No. 04-759

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH OLSON, MONICA OLSON, AND JAVIER VARGAS

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

PETITION FOR A WRIT OF CERTIORARI

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

With certain exceptions, the Federal Tort Claims Act waives the sovereign immunity of the United States for specified torts of federal employees acting within the scope of their employment, allowing liability "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. The Act also vests jurisdiction in federal district courts to hear such tort claims, "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 question presented is:

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.

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The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 362 F.3d 1236. The opinion of the district court (App., *infra*, 8a–31a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2004. A petition for rehearing was denied on July 21, 2004 (App., *infra*, 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, she

further extended the time to and including December 3, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are set forth in an appendix to the petition. App., *infra*, 36a-41a.

STATEMENT

This case presents an important question with respect to the extent of the United States' waiver of its sovereign immunity under the Federal Tort Claims Act (FTCA). The text of the FTCA expressly limits that waiver to circumstances in which a "private individual" would be liable. 28 U.S.C. 2674; see also 28 U.S.C. 1346(b). The court of appeals nonetheless looked to state law as it relates to the distinct duties of state governmental entities under state law, rather than the law as it relates to the duties of private persons, in holding that this case falls within the FTCA's waiver of sovereign immunity.

1. a. The FTCA waives the sovereign immunity of the United States for torts of federal employees acting within the scope of their employment, allowing liability "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Congress vested the district courts with exclusive jurisdiction to hear such tort claims, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The FTCA contains several further exceptions to this limited waiver of sovereign immunity. See 28 U.S.C. 2680(a)-(n).

b. The Federal Mine Safety and Health Amendments Act of 1977 (Mine 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 statute, the Secretary of Labor, through the Mine Safety and Health Administration (MSHA), promulgates health and safety standards for coal mines 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 statute requires MSHA to perform "frequent inspections and investigations in coal or other mines each year" for several purposes. 30 U.S.C. 813(a). The Secretary is required to make inspections of each underground mine "in its entirety at least four times a year." *Ibid.* The statute 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 complaint filed in federal district court, miners Joseph Olson and Javier Vargas were seriously injured in a mining accident at the Mission Underground Mine, a copper mine in Arizona that

is privately owned and operated by Asarco Incorporated. App., *infra*, 9a. Olson, his wife Monica Olson, and Vargas (respondents) sued the United States alleging that it was liable, due to MSHA's negligence, for the miners' injuries. *Id.* at 1a-2a. Respondents' claims for negligence were based on allegations that (1) MSHA Field Office Supervisor James Kirk failed to evaluate and sufficiently act upon six anonymous complaints he received regarding safety hazards at the mine; and (2) MSHA Inspector Alan Varland failed to inspect the mine thoroughly and in its entirety. *Ibid.*

b. The district court granted the government's motion to dismiss respondents' complaint for two independent reasons.[1]

i. The district court held that respondents' allegations failed to state a claim for tort liability under Arizona law. 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 explained 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.

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[1] The district court consolidated respondents' case with a suit brought by the family of Jose Villanueva, a miner killed in the same accident. App., *infra*, 8a. The *Villanueva* claims are not at issue in this petition.

That doctrine describes 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 party. App., *infra*, 23a-24a. Under the Restatement, such a person is liable to another or a third party 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 injured third parties, "he has undertaken to perform a duty owed by the other to the third person." *Ibid.* (quoting Restatement, *supra*, §§ 323, 324A). Applying those principles, the district court held that respondents could not 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 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"; under that exception, the 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."

App., *infra*, 24a-25a. Concluding that "private parties do not have regulatory authority to perform mine safety inspections," *id.* at 25a, 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 nevertheless failed to state a claim in this case 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." *Id.* at 25a.

ii. 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). App., *infra*, 15a-22a.

3. The court of appeals reversed and remanded. App., *infra*, 1a-7a.

a. The court of appeals declined to apply the principles of Arizona tort law that are applicable to private persons who conduct inspections—*i.e.*, the Good Samaritan doctrine. App., *infra*, 5a-6a. Instead, the court reasoned that "there is no private-sector analogue for mine inspections because private parties 'do not wield [regulatory] power' * * * to conduct such 'unique governmental functions.'" *Ibid.* (citations omitted). On

that basis, the court concluded that Arizona tort law applicable to governmental entities rather than private persons should be applied, characterizing the 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 state governmental mine inspectors would be subject to liability for failure to perform mandatory safety inspections. *Ibid.* By analogy, therefore, the court concluded that the federal government would be liable if it failed to perform mine inspections mandated by 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 because it concluded that the government failed to establish at the motion-to-dismiss stage that the actions at issue were discretionary. App., *infra*, 2a-5a.[2]

c. The court of appeals denied the United States' petition for rehearing and rehearing en banc. App., *infra*, 34a-35a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals disregards the plain language of the Federal Tort Claims Act in a manner that fundamentally expands the FTCA's waiver of sovereign immunity beyond the bounds of

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[2] The United States does not seek review of that factbound aspect of the court of appeals' decision.

what Congress enacted. The decision is in clear conflict not only with the FTCA's text, but also with the decisions of this Court and the decisions of other courts of appeals. Review by this Court is warranted to resolve those conflicts and address an important and recurring issue that is basic to Congress's limited waiver of sovereign immunity for tort claims based on conduct of federal employees acting within the scope of their employment.

Subject to certain exceptions, the FTCA waives the sovereign immunity of the United States for tort claims so as to make it liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. The incorporation of local law applicable to private persons is the cornerstone of the FTCA and its waiver of sovereign immunity. This Court's decisions leave no doubt that liability imposed on state governmental entities does not determine the FTCA liability of the United States, and that state-law Good Samaritan principles applicable to private individuals provide the appropriate benchmark for federal liability. See *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64 (1955); *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318-319 (1957). Nevertheless, without citing either *Indian Towing* or *Rayonier*, the court of appeals determined the United States' FTCA liability by reference to state law as it relates to state and municipal governmental entities, despite the existence of a readily available private analog. That decision is irreconcilable with the governing statutory language and this Court's seminal decisions.

Moreover, in declining to seek a private person analogy to determine the scope of the duty imposed under the FTCA for federal inspections and other regulatory activities, the decision below is contrary to the deci-

sions of a number of other circuits—including two circuits that have resolved claims relating to the actions of federal mine inspectors by application of Good Samaritan principles, and not by reference to state law applicable to governmental entities. See *Raymer* v. *United States*, 660 F.2d 1136, 1140-1142 (6th Cir. 1981); *Ayala* v. *United States*, 49 F.3d 607, 611-614 (10th Cir. 1995); accord *Hylin* v. *United States*, 715 F.2d 1206 (7th Cir. 1983), vacated, 469 U.S. 807, on remand decided on other grounds, 755 F.2d 551 (7th Cir. 1985). Review by this Court therefore is warranted.

A. THE COURT OF APPEALS' DECISION CONTRAVENES THE PLAIN LANGUAGE OF THE FEDERAL TORT CLAIMS ACT AND IS CONTRARY TO DECISIONS OF THIS COURT

The FTCA confers jurisdiction upon the federal district courts to hear tort claims for money damages against the United States "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 United States is liable under the FTCA only "in the same manner and to the same extent as a *private individual under like circumstances*," except that it is not liable for prejudgment interest or punitive damages. 28 U.S.C. 2674 (emphasis added). The latter provision is a waiver of the government's sovereign immunity and should not be extended beyond the bounds which Congress intended. See *Smith* v. *United States*, 507 U.S. 197, 203 (1993).

Instead of applying the clear text of the FTCA, the court of appeals looked to "whether, under Arizona law, *state and municipal entities* would be liable under like

circumstances." App., *infra*, 6a (emphasis added). The court 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 (citations omitted).[3] That analysis cannot be squared with the language of the FTCA or this Court's decisions. The plain text of the FTCA makes clear that the liability of the United States must be judged by reference to the liability of "a private individual under like circumstances," not by reference to the liability of a state or municipality.

Moreover, in its seminal decision in *Indian Towing*, *supra*, the Court rejected the government's suggestion that the Court impose liability on the United States "as if it were a municipal corporation and not as if it were a private person." 350 U.S. at 65. Acceptance of that suggestion, the Court reasoned, would saddle the FTCA with "the casuistries of municipal liability for torts." *Ibid.* Instead, the Court held that, even where 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. *Id.* at 64-65 (internal quotation marks omitted).

