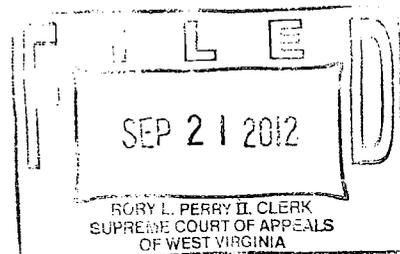


No. 12-0850



In the
**Supreme Court of Appeals
of West Virginia**

DELORICE BRAGG, as Administratrix of the Estate of Don Israel Bragg, and
FREDA HATFIELD, as Administratrix of the Estate of Ellery Hatfield,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONERS

On Certified Question from the United States Court of
Appeals for the Fourth Circuit, No. 11-1342

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PRELIMINARY STATEMENT

The Federal Government's brief describes an alternative—and decidedly inaccurate—universe when it comes to this case, the certified question the Fourth Circuit has asked this Court to answer, and this Court's negligence precedents. In the Government's alternative universe:

1. The wrongful death of a miner contemplated by the certified question was “caused by the negligence of mine operators” (Gov't Br. at 8), *even though* the certified question expressly states that the miner's wrongful death was caused by the “private party's negligent inspection.” *Bragg v. U.S.*, 2012 WL 2899317, at *1 (4th Cir. July 17, 2012).
2. The mine inspector at issue in the certified question is only *allegedly* negligent (*e.g.*, Gov't Br. at 1, 5, 23), *even though* the certified question—consistent with the Government's own admissions—expressly states that the mine inspector's inspection was *actually* “negligent.” *Bragg*, 2012 WL 289937, at *1.
3. This Court's general negligence principles do not apply where the harm is caused by a third party, and this Court should instead look to its decisions involving one's duty to prevent deliberate criminal acts on its property by a third party (Gov't Br. at 22-23), *even though* this case is *not* about failure to prevent harm caused by a third party (rather, it asks whether a private party can be “liable for the wrongful death of a miner resulting from the private party's negligent inspection”), this case does *not* involve a landowner or deliberate criminal acts, and this Court frequently *has* applied its general negligence principles to cases involving harm caused by a third party (*infra* at 13-17).

4. This Court's special relationships doctrine requires a showing of reliance by the plaintiff on the defendant (Gov't Br. at 21-22), *even though* the doctrine does not require reliance in most cases.

5. West Virginia's longstanding and emphatic public policy concern with mine and miner safety—barely acknowledged by the Government—takes a back seat to principles of federal law (Gov't Br. at 27-28), *even though*, as the Government admits on the same pages of its brief, it is *this State's* laws and policies, not those of the federal government, that control resolution of the certified question.

In this alternative but erroneous universe, the Government contends, this Court effectively should adopt a section of the Restatement (Second) of Torts—Section 324A—that it has never adopted in the nearly 48 years of that provision's existence. Of course, as shown above, the reality of the facts and law before this Court is noticeably different from the version told by the Government. The certified question is whether a private mine inspector is liable for a miner's wrongful death caused by a negligent inspection under West Virginia law—*not*, as the Government claims, whether the private mine inspector is liable for a miner's wrongful death caused by a third party. And it is precisely the kind of question this Court's general negligence principles are designed to resolve. The Government musters a single-paragraph argument to the contrary at the end of its brief, but there is little doubt that under general negligence principles, the answer to the certified question must be "yes."

This unavoidable outcome explains the Government's extreme efforts to change the facts and distort the law. After claiming, falsely, that this case concerns one's duty to prevent harm caused by third parties, the Government says that this Court's general negligence precedents are inapposite to such third-party harm cases. But that is clearly wrong too because several of those

precedents address exactly that: a defendant's liability for harm caused by a third party. Then, while admitting that a mine inspector can be liable if it has a special relationship with miners, the Government claims that the plaintiff must have relied on the inspector under this Court's special relationships decisions. But the Government is wrong again because in nearly all of this Court's special relationships decisions, it has not required any showing of reliance.

So the Government moves on to more misdirection. It acknowledges the importance of public policy in the duty analysis this Court must undertake, but it virtually ignores West Virginia's public policies that bear directly on whether a mine inspector owes a duty under West Virginia law to miners. And the Government compounds that disrespect for this State's paramount public policies by relying on *federal* law—in direct conflict with the Federal Tort Claims Act's express mandate that *state* law controls. Then, towards the end of its brief, the Government offers its vision of Section 324A and how its criteria would apply here. But it conspicuously ignores the dozens of authorities cited in Petitioners' opening brief demonstrating that the Government's construction of Section 324A is flawed, and that the private mine inspectors at issue here would be liable under that provision of law as well.

