclusion by applying the Good Samaritan doctrine in cases involving MSHA inspections. *Ibid.* (citing *Myers* v. *United States*, 17 F.3d 890, 903 (6th Cir. 1994); *Raymer* v. *United States*, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *Ayala* v. *United States*, 49 F.3d 607, 611-614 (10th Cir. 1995)).

The district court observed that the Ninth Circuit "has created an exception to [the] rule" that FTCA liability is generally limited to "occasions in which a private person would be liable in the law of the place where the activity occurred." Pet. App. 24a-25a. Under that exception, the district court explained, the United States may be liable for activities that private persons do not perform if "a state or municipal entity would be subject to liability under the law of the place where the activity occurred." *Id.* at 25a. Concluding that "private parties do not have regulatory authority to perform mine safety inspections," *ibid.*, the court therefore considered whether "an Arizona state or municipal entity would be subject to liability for negligent inspection of a mine." *Ibid.* Although the court understood Arizona law potentially to expose an Arizona governmental entity to liability for failing to perform a mandatory safety inspection, *ibid.*, the court held that respondents failed to state a claim in this case under that theory because they "failed to identify a statute or regulation that required MSHA to conduct an immediate inspection of the Mission Mine in response to the anonymous complaints or a mandatory regulation relating to the level of scrutiny of any MSHA mine inspection and subsequent enforcement." *Ibid.*

b. The district court also held that respondents' claims were barred by the discretionary function exception to the FTCA, which provides that the United States is not liable for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). Pet. App. 15a-22a. With respect to

Kirk's response to the six anonymous complaints, the district court determined, based on a report by the Department of Labor's Office of the Inspector General that was submitted by respondents, that Kirk did evaluate the complaints in accordance with MSHA policy, see *id.* at 16a-17a, and that his determination regarding whether to order an immediate inspection was a discretionary decision susceptible to policy analysis. See *id.* at 18a-21a. With respect to the adequacy of Varland's inspection of the Mission Mine in September 1999, the district court concluded that Varland had wide discretion in determining the scope of his inspection and whether to issue citations. See *id.* at 21a-22a.

c. The district court subsequently entered judgment, under Federal Rule of Civil Procedure 54(b), for the United States on respondents' complaint. Pet. App. 32a.[1]

4. The court of appeals reversed and remanded. Pet. App. 1a-7a.

a. The court of appeals declined to apply the principles of Arizona tort law, under the Good Samaritan doctrine, that are applicable to private persons who conduct inspections. Pet. App. 5a-6a. The court justified its rejection of that body of state law on the ground that "there is no private-sector analogue for mine inspections because private parties 'do not wield [regulatory] power' * * * to conduct such 'unique govern-

[1] The district court entered judgment on respondents' complaint under Rule 54(b) because it did not enter final judgment with respect to several distinct claims brought in a separate case by the family of Jose Villanueva, a miner killed in the same accident. Pet. App. 32a-33a. The district court had consolidated respondents' case with the *Villanueva* case. *Id.* at 8a. The *Villanueva* claims are not at issue in this Court.

mental functions.'" *Ibid.* (brackets added by court of appeals; citations omitted). Instead, the court decided that Arizona tort law applicable to governmental entities should be applied, identifying the relevant question as "whether, under Arizona law, state and municipal entities would be liable under like circumstances." *Id.* at 6a. The court of appeals construed Arizona law to provide that the State would be subject to liability for a failure by its mine inspectors to perform mandatory safety inspections. *Ibid.* By analogy, therefore, the court concluded that the federal government would be liable if it failed to perform mandatory duties under federal law. In the court of appeals' view, respondents had "allege[d] facts showing that Kirk and Varland breached mandatory duties under the Federal Mine Safety and Health Act, * * * the MSHA Handbook, and the Agency's Policy Manual." *Id.* at 7a. It therefore concluded that respondents had stated a claim for liability under the FTCA. *Ibid.*

b. The court of appeals also held that the discretionary function exception was inapplicable, determining that the government had failed to establish at the motion-to-dismiss stage that the actions at issue were discretionary. Pet. App. 2a-5a.[2]

SUMMARY OF ARGUMENT

The plain text of the Federal Tort Claims Act waives the United States' sovereign immunity only "under circumstances where the United States, *if a private person*, would be liable to the claimant in accordance

---

[2] Although the United States did not seek review of that fact-bound aspect of the court of appeals' decision in this Court, nothing in that opinion forecloses the United States from reasserting the discretionary function defense on remand after further factual development.

with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1) (emphasis added). Disregarding this clear statutory text, the court of appeals looked only to whether "*state and municipal entities* would be liable under like circumstances." Pet. App. 6a-7a (emphasis added). That approach cannot be reconciled with the plain text of the FTCA, the decisions of this Court, or the Congressional purpose behind the FTCA. And it fundamentally expands the FTCA's waiver of sovereign immunity beyond the bounds established by Congress.