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[3] In taking that approach, the panel relied upon a line of Ninth Circuit cases holding that the court may look to state tort law applicable to governmental entities where the government 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"). This line of cases apparently derives from the Ninth Circuit's decision in *Louie* v. *United States*, 776 F.2d 819, 824-825 (9th Cir. 1985), discussed in note 7, *infra*.

That is so, the Court explained, because the statutory language calls for looking to the liability of a "private individual" in "like circumstances," not identical circumstances. *Ibid.* And, of particular relevance here, the Court then suggested that the liability of the United States for its allegedly negligent operation of a Coast Guard lighthouse should be resolved under the Good Samaritan doctrine applicable to private persons. *Id.* at 64-65, 69.

The Court reaffirmed *Indian Towing*'s reading of the FTCA in *Rayonier*, *supra*. In that case, which involved the alleged negligence of Forest Service firefighters, the Court held that the provisions of the FTCA, "given their plain natural meaning, make the United States liable * * * if * * * [state] law would impose liability on private persons or corporations under similar circumstances." 352 U.S. at 319. The Court deemed it irrelevant that public firefighters were immune under state law due to their "uniquely governmental capacity," *id.* at 318-319 (internal quotation marks omitted), observing that it "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 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 *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).

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 compa-

nies, 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). As the district court recognized, see App., *infra*, 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, *supra*, which describes the liability of one who undertakes to render services to another. See *Easter* v. *Percy*, 810 P.2d 1053 (Ariz. Ct. App. 1991) (claim against consulting engineers for negligent inspection and supervision of a construction project); *Papastathis* v. *Beall*, 723 P.2d 97, 100 (Ariz. Ct. App. 1986) (claim that a private company negligently inspected and selected a defective beverage rack).

The court of appeals had no warrant to reject the analysis approved by this Court in favor of an analysis flatly at odds with the statutory language and this Court's decisions. Ignoring the private person reference mandated by the FTCA, the court of appeals believed that the liability of the United States should be determined by reference to Ariz. Rev. Stat. § 12-820 (1984), which 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." *Ibid.* (Historical and Statutory note, citing 1984 Ariz. Laws Ch. 285, § 1). Because the court of appeals determined that Arizona

has subjected itself to liability for violations of mandatory duties the State has imposed on its own employees, the court held that the United States could similarly be liable in tort for the breach by federal employees of mandatory duties imposed on them by federal law, without regard to whether a "private individual" would be liable under Arizona law "under like circumstances," 28 U.S.C. 2674. App., *infra*, 5a-7a.[4] That result cannot be reconciled with the text of the FTCA or this Court's decisions construing the Act, and should be rejected by this Court.

B. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

The Ninth Circuit's decision in this case also is contrary to decisions of many other courts of appeals. Unlike the decision below, and consistent with the text of the FTCA, other courts of appeals look to the liability of private persons under state law—usually under the Good Samaritan doctrine—to determine the extent of the United States' waiver of its sovereign immunity for allegedly negligent federal inspections

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[4] The Ninth Circuit applied the same analysis in *Doggett* v. *United States*, 875 F.2d 684, 689-690 (1989), to hold that a California statute making local governments liable for violations of their enactments would, by analogy, make the United States liable for violations of federal regulations. See *Concrete Tie of San Diego, Inc.* v. *Liberty Constr., Inc.*, 107 F.3d 1368 (9th Cir. 1997) (analyzing, under the same rationale, whether the Small Business Administration had violated mandatory laws or regulations under a program for socially or economically disadvantaged small businesses, such that it could be liable under the FTCA for alleged failure to provide a contractor with an opportunity to earn a reasonable profit and alleged failure to investigate contractors' financial and technical capacity).

and similar regulatory activities. The government is aware of no case from another circuit adopting the analysis used by the Ninth Circuit in circumstances comparable to those here.

1. Most notably, the Sixth Circuit, in *Raymer*, *supra*, expressly refused to follow the approach adopted by the court below. Like this case, *Raymer* involved the alleged negligence of federal mine inspectors. 660 F.2d at 1137. The Sixth Circuit rejected the government's suggestion that it should rely upon Kentucky case law holding that state and local governmental entities were not liable in tort for failing to enforce safety regulations. *Id.* at 1141-1142.[5] The Sixth Circuit reasoned that such case law would be relevant "[i]f the FTCA made the federal government liable to the same extent that the state of occurrence makes itself and its political subdivisions liable." 660 F.2d at 1142. But because the FTCA does not do so, the *Raymer* court concluded that "decisions denying recovery against states and their political subdivisions on grounds of sovereign immunity are not germane to FTCA cases. The pertinent inquiry is whether state law makes a *private individual*, *not the state or other*

[5] As *Raymer* indicates, the government at one time advanced the argument that courts should look to the immunities of state and local governmental entities, or to the absence of a cause of action against such governmental entities, in determining whether the United States is liable under circumstances such as those presented here. That position was correctly rejected in *Raymer*. It is now the position of the government that such an approach cannot be reconciled with the text of the FTCA, even when the result would be to bar a suit against the United States, just as it cannot be so reconciled when the result would be to subject the United States to liability beyond that of a private individual in like circumstances.

political entity, liable for an employee's failure to exercise due care under like circumstances." *Id.* at 1140 (emphasis added). The Sixth Circuit instead referred to the Good Samaritan doctrine applicable to private persons to decide whether the United States was liable. *Id.* at 1142-1144. The Sixth Circuit has since followed *Raymer* in another FTCA case involving the alleged negligence of federal mine inspectors, see *Myers* v. *United States*, 17 F.3d 890, 893-894, 901 (1994), where it again analyzed the claims under the Good Samaritan doctrine. *Id.* at 901-905.

In accord with the Sixth Circuit, and in stark contrast to the court below, the Tenth Circuit also has applied state law as it relates to private persons to analyze FTCA claims based on the alleged negligence of federal mine inspectors. In so doing, the court recognized that the FTCA requires such an analysis even if the alleged negligence related to conduct mandated by federal law. Thus, in *Ayala*, *supra*, the Tenth Circuit analyzed a claim that a federal mine inspector had provided negligent technical advice to an engineer for a mining company. 49 F.3d at 610. Based on the text of the FTCA, the Tenth Circuit recognized that "[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." *Ibid.* The court therefore assessed the United States' liability under state law related to private persons, including the Good Samaritan doctrine. *Id.* at 611-614. Similarly, although the judgment was later vacated and the case decided on other grounds, 469 U.S. 807 (1984); see 755 F.2d 551 (7th Cir. 1985), the Seventh Circuit recognized in *Hylin* that, under the text of the FTCA and this Court's decisions, "[i]t is well established * * * that FTCA

liability may be based even on conduct which is 'uniquely governmental,' such as inspection and certification, as long as the state in which the conduct occurred would recognize liability if the government tortfeasor were a private person." 715 F.2d at 1210; *id.* at 1210-1213 (applying Good Samaritan doctrine).[6]

2. The decision below is likewise contrary to numerous decisions in other circuits that look to the state law duties of private persons to analyze FTCA liability for a variety of federal inspection and regulatory activities. See, *e.g.*, *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1143, 1145-1148 (1st Cir. 1977) ("A prerequisite for recovery under the [FTCA] is that there be a 'negligent or wrongful act or omission * * * under circumstances where the United States, *if a private person*, would be liable.") (quoting 28 U.S.C. 1346(b)), cert. denied, 435 U.S. 1006 (1978) (emphasis added); *Dorking Genetics* v. *United States*, 76 F.3d 1261, 1266-1270 (2d Cir. 1996) ("The FTCA * * * only waives immunity under circumstances that would create liability 'in the same manner and to the same extent *as a private individual* under like circumstances.'") (quoting 28 U.S.C. 2674; emphasis added); *Loge* v. *United States*, 662 F.2d 1268, 1271 (8th Cir. 1981) ("The [FTCA] is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States

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[6] Indeed, even the Ninth Circuit, in an earlier, unpublished per curiam decision in another FTCA case relating to the alleged negligence of federal mine inspectors, rejected the very analysis adopted by the panel below. See *Aguirre* v. *United States*, No. 01-16057, 2002 WL 1791516 (9th Cir. Aug. 5, 2002) (44 Fed. Appx. 166). The government relied upon *Aguirre* in its petition for rehearing and rehearing en banc, see Gov't C.A. Reh'g Pet. 2, 6-12, but the Ninth Circuit nevertheless denied further review.

where a private person 'would be liable to the claimant.'") (internal quotation marks omitted; emphasis added), cert. denied, 456 U.S. 944 (1982); *Pate* v. *Oakwood Mobile Homes, Inc.*, 374 F.3d 1081, 1084 (11th Cir. 2004) ("The United States can only be found liable *if a comparable private party* would likewise be liable under Georgia law.") (emphasis added); *Howell* v. *United States*, 932 F.2d 915, 917 (11th Cir. 1991) ("[W]hether the United States is liable for the [Federal Aviation Administration] inspector's failure to act depends on *whether a similarly situated private employer* would be liable for such an omission under the law of Georgia.") (emphasis added).

