

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

3 UNITED STATES, :

4 Petitioner, :

5 v. : No. 04-759

6 JOSEPH OLSON, ET AL. :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, October 12, 2005

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:03 a.m.

14 APPEARANCES:

15 DEANNE E. MAYNARD, ESQ., Assistant to the Solicitor
16 General, Department of Justice, Washington, D.C.; on
17 behalf of the Petitioner.

18 THOMAS G. COTTER, ESQ., Tucson, Arizona; on behalf of the
19 Respondents.

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF DEANNE E. MAYNARD, ESQ. On behalf of the Petitioner	3
ORAL ARGUMENT OF THOMAS G. COTTER, ESQ. On behalf of the Respondents	24
REBUTTAL ARGUMENT OF DEANNE E. MAYNARD, ESQ. On behalf of the Petitioner	46

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

[11:03 a.m.]

CHIEF JUSTICE ROBERTS: We'll now hear argument,
United States v. Olson.

Ms. Maynard.

ORAL ARGUMENT OF DEANNE E. MAYNARD
ON BEHALF OF PETITIONER

MS. MAYNARD: Mr. Chief Justice, and may it
please the Court:

The Federal Tort Claims Act waives the sovereign
immunity of the United States for the torts of Federal
employees when private persons in like circumstances would
be liable. But instead of applying private-person
principles of liability, the Ninth Circuit looked to the
State and governmental-entity principles of liability. It
concluded that the United States could be liable here,
because Arizona has decided to hold its governmental
entities liable when State employees are negligent.

That decision is wrong, for two reasons. First,
it is contrary to the plain text of the Federal Tort
Claims Act. The Federal Tort Claims Act makes clear that
the liability of the United States is to be judged by the
principles of private-person liability in the place where
the tort occurred. In section 1346(b)(1), the Federal
Tort Claims Act allows jurisdiction and waives the

1 sovereign immunity of the United States under
2 circumstances where the United States, if a private
3 person, would be liable to the claimant in accordance with
4 the law of the place where the act or omission occurred.

5 JUSTICE KENNEDY: Do I understand that you would
6 accept the rule that if Arizona held a private inspector
7 liable to third persons for their injuries, then the
8 Government of the United States would be liable? It's not
9 quite the Good Samaritan -- not quite the Good Samaritan
10 type, but you would accept that as the proper measure of
11 your liability in a case like this?

12 MS. MAYNARD: As long as Arizona applied that
13 principle of liability to private persons in Arizona.

14 JUSTICE KENNEDY: Yes.

15 MS. MAYNARD: Yes, Justice Kennedy. So, it will
16 depend on what the particular State's law is. Here, the
17 only private-person law that was argued below was the Good
18 Samaritan doctrine, and -- as a possible analogy to the
19 conduct of the mine inspectors here. But it might --

20 JUSTICE KENNEDY: It gets ahead of the argument
21 just a little bit, but you had a footnote about police
22 officers. You have a park ranger, Federal employer. Is
23 the analog there that we look to -- what the duties of a
24 private security guard would be -- what do you do with
25 those cases?

1 MS. MAYNARD: Well, those cases, as we note, do
2 present, often, special circumstances not present in this
3 case, Justice Kennedy. But the answer to the question
4 that's presented here is the same. You still would look
5 to whether or not there is private -- a private-person
6 analog. And, if there is, then you would look to the
7 liability of private persons in that circumstance.

8 JUSTICE KENNEDY: So, even with the police
9 officer, I have to find a private analog.

10 MS. MAYNARD: Yes, you do. For example, if
11 someone brought a trespass action against a Federal law
12 enforcement officer for entering upon their land, you
13 would apply the same State law as it relates to trespass
14 claims against private persons. Those claims may, for
15 example, have a defense of lawful authority to enter.
16 When looking at whether or not a police officer had -- a
17 Federal officer had lawful authority to enter, one might
18 then look to Federal law to determine whether or not the
19 officer had authority to enter, but you would still be
20 applying the principles of private-person liability.

21 If one concluded that there was no private-
22 person analog, then the only answer under the Federal Tort
23 Claims Act would be that the United States cannot be
24 liable.

25 CHIEF JUSTICE ROBERTS: Well, I mean, that's

1 kind of a \$64,000 question here. Give me an example where
2 you think there's no private-person analog.

3 MS. MAYNARD: Well, Mr. Chief Justice, we think
4 it's often rare that there is no private-person analog,
5 given this Court's decision in Indian Towing, which
6 stresses --

7 CHIEF JUSTICE ROBERTS: Right.

8 MS. MAYNARD: -- that one should look to a
9 private person in like circumstances. I think this Court,
10 in Feres, although that decision has been -- has been
11 limited -- did determine that there was, in that
12 situation, no private-party analog --

13 CHIEF JUSTICE ROBERTS: Isn't there always a
14 private -- I mean, we're talking about tort law -- isn't
15 there always a private analog, which is, you know,
16 exercising reasonable care under the circumstances toward
17 people to whom you owe some duty, and you just apply that
18 general principle?

19 MS. MAYNARD: To the extent you're suggesting
20 that we just look to general theories of tort law, I think
21 that would be incorrect. The -- because the Tort Claims
22 Act -- the language of the Tort Claims Act makes the
23 United States liable only where a private party in like
24 circumstances would be liable. And in Indian Towing, this
25 Court defines "in like circumstances" as looking to the

1 same character of conduct of the -- of the person. So,
2 you would have to find a private person who's engaged in
3 the same character of conduct, and then ask the question,
4 What principles of liability does the State apply to those
5 persons? Here, the --

6 CHIEF JUSTICE ROBERTS: Well, all right, so if
7 it's a police officer stopping somebody on a highway, it's
8 the same as a private security guard stopping somebody at
9 a -- you know, the driveway at a plant or something.

10 MS. MAYNARD: That may be the closest private-
11 person analog. In that situation, however, when one goes
12 to apply the defense, it's just as one would if talking
13 about a private security guard. One would ask the
14 questions whether the guard had the requisite authority.

15 And the State would look to what that guard's authority
16 was. And often States would look -- if the guard happened
17 to be a Federal officer, would look to Federal law. And
18 that can be appropriate, I think, for -- under,
19 potentially, three different -- for, potentially, three
20 different reasons. One, the language of the defense in
21 2680(a), which provides the United States with a defense
22 to liability in circumstances where , with due care, you're
23 carrying out a Federal statute or regulation. It --
24 another source of authority might be the State-law
25 principles simply look to what the authority of the person

1 doing the conduct is, and then you would look to Federal
2 law for the source of that authority. And that could be
3 right, under this Court's suggestion in *Muniz*, that
4 Federal regulations -- once an actionable duty is
5 established under State tort principles, one can look to
6 Federal regulations to determine whether or not -- what
7 the applicable standard of --

8 JUSTICE GINSBURG: Can you back --

9 MS. MAYNARD: -- care was.

10 JUSTICE GINSBURG: -- up in *Muniz* a little bit?

11 Because that was a prison administration. And so, what
12 is the private-party analog to that?

13 MS. MAYNARD: I think this Court suggested, in
14 *Muniz*, that perhaps there could be private persons
15 operating prisons, or one would look --

16 JUSTICE GINSBURG: I don't recall --

17 MS. MAYNARD: -- in that --

18 JUSTICE GINSBURG: -- that in the decision. The
19 phrase from the Tort Claims Act about "as a private party"
20 was repeated, but I don't remember any discussion of what
21 that private party would be, in *Muniz*.