A. "[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (internal quotation marks omitted). The text of the FTCA could not be more plain: it limits the United States' waiver of its sovereign immunity, as well as the scope of its substantive liability, to the liability of a "private person," 28 U.S.C. 1346(b)(1), under "like circumstances," 28 U.S.C. 2674. That text forecloses any resort to the principles of state or municipal liability and limits courts to consideration of liability rules for private parties, such as the Good Samaritan doctrine. Yet the court of appeals subjected the United States to liability standards applicable to state and municipal governmental entities, without regard to whether a private person would be liable. In so doing, the court ignored this Court's instruction that the United States' waiver of sovereign immunity in the FTCA should not be extended beyond that prescribed by Congress. *Smith* v. *United States*, 507 U.S. 197, 203 (1993).

Moreover, this Court long has interpreted the relevant text of the FTCA according to its clear terms, leaving no doubt that state-law liability imposed on

private persons, not on state governmental entities, determines the FTCA liability of the United States. See, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64-65 (1955). The legislative history of the FTCA confirms Congress's purpose to incorporate state law applicable to private persons as the cornerstone of FTCA liability.

B. There simply is no justification for the court of appeals' stark departure from the text of the FTCA. The Ninth Circuit based its reliance on the liability of state and municipal entities on the purported "unique governmental functions" of federal mine inspectors. Pet. App. 6a. But this Court has rejected the view that the "uniquely governmental" nature of the conduct at issue can justify resort to the state tort law of governmental entities. See, *e.g.*, *Indian Towing*, 350 U.S. at 64-65. Rather, even when the government engages in "uniquely governmental" conduct, the proper inquiry under the FTCA is whether a "private person" would be liable under "like circumstances." *Ibid.*

The decision below transforms the FTCA from a statute waiving the sovereign immunity of the United States in situations in which a private individual would be liable to one that also waives the sovereign immunity of the United States on the same terms as States and municipalities, even when a private individual would not be liable. But in circumstances in which a private individual would not be liable, there is no liability under the FTCA. That does not necessarily mean that there is no liability for a federal employee's violation of a federal duty. A *Bivens* action may be available in the case of a constitutional tort,[3] and an

---

[3] See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

entire body of jurisprudence addresses the availability of private causes of action under federal law. But nothing suggests that Congress delegated questions about the extent of the federal government's sovereign immunity for violations of federal law to the disparate judgments of 50 States regarding the extent to which state and local governmental entities should enjoy sovereign immunity.

Moreover, by using Arizona law to make the federal government (and the federal government alone) liable for violations of mandatory federal duties, the Ninth Circuit further distorted the FTCA. The FTCA makes the government liable for conduct that is tortious if committed by a private person under *state* law, not federal law. *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994). In contravention of that statutory text, the court of appeals' reasoning would render every responsibility imposed on federal employees by federal law, regulation, or policy manual a potential source of tort liability. The court of appeals' approach also ignored the fact that mandatory obligations imposed on federal employees by a federal statute, regulation, or policy are the means of ensuring that the employees carry out the responsibilities they owe *to the United States*, to ensure that the government's mission will be fulfilled. They are not generally designed to create duties, actionable in tort, that are owed to particular private parties. In this case, for example, the ruling below would essentially render the Mine Safety and Health Administration directly responsible for the safety of individual miners, even though the Mine Act expressly states that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines." 30 U.S.C. 801(e).

There is nothing anomalous about applying the tort law applicable to private persons in a case such as this. Private entities routinely conduct safety inspections. In Arizona, tort claims against such entities are governed by the Good Samaritan doctrine, as defined in Sections 323 and 324A of the Restatement (Second) of Torts (1965), which describes the liability of one who undertakes to render services to another. Other courts of appeals have applied that very standard to FTCA claims alleging negligence by federal mine inspectors. That is the standard the court of appeals should have applied here and should apply on remand.

ARGUMENT

A. THE FEDERAL TORT CLAIMS ACT WAIVES THE UNITED STATES' SOVEREIGN IMMUNITY ONLY TO THE EXTENT THAT A PRIVATE PERSON IN LIKE CIRCUMSTANCES WOULD BE LIABLE

1. The FTCA waives the United States' sovereign immunity 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." 28 U.S.C. 1346(b)(1) (emphasis added). The plain text of that provision clearly limits the United States' tort liability to that of a private person under state law, and it confines the jurisdiction of the federal district courts to such claims. 28 U.S.C. 1346(b)(1).[4] Lest there be any doubt on the limit of the United States' waiver of its sovereign immunity, that limitation is reiterated in the provisions of the FTCA defining the scope of the United States'

[4] That waiver is itself subject to several exceptions. See 28 U.S.C. 2680(a)-(n); 28 U.S.C. 1346(b)(1).

liability. The FTCA provides that the United States shall be liable for tort claims only "in the same manner and to the same extent *as a private individual* under like circumstances." 28 U.S.C. 2674 (emphasis added). That provision not only confines the scope of the United States' substantive liability, it also constitutes a condition on the United States' waiver of its sovereign immunity. See 28 U.S.C. 1346(b)(1) (incorporating "the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671 *et seq.*).