For example, in two cases evaluating FTCA claims based on allegedly negligent inspection activities by, respectively, the Occupational and Safety Health Administration (OSHA) (*Pate*) and the Federal Aviation Administration (FAA) (*Howell*), the Eleventh Circuit has recognized that, "even 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." *Pate*, 374 F.3d at 1084 (quoting *Sellfors* v. *United States*, 697 F.2d 1362, 1367 (11th Cir. 1983)). The Eleventh Circuit emphasized that, with respect to "uniquely governmental functions," the private analog "need not be exact." *Ibid.* (quoting *Howell*, 932 F.2d at 918). Instead, as noted in *Howell*, the court looks "to the closest state law analogue: the 'good samaritan' doctrine," which "has since been used by all circuits considering FTCA liability in a regulatory-enforcement context." *Howell*, 932 F.2d at 918 & n.3. The Eleventh Circuit in both *Pate* and *Howell* concluded that the United States was not liable under the applicable

State's articulation of the Good Samaritan doctrine. *Id.* at 918-920; *Pate*, 374 F.3d at 1084-1087.

Other circuits have taken the same approach. See, *e.g.*, *Zabala Clemente*, 567 F.2d at 1145-1148 (evaluating FTCA claim involving FAA aircraft surveillance under Good Samaritan doctrine); *Dorking Genetics*, 76 F.3d at 1266-1270 (evaluating FTCA claim based on allegedly negligent inspection by Department of Agriculture veterinarians under Good Samaritan and other private liability principles, and recognizing that the "government is not limited to the liability assigned to municipal corporations under common law, nor is it insulated from FTCA liability simply because the negligence was committed in the performance of a uniquely governmental function"); *Loge*, 662 F.2d at 1274 (analyzing under the Good Samaritan doctrine a claim of government negligence with respect to the testing and licensing of a vaccine).[7]

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[7] Questions involving the role of state law pertaining to governmental entities have also arisen in FTCA cases in which Park Rangers, DEA Agents, and similar federal law enforcement officers are alleged to have been negligent in carrying out certain of their functions (*e.g.*, stopping vehicles on the highway), for which there may often be no "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* v. *United States*, 776 F.2d 819, 825 (9th Cir. 1989); 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

3. Furthermore, by faltering at the first step of its analysis in looking to special rules rendering state governmental entities liable, the decision below ultimately reached a conclusion that is irreconcilable at a broader level with a host of decisions of other courts of appeals. Because the Ninth Circuit determined that "a state governmental entity, including a state mine inspector, may be held liable under Arizona law for the failure to perform mandatory safety inspections," App., *infra*, 6a, the court concluded that 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," *id.* at 7a. That conclusion is flatly at odds with the holdings of other courts of appeals recognizing that "[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

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the question open). In some cases, the extent to which an officer acts under color of authority is relevant to the underlying tort; and in other cases, the consideration of state law principles applicable to state or local governmental entities may obscure the fact that there is no private person analogy, and thus no liability.

Cases involving law enforcement officers may 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 broader principles of state law that encompass actions by private individuals as well. See, *e.g.*, Restatement, *supra*, §§ 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 (1890).

its own affairs.'" *Sea Air Shuttle Corp.* v. *United States*, 112 F.3d 532, 536 (1st Cir. 1997). See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994) (noting that "we have consistently held that § 1346(b)'s reference to the 'law of the place' means law of the State—the source of substantive liability under the FTCA"); *Johnson* v. *Sawyer*, 47 F.3d 716, 727 (5th Cir. 1995) (en banc) (it "has consistently been held[] that 'the FTCA was not intended to redress breaches of federal statutory duties'"); *Art Metal-U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1157-1160 (D.C. Cir. 1985); *Clemente*, 567 F.2d at 1149; *Sellfors* v. *United States*, 697 F.2d 1362, 1365-1367 (11th Cir. 1983). The Ninth Circuit's novel holding to the contrary highlights—and magnifies—its error in straying from the "private individual" language of the FTCA. In so doing, the court severed all links with the scheme of tort liability adopted by Congress, and it veered into the territory exclusively governed by other remedial schemes with their own rules for when private causes of action are available. If left standing, the Ninth Circuit's decision could have the effect of transforming every federal law, regulation, and policy manual into a potential source of tort liability whenever state law makes state governmental entities liable for violations of similar state laws and regulations, without regard to whether a "private individual under like circumstances," 28 U.S.C. 2674, would owe any actionable duty to particular members of the public.

C. THE PETITION PRESENTS A RECURRING QUESTION OF FUNDAMENTAL IMPORTANCE

This Court's review is warranted because the decision below fundamentally undermines the liability scheme created by the FTCA. The FTCA embodies Congress's policy determinations as to the appropriate

scope of the United States' waiver of sovereign immunity for liability in tort. See, *e.g.*, *Indian Towing*, 350 U.S. at 68 ("The statute was the product of nearly thirty years of congressional consideration and was drawn with numerous substantive limitations and administrative safeguards."). Congress did not import into the FTCA each State's policy determinations regarding when state governmental entities should be held liable in tort. Instead, Congress defined the waiver of sovereign immunity with reference to the liability of "private individuals," 28 U.S.C. 2674, and it detailed specific exceptions to the FTCA's general waiver of sovereign immunity. 28 U.S.C. 2680.

Incorporating state-law rules of state governmental entity liability into FTCA cases—as the court did below—would inevitably subject the federal government to each State's policy decisions regarding governmental liability and would supplant Congress's contrary determination. Nothing in the FTCA authorizes such an approach. See *Indian Towing*, 350 U.S. at 65 (noting that liability under the FTCA is not governed by "the casuistries of municipal liability for torts"). Such a result would be highly destabilizing, given the enormous variation in, and constantly evolving nature of, state governmental immunity doctrines and state decisions about liability under state schemes through private causes of action, either express or implied.[8] The

[8] The changing nature of Arizona law defining the scope of governmental liability is instructive in this regard. Compare *Stone* v. *Arizona Hwy. 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) (adopting public-duty doctrine), and *Ryan* v. *State*, 656 P.2d 597,

Ninth Circuit's decision is particularly disturbing because it rewrites the FTCA to premise tort liability on violations of duties imposed on federal employees by federal law, regulations, and policy manuals without regard to whether such provisions are privately enforceable. Just as there was "no justification for this Court to read exemptions into the Act beyond those provided by Congress" to clothe federal actors with state governmental immunity afforded by state law, *Rayonier*, 352 U.S. at 320, so too is there no justification for *expanding* the liability of the United States by subjecting it to state governmental liability that exceeds the "private individual" liability imposed by the FTCA whenever a federal employee has violated, or negligently performed, a federal duty. As this Court noted in *Rayonier*, "[i]f the Act is to be altered that is a function for the same body that adopted it." *Id.* at 320.

The question presented is a frequently recurring one. Federal agencies undertake many inspection and other regulatory activities similar to those at issue here. Indeed, the inspections activities of the Department of Labor alone, undertaken through MSHA and OSHA, have been the subject of FTCA litigation for many years. Federal agencies need to know the standards under which they may be liable for those activities, and the lower federal courts need to know the standards under which FTCA cases based on such activities are to be adjudicated. This Court has previously granted

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599 (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 observing that the legislature made state officers, agents, and employees immune to liability for injury or damage resulting from certain "discretion[ary]" acts or omissions).

review to resolve similar questions involving the proper interpretation of the FTCA. See, *e.g.*, *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2747 (2004) (granting review to clarify the scope of the FTCA); *Smith*, 507 U.S. at 200 (granting review to resolve conflict between two courts of appeals on whether Antarctica falls within the "foreign-country" exception to FTCA); *Muniz*, 374 U.S. at 151 ("Because the decision below involves an important question in the construction of the [FTCA] and because two Courts of Appeals had previously reached a contrary result, we granted certiorari.") (footnote omitted). Review is warranted here as well.

CONCLUSION

The petition for certiorari should be granted.

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

DECEMBER 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-15141

JOSEPH OLSON, MONICA OLSON, JAVIER VARGAS,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

April 2, 2004

Before BETTY B. FLETCHER, STEPHEN REINHARDT, Circuit Judges, and JANE A. RESTANI,* Judge.