22 MS. MAYNARD: You may be right, Justice
23 Ginsburg. I think the important point to take away from
24 *Muniz* is that the Court stressed that, whatever the
25 measure of the United States' liability would be for the

1 claims at issue in that case, it could not be the State
2 law as it related to governmental entities; that one would
3 have to, as the text requires, look to State law as it
4 relates to private persons. The point that I --

5 JUSTICE GINSBURG: Because in those days the
6 Government was arguing it should be like State officials.

7 MS. MAYNARD: For purposes of obtaining
8 immunity, we were arguing that -- which I think is a
9 different argument than we're making here today -- we were
10 arguing that the Federal Tort Claims Act was not meant to
11 waive our sovereign immunity at all with respect to
12 certain types of governmental activities. But that's not
13 the argument that we're making today. Today, we are
14 arguing simply that one must, as the Court held in *Indian*
15 *Towing and Rayonier*, one should look to the -- to the --
16 to the text of the statute, and that that must be the
17 measure of our liability.

18 JUSTICE STEVENS: May I ask you, what would you
19 do if Arizona had a statute that said that any company
20 that contracts privately to do mine inspections must obey
21 the standards in the Federal guidelines? What would the
22 standard be?

23 MS. MAYNARD: That presents a difficult
24 question, Justice Stevens, as I'm sure you know.

25 [Laughter.]

1 MS. MAYNARD: And that would, obviously, be a
2 harder case than the one that we have here, and -- which I
3 would like to --

4 JUSTICE STEVENS: But you say --

5 MS. MAYNARD: -- address how you apply it here.

6 JUSTICE STEVENS: -- and I think you're probably
7 right --

8 MS. MAYNARD: If --

9 JUSTICE STEVENS: -- that you can't just make a
10 Federal -- implied Federal cause of action under the
11 Federal standards, from what we know. But then I was
12 wondering, What if the Arizona statute said that's what
13 the private firm should do?

14 MS. MAYNARD: If a State statute looked to
15 Federal law as the source -- I think one has to be careful
16 when one talks about "negligence per se" type principles,
17 which is what you're suggesting -- some States look to
18 statutes and regulations solely to establish a standard of
19 care once a separate duty has been established. And some
20 States, as respondents claim Arizona does, look to it
21 establish both duty and a standard of care.

22 But, putting that aside, if -- to respond
23 directly to your question -- if a State adopted a Federal
24 statute and used it to apply to private persons, you would
25 be most of the way home in getting Federal Tort Claims Act

1 -- at least the creation of potential liability against
2 the United States. However, I think in that instance,
3 there would still be a question as to the intent of
4 Congress, in the Federal statute itself that was used, as
5 to whether Congress intended to foreclose any private
6 action, any private enforcement, such that the States --
7 if the State has misinterpreted, in other words, a Federal
8 law, that presents, I think, a Federal question.

9 JUSTICE STEVENS: No, I'm assuming they just did
10 it independently. They said, "We want a regulation on the
11 private mine inspectors, and let's just adopt the -- a
12 standard that shall, in all respects, be the same as the
13 Federal standard."

14 MS. MAYNARD: If they're just simply borrowing
15 it, and don't feel compelled to borrow it, and are,
16 indeed, applying it to private persons who perform safety
17 inspections, then the United States could potentially be
18 liable under the Federal Tort Claims Act. As I mentioned
19 here, though, that is definitely not this case, because --

20 JUSTICE KENNEDY: Well, but it seems to me that
21 that's quite a foreseeable possibility. If there is such
22 a thing as private safety inspectors in Arizona -- I'm not
23 sure, but if there are, I assume that what they do is,
24 when they go into a particular industrial area, they look
25 at the safety standards for that industry, including

1 Federal and State regulations. So, if you have a mine
2 inspector, then it seems to me that his liability might
3 very well be measured by whether or not he's inspected the
4 mine in accordance to Federal safety standards.

5 MS. MAYNARD: Well, I have several answers to
6 that question, Justice Kennedy. First, your use of
7 "standards" there appears not to be one to create an
8 actual duty in the first instance, which is really the
9 question before this Court. Is there any duty between the
10 United States and the private miners? Secondly --

11 JUSTICE KENNEDY: Well, but I thought we said,
12 at the outset -- and correct me if I'm wrong -- if Arizona
13 imposes liability on private safety inspectors for
14 injuries to third persons, then the United States would be
15 liable here.

16 MS. MAYNARD: Oh, I'm sorry. I didn't realize
17 you were still operating --

18 JUSTICE KENNEDY: That was the --

19 MS. MAYNARD: -- under Justice --

20 JUSTICE KENNEDY: -- hypothetical.

21 MS. MAYNARD: -- Stevens' hypothetical. If
22 Arizona has created an actionable tort duty that it
23 imposed -- that it's willing to impose upon its private
24 citizens who perform safety inspections, to all persons
25 who work at places where they perform safety inspections,

1 that would be a different case. Then that would be
2 applying the law as it relates to private persons in like
3 circumstances.

4 Here, though, it's clear from the cases we
5 discuss in our brief, including *Easter* and *Papastathis*,
6 that Arizona -- when private parties perform safety
7 inspections on the property of another, Arizona applies
8 its Good Samaritan doctrine. That is not -- in order to
9 determine, at the outset, whether there's any actionable
10 duty between the inspectors and the injured party. That's
11 the step that the Ninth Circuit did not engage in here.
12 The Ninth Circuit, instead, decided --

13 JUSTICE KENNEDY: I understand.

14 MS. MAYNARD: Okay. So, the -- and the reason
15 that you can't, in this case, follow Justice Stevens'
16 reasoning is because the only provisions of law to which
17 the respondents point to set the negligence per se
18 principles are policy manuals and procedures of the coal
19 -- Federal Mine Act that apply only to Federal employees.
20 So, they point to no case or law where these provisions,
21 upon which they rely, would impose either a duty or a
22 standard of care upon private persons in Arizona. Now,
23 in that -- to distinguish it -- I'm sorry.

24 JUSTICE STEVENS: In your view -- even though
25 the Federal standard would not be controlling, in your

1 view, if you applied a general reasonable-person test,
2 would the Federal standards be admissible so that the
3 plaintiff could argue that there was a failure here which
4 is evidence of negligence?

5 MS. MAYNARD: In many States, one would look to
6 Federal standards for setting the standard of care. And
7 we think that it could be relevant here what the -- but
8 you must get over the duty hurdle. And that, respondents
9 cannot do by looking to State and governmental-entity
10 liability.

11 JUSTICE SOUTER: When you say that it may be
12 relevant, are you thinking of 2680(a)? Because 2680(a)
13 says, you know, if you exercise due care, any act that you
14 take in the -- in -- well, let's use the exact language --
15 "any act or omission in the execution of a statute or
16 regulation will not be a ground of liability," with -- at
17 least leaving open the door that any failure to take steps
18 that would have been reasonable in executing it might be.