In the end, West Virginia's vital concern with keeping its mines and miners safe will best be served by applying this Court's settled negligence and special relationship principles, and recognizing a private party's duty to miners to inspect a mine with reasonable care.

ARGUMENT

I. This Court's General Negligence Principles Govern The Tort Liability Of A Mine Inspector Whose Negligent Inspection Causes The Death Of A Miner.

In Petitioners' opening brief, they established that this Court's general negligence principles control the question of a private mine inspector's tort liability to miners who die as a result of the inspector's negligent mine inspection—just as those principles control the question

of any other private actor's tort liability for negligence that causes harm to another. There is nothing new or unusual about this. For that reason, the Government has only one choice—distort and distract in the hope that it might somehow be able to steer this Court from its decades-long adherence to the established general negligence principles it uses to determine a tortfeasor's liability for negligence that harms another. The Government's strategy fails.

A. The Government Improperly Attempts To Revise The Certified Question By Erroneously Claiming That This Case Involves Harm Resulting From The Conduct Of A Third Party.

The Government's principal mode of distortion is to rewrite the certified question, and to do so in conflict with the undisputed facts of this case. It claims that this Court's general negligence decisions are distinguishable because they "do not address circumstances such as those presented here, in which a plaintiff's injury resulted from the negligent or criminal conduct of a third party." Gov't Br. at 23. But this case clearly does *not* involve a "plaintiff's injury result[ing] from the negligent or criminal conduct of a third party." To the contrary, as the certified question expressly states, this case involves the "wrongful death of a miner resulting from the private party's negligent [mine] inspection." *Bragg*, 2012 WL 2899317, at *1. In other words, the question is whether there is liability where the plaintiff's injury (the miner's wrongful death) "result[s] from" the tortfeasor's negligence (the "private party's negligent [mine] inspection"). *Id.* And this question plainly is governed by the general negligence principles this Court always applies when one party's negligence harms another.

But that is not the only reason the Government's contention is wrong, because this Court's general negligence precedents have in fact been applied routinely in cases where, unlike here, the plaintiff's injury was caused by a third party. In fact, the Government acknowledges as much where it notes (Gov't Br. at 24) that in *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983), this Court applied its general negligence principles in determining one's liability for

negligence that foreseeably increased the risk that a *third party's conduct* would harm another. This Court also has applied its general negligence precedents in other cases involving harm directly inflicted by a third party. In *Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 479 S.E.2d 911 (1996), this Court applied its general negligent principles in determining that a highway and road designer could be held liable for an accident involving the injured plaintiff and a third party. And in *Wehner v. Weinstein*, 191 W. Va. 149, 444 S.E.2d 27 (1994), this Court applied its general negligence and foreseeability principles in concluding that the owner of a pizza shop, whose employee parked his delivery car negligently, could be liable when third parties broke into the car, disengaged the brake, put the car in the neutral, and the car rolled down a hill and killed a pedestrian.

Accordingly, it is clear that this Court's general negligence principles, which have been applied flexibly across a broad spectrum of cases, govern the resolution of the certified question.

B. The Government Mischaracterizes Petitioners' General Negligence Principles Argument And Fails To Respond To Several Aspects Of That Argument.

Rather than provide its own analysis of the general negligence principles, the Government largely ignores them, and instead mischaracterizes Petitioners' argument as asserting that liability arises merely where "the harm to be prevented is foreseeable and severe." Gov't Br. at 9. That obviously is wrong. Petitioners' argument is that liability for negligence arises where, as here, (1) the plaintiffs' injury is foreseeable, (2) the plaintiff sustains severe bodily injury or death as a result of the defendant's negligence, (3) there is a strong need for moral condemnation and deterrence of the defendant's negligence, and (4) public policies—particularly the State's strong policy in favor of keeping mines and miners safe that is squarely implicated here—support imposing a duty of care on the negligent actor. Pet. Br. at 11-20.

The Government then deploys its ignore-and-hope-the-court-won't-notice tactic. Most

notably, it ignores what it must concede—that (1) foreseeability of the plaintiff’s harm is the “ultimate test” of the existence of a tort duty of care under this Court’s precedents (Pet. Br. at 12-13 (citing cases)), and (2) a miner’s wrongful death is a plainly foreseeable consequence of a private party’s negligent mine inspection (*id.* at 17). It also ignores the undisputed and extreme severity of the bodily injury at issue—a miner’s wrongful death—as well as this Court’s explicit rule that where, as here, a case involves “‘harm to one’s body, the reach of what is recoverable is very great.’” *Aikens v. Debow*, 208 W. Va. 486, 492, 541 S.E.2d 576, 582 (2000) (citation omitted).