PER CURIAM.

Plaintiffs Joseph Olson, his wife Monica, and Javier Vargas appeal the district court's entry of final judgment on their Federal Tort Claims Act ("FTCA") claims pursuant to the government's motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Joseph Olson and Vargas were permanently disabled when a nine-ton slab of earth fell from the ceiling of the mine where they were working. Plaintiffs sued the Mine Safety and Health Administration ("MSHA") al-

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* The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

leging that the Agency was liable for the miners' injuries due to its negligence in carrying out or failing to carry out mandatory MSHA policies and procedures. Specifically, plaintiffs' claims for negligence arose from two main acts which they allege proximately caused their injuries: (1) MSHA Field Office Supervisor James Kirk's failure to evaluate six written and oral complaints he received regarding safety hazards at the mine; and (2) MSHA Inspector Alan Varland's failure to inspect the mine thoroughly and in its entirety.

The government moved to dismiss, and the district court granted the 12(b)(1) and (b)(6) motion on the grounds that the discretionary-function exception to the FTCA shielded the government from liability on plaintiffs' claims, and that no tort action was available for similar conduct under Arizona law. We disagree on both counts, and, accordingly, we reverse and remand.

I

The FTCA waives sovereign immunity for specified torts of federal employees, including negligent or wrongful acts or omissions "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, would be liable under the law of the state "where the act or omission occurred." 28 U.S.C. § 1346(b). A limitation on this waiver of sovereign immunity exists where the government is performing a "discretionary function," whether or not the discretion is abused. *Miller v. United States*, 163 F.3d 591, 593 (9th Cir.1998). However, the discretionary-function exception covers acts which involve an element of choice; it does not apply where a "federal statute, regulation, or policy specifically prescribe[s] a course of action for an employee to follow,"

because "[i]n this event, the employee has no rightful option but to adhere to the directive." *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L.Ed.2d 531 (1988). Further, the exception protects only government actions and decisions based on "social, economic, and political policy." *Id.* at 537, 108 S. Ct. 1954. The government bears the burden of establishing that the test is met and that discretionary immunity applies. *Miller*, 163 F.3d at 594.

Taking all of the allegations of the complaint as true, and construing these facts in the light most favorable to the nonmoving party, as we must when reviewing entry of final judgment on a 12(b)(1) and 12(b)(6) motion to dismiss, *see United States v. One 1997 Mercedes E420*, 175 F.3d 1129, 1131 n.1 (9th Cir. 1999), we hold that the government has failed to carry its burden here.

First, regarding Kirk's acts, the statute, 30 U.S.C. § 813(g), provides only that MSHA must respond with an "immediate inspection" when it receives safety hazard complaints that are "reduced to writing" and "signed by the representative of the miners or by the miner." However, although "many times, complaints concerning hazardous conditions do not meet the technical requirements" of 30 U.S.C. § 813(g), MSHA's General Inspection Procedures Handbook requires that "*all* complaints of alleged hazards . . . must be evaluated." General Inspection Procedures Handbook (April 1989), at 27 (emphasis added). Similarly, MSHA's Program Policy Manual mandates that, "[i]n these situations, the inspector receiving the information *must evaluate* and determine a course of action." Program Policy Manual, vol. 3, pt. 43 (emphasis added).

The Agency's own March 2000 internal investigation specifically concluded that, despite these compulsory

directives, Kirk failed to ensure that "*all* complaints" were handled in accordance with MSHA policy and procedures. Similarly, in its own subsequent report, the Office of Inspector General ("OIG") concluded that Kirk received valid complaints but did not "effectively evaluate" these complaints in determining a course of action. In fact, the OIG report relates that Kirk did not evaluate the anonymous complaints at all and that he dismissed them because he believed that anonymous complaints were not valid under 30 U.S.C. § 813(g). Because MSHA policies prescribe a course of action that Kirk failed to follow, we conclude that MSHA has not established that the discretionary-function exception covers Kirk's actions. *See Berkovitz*, 486 U.S. at 536.

We also hold that the government has failed to show that Varland's inspections of the mine fell within the discretionary-function exception. MSHA is required to "make inspections of each underground coal or other mine *in its entirety* at least four times a year." 30 U.S.C. § 813(a) (emphasis added). The accident occurred in or near an area of the mine that had been barricaded earlier, only to be re-opened for work shortly before the disaster. At least one complaint contained specific allegations that management had closed off certain areas prior to the inspectors' arrival "only for workers to again be sent back to those areas a few days later to work under poor conditions."

Although the OIG reported evidence that Varland entered the barricaded areas of the mine during his March 1999 inspection, the report also stated that, despite the allegations regarding such areas, they were *not* inspected during the subsequent April 1999, May 1999, and September 1999 inspections conducted by

Varland (or during the November 1999 inspection conducted by his successor). In short, the mine was not, as mandated by statute, inspected in its entirety. Thus, MSHA has not established that the discretionary-function exception covers Varland's actions.

In sum, the government has failed to establish that discretionary immunity applies with respect to either Kirk's or Varland's actions. *See Miller*, 163 F.3d at 594.

II

Because the FTCA does not create liability, but merely waives sovereign immunity to the extent that state-law would impose liability on a "private individual in similar circumstances," 28 U.S.C. § 2674, we must also determine whether plaintiffs have pled facts sufficient to justify the imposition of liability under ordinary state-law principles.

Generally, the United States can be held liable under the FTCA only when liability would attach to a private actor under the law of the place where the tort occurred. *Delta Savings Bank v. United States*, 265 F.3d 1017, 1024 (9th Cir. 2001). However, the United States may be liable "'for the performance of some activities that private persons do not perform,' . . . when a state or municipal entity would be held liable under the law where the activity occurred." *Concrete Tie of San Diego, Inc. v. Liberty Constr., Inc.*, 107 F.3d 1368, 1371 (9th Cir. 1997) (quoting *Hines v. United States*, 60 F.3d 1442, 1448 (9th Cir. 1995)). In such instances, liability attaches if the United States breaches "a mandatory duty for which a cause of action lies." *Id.*

As a threshold matter, we hold that the district court correctly determined that there is no private-sector analogue for mine inspections because private parties

"do not wield [regulatory] power," *Hines*, 60 F.3d at 1448, to conduct such "unique governmental functions." *Doggett v. United States*, 875 F.2d 684, 689 (9th Cir. 1989). The question thus becomes whether, under Arizona law, state and municipal entities would be liable under like circumstances. The answer is yes. As the district court pointed out, a state governmental entity, including a state mine inspector, may be held liable under Arizona law for the failure to perform mandatory safety inspections. *See Diaz v. Magma Copper Co.*, 190 Ariz. 544, 554-55, 950 P.2d 1165 (App. 1997). In so holding, the *Diaz* court specifically rejected the state agency's argument that the state should be immune from liability in this context because mine inspections require the determination of government policy. The court explained that, under the Act granting absolute and qualified immunity for certain state actions, Actions Against Public Entities or Employees, Ariz. Rev. Stat. §§ 12-820-12-826, Arizona construes state immunity narrowly.[1]

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[1] The government argues that *Diaz* is no longer applicable because of a subsequent amendment that altered some of the wording of the Arizona statute granting state employees qualified immunity for certain conduct. We disagree. The amendment seems to have been undertaken to simplify the language of the provision and clarify the legislature's intent. At the time *Diaz* was decided, Arizona law provided qualified immunity, unless the public employee intended to cause injury or was grossly negligent, for the "failure to discover violations of any provision of law *requiring inspections* of property other than property owned by the public entity in question." *See* Ariz. Rev. Stat. § 12-820.02(A)(6) (West 1998) (emphasis added to highlight amended text). In 1999, the provision was amended slightly to grant qualified immunity for "failure to discover violations of any provision of law *when inspections are done* of property other than property owned by the public entity in question." *See* Ariz. Rev. Stat. § 12-820.02(A)(6)

Because the plaintiffs allege facts showing that Kirk and Varland 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, we conclude that, for purposes of 12(b)(6), they have stated a claim under state law principles.

III

For the foregoing reasons, we REVERSE the district court's entry of final judgment in favor of the government, and REMAND for further proceedings in conformance with this opinion.

(West 1999) (emphasis added). The government provides no argument why this non-substantive, clarifying amendment to the qualified immunity statute would alter the *Diaz* court's analysis in any way, and accordingly, we conclude that *Diaz*'s reasoning and holding were unaffected by the amendment.