19 Is that why you answered Justice Stevens as you did?

20 MS. MAYNARD: Well, just to take your question,
21 and then maybe clarify what you mean by what --

22 JUSTICE SOUTER: Let me -- let me --

23 MS. MAYNARD: I can --

24 JUSTICE SOUTER: -- ask it --

25 MS. MAYNARD: -- I can -- I can answer it the

1 26- --

2 JUSTICE SOUTER: Look, I don't have to cross-
3 reference --

4 MS. MAYNARD: Good.

5 JUSTICE SOUTER: -- it to Justice Stevens.

6 MS. MAYNARD: Okay.

7 JUSTICE SOUTER: Give me an example of the -- of
8 the function of 2680(a). When would there be liability,
9 but for that provision?

10 MS. MAYNARD: Well, I think -- obviously, you
11 don't get to 2680(a) unless you've gotten through the
12 first part and established --

13 JUSTICE SOUTER: Right.

14 MS. MAYNARD: -- that there's some actionable
15 duty on private persons in like circumstances and that we
16 might be liable. If you do get over that hurdle -- say,
17 for example, the State standard of care with -- in
18 relation to private parties is higher than that required
19 by Federal statute -- imagine a Federal regulation that
20 requires VA doctors to --

21 JUSTICE SOUTER: Oh, I could -- I could --

22 MS. MAYNARD: -- take care of their patients
23 once a day.

24 JUSTICE SOUTER: -- I could understand that if
25 they -- it would be an easier question for me if the

1 statute said, "Even if you violate the statute, if you
2 otherwise use reasonable care, no liability." But here,
3 it talks about reasonable care when you are -- when you
4 are, in the statutory phrase, in the execution of the
5 statute, which suggests to me you're not violating the
6 statute, you're not violating any standard. So, what
7 function does it serve?

8 MS. MAYNARD: Well, it can serve functions in
9 other instances; for example, if someone alleges that you
10 were following the statute, but the statute was invalid.
11 But I think in terms of a -- because it goes on to say
12 whether or not the -- the regulation --

13 JUSTICE SOUTER: So, it's really --

14 MS. MAYNARD: -- is valid.

15 JUSTICE SOUTER: -- the validity is the -- is
16 the nub of the provision.

17 MS. MAYNARD: No, Your Honor. I was just saying
18 it has that other function. I think, here, the short
19 answer to your question is, if this -- if, when you're
20 talking about the -- what's an appropriate standard of
21 care once one's established an actionable duty -- if the
22 State law, as it relates to private persons, set a more
23 stringent standard of care than the Federal regulation,
24 for example, and the Federal employee were complying with
25 the standard of care set forth in the Federal regulation

1 --

2 JUSTICE SOUTER: Of the Federal -- I -- okay.

3 MS. MAYNARD: -- this could potentially provide
4 a defense, even though, once you went through the first
5 part of the statute --

6 JUSTICE SCALIA: I really don't understand the
7 -- are you sure that a failure to execute a statute does
8 not come within the language, "an act or omission," in the
9 execution of a statute? I would think a total failure
10 to execute is an omission in the execution of the statute.

11 MS. MAYNARD: I'm not sure I --

12 JUSTICE SCALIA: You mean if you executed 90
13 percent and omit 10 percent of what you're supposed to do,
14 it comes within that language, but if you don't execute at
15 all, it doesn't? That seems to me most unlikely. I mean
16 it seems to me --

17 JUSTICE SOUTER: She's saying "execution" is not
18 synonymous with "performance," which may well be correct.

19 JUSTICE SCALIA: Yes. Well, you --

20 JUSTICE SOUTER: I had assumed that --

21 JUSTICE SCALIA: -- you accepted, it seemed to
22 me, the premise of --

23 JUSTICE SOUTER: Yes.

24 JUSTICE SCALIA: -- Justice Souter's question,
25 which is that (a) -- 2680(a) only applies to a failed

1 execution. There has to be at least an attempted
2 execution. I'm not sure that's true. It says "an act or
3 omission" in the execution. And I think a total -- I just
4 don't do the thing at all. I think that's an omission in
5 the execution.

6 MS. MAYNARD: I must be missing the thread of
7 the question somewhere. I was just --

8 JUSTICE SCALIA: I --

9 MS. MAYNARD: -- I was trying to make just --

10 JUSTICE SOUTER: No, but you've --

11 MS. MAYNARD: -- a simple, modest point that --

12 JUSTICE SOUTER: -- you've still answered my
13 question. I mean, you're -- you have said, "Assuming that
14 the individual is executing the statute, there is no
15 deficiency in the performance of executing the statute.
16 There is still this function." And I think I understand
17 your answer. But, I mean, I think Justice Scalia's point
18 is correct, it may apply in cases in which you are
19 purporting to act under the statute, but you omit actions
20 that you should take. In other words, your performance is
21 deficient. And there, the answer is easier, because it
22 says as long as you're exercising due care, no liability.

23 MS. MAYNARD: We may still have a defense in --

24 JUSTICE SOUTER: Yes.

25 MS. MAYNARD: -- that situation. I think --

1 JUSTICE SOUTER: Yes.

2 MS. MAYNARD: -- that's correct. It's an
3 important point --

4 JUSTICE GINSBURG: There was an argument that
5 was made in your brief, and I didn't fully grasp the
6 thrust of it, in the -- that is, you said that the Mine
7 Safety and Health Administration has a duty to the
8 Secretary of Labor, but not to the mine operator and not
9 to the miner. If that were true, then would there be --
10 you wouldn't even get to the Good Samaritan doctrine,
11 would you, if the only duty is to the Secretary of Labor?

12 MS. MAYNARD: Well, I think that, in fact, would
13 be an application of the Good Samaritan doctrine, Justice
14 Ginsburg. In other words, I think you're referring to the
15 first part of the -- we have an -- we believe we have an
16 argument. And the Daggett case, which we cite, addresses
17 whether -- I think this is an open question in Arizona law
18 under their interpretation of the Good Samaritan doctrine
19 -- whether someone in the position of the United States
20 here is -- has undertaken to render services to another.
21 Because that's the argument to which you're referring, I
22 believe. And we think there is an argument that we are
23 not rendering services to another. But that is not the
24 same as saying that the Good Samaritan doctrine -- that is
25 an application of the Good Samaritan doctrine. In other

1 words, courts, when they -- these are all factors that
2 take into account whether someone will have a duty,
3 pursuant to the Good Samaritan doctrine -- one of the
4 factors is that you must have undertaken to render
5 services to another. Another factor, which we think is
6 also relevant here, is whether or not the injured party
7 justifiably and detrimentally relied. And we don't think
8 -- you know, they have asked you to decide this question
9 -- we think this is more appropriate a question for
10 remand, but the United States does not believe that the
11 respondents can make out either of those elements of the
12 Good Samaritan doctrine, and that the United States,
13 therefore, cannot ultimately be liable only -- under the
14 only available private-person analogy.

15 But the important point is, you -- that is an
16 application of the Good Samaritan doctrine.

17 JUSTICE GINSBURG: You're not sure that the
18 Good Samaritan doctrine is the -- is necessarily what the
19 Arizona law would be -- what the analog would be.