The Government isn’t done ignoring. It proceeds to ignore entirely this Court’s rule that, in determining whether negligence is actionable, it “will also consider the level of condemnation and deterrence that may be required as a sufficient response to the conduct at issue.” *Hannah v. Heeter*, 213 W. Va. 704, 710, 584 S.E.2d 560, 566 (2003) (cited at Pet. Br. at 13). And it further ignores the public policy considerations this Court has said should be consulted in negligence cases—“the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant” (*e.g.*, *Aikens*, 208 W. Va. at 491, 541 S.E.2d at 581) (quotations omitted)—and offers no response to Petitioners’ argument that these public policies support a private mine inspector’s duty of care to miners. Pet. Br. at 18-19.

The Government caps off its ignore-and-avoid strategy by mentioning—but giving no weight or respect to—West Virginia’s public policy in favor of keeping miners safe. Gov’t Br. at 27. That emphatic policy of this State remains as powerful and important as ever, and it strongly supports imposing a duty of care on private mine inspectors.

C. The Government’s Repeated Invocation Of Some Distinction Between Affirmative Acts And Omissions Is Both Unsupported And Irrelevant.

Finally, the Government relies on the supposed distinction between affirmative acts

(“misfeasance”) and omissions (“non-feasance”) in an effort to persuade the Court not to apply its general negligence principles. (Gov’t Br. at 11) It claims that “non-feasance[,]” which is the label the Government affixes to its own negligence in this case, can only support liability for harm caused by a third party where there is a “special relation” between the tortfeasor and the injured party. *Id.* This line of argument collapses on every level.

First, as discussed above, this is *not* a case of one’s duty to prevent harm caused by a third party; it is a case about a tortfeasor’s duty to one who he has harmed directly. Second, the Government’s key premise—that a negligent mine inspection amounts to “non-feasance”—is flatly incorrect. A negligent mine inspection is an inspection that is carried out, but not to the level of reasonable care that the law requires. In other words, it is, at a minimum, a “misfeasance.” Third, this Court’s decisions on a duty to protect from harm caused by a third party do not distinguish between action and inaction. Rather, they expressly provide for liability whether the conduct is an “affirmative action[.]” *or* an “omission[.]” *Miller v. Whitworth*, 193 W. Va. 262, 266, 455 S.E.2d 821, 825 (1995).

Fourth, the Government’s proposed misfeasance/non-feasance construct has been heavily criticized—including in the Restatement itself. *See, e.g., Adams v. City of Fremont*, 80 Cal. Rptr. 2d 196, 224 (Cal. Ct. App. 1999) (referring to the “false expediency” of the distinction and noting “that the same challenged conduct may be characterized as either nonfeasance or misfeasance, thus eliminating this distinction as a meaningful way to apply tort doctrine”); Restatement (Second) of Torts § 314 cmt. c (noting that decisions based on the “nonfeasance” distinction “have been condemned by legal writers as revolting to any moral sense”). Therefore, the Court’s general negligence principles clearly apply here and resolve the certified question.

D. The Government's Public Policy Analysis, Based On Inapplicable Federal Law And A Distortion Of The Certified Question, Is Plainly Flawed.

The Government does not, because it cannot, deny that public policy plays an essential role in this Court's tort duty analysis. Rather than confront the public policies Petitioners say bear on the certified question (*see supra* at 5-6), the Government ignores them and claims that there are other public policies that preclude a duty here. The Government is wrong.

The Government's policy argument begins by flying in the face of this Court's settled precedent when it claims that there is no "need" for the Court to "reassess[]" on a case by case basis" the applicable "policy considerations." Gov't Br. at 26. This Court repeatedly has expressed the opposite view—that in negligence cases, a "case by case" determination is exactly what is required. *See, e.g., Miller*, 193 W. Va. at 267, 455 S.E.2d at 826.

The Government's specific policy arguments are meritless, too. The Government first invokes the supposed "fundamental premise of American tort law [] that a person generally has no duty to protect others from foreseeable harm caused by third parties absent a special relationship." Gov't Br. at 26. This assertion misses the mark because the certified question does *not* present the issue of one's duty to protect others from harm caused by third parties—it presents the issue of one's duty not to act negligently in performing an act that causes another's wrongful death. For the same reason, the Government's reliance (*id.*) on the "Good Samaritan" doctrine and the need to encourage "bystander[s] ... to offer assistance gratuitously" to others is misplaced because this manifestly is not a case about a "bystander" who provides aid to one injured by a third party, or who "volunteer[s] his services." *Id.* at 26, 27. Instead, it is a case about an active participant (a private party) who undertakes an affirmative course of conduct (mine inspections), for consideration, and whose conduct directly "result[s]" in the wrongful death of another (a miner). *Bragg*, 2012 WL 2899317, at *1.