Moreover, under the Arizona statute, immunity applies only when an inspection *is* conducted, but fails "to discover violations." Thus, the provision would *not* apply to plaintiffs' allegations that Kirk failed to evaluate safety complaints and that Varland failed to conduct required inspections *at all*. Finally, even if the statute were applicable, the governmental conduct at issue here might well constitute "gross negligence."

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. CIV-01-663-TUC-WDB
CIV-02-323
(Consolidated)

AMPARO VILLANUEVA, ET AL., PLAINTIFF

v.

UNITED STATES, DEFENDANT

[Filed: Dec. 26, 2002]

ORDER

Pending before the Court are Defendant's Motions to Dismiss based on a lack of subject matter jurisdiction and failure to state a claim. This case stems from a mining accident whereby one miner was killed (Jose Villanueva) and two were seriously injured (Joe Olson and Javier Vargas). The Villanueva case (CV 01-663) was filed separately and prior to the filing of the Olson/Vargas (CV 02-323). However, due to the fact that the cases arise from the same mining accident, this Court granted Defendant's motion to consolidate these cases. Defendant has now filed one motion to dismiss the claims of the Villanueva Plaintiffs and another separate motion to dismiss the claims of the Olson and Vargas Plaintiffs.

I. FACTUAL BACKGROUND

This Federal Tort Claims Act ("FTCA") action arises out of a January 31, 2000 mining accident in which Jose Villanueva was killed, and Joe Olson and Javier Vargas were seriously injured at Asarco's Mission Underground Mine ("Mine") near Sahuarita, Arizona. The accident occurred when Villanueva and two other Asarco employees were loading explosives in predrilled holes in the ceiling of an underground room when a nine-ton slab of earth dislodged from the room's ceiling.

Just a few weeks prior to the accident, Asarco had reopened the 215-north slope at the Mission Underground Mine and was using a "back-stop" approach (drilling holes into a ceiling, then placing explosives in those holes to blast loose pieces of the ceiling) in which it was excavating the ceiling of previously developed rooms. Asarco planned two rounds of back-stopping and had nearly completed the first round when the accident occurred.

Evidence uncovered during a post-accident investigation by the Department of Labor's Inspector General revealed that Mine Safety and Health Administration ("MSHA") Supervisor James Kirk received an anonymous written complaint about the Mission Underground Mine in January 1999 and five anonymous telephone complaints between May and September of 1999. Three calls were from Villanueva's daughter and two from a family friend. Villanueva's daughter refused to identify herself to Kirk because she said that Asarco had retaliated against miners who complained about working conditions. Kirk did not initiate an immediate inspection based upon these anonymous complaints.

In September of 1999, MSHA inspector Alan Varland performed a regularly scheduled inspection. During that inspection, Villanueva complained specifically about inadequate ground control to prevent rock fall. The subsequent investigation revealed that Varland did not conduct a thorough investigation. The investigation also concluded that Asarco had not properly supported the ceiling with appropriate ground supports. Lastly, the investigation also revealed Villanueva's identity was disclosed to Asarco as the source of the anonymous complaints (**facts and claims relating to the disclosure of the identity of Villanueva as the source of anonymous complaints are *only* relevant to the Villanueva Plaintiffs, not the Olson/Vargas Plaintiffs).

The final report from the Inspector General faulted Kirk for improperly determining that the anonymous complaints were invalid, improperly documenting the complaints, improperly discarding all his notes on the matter, and failing to order an immediate inspection of the alleged imminent hazard. The Inspector General also found that Varland's disclosure of Villanueva's identity violated MSHA policy.

Plaintiffs Olson and Vargas are now suing the United States for negligence. They allege that due to its negligence, they have suffered permanent physical injuries and other damages stemming from those injuries. Olson and Vargas' claims for negligence arise from two circumstances: (1) Kirk's failure to consider the informal complaints and failure to order immediate inspections of the Asarco mine; and (2) Varland's failure to conduct an adequate investigation of the mine. In contrast, these facts no longer serve as a basis for liability for the Villanueva Plaintiffs. This Court has already previously granted (denying leave to amend) Defendant's

motion to dismiss Villanueva's claims based on those two circumstances. Thus, the Villanueva Plaintiffs' only remaining claim for recovery stems from the fact that Varland disclosed to Asarco that Jose Villanueva was the source of anonymous complaints. Because the respective claims now stem from different circumstances, the Olson and Vargas claims will be evaluated separately from the Villanueva claims.

II. STANDARD OF REVIEW

When a party asserting a F.R.C.P. 12(b)(1) motion to dismiss for lack of jurisdiction submits extrinsic evidence for the Court's consideration, the Court may consider such evidence, and the party asserting subject matter jurisdiction bears the burden to produce evidence necessary to establish subject matter jurisdiction. See *Assoc. of American Medical Colleges v. U.S.*, 217 F.3d 770, 778-79 (9th Cir. 2000) quoting *St. Claire v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

In reviewing a motion to dismiss for failure to state a claim, this Court's review is limited to the contents of the complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994) (citations omitted). All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party. *Id.* A complaint should not be dismissed unless it appears beyond doubt that Plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Id.* However, the Court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. *Id.* at 754-55.

III. LEGAL STANDARDS

1. The Federal Mine and Safety Act ("FMSHA")

Under FMSHA, 30 U.S.C. § 801, et. seq., mine operators, like Asarco, have the primary responsibility for the prevention of unsafe and unhealthy conditions. *See* 30 U.S.C. § 801(d), (e). One of their duties is to find and eliminate hazardous ground conditions. *See e.g.*, 30 C.F.R. §§ 57.3200, 57.3360, and 57.3401. However, the Secretary of Health and Human Services and the Secretary of Labor are directed to promulgate mandatory standards to protect to the health and safety of miners. *See id.* at § 801(g). Furthermore, representatives of the Department of Labor are directed to make at least four inspections each year to ensure compliance by mine operators and to detect any imminent dangers. *See id.* at § 813(a).

In addition, a miner has the right to an immediate inspection if he has reasonable grounds to believe that a violation has occurred or an imminent danger exists and if he provides a written and signed notice to an inspector. *See id.* at § 813(g)(1). A copy of this written notice is provided to the mine operator, but the miner's name is to be omitted from that copy of the notice. *See id.* Upon receipt of the notice, the inspector shall conduct a "special inspection" as soon as possible. *See id.* While the statute requires a written and signed notice, the MSHA General Inspection Procedures Handbook in force at the time of the accident noted that some complaints may not meet the technical requirements of the statute, yet required that "all complaints . . . must be evaluated," and "[i]f appropriate, inspection steps must then be taken." *See* MSHA General Inspection Procedures Handbook at 27. Simi-

larly, the MSHA Program Policy Manual also noted that informal complaints still require that the inspector "must evaluate and determine a course of action, which in some cases may result in an immediate inspection, but in other cases may not." *See* MSHA Program Policy Manual, Vol. III at 42-1.

2. The Federal Tort Claims Act ("FTCA")

The FTCA is a limited waiver of sovereign immunity and the sole means by which a plaintiff can sue the United States in tort. *See e.g.*, *Vickers v. U.S.*, 228 F.3d 944, 948-49 (9th Cir. 2000). In addition, Plaintiffs bear the burden of pointing to an unequivocal waiver of immunity. *See Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984). As it pertains to the claims in this case, the Court will briefly discuss the underlying basis for liability under the FTCA as well as the intentional tort and discretionary function exceptions.

(a) Underlying Basis for Liability

Under the FTCA, the United States is liable only "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). Therefore, 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. *See e.g.*, *Zabala Clemente v. United States*, 567 F.2d 1140, 1149 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

(b) Intentional Tort Exception

While the FTCA waives the United States' sovereign immunity as to some tort claims, the United States has not waived its immunity as to all claims. For example, the FTCA generally bars the United States' liability for certain intentional torts, including assault and battery. *See* 28 U.S.C. § 2680(h). Furthermore, the application of the intentional tort exception falls within the purview of federal, not state, law. *See Woods v. United States*, 720 F.2d 1451, 1453 n.2 (9th Cir. 1983).