20 MS. MAYNARD: In our view, it's the only
21 private-person law that respondents argued to the Ninth
22 Circuit. Respondents have submitted a new argument to
23 this court contending that governmental-entity law and
24 private-party law in Arizona is equivalent in this
25 situation. But that is wrong. It is clear that the State

1 of Arizona, as a public-policy matter, has decided to
2 create broader, actionable tort duties on its own
3 governmental employees, and to expose itself and open its
4 own coffers to -- when -- to claims when its employees
5 have injured its citizens. But that is not the same law
6 that they apply to private persons, and we know that from
7 the Daggett case, which we discuss -- I believe it's on
8 page 6 of our reply brief.

9 In the Daggett case, that was a case involving
10 an inspection by a county of a swimming recreation area,
11 pursuant to mandatory State and county regulations that
12 required such inspections. The Arizona Court of Appeals
13 there held that there was a duty by the county to a person
14 who had -- who dove into the swimming pool and was injured
15 as a result of hitting the bottom, that there was an
16 actionable duty running against the county there as a
17 matter of the State of Arizona's decision to create tort
18 duties when its employees and governmental entities violate
19 mandatory obligations or perform them negligently.

20 JUSTICE STEVENS: Ms. Maynard, may I interrupt
21 and just ask this? Do we have to decide what the Arizona
22 rule is in order to decide the main question presented --
23 namely, whether the analogy to Arizona public officials is
24 sufficient?

25 MS. MAYNARD: Not necessarily, Justice Stevens.

1 We think it's perfectly clear, from the text of the
2 statute and the language of the Ninth Circuit's decision,
3 that what they did is improper.

4 JUSTICE STEVENS: But I'm just wondering if
5 you're not discussing a State-law issue that has not been
6 decided by either court below or really fully argued here.

7 MS. MAYNARD: Well, it has not -- the -- whether
8 or not there's an equivalency, whether or not private
9 persons are liable in the same instances as State and
10 governmental entities, was not argued by the respondents
11 below.

12 JUSTICE STEVENS: Right.

13 MS. MAYNARD: And, therefore, it was not
14 decided. We do not think -- it is a question of State
15 law, but we think the answer is very clear, because
16 respondent -- the only thing respondents point to here to
17 assert that there is an equivalent are cases making State
18 and county and governmental entities liable. They point
19 to nothing, as they concede, cases involving private
20 persons.

21 So, there -- if -- we don't think the Court
22 should remand, which would be an invitation to the Ninth
23 Circuit to essentially do, under another guise, what it
24 has already done, which is essentially apply governmental-
25 entity liability to the United States, in contradiction to

1 the --

2 JUSTICE SCALIA: Well, I wouldn't do that.

3 MS. MAYNARD: -- text of the statute.

4 If I can finish my Daggett answer, though,
5 Justice Stevens, I think that'll make clear why the two
6 are distinct and why it isn't a difficult question of
7 Arizona law.

8 The Daggett court went on to decide that the
9 county, although it had a duty to the injured party
10 pursuant to governmental entity law, similar to what the
11 Ninth Circuit applied to us here, there would be no
12 actionable duty if one applied the Good Samaritan
13 doctrine. It found that none of the second three prongs
14 of the Good Samaritan doctrine were met, and it also
15 raised the question as to whether or not someone in the
16 position of the county would even be rendering services
17 into another sufficient to meet that part of the Good
18 Samaritan doctrine.

19 So, we think it is very clear that the two are
20 not the same. The -- so, we would ask that the Court not
21 remand, and leave that question open, Justice Stevens.

22 JUSTICE KENNEDY: It's just a background
23 question. I'm curious, was ASARCO sued here, or -- and is
24 its liability capped by workmen's comp laws, or?

25 MS. MAYNARD: I do not know whether they were

1 actually sued. There are -- their -- I do believe their
2 liability, though, is that workers' comp is an exclusive
3 remedy here. And, although it's not in the record in this
4 case, the State of Arizona was also sued, and, according
5 to news reports, settled for substantial sums with both of
6 the respondents.

7 If there are no further questions at this time,
8 I would like to reserve my time.

9 CHIEF JUSTICE ROBERTS: Thank you, Ms. Maynard.
10 Mr. Cotter.

11 ORAL ARGUMENT OF THOMAS G. COTTER
12 ON BEHALF OF RESPONDENTS

13 MR. COTTER: Thank you, Your Honor.

14 Mr. Chief Justice, and may it please the Court:

15 I'd like to begin by addressing the last point
16 made by the Office of the Solicitor General, which is the
17 Daggett case. And I address that merely to highlight that
18 this is a State law issue. It -- the Daggett case did not hold,
19 as the Solicitor General maintains, that under Arizona law
20 there would be no duty under the restatement sections 323
21 or 324. In fact, what the Court says in remanding the
22 case because they found a duty under the county
23 regulations, is, "We assume, without deciding, that there
24 is a claim under 324 and -- 323 and 324, and note simply
25 that there are no allegations in the plaintiff's complaint

1 that would satisfy those issues." So, they simply say,
2 because there's additional litigation coming, they were
3 giving heads up to the party that he needs to amend the
4 complain to assert the Good Samaritan elements.

5 JUSTICE GINSBURG: May I ask you a question that
6 Justice Kennedy just brought up? Did this -- did Mr.
7 Olson collect, under the State workers' compensation
8 statute, from the mine operators?

9 MR. COTTER: Your Honor, Mr. Olson did collect,
10 under the State workers' compensation statute, from the
11 mine operator, that is correct, as did Mr. Vargas. And,
12 in fact, the State of Arizona was sued -- the State mine
13 inspector -- alleging that they were negligent, and that
14 case was resolved. That -- a point of interest in that
15 case is that in that case, the State -- because Arizona is
16 a pure comparative-negligence State -- alleged that the
17 Federal mine inspector was partially at fault and that,
18 therefore, Mr. Olson and Mr. Vargas' damages should be
19 reduced, just as, in our case, if we had proceeded beyond
20 the motion-to-dismiss phase, we could have anticipated, as
21 is common, that the Federal Government would have
22 identified the State of Arizona and the mine operator to
23 be non-parties at fault, as well, so that those
24 individuals -- the negligence of those individuals would
25 reduce the plaintiff's damages against the Federal

1 Government.

2 JUSTICE GINSBURG: But the -- but the mine
3 operator -- the Compensation Act is the exclusive remedy
4 under Arizona law, so the -- nobody could get anything
5 more from the mine operator. Is that so?

6 MR. COTTER: That is correct. In the interest
7 of candor, I have to tell Your Honor that we sued the
8 parent company to the mine operator, which is Grupo
9 Mexico, in an attempt to assert a claim, and that case was
10 resolved only by some -- by making some concessions on the
11 workers' compensation lien issues that the workers'
12 compensation carrier had back against the claimants for
13 their recovery from the State of Arizona.

14 I hope that's clear. But, generally, workers'
15 compensation carriers have a right to get repaid if
16 there's some private settlement, and concessions were made
17 on that right, because of the -- suing the parent company,
18 and that case was never resolved on the merits.

19 To begin, Your Honor, this came to the Ninth
20 Circuit from a motion to dismiss. And that has
21 significance to this -- to this question, because the
22 plaintiffs were not able to develop the factual record
23 which goes to the issues of whether or not there would be
24 liability under the State law -- the Good Samaritan law or
25 under -- issues about assumption of duty under State law.