Disregarding the FTCA's plain text, the court of appeals looked not to the liability of private persons under Arizona law, but to "whether, under Arizona law, *state and municipal entities* would be liable under like circumstances." Pet. App. 6a. (emphasis added). That approach cannot be sustained. "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)); accord *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). That well-established principle has particular force here, because the statutory provision at issue is a waiver of the United States' sovereign immunity. As this Court has made clear, the FTCA itself establishes the limits of that waiver, and those limits may not be extended beyond the bounds established by Congress. *Smith* v. *United States*, 507 U.S. 197, 203 (1993). The text of the FTCA simply leaves no room to expand the United States' liability in tort—as the court of appeals did here—to encompass additional liability that a State has chosen to impose upon its own governmental entities, without regard to whether a private person would be liable in like circumstances.

2. This Court's decisions construing the "private individual" language in the FTCA likewise foreclose the conclusion reached by the court below. This Court long has made clear that the liability of the United States under the FTCA must be judged by reference to the liability imposed upon private individuals and not by reference to the liability of a State or municipality.

The Court so held in its seminal decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). In that case, the Court considered an FTCA claim that the United States was liable for the Coast Guard's alleged negligence in the operation of a lighthouse. *Id.* at 62. The United States contended that it was not liable under the FTCA for the performance of such "uniquely governmental functions." *Id.* at 64. In effect, the Court observed, the United States sought to "read[] the statute as imposing liability in the same manner as if [the United States] were a municipal corporation and not as if it were a private person." *Id.* at 65.

The Court expressly rejected that approach. The Court reasoned that to accept it would saddle the FTCA with "the casuistries of municipal liability for torts." *Indian Towing*, 350 U.S. at 65. The Court declined to "push the courts into the 'non-governmental'—'governmental' quagmire that has long plagued the law of municipal corporations," noting the "irreconcilable conflict" among the various state laws of governmental liability. *Ibid.*

Instead, the Court held that, even when the United States performs "uniquely governmental functions," the question is not whether a municipality would be liable, but whether a private party would be liable. *Indian Towing*, 350 U.S. at 64-65. That is so, the Court explained, because the text of the FTCA requires reference to the liability principles applicable to a private

individual in "like," not "the same," circumstances. *Id.* at 64. And, of particular importance here, the Court suggested that the liability of the United States for the Coast Guard's alleged negligence in the operation of the lighthouse should be resolved under the Good Samaritan doctrine that is part of the law of torts applicable to private persons. *Id.* at 64-65.

The Court reaffirmed *Indian Towing*'s reading of the FTCA in *Rayonier Inc.* v. *United States*, 352 U.S. 315 (1957). That case involved the alleged negligence of the Forest Service in allowing flammable material to accumulate on federal land and in failing to prevent, contain, and extinguish a fire that began on that land. *Id.* at 316-317. The Court rejected the United States' argument that it was not liable because of Washington state law limiting the liability of municipal or other local governments for the actions of public firefighters. *Id.* at 318-319. Instead, the Court held that the provisions of the FTCA, "given their plain natural meaning, make the United States liable to petitioners for the Forest Service's negligence in fighting the forest fire if, as alleged in the complaints, Washington law would impose liability on private persons or corporations under similar circumstances." *Id.* at 318.

The Court deemed it irrelevant in *Rayonier* that public firefighters were immune under state law because of their "uniquely governmental capacity," *Rayonier*, 352 U.S. at 318-319 (internal quotation marks omitted), observing that the Court had "expressly decided in *Indian Towing* that the United States' liability is not restricted to the liability of a municipal corporation or other public body." *Id.* at 319. Rather, the Court held, "the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for

similar negligence under the laws of the State where the acts occurred." *Ibid.* See also *United States* v. *Muniz*, 374 U.S. 150, 164 (1963) (holding that federal prisoners may bring suit under the FTCA even though state jailers or the State itself might be immune from tort suits by prisoners); *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2747 (2004) (FTCA was designed "to render the Government liable in tort as a private individual would be under like circumstances") (quoting *Richards* v. *United States*, 369 U.S. 1, 6 (1962)).

To be sure, in *Indian Towing* and *Rayonier*, subjecting the United States to the state law applicable to governmental entities would have rendered the United States immune from suit, rather than subjected it to special rules *imposing* liability, as in the present case. But the Court's refusal to apply the law applicable to local governmental entities was not based on an interest in maximizing the United States' liability: it was based on the text of the FTCA. See *Indian Towing*, 350 U.S. at 64-65; *Rayonier*, 352 U.S. at 318. Indeed, in *Indian Towing*, the Court noted that the incorporation of governmental liability principles was "unsatisfactory" regardless of whether the outcome under a particular State's law of governmental liability would be immunity for the United States or a judgment of liability against the United States. See 350 U.S. at 65 & n.1.

3. Given the plain language of the FTCA, resort to the legislative history is unnecessary. See *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 186-187 & n.8 (2004); *Ratzlaf* v. *United States*, 510 U.S. 135, 148 (1994) (observing that there is no need to resort to legislative history to cloud clear legislative text). But even if the Court were to turn to the legislative history, that history demonstrates a congressional purpose to expose

the United States to liability for the conduct of its employees only to the extent that a private individual would be liable under like circumstances.