(c) Discretionary Function Exception

As a threshold matter, even assuming that Plaintiffs can state a claim under Arizona law, the FTCA shields the United States for claims "based upon the exercise or performance of [*sic*] 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. § 2880(a) (*emphasis added*). The U.S. Supreme Court has established a two-prong test to determine whether the discretionary function exception has been met. First, a court must determine if a government employee's action is discretionary or mandatory. *See United States v. Gaubert*, 499 U.S. 315, 323 (1991). A discretionary act has been defined as "one that involves choice or judgment." *Id.* at 325. On the other hand, discretion is not found where a "'federal statute, regulation or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but adhere to the directive.'" *Id.* at 322 *quoting Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Second, if the conduct is discretionary, the court must determine if the employee's discretion is

based on considerations of public policy. *See id.* at 322. If the government proves the first prong, it "must be presumed" that the employee's acts "are grounded in policy when exercising that discretion." *Id.* at 324. Therefore, even acts made at the operational level are subject to the exception so long as they are made in furtherance of the policy scheme. *See id.* at 324-25. Furthermore, the actual decision "need not *actually* be grounded in policy considerations so long as it is by its nature, susceptible to a policy analysis." *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174 (9th Cir. 2002). Ultimately, the exception is designed to prevent judicial second-guessing of legislative and administrative decisions based upon social, economic, or political policy. *See Gaubert*, 499 U.S. at 323.

While Plaintiffs bear the burden of pointing to an unequivocal waiver of immunity, the government bears the burden on the discretionary function exception. *See GATX/Airlog Co.*, 286 F.3d at 1174 (citation omitted). Finally, if the discretionary function exception applies, this Court lacks subject matter jurisdiction. *See id.*, 286 F.3d at 1173.

IV. ANALYSIS OF THE CLAIMS OF THE OLSON AND VARGAS PLAINTIFFS: THE DISCRETIONARY FUNCTION EXCEPTION BARS THEIR CLAIMS

As discussed earlier, Plaintiffs' claims for relief stem from the negligence of two MSHA employees. As a threshold matter, these incidents must be evaluated to determine if the discretionary function of the FTCA applies.

1. Kirk's Failure to Consider Informal Complaints and Failure to Order Immediate Inspections

Defendant argues that Kirk's decision not to order an immediate inspection of the Mine based upon the anonymous complaints is protected by the discretionary function exception. Defendant claims that since the anonymous complaints did not meet the requirements of 30 U.S.C. § 813(g)(1), Kirk was not required to initiate an immediate inspection under the statute or the MSHA's policies. In addition, Defendant argues that where the §813(g)(1) procedures are not met, the language in the MSHA General Inspection Procedures Handbook ("MSHA Handbook") specifically gives the MSHA inspector wide discretion to order an immediate inspection.

Under §813(g)(1), an immediate inspection is only required where the miner or a miner representative believes that the mine he is working in is operating in violation of a safety provision of the FMSHA and the miner gives such notice to a MSHA inspector "in writing, signed by the representative of the miners or by the miner." *Id.* However, pursuant to the MSHA handbook, even if the complaint does not meet these formal procedures, all complaints (anonymous or not) must be evaluated by the MSHA inspector. Based on this evaluation, the MSHA inspector must independently decide whether an immediate inspection is warranted.

Plaintiffs argue that Kirk's actions were in fact mandatory, and therefore do not meet the first prong of the discretionary function exception. First, Plaintiffs argue that Kirk had a mandatory duty to evaluate the anonymous complaints to determine if an immediate

inspection was necessary. Plaintiffs argue that Kirk did not evaluate these complaints, thereby violating a mandatory duty. To support this claim, Plaintiffs rely on a report from the Office of the Inspector General ("OIG Report") investigating the accident in question. However, Plaintiffs take several statements out of context to make it appear as if Kirk did not evaluate the complaints. A close reading of the OIG Report only points to the conclusion that Kirk did in fact evaluate the complaint [*sic*]. The OIG report states:

> According to MSHA's March 7, 2000 internal investigation, the Mesa field office supervisor *evaluated* the complaints and made the determination that these complaints were not valid because the person(s) did not identify themselves. Moreover, the mine inspector state [*sic*] in sworn testimony that both he and the field office supervisor *believed* these were not valid complaints because the verbal complaints received by the field office supervisor were not specific enough . . . . We concluded that the field office supervisor *did not effectively evaluate* the complaints in determining a course of action. We also determined that he did not act prudently in failing to document the complaints.

Exhibit 1 to Plaintiff's Response, p. 5-6 (*emphasis added*). As this language shows, the OIG Report that Plaintiffs rely on to argue that Kirk did not evaluate the complaints actually rebuts their contention, and specifically states that Kirk did evaluate the complaints in question. For purposes of the discretionary function exception, the fact that the OIG report concluded the evaluations were not effective is irrelevant.

Even if the Court assumed that Kirk did not evaluate the complaints, the line of causation to support Plaintiffs [*sic*] claim of negligence based on Kirk's actions or lack thereof must lead to the ultimate failure of Kirk to order an immediate investigation of these complaints, which was a discretionary act. Decisions regarding whether to order the inspections in response to anonymous complaints and the scrutiny of those inspections is ultimately left to the government's discretion. Because the complaints were anonymous, Kirk was not required to order an immediate inspection. *See* §813(g). In this situation, the MSHA Handbook on page 27 states: "*If appropriate*, inspection steps must be taken." (*emphasis added*). Thus, in the anonymous complaint situation, the MSHA Handbook on page 3 also states: "In these situations, the inspector receiving the information must evaluate and *determine a course of action*, which in some cases *may* result in an immediate inspection, but in other cases it *may not*." (*emphasis added)*. Pursuant to the MSHA policies, Kirk's actions would clearly involve judgment or choice. As such, Kirk's actions or lack thereof were discretionary. Thus, the first prong of the discretionary function exception is met. *See* 28 U.S.C. §2680(a); *U.S. v. Gaubert*, 499 U.S. 315, 323 (1991).

The second prong of the discretionary function exception requires that discretionary action be based on considerations of policy. *Gaubert*, 499 U.S. at 322. Since Kirk's actions were discretionary, it "must be presumed" that Kirk's acts "are grounded in policy when exercising that discretion." *Id.* at 324. Kirk's actions need not actually be grounded in policy, so long as they were "susceptible to policy analysis." *GATX/Airlog Co. v. United States*, 286 F.3d 1168 (9th

Cir. 2002). Many cases have applied the discretionary function exception to actions or inactions by MSHA inspectors. See *Bernaldes v. United States*, 81 F.3d 428 (4th Cir. 1996) (applying exception to negligent failure to discover safety violations); *Deel v. United States*, 923 F. Supp. 98 (W.D. Vir. 1996) (applying exception to claim that mine inspector failed to make a thorough inspection); and *Estate of Denny Bernaldes v. United States*, 877 F. Supp. 301 (W.D. Va. 1995). *See also Hylin v. United States*, 755 F.2d 551 (7th Cir. 1985); *Russell v. United States*, 763 F.2d 786 (10th Cir. 1985); *and Bernitsky v. United States*, 620 F.2d 948 (3rd Cir.), *cert. denied*, 449 U.S. 870 (1980).[1]

The analytical approach applied by these recent MSHA cases is consistent with precedent from the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit. *See United States v. Varig Airlines*, 467 U.S. 707, 820 (1984) (holding that the discretionary function exception protected FAA employees in executing spot-check inspection program because the program "specifically empowered [employees] to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources"). See also *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174 (9th Cir. 2002) (applying the discretionary function exception to FAA inspections). In *GATX/Airlog Co.*, the Ninth Circuit recently held that, even if a decision is based entirely upon objectively scientific standards, "the questions is

[1] The Court notes that these are pre-*Gaubert* cases, yet believes that the cases do lend some helpful analysis of the duties of MSHA inspectors.

[sic] not whether policy factor necessary for a finding of immunity were *in fact* taken into consideration, but merely whether such a decision is *susceptible* to policy analysis." *Id.* at 1174. In addition, "[s]imply because technical data is at issue does not mean that the decisions are stripped of their policy implications." *Id.* at 1177.[2] *See also, Cunningham v. U.S.*, 786 F.2d 1445, 1446-1447 (9th Cir. 1986) (holding that the discretionary function exception applied to allegedly negligent inspections performed by the Occupational Safety and Health Administration).