The Government also resorts to the same *federal law* policy defense it has offered throughout this case: that because the federal Mine Act (30 U.S.C. § 801(e)) says that mine operators have “primary responsibility” for making mines safe, “imposing a general duty of care onto MSHA for safety in the nation’s mines would ‘in effect, shift the responsibility for safety away from operators and onto MSHA....’” Gov’t Br. at 28 (citation omitted). But on the previous page of its brief, the Government acknowledges, as it must, that it is the “law that a state would apply to a private person in similar circumstances”—*not* federal law—that governs here. *Id.* at 27. Moreover, as Petitioners showed in their reply brief in the Fourth Circuit, the federal Mine Act does not make mine operators *exclusively* responsible for mine safety, and it certainly does not confer any immunity on mine inspectors for their negligence. Pet. 4th Cir. Reply Br. at 5-7. And, even if the federal Mine Act could be considered in assessing the relevant public policies, its provisions expressly recognizing the paramount importance of mine and miner safety reinforce the need to impose a duty of care on private mine inspectors here. *See* 30 U.S.C. § 801(a)-(d).

The Government closes with unsupported assertions about the supposed negative policy consequences of holding a private mine inspector liable for causing a miner’s wrongful death, but these ring just as hollow. It says that if such a duty is imposed on mine inspectors, “few would be willing or able to offer assistance gratuitously.” Gov’t Br. at 26. But this is not a case about “gratuitous” undertakings, no matter how many times (at least 5) the Government repeats the word, and the Government itself acknowledges (Gov’t Br. at 4) that it is *required* by law to conduct mine inspections and issue citations for safety violations. Moreover, the Government’s claim lacks any logical connection to this case because imposing a duty here does not, in fact, require the application of the “Good Samaritan” principles that might apply in certain cases in

determining whether one has a duty to protect another injured by a third party.

The Government then claims, again without support, that given the mine operator's duty to keep its mine safe, "unless a mine inspector affirmatively makes the situation worse than it would have been otherwise, an injured miner's remedy should be compensation from the mine." Gov't Br. at 28. But this only begs the question why this should be the case—a question the Government fails to answer. And, as discussed below (*infra* at 20) and in Petitioners' opening brief (at 32-33), a mine inspector's failure to detect safety hazards in a mine and bring the existence of those hazards to the operator's attention to be corrected surely "makes the situation worse than it would have been" had the inspector done its job properly and with reasonable care.

Unbowed, the Government doubles down, arguing that imposing liability in circumstances other than where the inspector "affirmatively makes the situation worse ... would render any private inspector fearful of unlimited liability" and "would apply with equal force to numerous other private inspections or to any circumstances where an individual provides—or fails to provide—aid to another." *Id.* But the Government offers no support for this supposition and hyperbole. Indeed, the tort rule for which Petitioners advocate is located comfortably within this Court's decades-long negligence jurisprudence, and is tied closely to the narrow, mine-specific contours of the certified question in this case. Moreover, although the Government ignores them, Petitioners discussed at length in their opening brief the legal principles and defenses available to private mine inspectors in defending themselves and limiting their responsibility for a miner's wrongful death. Pet. Br. at 23-24. There is no "unlimited liability" fear here, and certainly none that this Court will not confine through its prudent, case-by-case application of its general negligence principles. Accordingly, public policy strongly supports a private mine inspector's duty to miners killed as a result of a negligent inspection.

III. Mine Inspectors Also Have A Duty To Miners Under This Court's Special Relationship Doctrine, Which The Government Grossly Mischaracterizes.

Petitioners argue that an independent basis for a duty of care is the existence of a “special relationship” between mine inspectors and miners. Pet. Br. at 24-27. The Government agrees, for the first time, that “an actionable duty exists [] if there is a special relationship between the plaintiff and defendant....” Gov’t Br. at 3. Nor does it dispute that this Court’s special relationship doctrine applies to bodily harm cases like this one every bit as much, if not more, as it applies to economic injury cases. Further, the Government does not even attempt to rebut Petitioners’ argument that a special relationship existed here because (1) miners clearly are “affected differently” from the rest of society by a negligent mine inspection, and (2) a miner’s wrongful death is a foreseeable consequence of that negligent inspection. Pet. Br. at 24-27.