The FTCA was the product of "nearly thirty years of congressional consideration." *Dalehite* v. *United States*, 346 U.S. 15, 24 (1953). As this Court recognized in *Dalehite*, Congress's purpose in enacting the FTCA was to relieve Congress and the President from the burden of disposing of the great number of private claim bills filed each year seeking redress for alleged tortious conduct by government employees. *Id.* at 24-25 & n.9; see S. Rep. No. 1400, 79th Cong., 2d Sess. 30-31 (1946) (describing "the magnitude of the task of considering and disposing of private claims"); *Indian Towing*, 350 U.S. at 68-69 (recognizing that "[t]he broad and just purpose" of the FTCA 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 and not to leave just treatment to the caprice and legislative burden of individual private laws"); *Feres* v. *United States*, 340 U.S. 135, 139-140 (1950) ("As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs—wrongs which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government."). "Uppermost in the collective mind of Congress were the ordinary common-law torts"—such as "negligence in the operation of vehicles," an example frequently mentioned throughout the legislative history. *Dalehite*, 346 U.S. at 26 n.10, 28; see S. Rep. No. 1400, *supra*, at 31; H.R. Rep. No. 1287, 79th Cong., 1st Sess. 3 (1946); see also *Sosa*, 124 S. Ct. at 2751 n.4 ("The FTCA was passed with precisely these kinds of garden-variety

torts in mind."); *id.* at 2780 n.5 (Ginsburg, J., concurring) ("Enacting the FTCA, Congress was concerned with quotidian 'wrongs which would have been actionable if inflicted by an individual or a corporation.'") (quoting *Feres*, 340 U.S. at 139).

Because Congress was concerned about the problems created by the commission of "ordinary common-law torts" by government employees of the sort that private persons commonly commit (*e.g.*, negligence in the operation of a vehicle), *Dalehite*, 346 U.S. at 28, 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." 28 U.S.C. 1346(b)(1); see 28 U.S.C. 2674. The legislative history reveals no intent to extend the United States' liability beyond that provided by the text of the FTCA just quoted, or beyond that of a private person under state law, so as to encompass any *additional* liability that a State may choose to impose upon its own governmental entities. To the contrary, the legislative history confirms that Congress's purpose was to make the tort liability of the United States "the *same* as that of a private person under like circumstance, in accordance with the local law." S. Rep. No. 1400, *supra*, at 32 (emphasis added); accord *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 26 (1942). As explained by a Special Assistant to the Attorney General, testifying on an earlier bill materially identical in relevant part to the version ultimately enacted, the bill would not permit "every private claim against the government [to] go to court, but only that type of claim which would be

justiciable as against private individuals." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 52-53 (1940) (statement of Alexander Holtzoff, Special Assistant to the Attorney General).

B. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE TEXT OF THE FTCA, THIS COURT'S DECISIONS, AND THE PURPOSE OF THE FTCA

Ignoring the "private person" limitation mandated by the text of the FTCA and this Court's decisions, the court of appeals, as noted above, looked to "whether, under Arizona law, state and municipal entities would be liable under like circumstances." Pet. App. 6a. It did so based on its conclusion that "there is no private-sector analogue for mine inspections because private parties 'do not wield [regulatory] power' * * * to conduct such 'unique governmental functions.'" *Id.* at 5a-6a (brackets added by court of appeals; citations omitted). The court of appeals therefore believed that the liability of the United States should instead be determined by reference to an Arizona statute, Ariz. Rev. Stat. Ann. §§ 12-820 *et seq.* (West 2003), that declares it "to be the public policy of this state that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state." *Id.* § 12-820 (historical and statutory note, citing 1984 Ariz. Sess. Laws ch. 285, § 1); Pet. App. 6a. Determining that Arizona could be liable under circumstances similar to those here for the actions of a state mine inspector, the court of appeals concluded that the federal government also could be held liable. Pet. App. 6a-7a.

1. As discussed above, the court of appeals' analysis is entirely at odds with the text of the FTCA. It also cannot be squared with this Court's decisions interpreting that text or with the purposes of the FTCA. And the Ninth Circuit's approach would subject the United States to the "inevitable chaos" of state and municipal liability. See *Indian Towing*, 350 U.S. at 65.[5]

The effect of the Ninth Circuit's approach, moreover, is to adopt a rule that serves to maximize the liability of the United States by subjecting it to liability in tort under *either* the principles governing liability of private individuals *or*, if those principles do not result in liability, to the principles applicable to governmental entities. It is wholly inconsistent with well-established canons of construction to expand a waiver of sovereign immunity beyond the explicit limit in the statutory text to effectuate such a rule of maximum liability. See *Ron Pair Enters.*, 489 U.S. at 241; *Smith*, 507 U.S. at 203.