In light of the Ninth Circuit's recent decision in *GATX/Airlog Co.*, the Court believes that the Ninth Circuit would find that the discretionary acts in this

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[2] The Court notes that two Circuit Courts of Appeals have taken an opposite view and find that the discretionary function exception does not apply to MSHA inspections. *See Myers v. United States*, 17 F.3d 890 (6th Cir. 1994) and *Ayala* v. *United States*, 980 F.2d 1342, 1349-50 (10th Cir. 1992). In *Myers*, the United States Court of Appeals for the Sixth Circuit found that the second prong of the discretionary function test is *not* satisfied when a determination is made by the mere "application of objective scientific standards." *Myers*, 17 F.3d at 897. Since MSHA inspectors are only authorized to determine compliance and issue mandatory citations, the Sixth Circuit found that the discretionary function exception had not been satisfied. *See id.* at 898. However, the Court believes these are inconsistent with recent Ninth Circuit authority. Lastly, the Court notes that the Plaintiffs cited several Ninth Circuit cases for the proposition that the MSHA actions in question are not susceptible to policy analysis. Plaintiffs' reliance on these cases is misplaced. Those cases stemmed largely from circumstances where the government was itself responsible for maintaining safe conditions on its own land. However, in cases such as this one where the federal government is only responsible for establishing safety standards and monitoring compliance with such standards, the Ninth Circuit has held that discretionary acts of the inspectors are susceptible to policy analysis.

case were susceptible to policy analysis and would therefore grant discretionary function immunity to MSHA inspectors relating to mine inspection claims raised in this matter. Accordingly, the Court finds that Kirk's actions were discretionary and that those actions are susceptible to policy analysis. Thus, the discretionary function exception applies to Plaintiffs' claims stemming from Kirk's actions. Defendant's motion to dismiss Plaintiffs' claims stemming from Kirk's conduct based on the discretionary function exception is granted.

2. The Adequacy of Varland's Inspection of the Mine

Plaintiffs next argue that Varland's negligent inspection of the Mine was a proximate cause of the injuries in question. Plaintiffs claim the relevant statutes and polices mandated that Varland conduct a more adequate inspection and objectively required Varland to issue citations for the utterly unsafe conditions in the Mine. Plaintiffs essentially claim that because the conditions in the mine were so objectively unsafe, Varland was required to issue citations and conduct a more thorough inspection.

Despite Plaintiffs claims to the contrary, the relevant laws and policies in place at the time of the Varland inspection clearly gave Varland wide discretion in his inspections. Under 30 U.S.C. §814:

> If, upon inspection . . . the Secretary or his authorized representative *believes* that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard . . . he shall . . . issue a citation to the operator." (*emphasis added*)

Defendant goes on to cite a plethora of other relevant provisions containing language clearly showing that Varland had wide discretion in determining the scope of his inspection and when to issue sanctions against mines. Thus, Varland's conduct was clearly discretionary. Although Varland may have conducted a grossly inadequate inspection, the FTCA unfortunately still shields his actions if they were discretionary. *See* 28 U.S.C. §2680(a) (the federal government is shielded from liability where the government agent's conduct was "based upon the exercise or performance *or the failure to exercise or perform a discretionary function or duty . . . whether of [sic] not the discretion involved be abused.*") (*emphasis added*). For the same reasons stated in relation to Kirk's conduct, Varland's discretionary acts are also susceptible to policy analysis.

Pursuant to the foregoing analysis, Olson and Vargas' claims based on the conduct of both Kirk and Varland are clearly barred by the discretionary function exception of the FTCA. As such, pursuant to 28 U.S.C. §2680(a), Defendant's motion to dismiss all of Olson and Vargas' claims is granted.

IV. ANALYSIS OF OLSON AND VARGAS' CLAIMS: FAILURE TO STATE A CLAIM

Even assuming that the discretionary function exception does not apply, Plaintiffs' claims are still barred because they fail to state a claim. Pursuant to the relevant authority, Plaintiffs' claims relating to the conduct of Kirk and Varland must be analyzed under both the Restatement (Second) of Torts and Arizona common law relating to governmental entities' duties to perform inspections. Whether analyzed under either

body of law, Plaintiffs have failed to state a claim under Arizona law.

1. Potential Liability Under the Restatement

Negligent inspection claims in Arizona are governed under sections 323 and 324A of the Restatement. *See e.g.*, *Daggett v. County of Maricopa*, 160 Ariz. 80, 85, 770 P.2d at 384, 389 (App. 1989) and *Easter v. Percy*, 168 Ariz. 46, 49; 810 P.2d 1053, 1056 (App. 1991).

> Section 323 of the Restatement provides as follows:
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance on the undertaking.

Id.

> Section 324(a) of the Restatement sets forth as follows:
>
> 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.

Id.

Because Plaintiffs have 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, they can not state a claim pursuant to the Restatement. Other federal cases involving MSHA inspections have come to similar conclusions. *See Myers v. United States*, 17 F.3d 890, 903 (6th Cir. 1994) and *Raymer v. United States*, 660 F.2d 1136 (6th Cir. 1981) (rejecting § 324A claim against MSHA employees). *See also e.g.*, *Ayala v. United States*, 49 F.3d 607, 611-14 (10th Cir. 1995) (refusing to find that MSHA has a duty of care in providing technical assistance because mine operators are primarily responsible for mine safety). As such, the Court concludes that Plaintiffs have failed to state a viable negligent inspection claim under the Restatement.

2. Potential Liability Under Arizona Common Law

While the FTCA normally limits the liability of the United States to occasions in which a private person would be liable in the law of the place where the activity occurred, the Ninth Circuit has created an exception to this rule such that the United States "may

be liable under the FTCA 'for the performance of some activities that private persons do not perform', but only when a state or municipal entity would be subject to liability under the law of the place where the activity occurred." *Concrete Tie of San Diego, Inc. v. Liberty Const., Inc.*, 107 F.3d 1368, 1371 (9th Cir. 1997) citing *Hines v. United States*, 60 F.3d 1442, 1448 (9th Cir. 1995). Since private parties do not have regulatory authority to perform mine safety inspections, the Court must look to see if an Arizona state or municipal entity would be subject to liability for a negligent inspection of a mine. *See Hines*, 60 F.3d at 1448. In that regard, Arizona has held that a state governmental entity, including a state mine inspector, could be potentially liable of negligently performing required safety inspections. *See Daggett v. County of Maricopa*, 160 Ariz. 80, 85, 770 P.2d at 384, 389 (App. 1989) (finding governmental entity owed duty of inspection to water park patron based upon regulations requiring entity to perform inspections), *and Diaz v. Magma Copper Co.*, 190 Ariz. 544, 554-55, 950 P.2d 1165, 1175-76 (App. 1997) (finding mine inspector potentially liable for failing to inspect mine). Nonetheless, as discussed earlier, Plaintiffs have 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. Thus, Plaintiffs have failed to state a claim under Arizona law. *See e.g., Keams v. Tempe Technical Institute, Inc.*, 16 F.Supp.2d 1119, 1123 (D. Ariz. 1998).

Accordingly, the Olson and Vargas Plaintiffs have failed to state a claim under Arizona law. As such,

Defendant's motion to dismiss all of their claims based on failure to state a claim is granted.

V. ANALYSIS OF VILLANUEVA'S CLAIMS

The claims for the Villanueva plaintiffs stem solely from Varland's failure to maintain Villanueva's confidentiality. As Plaintiffs allege and Defendant concedes, contrary to the FMSHA and the relevant regulations, Varland failed to maintain Villanueva's confidentiality and, in fact, disclosed his identity to Asarco in direct violation of the relevant authority on confidentiality [*sic*]. As a result, Plaintiffs claim that this disclosure proximately caused Villanueva's death.

1. Negligence/Constructive Fraud

Plaintiffs claim that Varland's disclosure was negligent and in violation of the confidential relationship between miners and MSHA inspectors. They argue that the relevant MSHA regulations required inspectors to bring information received about dangerous conditions to the attention of mine operators without revealing the identity of the person providing the information. They argue that MSHA policy prohibited revealing the name of a complaining miner to the mine operator because MSHA knew that mine operators would often retaliate against miners who made safety complaints. Despite this policy and knowledge of potential retaliation, Plaintiffs argue that Varland disclosed Villanueva as the source of safety complaints, and this led to retaliation by Asarco which proximately caused Villanueva's death.

In response, Defendant argues that these claims are barred by 28 U.S.C. §2680(h) which states that any claims "arising out of . . . misrepresentation [or]

deceit" is barred by the FTCA. Defendant argues that the claims in question essentially arise out of misrepresentation or deceipt, and are therefore barred by §2680(h).

Defendant's attempt to characterize Plaintiff's claim as misrepresentation or deceipt [*sic*] must fail. Pursuant to the allegations in Plaintiffs' complaint, they have viable claims for negligence and constructive fraud:

> Constructive fraud is defined as a breach of a legal or equitable duty which, without regard to moral guilt or intent of the person charged, the law declares fraudulent because the breach tends to deceive others, violates public or private confidences, or injures public interests . . . Constructive fraud in [certain] context[s] means that a negligent omission of a regulatory requirement or noncompliance with a regulation cause prejudice to persons whom the regulation was intended to protect . . .