1 JUSTICE SCALIA: Well, that goes to the remand
2 question raised --

3 MR. COTTER: It --

4 JUSTICE SCALIA: -- earlier.

5 MR. COTTER: -- it does --

6 JUSTICE SCALIA: It doesn't -- it doesn't go to
7 whether the Ninth Circuit was correct here.

8 MR. COTTER: Well, in a roundabout way, it does,
9 Justice Scalia, because what happened was, the Ninth
10 Circuit was faced with the task, under the Federal Tort
11 Claim Act, of deciding whether -- if the Federal
12 Government -- the Federal mine inspectors, if you would --
13 were private people under like circumstances, would they
14 be liable? So, the Ninth Circuit was essentially asked a
15 hypothetical question by the Federal Tort Claim, and it
16 was asked to resolve that question on a motion to dismiss
17 for failure to state a claim, which the standard is, of
18 course, that we can set -- we can prove no facts which
19 would -- which would establish a cause of action. And
20 what the court really did, because the court applied a
21 body of law -- the Ninth Circuit -- that began with the
22 Louie doctrine -- is, the court looked at Arizona mine-
23 inspector law as a predictor to what Arizona private-
24 person law would be.

25 And from Justice Roberts' questions about police

1 officers, in the Louie case, the State of Washington, like
2 the State of Arizona, had waived sovereign immunity.

3 JUSTICE BREYER: Well, I mean, that might have
4 -- you might have won if they had said, "We're going to
5 look to see what the law is in Arizona governing a private
6 person who performs a similar kind of inspection. And we
7 decide that it's the same." You would have won that, I
8 guess. But you didn't, because they didn't. That isn't
9 what they said.

10 MR. COTTER: That --

11 JUSTICE BREYER: That is, we're not looking to
12 the law governing private persons, we are just looking at
13 law governing municipalities, and they're -- it seems to
14 me they are pretty clearly wrong about that, unless you
15 give me a reason why they're right.

16 MR. COTTER: Well, Your Honor, what -- our
17 position is that, although they applied the law of
18 municipalities and the State, what they were really doing
19 is applying the Louie doctrine, which says that when you
20 cannot identify a private actor, then the best evidence of
21 what the State's law is, with respect to the actions of a
22 party in the same circumstances, is to look at the State
23 liability, and that --

24 JUSTICE BREYER: That's a good question.
25 Suppose you really had a person who -- there's just no

1 comparable private person in like circumstances. I can't
2 even imagine what that could be. Maybe you could imagine.

3 But I was trying to think of some secret research on
4 turning people invisible or something for military
5 purposes. I mean, I -- it's just hard -- I mean, hard
6 here, obviously. There is such a person. There are
7 private mine inspectors.

8 MR. COTTER: Well, actually, I'm not aware of
9 any private mine inspectors, but if we want to take that
10 thought --

11 JUSTICE BREYER: Maybe there are not --

12 MR. COTTER: If the private mine inspector had
13 the -- assumed the same duties, so it's under like
14 circumstances, that the Federal mine inspector had here,
15 which was to inspect the mine in its entirety four times
16 per year and to respond to all safety-related complaints
17 and determine whether they present imminent hazards, and
18 to remove the miners from the area -- if those are the
19 characteristics of the private individual under like
20 circumstances, then I concede that would be a better
21 predictor of State -- and if we knew what Arizona would
22 decide in that context, I --

23 JUSTICE SCALIA: Mr. Cotter, I don't -- I don't
24 see, in the opinion, any indication that the Ninth Circuit
25 was doing what you -- what you assert it was trying to do

1 -- namely, to predict what future California law -- locked
2 deep in the bosom of the California Supreme Court, but not
3 yet disclosed to the public -- will hold. It didn't
4 proceed that way at all. It says, generally, the United
5 States can be held liable only when liability was attached
6 to a private actor. However, the United States may be liable,
7 quoting from one of the Ninth Circuit's earlier cases, for the
8 performance of some activities that private persons do not
9 perform when a State or municipal entity would be held liable
10 under the law where the activity occurred. I don't see they are
11 saying, "We are trying to predict what California would do
12 in a private situation." They have set forth a rule that,
13 where there's no cause of action against a private person,
14 we look to whether there would be a cause of action under
15 -- against a State or subdivision of the State.

16 MR. COTTER: Justice Scalia, I concede that the
17 Court has accurately characterized the opinion. If I
18 remember the cases cited by the opinion, they're Concrete
19 Tie and Hines, which lead directly back to the Louie
20 opinion, which was the decided at the behest of the
21 Government, because, in Louie, there was a law enforcement
22 operator who -- a law enforcement official who failed to
23 stop a drunk driver, and they said, "There is" -- the
24 Government said, "There is no private person here." And,
25 therefore, if you look to Washington State law, which does

1 not impose liability in these circumstances, you get a
2 good idea of what Washington law would rule if there were
3 a private person.

4 JUSTICE SCALIA: How long ago was that -- was
5 Louie decided?

6 MR. COTTER: Your Honor, I believe it was about
7 20 years ago.

8 JUSTICE SCALIA: Twenty years ago. And
9 Washington still has not yet made this prediction come
10 true, I gather.

11 MR. COTTER: You mean it has not ruled on --

12 JUSTICE SCALIA: Exactly.

13 MR. COTTER: -- the subject?

14 JUSTICE SCALIA: It has not extended its
15 Government Tort Claims Act to private citizens.

16 MR. COTTER: I think -- I think that the Federal
17 Tort Claim Act does not apply to private citizens in
18 Washington.

19 JUSTICE SCALIA: No, I'm saying the prediction
20 that Louie made had not yet come true. There is still no
21 Washington decision that has done what Louie said it would
22 --

23 MR. COTTER: Would not do.

24 JUSTICE SCALIA: -- would be done.

25 MR. COTTER: Louie predicted that there would be

1 no liability. And, in fact, I think that that remains the
2 law.

3 JUSTICE BREYER: Yes, but Louie, according to
4 the SG, says, "We say here that this person is not liable
5 -- the Government is not liable, because, in Washington,
6 Washington would not make a municipality liable," while
7 adding that the law of Washington is that a municipality
8 is liable only if a private person in Washington is
9 liable. So, I wouldn't think Louie is very good authority
10 that the Ninth Circuit thought it was for the proposition
11 that you look not to the private person, but you look to
12 only the municipality.

13 MR. COTTER: If I understand Your Honor's --

14 JUSTICE BREYER: Well, I'm just --

15 MR. COTTER: -- point --

16 JUSTICE BREYER: -- reading from their brief.
17 What they say is, the court stressed that the equivalence
18 is important. The equivalence of what? Under Washington
19 law, State and municipal government entities are liable
20 only to the same extent as a private person. And they
21 cite page 825. And they stress this equivalence, because
22 a finding of immunity for State employees under State law
23 does not determine the scope of the U.S. liability, etcetera.