---

[5] The changing nature of Arizona law defining the scope of governmental liability exemplifies the "inevitable chaos" to which the Court referred. Compare *Stone* v. *Arizona Highway Comm'n*, 381 P.2d 107, 109-112 (Ariz. 1963) (en banc) (abolishing "the rule of governmental immunity from tort liability" and announcing that "where negligence is the proximate cause of injury, the rule is liability and immunity is the exception"), with *Massengill* v. *Yuma County*, 456 P.2d 376, 381 (Ariz. 1969) (en banc) (adopting public-duty doctrine, *i.e.*, holding that the duties of public officers are owed to the general public rather than to any particular member of the public), and *Ryan* v. *State*, 656 P.2d 597, 599-600 (Ariz. 1982) (en banc) (overruling *Massengill* and renouncing the public-duty doctrine, while "hasten[ing] to point out that certain areas of immunity must remain" and endorsing use of governmental immunity as a defense when necessary "to avoid a severe hampering of a governmental function or thwarting of established public policy"), and *Clouse* v. *State*, 16 P.3d 757, 760 (Ariz. 2001) (en banc) (discussing legislation passed in response to *Ryan*).

2. In any event, this Court has expressly rejected the justification the court of appeals advanced for looking to the law applicable to governmental entities—that because regulatory inspections involve "uniquely governmental" conduct, there is no need to apply the law as it relates to private individuals. See, *e.g.*, *Indian Towing*, 350 U.S. at 64-65. As the Court has made clear, even in situations involving uniquely governmental conduct, the proper inquiry is to look to whether a private individual would be liable under "like circumstances." *Id.* at 64 (quoting 28 U.S.C. 2674).

In relying upon the purported "unique governmental functions" of the mine inspectors here, the court below followed (Pet. App. 5a-6a) a line of Ninth Circuit decisions holding that the court may look to state tort law applicable to governmental entities when the United States is performing "activities that private persons do not perform." *Hines* v. *United States*, 60 F.3d 1442, 1448 (9th Cir. 1995) (holding that "[b]ecause private persons do not wield power to screen drivers of independent contractors who deliver bulk mail, the proper examination is whether state or municipal entities would be subject to liability").[6] That line of cases derives from the Ninth Circuit's decision in *Louie* v. *United States*, 776 F.2d 819, 824-825 (1985).

In *Louie*, the plaintiff's husband was killed when a car driven by an intoxicated off-duty federal soldier collided with his car on a public highway. 776 F.2d at 821. Several hours before the fatal accident, the local sheriff's office had arrested the soldier for driving

---

[6] See, *e.g.*, *Concrete Tie of San Diego, Inc.* v. *Liberty Constr., Inc.*, 107 F.3d 1368, 1371 (9th Cir. 1997); *Aguilar* v. *United States*, 920 F.2d 1475, 1477 (9th Cir. 1990); *Doggett* v. *United States*, 875 F.2d 684, 689-693 (9th Cir. 1989).

while under the influence and returned him to his military base, where federal military police officers had transported him from the main gate to his quarters. *Ibid.* The plaintiff alleged that the United States was liable under the FTCA for failing to control the actions of the off-duty soldier in the several hours prior to the accident. *Id.* at 821-822. The Ninth Circuit held that, under the circumstances, the military police officers owed no duty to the accident victim under Washington law. *Id.* at 827.

It is noteworthy that *Louie* itself did not disregard the private person analogy. Although the *Louie* court determined that no liability should be imposed on the United States for the actions of the military police officers because state law would not have imposed liability on governmental entities, the court emphasized that that approach was appropriate only because under Washington law, state and municipal governmental entities are liable only to the same extent as a private person. *Louie*, 776 F.2d at 825. The Court stressed that "[t]his equivalence is important because * * * a finding of immunity for state employees under state law does not determine the scope of the United States' liability under the FTCA." *Ibid.*

More fundamentally, to the extent that *Louie* and its progeny hold or suggest that the FTCA liability of the United States can be judged according to the liability of state governmental entities without regard to whether a private individual under like circumstances would be liable, those decisions are as misconceived as the decision below. If a private individual in like circumstances would not be liable, or if there is no private individual in like circumstances, the United States is simply not liable under the FTCA. See, *e.g.*, *Feres*, 340 U.S. at 141, 146 (holding that the United States is not

liable under the FTCA to those serving in the military for injuries arising out of or incident to their service) ("One obvious shortcoming in these claims is that plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States.").[7]