Instead, the Government claims that a special relationship only exists under West Virginia law where the plaintiff also can show reliance on the defendant. Gov’t Br. at 21, 33. It is wrong. Two of the cases the Government relies on for this supposed requirement—*Walker v. Meadows*, 206 W. Va. 78, 521 S.E.2d 801 (1999) and *Wolfe v. City of Wheeling*, 182 W. Va. 253, 387 S.E.2d 307 (1989)—involve the so-called “public duty doctrine,” which governs a “local government entity’s liability for nondiscretionary ... functions....” *Walker*, 206 W. Va. at 83, 521 S.E.2d at 806 (citation omitted). But under the U.S. Supreme Court’s holding in *U.S. v. Olson*, 546 U.S. 43 (2005), that doctrine has absolutely nothing to do with the certified question here. *Id.* at 45-46 (holding that the FTCA “says that it waives sovereign immunity ‘under circumstances where the United States, if a *private person*,’ not ‘the United States, if a state or municipal entity,’ would be liable”) (quoting 28 U.S.C. § 1346(b)(1)).

The Government also cites *Glascocock v. City Nat’l Bank of West Virginia*, 213 W. Va. 61, 576 S.E.2d 540 (2002), to support its claimed reliance requirement (Gov’t Br. at 21-22), but it is

wrong again. In *Glascok*, the Court concluded that a special relationship would have existed between the plaintiff borrowers and the defendant bank even if the borrowers had *not* relied upon the bank's failure to disclose an inspection of the home they were building which revealed numerous material defects. Notably, the *Glascok* Court found that a special relationship existed *despite* the fact that it made "no finding that withholding the report actually caused the Glascoks any harm"; it was "likely that the Glascoks had no choice in converting their loan"; it was "clear from the record that the Glascoks had their own inspectors examine the home at least half a dozen times"; and a "jury might well conclude that the bank's retention of the report did not harm the Glascoks at all." *Id.* at 545-46. That is, even though the plaintiffs may not have actually or reasonably relied to their detriment on information from the bank, the bank's inspection of the home still formed a special relationship with the homeowners that imposed on the bank a duty to disclose information that it possessed about the home. *Id.*

The Court did indicate in *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 549 S.E.2d 266 (2001), that a "design professional" such as an architect or engineer would owe a duty of care to a contractor on a special relationship theory where the contractor relied upon the design professional's work product. But the Court did not impose any generally applicable reliance requirement there or in two of its other leading special relationship precedents—*Aikens* and *White v. AAMG Constr. Lending Ctr.*, 226 W. Va. 339, 700 S.E.2d 791 (2010)—and the Government does not claim to the contrary. And in *Aikens*, the Court identified numerous cases involving a "special class of plaintiffs" where a special relationship supported the existence of a duty, but where reliance was neither required nor proved. *Aikens*, 208 W. Va. at 500-01 & nn. 8-15, 541 S.E.2d at 590-91 & nn. 8-15. Two of these cases cited by *Aikens* even involved the liability of an inspector to a "remote purchaser" of the property inspected. *Id.* at 500 n. 10, 541

S.E.2d at 590 n. 10 (citing *Stemple v. Dobson*, 184 W. Va. 317, 400 S.E.2d 561 (1990); *Hardy v. Carmichael*, 24 Cal. Rptr. 475 (Cal. Ct. App. 1962)).

Even if the Government was right about a reliance requirement (it isn't), reliance often will exist in the mine inspection cases contemplated by the certified question, and it certainly is established on the facts in this particular case. See Pet. Br. at 32-37 (pointing to the facts establishing Petitioners' husbands' reliance on the Government's inspections). Where miners are aware that inspections are being conducted—and they almost certainly will be in most instances—it is likely that they will rely, reasonably, on the adequacy of those inspections to keep the mines in which they work safe: As many courts in similar cases have concluded, the miners' vigilance likely will be dulled and they will be lulled into a sense of security. Pet. Br. at 32-33, 35-37 (citing cases). Indeed, reliance on a safety inspection arises “where the fact of inspection is known to the third person but the defect is unknown” and where the third person engages in “business as usual in the belief that any necessary precautions would be taken or called to the user's attention.” *Smith v. Universal Underwriters Ins. Co.*, 752 F.2d 1535, 1537 (11th Cir. 1985) (citation omitted). Thus, a private mine inspector owes a duty to miners under the Court's special relationship doctrine.

IV. The Government's Reliance On So-Called “Assumed Duty” Cases And Cases Involving Duties To Protect Others From The Intentional Criminal Acts Of Third Parties Is Misplaced.