24 MR. COTTER: And, in fact, Your Honor, the
25 equivalence factor in Louie is present in this case.

1 JUSTICE BREYER: Well, anyway, if Louie helps
2 something other than that, it's wrong, too, isn't it?
3 Because what the statute says is, it's a question of
4 looking to the --

5 MR. COTTER: We --

6 JUSTICE BREYER: -- private person.

7 MR. COTTER: The respondents concede that the
8 question is "private person under like circumstances." We
9 concede that point. Our point is simply that, on a motion
10 to dismiss, the Ninth Circuit was faced with trying to
11 decide: What would Arizona law be with a private person
12 under like circumstances?

13 JUSTICE SCALIA: But it didn't try to do that.
14 It made no effort to do that. It just said -- it just
15 said the United States may be liable when a State or
16 municipal entity would be held liable. It made no effort
17 to figure out what Washington would do with a private
18 individual.

19 CHIEF JUSTICE ROBERTS: In the -- in the face of
20 a district court opinion that applied the Good Samaritan
21 statute and threw the case out because no allegation could
22 be made to come within the Good Samaritan statute. So, it
23 seems pretty clear that they're doing something quite different
24 from what you're suggesting.

25 MR. COTTER: Well, Justice Roberts, our

1 contention is that the genesis of the doctrine that they
2 applied, and that the Fifth Circuit applies, and that the
3 D.C. circuit applies, is to predict State law, that its
4 purpose is not to expand liability where State law doesn't
5 exist. In fact, if you read the opinion of the Ninth
6 Circuit in this case, it acknowledges that private person
7 is the test. But then it says that when we cannot find a
8 private person, this is what we do. We go look to the
9 State law. And the Crider case says, basically, that when
10 you do that -- from the Fifth Circuit -- what you're doing
11 is looking at the legal principles that are -- you're
12 looking at a factual situation that best articulates the
13 State-law legal principles --

14 CHIEF JUSTICE ROBERTS: But, doesn't that
15 approach -- it doesn't make any sense, because you're only
16 looking at half of the equation. Presumably, if you have
17 a special set of principles for governmental actors, they
18 include immunities and defenses and all that. And you
19 just want the benefit of the liability, but you don't
20 want, I take it, the immunities and defenses that go along
21 with it.

22 MR. COTTER: Well, that issue was actually
23 raised in the Henzel case, in the D.C. circuit, where the
24 -- there was a high-speed chase and the officer caused a
25 collision, and what happened was, the Government argued

1 that you can't apply the standard applicable defined duty
2 of the Government, but you can apply the Government -- or
3 the D.C. regulations as to standard of care. And the D.C.
4 Circuit found, no, it would follow Louie and Crider, and
5 say that the best predictor of the State law, when you
6 can't find an analogous private person, is the liability
7 statutes that concern the law enforcement, but, following
8 Indian Towing, it would not apply the gross-negligence
9 standard that the D.C. Circuit had adopted that concerned
10 the officers.

11 JUSTICE BREYER: That's actually a rather
12 interesting question I don't really know the answer to.
13 The idea is that you can't find an analogous private
14 person. We might have to write something about that. You
15 could say -- you -- there always is an analogous private
16 person. It's impossible to think of an example.

17 The other extreme, you have the Ninth Circuit,
18 which could -- which says as long as the Government was
19 involved in regulation, there is no analogous private
20 person, because private people don't regulate. I would
21 think that was almost certainly wrong.

22 But what is the right way to go about it? Are
23 there such people, or aren't there?

24 MR. COTTER: Well, Your Honor, what I would say
25 in this case is, the absolute wrong way to go about it is

1 on a motion to dismiss, because, unfortunately, the record
2 wasn't developed, which may, in fact, speak to issues that
3 may, in fact, address Arizona law on Good Samaritan, for
4 instance -- the issue of whether, under Arizona law, a
5 duty was assumed, the issue of whether reliance exists.

6 And I have to correct the Solicitor General.
7 The reliance does not merely come from the injured party.
8 The restatement section, section three- -- or the
9 restatement section 324 says reliance is from the other
10 for the injured party. So, in this case --

11 CHIEF JUSTICE ROBERTS: Well, doesn't that make
12 it a contract case? If you're talking about the party
13 who's contracted with, say, a private inspector -- I mean,
14 I have a contract, somebody comes and inspects the house
15 for termites, and I assume, if they don't do a good job
16 and the house is damaged, they're liable. But that's
17 under contract, and this is a question of tort liability.

18 MR. COTTER: Well, if I may answer with a
19 hypothetical, Your Honor, because we did not get to
20 develop the record, what happened in this case is, the
21 mine method changed. They went from taking the floor to
22 the taking the back. And they ripped out the ground
23 support. So, people were working under unsupported ground.

24 We, because there was a motion to dismiss, never got the
25 opportunity to take the mine operator and said, "Why on

1 Earth" -- the deposition of the mine operator -- "did you
2 think you could do this?"

3 JUSTICE SCALIA: What --

4 MR. COTTER: "Why on Earth did" --

5 JUSTICE SCALIA: What was your response to the
6 motion to dismiss? The Government said that you didn't
7 raise, in response to the motion to dismiss, any assertion
8 that private individuals would be liable --

9 MR. COTTER: Oh --

10 JUSTICE SCALIA: -- under State law in this --
11 in this situation.

12 MR. COTTER: Justice Scalia, I did not
13 understand the Government to be saying that --

14 JUSTICE SCALIA: Oh, I -- that's how I
15 understood it.

16 MR. COTTER: -- and it is not true, if that was
17 --

18 JUSTICE SCALIA: Okay.

19 MR. COTTER: -- what they said.

20 JUSTICE SCALIA: What was your response?

21 MR. COTTER: Our response was that the law --
22 first, our response was that, under the motion to dismiss,
23 our factual allegations in the complaint have to be
24 accepted, and we alleged all the elements of the Good
25 Samaritan doctrine, and all the elements of the uniquely

1 governmental --

2 JUSTICE SCALIA: You said that? You said that,
3 "And we have a -- we have asserted all the elements of
4 Good Samaritan"?

5 MR. COTTER: Yes.

6 JUSTICE SCALIA: Okay.

7 MR. COTTER: And what happened was, frankly,
8 Judge Browning dismissed, relying, I think, on the -- more
9 on the discretionary function exception, and then the
10 Myers case, out of the Sixth Circuit, saying, as a matter
11 of law, this -- as a matter of Federal law, MSHA is not an
12 assumption of duty by the Government. And I don't know
13 whether this Court is inclined to address that issue or
14 not, but I'd just like to point out on that issue, the
15 Federal Tort Claim Act makes the issue of whether the
16 Government's liable a question of State law. The question
17 is, as we have conceded, whether the mine inspector would
18 be liable if he were a private person, and -- which I
19 think goes to the prior question about, "What if there is
20 no" --

21 JUSTICE KENNEDY: But we can remand for that.
22 What's here is, the Ninth Circuit held that there's
23 liability based on what the liability of a State agent
24 would be, and that's just not the rule.

25 MR. COTTER: Well, Your Honor, if the Court is -

1 -

2 JUSTICE KENNEDY: So, we have to give some
3 instructions as to how the -- as to whether or not the
4 Ninth Circuit is right about that.