See Taeger v. Catholic Family and Communtiy Services, 196 Ariz. 285, 289 (App. 1999). Accepting Plaintiffs' allegations as true, Plaintiffs' [*sic*] meet this standard. This standard provides the relevant duty for Plaintiffs' negligence claim to survive and the relevant standard for constructive fraud. MSHA regulations imposed a mandatory duty upon Varland to not disclose the fact that Villanueva was the source of numerous safety complaints to Asarco. This policy was instituted to protect miners because MSHA knew that mine operators often retaliated against complaining miners. Varland either negligently or intentionally told Asarco operators that Villanueva was the source of safety

complaints in direct violation of MSHA regulations and policies. This disclosure resulted in retaliation from Asarco which eventually led to the death of Villanueva. Pursuant to relevant Arizona authority and the facts alleged in Plaintiffs' complaint, Plaintiffs' claims for constructive fraud and negligence are viable claims.

Despite Plaintiffs' allegations and this Arizona authority, Defendant argues that Plaintiffs' claim arises out of misrepresentation or deceit. Defendant essentially argues that the crux of the Plaintiffs' claims is that Villanueva was deceived into trusting the inspector to maintain his confidence. Defendant argues that Varland did indeed make misrepresentations because Varland impliedly represented that he would follow MSHA policies and would not disclose Villanueva as a source of complaints. Defendant then argues Villanueva relied on these implied representations to his detriment. Accordingly, Defendant argues that Plaintiffs claim must be labeled misrepresentation or deceipt [*sic*], and are thereby barred by §2680(h). However, Plaintiffs never allege that Varland actually or impliedly misrepresented anything. Plaintiffs' facts as alleged simply show that Varland had a duty to protect Villanueva's confidentiality pursuant to specific MSHA regulations, Varland violated this mandatory duty, and this resulted in Villanueva's death. Under these alleged facts, there was no deceit or misrepresentation that would bar Plaintiff's claims pursuant to §2680(h). Lastly, despite Defendant's arguments to the contrary, misrepresentation or deceit is not an essential element a [*sic*] claim for constructive fraud. The definition of constructive fraud cited above clearly rebuts this argument. Accordingly, Defendant's motion to dismiss

Plaintiffs' claim for negligence and constructive fraud are denied.

2. Intentional Infliction of Emotional Distress

Plaintiffs alternatively claim that Varland entered into a conscious agreement with Asarco to pursue a common plan to commit the tort of intentional infliction of emotional distress against Villanueva.

Plaintiffs' claim for emotional distress must be dismissed for failure to state a claim. The biggest flaw in Plaintiff's claim for emotional distress is a lack of causation in the death of Villanueva. To prove their intentional infliction of emotional distress claim, Plaintiffs must prove that: (1) Defendant's conduct was extreme and outrageous; (2) Defendant either intended to cause emotional distress or recklessly disregarded the near certainty that would result from his conduct, and (3) Severe emotional distress occurred as a result of Defendant's conduct. *See Johnson v. McDonald*, 197 Ariz. 155 (App. 1999). Even assuming these elements are met, Plaintiffs' claim is still barred by the Arizona wrongful death statue. A.R.S. 12-611 states:

> When death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages . . . (*emphasis added*)

In light of the fact that Mr. Villanueva was killed in the Asarco mine, Plaintiffs argue that the emotional distress claim survives under the wrongful death

statute. However, pursuant to A.R.S. § 12-611, a claim is viable under the statute only if the wrongful act or neglect supporting the underlying claim for emotional distress actually caused the death of Villanueva. Varland and Asarco conspiring to cause Villanueva severe emotional distress did not cause the death of Villanueva. Even if Villanueva suffered severe emotional distress prior to his death due to the alleged wrongful acts of Varland and Asarco, these acts supporting Plaintiffs' emotional distress claim did not kill Villanueva. If Villanueva suffered emotional distress, and that distress actually caused him to commit suicide, then the Plaintiffs would have an emotional distress claim that would survive under the wrongful death act because the resulting distress would have proximately caused Villanueva's death. However, this is not the case. The cause of Villanueva's death was a none-ton [*sic*] slab of earth that dislodged from the underground room he was working in on January 31, 2000. Under the facts of this case, although negligence in revealing Villanueva's name to Asarco may have proximately caused his death, intentionally causing Villanueva emotional distress did not contribute to his demise. To the extent that Plaintiffs allege in support of the emotional distress claim that Varland and Defendant specifically conspired to cause the death of Villanueva, these claims are distinct from the emotional distress claim and arise out of a intent to commit an assault and battery which are barred by 28 U.S.C. §2680(h). Accordingly, Defendant's motion to dismiss Plaintiff's claim for intentional infliction of emotional distress is granted.

CONCLUSION

Accordingly, IT IS HEREBY ORDERED as follows:

(1) The Motion to Permit Supplement Opposition to Motion to Dismiss was considered and is **GRANTED**.

(2) Defendant's Motion to Dismiss all of the claims of the Olson and Vargas Plaintiffs is **GRANTED**. In addition, they shall not have the opportunity to amend their complaint. The Court may deny amendment if such amendments would be futile. *See Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998). The Court believes that any amendments would be futile, and accordingly **DENIES** any amendments to the Olson and Vargas complaint. Pursuant to F.R.C.P. 54(b), there is no just reason for delaying a final judgment to these Plaintiffs, and as such, the **CLERK OF THE COURT** shall **ENTER A FINAL JUDGMENT** as to the Olson and Vargas Plaintiffs.

(3) Defendant's Motion to Dismiss the Villanueva Plaintiffs' claim for intentional infliction of emotional distress is **GRANTED**. Because the Court believes that any amendment of the complaint on this claim would be futile, any amendments on this claim are **DENIED**.

(4) Defendant's Motion to Dismiss the Villanueva Plaintiffs' remaining claims is **DENIED**.

DATED this 23 day of December, 2002.

/s/ WILLIAM D. BROWNING
William D. Browning
Senior United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. CIV-01-663-TUC-WDB
CIV-02-323-TUC-WDB
(Consolidated)

AMPARO VILLANUEVA, ET AL., PLAINTIFF

v.

UNITED STATES, DEFENDANT

[Filed: Dec. 26, 2002]

JUDGMENT IN A CIVIL CASE

X **DECISION BY COURT**. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion to Dismiss all of the claims of the Olson and Vargas Plaintiffs is GRANTED. Pursuant to Rule 54(b) of the Federal Rule of Civil Procedure, there is no just reason for delay and judgment is entered in favor of defendants and against plaintiff Olson and Vargas.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss the Villanueva Plaintiffs' claim for intentional infliction of emotional distress is GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion to dismiss the Villanueva Plaintiff's remaining claims is DENIED.

December 23, 2002
Date

RICHARD H. WEARE
CLERK

\s\ RENEE LUDEKE
(By) Rene Ludeke,
Deputy Clerk

Copies to: J/B

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-15141
D.C. Nos. CV-01-00663-WDB
CV-02-00323-WDB

JOSEPH OLSON, HUSBAND, ET AL.,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed: July 21, 2004]

ORDER

Before: B. FLETCHER, REINHARDT, Circuit Judges, and RESTANI Chief IT Judge.*

The panel has voted unanimously to deny the petition for rehearing. Judge Reinhardt has voted to deny the petition for rehearing en banc, and Judge Betty Fletcher and Judge Restani so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

* The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for panel or en banc rehearing will be entertained.

APPENDIX D

Statutory Provisions

28 U.S.C. 1346.

United States as defendant

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

* * * * *

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

* * * * *

28 U.S.C. 2674.

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be

liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

30 U.S.C. 801.

Congressional findings and declaration of purpose

Congress declares that—

(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this chapter (1) to establish interim mandatory health health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

30 U.S.C. 811.

Mandatory safety and health standards

(a) Development, promulgation, and revision

The Secretary shall by rule in accordance with procedures set forth in this section and in accordance with section 553 of title 5 (without regard to any reference in such section to sections 556 and 557 of such title), develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.

30 U.S.C. 813.

Inspections, investigations, and recordkeeping

(a) Purposes; advance notice; frequency; guidelines; right of access

Authorized representatives of the Secretary or the Secretary of Health and Human Services shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health and Human Services may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this

chapter, the Secretary, or the Secretary of Health and Human Services, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary or the Secretary of Health and Human Services, shall have a right of entry to, upon, or through any coal or other mine.

* * * * *

(g) Immediate inspection; notice of violation or danger; determination

(1) Whenever a reprersentative [*sic*] of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this chapter or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this subchapter. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.