Unable to show that this Court should decline to apply its flexible general negligence and special relationship principles and find a duty here, the Government turns to what it calls “assumed duty” cases, or cases where one's conduct results in the assumption of a duty. Gov't Br. at 19-20. It also relies on this Court's decisions addressing a landowner and landlord's liability for a third party's intentional criminal acts that occur on its property. *Id.* at 22-26. The Government's case law analysis is inaccurate; its analogy to third-party criminal act cases does

not fit; and even if the analogy did fit, it would squarely support a duty here.

To begin with, the Government cites two supposed “assumed duty” cases that are off-point. *Milhorn v. West Virginia Department of Agriculture*, 2012 WL 3104303 (W. Va. June 22, 2012), was a memorandum disposition involving a West Virginia government agency’s supposed duty to build a fence around certain property, which the plaintiff trespasser, who was intoxicated and high on marijuana, claimed would have kept him from trespassing, climbing onto the roof of a building, and falling off. But there was no basis whatsoever to establish that the agency had assumed any duty—it never acted, nor did it promise to. Moreover, the Court expressly refused to adopt the assumed duty principles set forth in Section 323 of the Restatement, going out of its way to point out that “this section has only been mentioned by the Court ... in footnotes in opinions in medical malpractice cases.” *Id.* at *3. *Milhorn* is irrelevant.

Wingrove v. Home Land Co., 120 W. Va. 100, 196 S.E. 563 (1938), is not even an assumed duty case at all. There, the Court imposed a duty because the defendant’s affirmative acts created a defect in a gas storage tank that did not exist before the defendant tried to repair it, and that directly caused the plaintiff’s injury (a general negligence case), *not* because the defect in the tank existed before the defendant tried to repair it, and the defendant assumed, and then negligently carried out, its duty to repair that defect (an assumed duty case).

After mischaracterizing this Court’s special relationship precedents (*supra* at 11-13), the Government then turns to the heart of its argument in Section I.B—that this Court’s decisions on the duty to prevent the intentional criminal conduct of a third party control the duty question here. Gov’t Br. at 22-26. As discussed above, however, these cases do not fit because the certified question does *not* present the question of a duty to prevent harm caused by third parties, or harm caused by intentional criminal acts. The certified question asks about harm caused to

miners by a mine inspector's negligence, period. *Bragg*, 2012 WL 2899317, at *1. And this is a question that can and should be resolved with this Court's settled general negligence principles.

Moreover, these third-party intentional criminal act cases are resolved under the same general negligence principles of foreseeability and public policy discussed above, and they fully *support* a mine inspector's duty to a miner. In *Miller*, 193 W. Va. 262, 455 S.E.2d 821, for example—the Government's principal authority for its duty to prevent harm caused by third parties theorem—this Court began its duty analysis with *Robertson*, one of this Court's seminal general negligence principle decisions. See Pet. Br. at 12, 21-22. The *Miller* Court reiterated both that (1) “foreseeability of risk is an important consideration” and (2) “that courts should consider the ‘likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant’”—in other words, the Court began its analysis with its general negligence principles. *Miller*, 193 W. Va. at 266, 455 S.E.2d at 825 (quoting *Robertson*, 171 W. Va. at 612, 455 S.E.2d at 568). The Court then held that there are at least “two situations” when a duty to prevent an intentional criminal act arises: “(1) when a person has a special relationship which gives rise to a duty to protect another person from intentional misconduct or (2) when the person's affirmative actions or omissions have exposed another to a foreseeable high risk of harm from the intentional misconduct.” *Id.*

The Government nonetheless claims that under *Miller*, a landlord's duty to protect a tenant from a third person's intentional criminal acts “can only arise when the landlord could reasonably foresee that his own actions or omissions have unreasonably created or increased the risk of injury from the intentional criminal activity.” Gov't Br. at 22 (quoting *Miller*, 193 W. Va. at 266, 455 S.E.2d at 825). But the Government clearly takes that quote out of context. The Court was talking only about when a landlord's duty to protect could arise under the second of

the “two situations” where it previously noted a duty could arise. More notably, the Court “stress[ed] that the[se] [] two situations are not exclusive[,]” and a duty could arise in other circumstances. *Miller*, 193 W. Va. at 266-67, 455 S.E.2d at 825-26.