---

[7] Other FTCA cases have, like *Louie*, involved allegations that Park Rangers, DEA Agents, and similar federal law enforcement officers have been negligent in carrying out certain of their functions (*e.g.*, stopping vehicles on the highway) for which there often may not be a "private person" analog. Some courts of appeals—while recognizing that the relevant state law in such cases is that pertaining to private individuals and declining to apply state laws rendering a state or local government *immune* from suit—have nevertheless looked to whether a state law enforcement officer in similar circumstances would owe an actionable special duty to a particular member of the public to prevent injury, rather than a general duty to the public at large to enforce the law. See, *e.g.*, *Crider* v. *United States*, 885 F.2d 294, 296-298 (5th Cir. 1989), cert. denied, 495 U.S. 956 (1990); *Louie*, 776 F.2d at 825; cf. *Florida Auto Auction of Orlando, Inc.* v. *United States*, 74 F.3d 498, 502-505 (4th Cir. 1996); see also *Kaniff* v. *United States*, 351 F.3d 780, 790 (7th Cir. 2003) (leaving the question open). But even in the specific law enforcement context of cases like *Louie*, where an appropriate analog may be less readily available (if available at all), the guidepost must be the state tort law pertaining to private persons, if any, in like circumstances. See, *e.g.*, *Bolduc* v. *United States*, 402 F.3d 50, 59 (1st Cir. 2005) (rejecting FTCA liability for FBI agent's failure to disclose exculpatory evidence because "Wisconsin law nonetheless would preclude the imposition of private liability on a private person in circumstances similar to those" presented).

That said, cases involving law enforcement officers like FBI or DEA Agents or Park Rangers may sometimes raise distinct issues that are not presented here, such as the privileges or prerogatives that such officers necessarily have to arrest suspects where in other circumstances such conduct would constitute assault or battery. See, *e.g.*, *Washington* v. *DEA*, 183 F.3d 868, 874 (8th Cir. 1999). Often such special privileges or prerogatives are part of

3. The Ninth Circuit's decision, which would make federal liability for uniquely governmental functions without a private-liability analog turn on state and municipal liability doctrines, reflects a fundamentally different policy judgment from that reflected in the FTCA. The FTCA waived the sovereign immunity of the United States in situations in which a private individual would be liable. In circumstances in which a private person would not be liable or that involve a uniquely governmental function with no private-liability analog (unlike this case, see pp. 31-33, *infra*), the FTCA does not impose liability. That is because, as the First Circuit recently explained, "the federal government does not yield its immunity with respect to obligations that are peculiar to governments or official-capacity state actors and which have no private counterpart in state law." *Bolduc* v. *United States*, 402 F.3d 50, 57 (1st Cir. 2005).[8] That is not to say that there is no source of potential federal liability in such situations. In cases involving constitutional torts, an injured party may have a *Bivens* action. Moreover, in

---

broader principles of state law that encompass actions by private individuals as well. See, *e.g.*, Restatement §§ 10, 63, 65, 76, 114, 119, 120A, 121, 196, 197. And federal law itself also confers certain privileges, or immunity from regulation under state law, on federal officers in certain circumstances. See *In re Neagle*, 135 U.S. 1, 61-63, 68-70, 76 (1890) (holding federal Marshal not liable under California law for killing a man who attacked a United States Supreme Court Justice, as the Marshal was "acting under the authority of the law of the United States, and was justified in so doing"). The Court need not consider such issues here, however.

[8] See also *DiMella* v. *Gray Lines of Boston, Inc.*, 836 F.2d 718, 720 (1st Cir. 1988) ("Whatever liability the Commonwealth may have chosen to assume for itself as a matter of governmental policy has no bearing on the liability of Massachusetts private persons, the standard the federal government accepted [in the FTCA].").

the case of statutory or regulatory violations, an express cause of action may be available, and an entire body of jurisprudence exists to identify implicit causes of action. But there is no indication in the FTCA, or in any other source of law, that in those situations in which a private party would not be liable, Congress incorporated the disparate judgments of 50 States about the extent to which sovereign immunity should be waived. That would be a radically different policy judgment than that actually enacted in the FTCA—liability to the extent of a private individual—and it is one this Court has expressly rejected.

To the extent the Ninth Circuit used Arizona law to make federal laws and regulations directly actionable, it further distorted the FTCA. The Ninth Circuit reasoned that, because "a state governmental entity, including a state mine inspector, may be held liable under Arizona law for the failure to perform mandatory safety inspections," Pet. App. 6a, the United States could be held liable if federal mine inspectors "breached mandatory duties under the Federal Mine Safety and Health Act, 30 U.S.C. 801 *et seq.*, the MSHA Handbook, and the Agency's Policy Manual." Pet. App. 7a. In so holding, the Ninth Circuit premised the United States' potential FTCA liability not on the violation of duties based in state law, but on the purported violation of federal statutes, regulations, and policies.[9]

---

[9] The Ninth Circuit's reasoning here, which appears to make all mandatory federal statutory and regulatory duties actionable in the FTCA context (without regard to whether they would give rise to a federal cause of action under the normal federal-law principles for identifying causes of action) just because Arizona law appears to make all mandatory state-law duties of governmental entities actionable, is quite different from a decision applying state tort law that in turn expressly incorporates a federal-law standard

That reasoning has the effect of making federal law an independent source of tort liability for the United States (and only the United States), contrary to the fundamental requirement that FTCA liability be based upon *state*-law tort principles applicable to private individuals. The FTCA waives the United States' sovereign immunity in tort, and grants federal courts jurisdiction over tort suits against the United States, 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.*" 28 U.S.C. 1346(b)(1) (emphasis added); see *Molzof* v. *United States*, 502 U.S. 301, 305 (1992) (noting that "the extent of the United States' liability under the FTCA is generally determined by reference to state law"); *Richards* v. *United States*, 369 U.S. 1, 9 (1962) ("In the Tort Claims Act Congress has expressly stated that the Government's liability is to be determined by the application of a particular law, the law of the place where the act or omission occurred."); S. Rep. No. 1400, *supra*, at 32 ("The liability of the United States will be the same as that of a private person under like circumstance, in accordance with the local law.").