5 MR. COTTER: If the Court --

6 JUSTICE KENNEDY: And that's why you're here.

7 MR. COTTER: -- if the Court is convinced that
8 what the Ninth Circuit did was not try to predict what
9 private law would -- that -- what private law in Arizona
10 would be, if the Federal mine inspector was a private
11 citizen, then we would concede that that's not the law.
12 But we believe that is what the Ninth Circuit did
13 following those cases -- the Louie case, the Crider case,
14 and all of the cases that were --

15 JUSTICE BREYER: See, that's exactly what's
16 concerning me, and I don't quite see my way to an answer.
17 Suppose we do send it back because we think just what you
18 said wasn't so is so, they have to now into this. They'll
19 have to go into it. Should we suggest, "Look, you try
20 harder to find a private analogy, because there's almost
21 always a private analogy." Every Government official has
22 some similarities to private people, and some differences.
23 So, we could emphasize that, or we could suggest, "No,
24 actually, there are quite a few differences." I don't
25 have much of a feeling for which way to go on that.

1 MR. COTTER: Your Honor, if you do decide to
2 remand -- which if the issue of the Good Samaritan
3 doctrine or assumption of duty under Arizona law is going
4 to be addressed, we recommend that there is a remand -- we
5 would urge the Court, as a matter of first -- the first
6 rule is to instruct the Ninth Circuit that these are badly
7 -- these are cases that are badly decided on motions to
8 dismiss for failure to state a claim. Because the Arizona
9 law on when someone cites a -- adopts a duty -- the
10 Daggett case or the Papastathis case -- are all fact-
11 intensive.

12 JUSTICE BREYER: No, that's not -- that's not
13 what I've been asking.

14 MR. COTTER: And --

15 JUSTICE BREYER: And to expose everything I was
16 -- perhaps the better thing is to say, "There's always a
17 private analogy," or try very hard, because if you really
18 found an instance there was no private analogy to, maybe
19 there would be no recovery, because the statute simply
20 speaks about private party.

21 MR. COTTER: With all due respect, Your Honor --

22 JUSTICE BREYER: And this is a statute designed
23 to give people recovery --

24 MR. COTTER: Sure.

25 JUSTICE BREYER: -- when people commit torts.

1 MR. COTTER: It's a -- it's a statute where --
2 with a broad waiver intended. But I actually think if the
3 -- if the rule were "If there's no private analogy,
4 there's no recovery," it sort of reverses the statute.

5 JUSTICE SOUTER: It does.

6 JUSTICE BREYER: Yes, it does, but that --
7 would we end up there, because of the way the statute's
8 written? You avoid the whole matter if you say, "Look for
9 the closest private person, no matter what." And maybe
10 that's --

11 MR. COTTER: I concede that point, Your Honor.

12 JUSTICE SOUTER: Okay, who's your -- what's your
13 best analog?

14 MR. COTTER: My best analogy here is a private
15 mine inspector who has the same duties as a Federal mine
16 inspector, which, in this case, who -- you could say
17 someone who contracted --

18 JUSTICE SOUTER: Whom does he work for? Do
19 mines hire these people, or does he work for the liability
20 carrier, which I would have expected? I mean, if we're
21 going to make the kind of suggestion that Justice Breyer
22 says maybe we ought to make, we ought to have something in
23 mind. And is it -- is it the -- is it an inspector who
24 works for the liability carrier who would be the closest
25 analog in your case?

1 MR. COTTER: Well, earlier, the suggestion was
2 made, "What happens if the Government" -- I thought the
3 suggestion was, "What if the Government outsources mine
4 inspections? What if, instead of" --

5 JUSTICE SOUTER: No, but this -- that's all
6 hypothetical. You're litigating this case. You must have
7 something in mind. Whom do you have in mind as your best
8 analog?

9 MR. COTTER: The Arizona State mine inspector.
10 The --

11 JUSTICE SOUTER: What's your second-best analog?
12 [Laughter.]

13 MR. COTTER: Well, my second-best analog, I
14 guess, would be a workers' comp carrier, an insurer, or --

15 JUSTICE O'CONNOR: But I thought you had assumed
16 that, under the Arizona law, you could rely on the Good
17 Samaritan doctrine --

18 MR. COTTER: I believe we can rely --

19 JUSTICE O'CONNOR: And I thought that, at least,
20 would be open on remand.

21 MR. COTTER: I --

22 JUSTICE O'CONNOR: Is it necessary that we go
23 further than that?

24 MR. COTTER: Well, I don't think it's necessary,
25 if the Court doesn't want to address whether the

1 Government always needs to -- or the courts always need to
2 find a private person. The Good --

3 JUSTICE GINSBURG: Aren't there, in all kinds of
4 situations, private inspectors? One of them that was
5 mentioned in the briefs, I think, is an elevator operator.

6 MR. COTTER: Sure.

7 JUSTICE GINSBURG: Elevator operation inspector.
8 So, there's lots of private inspectors. There may not be
9 private mine inspectors. I don't know about that. But
10 this would be inspector liability.

11 MR. COTTER: Well, in the restatement, section
12 324, under "Assumption of a Duty," gives an example. And
13 the example is, if a private company hires a scaffolding
14 inspector, and the scaffolding inspector does a negligent
15 inspection, and a worker falls and is injured, the worker
16 has a claim against the scaffolding inspector. And then,
17 under the reliance component is --

18 CHIEF JUSTICE ROBERTS: Well, but only --
19 presumably, only if they meet the requirements of the Good
20 Samaritan law.

21 MR. COTTER: I believe --

22 CHIEF JUSTICE ROBERTS: Which -- they would have
23 to show that there was an increase in the risk of harm,
24 which I think it would not be true in your hypothetical,
25 or that there was a duty owed to the third party -- the

1 scaffolding inspector is presumably hired by the
2 contractor, not by the employees -- or there was reliance.

3 MR. COTTER: I think that that's true, Your
4 Honor, although I'd like to read a quote from Papastathis,
5 which is -- the court relied on. The quote is just this,
6 "Numerous cases have held that once a party gratuitously
7 agrees to inspect and the third party is subsequently
8 injured, that party can be held liable for its negligent
9 inspection." There is a host of Arizona case law on
10 assumed duties. And the case I would refer to is Martinez
11 versus State, which is simply a case where a road washes
12 out, and the Government reroutes the road for a -- for a
13 period of time across a private land, and, for a period of
14 time, grades it, and then stops grading it. And, in that
15 circumstance, the Government was held liable simply for
16 having, for that period of the time, assumed a duty. And
17 there wasn't an analysis in the Martinez case of whether
18 or not the elements of section 324(a) were met or not.

19 CHIEF JUSTICE ROBERTS: So, we're just debating
20 now whether or not you've satisfied the requirements of
21 the Good Samaritan statute.

22 MR. COTTER: Or whether there are alternative
23 theories of liability available under Arizona State law.

24 CHIEF JUSTICE ROBERTS: Did you argue -- I mean,
25 you lost in the district court on the Good Samaritan

1 statute.