In any case, assuming for the sake of argument that this is, as the Government wrongly claims, a case where the “plaintiff’s injury resulted from the negligent or criminal conduct of a third party” (Gov’t Br. at 23), the typical mine inspector case—and certainly the undisputed facts of *this* mine inspector case—plainly would meet *Miller*’s second test for imposing a duty. That is because any mine inspector reasonably can foresee that if he conducts his inspection negligently and fails to discover a safety hazard that the third-party mine operator negligently or intentionally created or allowed to exist, he “will have exposed [the miners in the mine] to a foreseeable high risk of harm” from the third-party operator’s wrongdoing. *Miller*, 193 W. Va. at 266, 455 S.E.2d at 825. Indeed, this Court made clear in *Miller* that third-party *negligence* is far easier to foresee than third-party intentional criminal acts. *Id.*

This analysis is fully consistent with safety inspection cases across the country, including those Petitioners cited in their opening brief—and the Government ignored. *See* Pet. Br. at 30-36; *infra* at 18-20; *see also* *Carvalho v. Toll Bros. & Developers*, 651 A.2d 492, 498 (N.J. Super. App. Div. 1995) (holding that safety inspector of sewer excavation site, present to ensure the engineer’s “compliance with the plans and specifications” and “aware of water present in the trench and [who] had seen the trench collapse” previously, increased the risk of harm when, despite “his knowledge of the unsafe nature of the trench,” he failed to take steps “to prevent” the trench from collapsing and killing a worker; “[f]airness and policy [thus] dictate[d] imposition of a duty upon the engineer since, as a professional, he or she could not ‘stand idly by with actual knowledge of unsafe safety practices on the jobsite and take no steps’ to prevent

injury to the workers at risk”) (citation omitted). These cases reinforce the applicability of this Court’s general negligence principles and the recognition of a duty here.

V. Mine Inspectors Also Have A Duty To Miners Who Die As A Result Of Negligent Mine Inspections Under Section 324A Of The Restatement.

Unsurprisingly, the Government urges the Court to adopt the principles of duty set forth in Section 324A. *E.g.*, Gov’t Br. at 2. It claims that even though this Court has never accepted these Restatement principles, its decisions “have long applied the fundamental principles of Good Samaritan law that one who gratuitously offers assistance may be subject to liability only if his conduct makes matters worse or induces reasonable, detrimental reliance.” *Id.* at 19. Once again, however, this line of argument is inapposite because this is not a “Good Samaritan” case involving one’s duty to protect another who has been harmed by a third party.

Moreover, the Government is wrong when it says that an “actionable *duty* arises ... only if a defendant increases the risk of harm, assumes the duty of another, or induces objectively reasonable reliance.” Gov’t Br. at 2 (emphasis added). As Petitioners demonstrated in their opening brief, and numerous appellate courts have held, these three criteria—increasing the risk of harm, assuming the duty of another, and reliance—relate strictly to whether the defendant’s negligence *caused* the plaintiff’s injury. Pet. Br. at 32 (citing cases); *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 263 (3d Cir. 2010) (holding that these three criteria set forth Section 324A’s “three causation requirements”). And, as the certified question makes crystal clear, causation is not an issue here—it is assumed that the miner’s wrongful death “result[ed] from the private party’s negligent [mine] inspection.” *Bragg*, 2012 WL 2899317, at *1. Petitioners raised these points expressly in their opening brief, and the Government, having offered no response to them, has waived any objection. *See Roth v. U.S. Dept. of Justice*, 642 F.3d 1161, 1181 (D.C. Cir. 2011) (“Even appellees waive arguments by failing to brief them.”) (citation omitted).

Beyond all of this, Petitioners showed in their opening brief that even if Section 324A's lettered subsections governed the duty analysis here, a private party negligently inspecting a mine clearly would owe a duty under those principles to a miner who lost his life.¹ Pet. Br. at 29-37. Petitioners cited more than a dozen Section 324A cases from other jurisdictions outlining the scope of the Section 324A requirements and imposing a duty of care on inspectors—including federal government inspectors—in analogous circumstances. *Id.* In making its argument that no duty would arise under Section 324A, however, the Government chooses to ignore each and every one of these cases.² Gov't Br. at 30-32.

Instead, the Government repeats the arguments it made in the Fourth Circuit, relying on the same authorities. It first says that under the increased risk of harm criterion, the mine inspection must have “increased the risk of harm to the miners beyond what it would have been had MSHA not acted at all[,]” a standard it claims is not met here because the Aracoma mine operator caused the fire that killed Petitioners' husbands, while MSHA merely failed to take steps to “force[] the mine operator to remedy its own failures.” *Id.* at 30. The Government is wrong in its formulation of the standard and its application here.

¹ The Government claims (at 28) that “this Court need not determine whether a mine inspector might ever owe an actionable duty to miners[,]” and that Petitioners' analysis of Section 324A in their opening brief is premature because that is a question for the Fourth Circuit. But the Government is confusing the issues. This Court's accepted task is to answer the certified question. And in order to answer the certified question, this Court must determine whether the private mine inspector described in that question—whose negligent inspection causes a miner's death—would owe a duty of care to the deceased miner. Petitioners have argued that the contemplated private inspector would owe a duty of care, whether under general negligence principles, the special relationship doctrine, Section 324A, or other third-party harm principles.