In *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994), this Court explained that "§ 1346(b)'s reference to the 'law of the place' means law of the State—the source of substantive liability under the FTCA." The Court therefore held that federal constitutional torts are not

---

of care, see, *e.g.*, *Merrell Dow Pharms. Inc.* v. *Thompson*, 478 U.S. 804 (1986). The Arizona law on which the Ninth Circuit relied does not purport to make federal standards the measure of liability for any alleged tortfeasor—whether a private person or a state or federal official. Rather, the Ninth Circuit has made federal law actionable only with respect to the actions of federal officials.

actionable under the FTCA because, "[b]y definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right." *Ibid.* The Ninth Circuit's approach here is similarly impermissible. It effectively imposes FTCA liability for breach of mandatory responsibilities allegedly imposed on federal employees by federal law—*i.e.*, alleged "mandatory duties under the Federal Mine Safety and Health Act, * * *, the MSHA Handbook, and the Agency's Policy Manual," Pet. App. 7a—regardless of whether there is a breach of any actionable tort duty imposed on private persons by state law. And it imposes such liability only on the United States. That federal law would not be directly relevant in a tort action against a state official or a private individual.

That result is contrary to the well-established principle that "the FTCA was not intended to redress breaches of federal statutory duties." *Johnson* v. *Sawyer*, 47 F.3d 716, 727-729 (5th Cir. 1995) (en banc) (quoting *Sellfors* v. *United States*, 697 F.2d 1362, 1365 (11th Cir. 1983), cert. denied, 468 U.S. 1204 (1984)). Indeed, "[i]t 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.'" *Sea Air Shuttle Corp.* v. *United States*, 112 F.3d 532, 536 (1st Cir. 1997) (quoting *Johnson*, 47 F.3d at 728). That is so because "[t]he FTCA's law of the place requirement is not satisfied by * * * federal statutes or regulations standing alone * * *. The alleged violations also must constitute violations of duties analogous to those imposed under local law." *Chen* v. *United*

States, 854 F.2d 622, 626 (2d Cir. 1988) (citations and internal quotation marks omitted).[10]

As the en banc Fifth Circuit has explained, "the violation of a federal statute or regulation does not give rise to FTCA liability unless the relationship between the offending federal employee or agency and the injured party is such that the former, if a private person or entity, would owe a duty under state law to the latter in a *nonfederal* context." *Johnson*, 47 F.3d at 728. Accordingly, as the Tenth Circuit has held with respect to federal mine inspectors, "[e]ven if specific behavior is statutorily required of a federal employee, the government is not liable under the FTCA unless state law recognizes a comparable liability for private persons." *Ayala* v. *United States*, 49 F.3d 607, 620 (10th Cir. 1995); cf. *Pate* v. *Oakwood Mobile Homes, Inc.*, 374 F.3d 1081, 1084 (11th Cir. 2004) ("[E]ven where specific behavior of federal employees is required by statute, liability to the beneficiaries of that statute may not be founded on the [FTCA] if state law recognizes no comparable private liability.") (quoting *Sellfors*, 697 F.2d at 1367). Such a rule makes sense because, as discussed further at pp. 30-31, *infra*, the mere placement of a responsibility on federal employees by federal law, regulation, or policy as an internal matter, to ensure the consistent and effective operation of the government, does not impose upon the United States or its employees a duty, actionable in tort, owed to any particular member of the public. Cf. *Zabala*

---

[10] See also, *e.g.*, *Bolduc*, 402 F.3d at 56 ("Federal constitutional or statutory law cannot function as the source of FTCA liability."); *Art Metal-U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1157-1160 (D.C. Cir. 1985); *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1149 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

Clemente v. *United States*, 567 F.2d 1140, 1144-1145 (1st Cir. 1977) ("This duty to comply with the directives of their superiors is owed by the employees to the government and is totally distinguishable from a duty owed by the government to the public on which liability could be based."), cert. denied, 435 U.S. 1006 (1978).

The Ninth Circuit's analysis would have the effect of transforming every federal law, regulation, and policy manual that is written in mandatory terms to direct federal employees in obligations owed to their *employer* into a potential source of tort liability, at least whenever state law makes state governmental entities liable for violations of similar state laws and regulations —without regard to whether a "private person[] would be liable to the claimant." 28 U.S.C. 1346(b)(1). That is not the scheme Congress enacted, and it would greatly expand the bounds of Congress's waiver of sovereign immunity.