2 MR. COTTER: Yes.

3 CHIEF JUSTICE ROBERTS: On your appeal, did you
4 argue that that was wrong?

5 MR. COTTER: Yes. And the Ninth Circuit simply
6 didn't reach that issue.

7 JUSTICE GINSBURG: But you said the district
8 court went off on discretionary function?

9 MR. COTTER: It went off primarily under
10 discretionary function, but then in addressing the Arizona
11 -- the Good Samaritan doctrine under Arizona, it relied on
12 the Myers case, which is a case in which -- the Sixth
13 Circuit said that when you have the case -- or safety
14 inspections like the Federal -- like MSHA, that court
15 would adopt a actor, slash, monitor dichotomy so that
16 there could never be an assumption of duty under --
17 because the Government was only in a monitor function.
18 And, to the extent that that's at issue, Your Honor, I
19 would think that that would be a question, under State
20 law, of whether the Government had assumed the duty. And
21 if not under State law, it would be a question under the
22 Federal Tort Claim of whether an -- there is an exception
23 that has been met. And there is no exception. I think
24 that this Court, in Berkovitz, said that regulatory
25 conduct can be actionable under the Federal Tort Claim if

1 it -- the discretion isn't met -- or the discretionary
2 exception isn't met. And in this case there was an
3 absolute obligation to make these inspections and an
4 absolute failure to do so.

5 MR. COTTER: Your Honor, if there are -- or the
6 Court -- if there's no further questions, I'd like to --

7 CHIEF JUSTICE ROBERTS: Thank you, Mr. Cotter.

8 Ms. Maynard, you have five minutes left.

9 REBUTTAL ARGUMENT OF DEANNE E. MAYNARD

10 ON BEHALF OF PETITIONER

11 MS. MAYNARD: Thank you, Mr. Chief Justice.

12 If I may just start where he ended. Just to be
13 clear, Justice Scalia, the point that I was making is, the
14 only private-person law to which respondents pointed below
15 was that of the Good Samaritan doctrine. That -- whether
16 or not respondents can make out a claim under the Good
17 Samaritan doctrine would require meeting all of the
18 elements of that doctrine. That would be primarily a
19 State-law question, but we do think there's an ingredient
20 of a Federal question there, especially, for example, in
21 deciding whether or not they reasonably and detrimentally
22 relied. Other courts of appeals, including the Sixth
23 Circuit, in Myers and Raymer, have said that the language
24 of the Mine Act is relevant to whether or not a party can
25 simply rely on the very -- just the bare existence of the

1 MSHA -- of MSHA's existence and its inspections, and held
2 that, given the language in the Mine Act that expressly
3 leaves the safety of the mine to the -- primarily to the
4 mine operators through the assistance of the miners, that
5 it would be unreasonable to rely.

6 Here, it -- this was completely appropriately
7 decided by the district court on a motion to dismiss,
8 because they came forward with affidavits that say nothing
9 more than that they relied upon the existence of the MSHA
10 scheme. And that, under Arizona's Good Samaritan law in -
11 - taking into account the Federal scheme, is insufficient,
12 because it is insufficient under Arizona law.

13 CHIEF JUSTICE ROBERTS: You consider affidavits
14 on a motion to dismiss?

15 MS. MAYNARD: This is a 12(b)(1) and a 12(b)(6)
16 motion to dismiss, Mr. Chief Justice, because it's also a
17 jurisdictional issue, so it is possible. They came
18 forward with these reliance affidavits, and I think it's
19 significant how little they say. The reliance affidavits
20 would obviously not require any discovery on their part to
21 indicate what their actions were, in terms of --

22 CHIEF JUSTICE ROBERTS: But what --

23 MS. MAYNARD: -- upon which they were relying.

24 CHIEF JUSTICE ROBERTS: -- what argument do you
25 have to avoid a remand for consideration of liability

1 under the Good Samaritan law?

2 MS. MAYNARD: I think that's -- that's one of
3 our arguments, that they can't meet the Good Samaritan law
4 --

5 CHIEF JUSTICE ROBERTS: But they didn't have a
6 chance to argue that before the court of appeals, right?

7 MS. MAYNARD: Oh, no, Your Honor, they argued
8 that before the --

9 CHIEF JUSTICE ROBERTS: But court of appeals
10 didn't decide that.

11 MS. MAYNARD: The court of appeals didn't decide
12 that. But, tellingly, I think, as Justice Breyer
13 suggested, the court of appeals -- and I think your
14 question has suggested -- it seems that they think there
15 is no liability there. The premise of the court of
16 appeals' holding was that there is no private-party
17 analog.

18 Justice Breyer, if there is no private-party
19 analog, if you conclude that this type of regulatory
20 activity has no private-party analog, the only appropriate
21 answer under the Federal Tort Claims Act is that the
22 United States cannot be liable. You cannot --

23 CHIEF JUSTICE ROBERTS: But you think there is a
24 private-party analog.

25 MS. MAYNARD: We think that the Good Samaritan

1 doctrine affords an -- under this Court's interpretation,
2 in Indian Towing, of the "like circumstances" doctrine, we
3 think one could look to the Good Samaritan principles,
4 under which we think we would prevail.

5 If I may, Justice Ginsburg, return --

6 JUSTICE SCALIA: Saying that there is no
7 private-party analog is not quite the same thing as saying
8 you lose under what we consider to be the proper private-
9 party analog -- namely, Good Samaritan.

10 MS. MAYNARD: We believe that once -- I'm not
11 sure I get the vein of your question, but I'll -- the --
12 if there is no private-party analog, so there's no
13 private-person in like circumstances, the United States
14 cannot be held liable. If there is a private-party in
15 like circumstances, one then must apply that law to the
16 facts and the claims and determine whether or not the United
17 States is liable.

18 JUSTICE SCALIA: Which the court of appeals
19 hasn't done.

20 MS. MAYNARD: But the district court did here,
21 Your Honor, and held that we weren't liable. If the
22 Court's going to decide this on the record, we think the
23 Court can decide on this record that there could not be
24 Good Samaritan law under Arizona law.

25 CHIEF JUSTICE ROBERTS: But we didn't bring cert

1 on that question.

2 MS. MAYNARD: That was -- I think it's fairly
3 encompassed. The -- it -- the question presented is
4 whether or not the court applied -- should have looked to
5 private-person law. I think if you say yes, you could
6 look to that law and conclude on this record that there
7 can't be liability.

8 Justice Ginsburg, if I may turn back to your
9 point about Muniz, I think you're correct that they didn't
10 specifically -- the court in that case didn't specifically
11 suggest what the private analog might be on remand,
12 although it did suggest perhaps it would be personal-
13 injury law as it relates to private persons in like
14 circumstances. But I think the important point in Muniz
15 on that point is akin to what I was just making to Justice
16 Scalia, which is that the court said there is consent to
17 sue here, so the prisoners may sue. Whether or not
18 they're going to be able to ultimately make out a claim
19 under private-person law is a different question.

20 So, the Federal Tort Claims Act is not a
21 guarantee of monetary compensation from the United States.

22 And one cannot do what the Ninth Circuit did, which is to
23 keep looking for possible analogies in -- under which the
24 result would be that the United States is held liable.

25 Sometimes, just like with private-party analogs, just like

1 with private safety inspectors, the answer will be: the
2 private party can't be held liable under the applicable
3 private-person law. And in -- the private-person law in
4 Arizona, I think it's clear, is the Good --

5 I'm sorry. My Time is up.

6 CHIEF JUSTICE ROBERTS: Thank you, Ms. Maynard.

7 The case is submitted.

8 [Whereupon, at 11:59 a.m., the case in the
9 above-entitled matter was submitted.]

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25