² The Government includes a nearly 3-page footnote with citations to non-West Virginia cases supposedly adopting § 324A (or the related § 323) of the Restatement. Gov't Br. at 13-16 n. 4. But at least two-thirds of these cases are *not* inspection cases (by Petitioners' count, at least 30 of the 44 cases cited in footnote 4 are not inspection cases). Nor does the Government suggest that any of the inspection cases cited in footnote 4 requires a showing of increased risk of harm or reliance where, as here, it is undisputed that the inspector's negligence caused the plaintiff's injury.

Section 324A(a) makes no mention of the “beyond what it would have been had [defendant] not acted at all” language the Government injects; it asks only whether the risk of harm is increased beyond what it would have been had “reasonable care” been “exercise[d.]” See Rest. § 324A(a) (actor is subject to liability if “his failure to exercise reasonable care increases the risk of such harm”); *Rawson v. United Steelworkers of Am.*, 726 P.2d 742, 750 (Idaho 1986) (Section 324A(a) asks whether a negligent mine inspection “resulted in [miners] being subjected to increased hazards or potential for death ... than would otherwise have been the situation had the inspections been performed without negligence”), *rev’d on other grounds by United Steelworkers of Am., AFL-CIO v. Rawson*, 495 U.S. 362 (1990). Additionally, the Government neglects to point out that West Virginia law is in fact broader than the Restatement when it comes to the “risk of harm” criterion—it provides for liability not only when one “increases” the risk of harm, but also where one creates or “exposes” another to a risk of harm. *Miller*, 193 W. Va. at 266-68, 455 S.E.2d at 825-27.

The Government’s application of the “risk of harm” standard is equally erroneous. Its claim (at 30) that the mine operator’s negligence—not MSHA’s inspections—caused the fire that killed Petitioners’ husbands squarely contradicts the certified question, which focuses on miners’ deaths “resulting from the private party’s negligent [mine] inspection.” *Bragg*, 2012 WL 2899317, at *1. Moreover, properly understood, the “increased risk of harm” criterion is met here because non-negligent inspections would have lessened the direct risk of physical harm to the miners.

The Government then asserts that under the reliance criterion (Rest. § 324A(c)), the mine inspection must have “induced actual, reasonable reliance by the miners that caused them to forgo other remedies or protections[,]” a standard it claims is not mere here because “plaintiffs

do not allege that MSHA's actions caused them 'to forgo other remedies or precautions.'" *Id.* at 30-31 (citations and internal quotations omitted). Again, the Government is wrong in its formulation of the standard and its application here. For one thing, the "forgo other remedies or protections" language is not found in Section 324A(c). Moreover, as Petitioners showed in their opening brief and discussed above (*supra* at 13), reliance on a safety inspection arises "where the fact of inspection is known to the third person but the defect is unknown" and where the third person engages in "business as usual in the belief that any necessary precautions would be taken or called to the user's attention." *Smith*, 752 F.2d at 1537 (citation omitted). That is because knowledge of the inspections "lull[s]" third parties such as mine operators and miners "into a false sense of security" (*Johnson v. Abbe Eng'g Co.*, 749 F.2d 1131, 1133-34 (5th Cir. 1984)), "dull[ing] the[ir] call to vigilance" (*Irving v. U.S.*, 942 F. Supp. 1483, 1504 (D.N.H. 1996) (citations omitted), *rev'd en banc on other grounds* by 162 F.3d 154 (1st Cir. 1998)). The Government provides no answer to these authorities or their common-sense reliance standard.

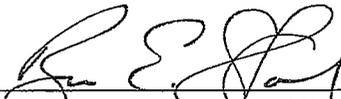
Finally, the Government once again resorts to a *federal law* defense to the certified question of state law before the Court, claiming that because the federal Mine Act places primary responsibility for safety on the mine operator, miners cannot "reasonably rely" on MSHA to do its job. Gov't Br. at 31-32. But once again, federal law has nothing to do with the West Virginia law question this Court must resolve. And, at a minimum, whether reliance is reasonable in this context is a question of fact that won't be resolved until this case is returned to the U.S. District Court. *See Bank of Montreal v. Signet Bank*, 193 F.3d 818, 835 (4th Cir. 1999).

CONCLUSION

Accordingly, based on either its settled general negligence principles or its special relationship doctrine, the Court should answer the certified question in the affirmative.

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