4. Such an expansion of the United States' exposure to liability would impose an immense burden on federal agencies, particularly those such as MSHA that regularly conduct inspections. Federal agencies undertake inspection and other regulatory activities designed to enforce federal requirements and to encourage safety measures by private individuals and businesses, such as the mine operators covered by the Mine Act. In so doing, the federal government does not accept responsibility for the safety of any particular individual. See, *e.g.*, *Myers*, 17 F.3d at 899-901 (rejecting plaintiffs' contention that the Mine Act and MSHA regulations are "'safety statutes' enacted to protect a particular class (miners) from a particular kind of harm (unsafe mining conditions)," such that breach of the Act or regulations subjects the United States to liability for negligence per se); see also *Zabala Clemente*, 567 F.2d at 1144 ("It

is obvious that one of the purposes of the Federal Aviation Act was to promote air travel safety; but this fact hardly creates a legal duty to provide a particular class of passengers particular protective measures.").

To the contrary, here, as the Mine Act expressly states, primary responsibility for the safety of the mines remains with the mine operators and the miners. See 30 U.S.C. 801(e) (providing that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines"). Despite that express disclaimer in the Mine Act, the Ninth Circuit adopted an approach that would essentially render MSHA directly responsible for the safety of particular individual miners, without regard to whether a private person would owe a duty in similar circumstances under state law. Such a result cannot be squared with the FTCA or the Mine Act. See, *e.g.*, *Myers*, 17 F.3d at 901 (rejecting FTCA claim based on alleged negligence of federal mine inspectors in part because plaintiffs' argument "would provide a means of making the government liable as an insurer for every private party's violation of a federal regulatory scheme"); see also *Zabala Clemente*, 567 F.2d at 1151 ("We do not believe that the expanded role of the federal government in the safety area through such legislation as OSHA indicates an intent of Congress to make the United States a joint insurer of all activity subject to inspection under that statute or others.").

5. For the foregoing reasons, the Ninth Circuit had no warrant to adopt an analysis flatly at odds with the FTCA's plain text and this Court's decisions. The Circuit's error is particularly striking because this case presents no anomalies or special difficulties in applying the text of the FTCA or this Court's precedents.

Private entities—such as insurance companies, labor unions, consultants, employers, and landowners—routinely conduct safety inspections analogous to the mine inspections at issue here. See, *e.g.*, *Radcliffe* v. *Rainbow Constr. Co.*, 254 F.3d 772, 776-777 (9th Cir.) (discussing workplace inspections by union representatives), cert. denied, 534 U.S. 1020 (2001); *Camacho* v. *Du Sung Corp.*, 121 F.3d 1315, 1317 (9th Cir. 1997) (describing state-law duty of commercial landowners to inspect premises); *Canipe* v. *National Loss Control Serv. Corp.*, 736 F.2d 1055, 1057 (5th Cir. 1984) (discussing tort liability of corporation that provided "safety inspections and related accident-prevention services at the plant in which the plaintiff worked"), cert. denied, 469 U.S. 1191 (1985).

As the district court recognized, see Pet. App. 23a-24a, in Arizona, where respondents' accident occurred, tort claims against private parties who conduct safety inspections are analyzed under the Good Samaritan doctrine, as defined in Sections 323 and 324A of the Restatement. See *Easter* v. *Percy*, 810 P.2d 1053, 1056-1057 (Ariz. Ct. App. 1991) (claim against consulting engineers for negligent inspection and supervision of construction project); *Papastathis* v. *Beall*, 723 P.2d 97, 100 (Ariz. Ct. App. 1986) (claim that private company negligently inspected and selected defective beverage rack). That is the standard suggested by this Court in *Indian Towing*, 350 U.S. at 64-65, and the standard that other courts of appeals have applied to determine the extent of the United States' waiver of its sovereign immunity for allegedly negligent federal inspections, including inspections by federal mine inspectors, and similar regulatory activities. See *Raymer* v. *United States*, 660 F.2d 1136, 1142-1144 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982) (applying Good Samaritan

doctrine to FTCA claim involving alleged negligence of federal mine inspectors); *Myers* v. *United States*, 17 F.3d 890, 900-905 (6th Cir. 1994) (same); *Ayala*, 49 F.3d at 612-614 (same); see also, *e.g.*, *Dorking Genetics* v. *United States*, 76 F.3d 1261, 1266-1269 (2d Cir. 1996) (evaluating FTCA claim based on allegedly negligent inspection by Department of Agriculture veterinarians under Good Samaritan doctrine and other private liability principles); *Howell* v. *United States*, 932 F.2d 915, 918 & n.3 (11th Cir. 1991) (recognizing that the Good Samaritan doctrine "has been used by all circuits considering FTCA liability in a regulatory-enforcement context"); *Zabala Clemente*, 567 F.2d at 1145-1148 (evaluating FTCA claim involving FAA aircraft surveillance under Good Samaritan doctrine).

Accordingly, the Ninth Circuit should have assessed the potential liability of the United States under Arizona's Good Samaritan doctrine, and the Court should remand for the Ninth Circuit to address that question of state law in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DEANNE E. MAYNARD
Assistant to the Solicitor General

MARK B. STERN
DANA J. MARTIN
Attorneys

APRIL 2005