No. _____

In The
Supreme Court of the United States

CRAIG CUNNINGHAM, on behalf of
himself and all others similarly situated,

Petitioner,

v.

GENERAL DYNAMICS
INFORMATION TECHNOLOGY, INC.,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Almost 80 years ago, in *Yearsley v. W. A. Ross Const. Co.*, 309 U.S. 18, 21-22 (1940), under seemingly innocuous facts, this Court created a defense to liability for a private contractor who caused flood damage while building dikes as authorized by a federal statute and as directed by a federal government agency. Because the *Yearsley* Court did not articulate the scope of, and rationale for, the defense it created,[1] the defense has become a means by which federal agencies have exonerated unlawful conduct by private contractors that now receive more than $500 billion per year to engage in an ever-growing array of tasks, ranging from running prisons to marketing private health insurance options under the Affordable Care Act.

The Fourth Circuit granted a private government contractor immunity from liability in this case for violating federal laws prohibiting robocalls, presenting these questions:

1. Is the private contractor's defense described in *Yearsley* a jurisdictional defense that, like the government's sovereign immunity, may be the subject of a motion to dismiss pursuant to Fed. R.

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[1] *E.g., Kuwait Pearls Catering Co., WLL v. Kellogg, Brown & Root Servs., Inc.*, 853 F.3d 173, 185 (5th Cir. 2017) ("*Yearsley's* rationale is both sparse and unclear"); *Adkisson v. Jacobs Engineering Group, Inc.*, 790 F.3d 641, 646 (6th Cir. 2015) ("*Yearsley's* spare reasoning . . . creates uncertainty as to the scope of the decision"), *cert. denied*, 136 S. Ct. 980 (2016).

QUESTIONS PRESENTED – Continued

Civ. P. 12(b)(1) – a motion on which the injured plaintiff bears the ultimate burden of proving subject matter jurisdiction – as the Fourth Circuit ruled? Or does *Yearsley* instead articulate an affirmative defense that the private contractor-defendant bears the burden of proving on a motion for summary judgment or at trial, as the Fifth, Sixth and Ninth Circuits have ruled?

2. Does *Yearsley* enable a federal agency to direct a private contractor to violate *federal* laws passed by Congress on the theory that the contractor's immunity is derivative of the federal government's sovereign immunity, as the Fourth Circuit ruled? Or does *Yearsley* enable a federal agency to direct a contractor to violate only *state* laws, as the Second, Sixth and Ninth Circuits have determined, because the theory underlying the defense is state law preemption and because an executive agency may not intrude upon Congress's powers to enact federal laws?

3. Does a federal statute's grant of general authority to an agency to administer a government program empower the agency to direct a contractor to engage in conduct that violates another federal statute, and thereby exonerate conduct violating that other federal statute?

PARTIES TO THE PROCEEDING

Petitioner is Craig Cunningham. Respondent is General Dynamics Information Technology, Inc.

RULE 29.6 STATEMENT

Because petitioner is not a corporation, Rule 29.6 does not apply.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Craig Cunningham ("Cunningham") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW, AND BASIS FOR DISTRICT COURT'S FEDERAL JURISDICTION

The opinion of the Fourth Circuit Court of Appeals is reported at *Cunningham v. General Dynamics Information Technology, Inc.*, 888 F.3d 640 (4th Cir. 2018) ("Op.," reprinted on pages App. 1a-21a of the appendix to this petition). The Fourth Circuit affirmed the district court's decision dismissing Cunningham's complaint in *Cunningham v. General Dynamics Information Technology, Inc.*, Civil No. 1:16-cv-00545, 2017 WL 1682534 (E.D. Va. May 1, 2017). (App. 22a-38a). The district court's dismissal was preceded by its unreported interim opinion issued on October 18, 2016. (App. 39a-51a). The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 because Cunningham's complaint alleges claims for violation of a federal statute, 47 U.S.C. § 227(b).

THIS COURT'S JURISDICTION

The court of appeals issued its opinion and entered judgment on April 24, 2018. The court of

appeals denied Cunningham's petition for rehearing en banc on May 22, 2018. (App. 52a). Cunningham has filed this petition for a writ of certiorari within 90 days thereafter, in compliance with Supreme Court Rules 13.1 & 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES, REGULATIONS AND RULES

The following constitutional, statutory and regulatory provisions are relevant to this petition: 42 U.S.C. §§ 18081(e)(4)(A)(i) & 18083(a), (b) & (e); 47 U.S.C. §§ 227(a)(1) & (b)(1)-(3); 47 C.F.R. §§ 64.1200(a), (b) & (f); 48 C.F.R. § 1.602-1(b); and Fed. R. Civ. P. 12(b)(1). (App. 53a-64a).

STATEMENT OF THE CASE

A. Summary of Relevant Facts

This litigation involves a series of advertising campaigns that defendant-respondent General Dynamics Information Technology, Inc. ("GDIT") carried out to promote the availability of private health insurance to persons who register on exchanges established by the Affordable Care Act (the "ACA"). As the Fourth Circuit confirmed, those campaigns were the subject of a written contract between GDIT and the Centers for Medicare and Medicaid Services ("CMS"). Op. at 5a, 888 F.3d at 644. Section 17 of the contract

required GDIT to maintain a corporate compliance program to insure that GDIT obeyed all statutes and regulations applicable to the contract. *Id*.

While CMS did authorize GDIT to use an autodialer to make calls, and from time to time provided GDIT with the telephone numbers to call and a script of a message to deliver to the persons GDIT was to call, Op. at 5a, 888 F.3d at 644, nowhere did CMS ever specifically direct GDIT to make robocalls without obtaining the prior express consent required by the Telephone Consumer Protection Act of 1991, as amended (the "TCPA"), from the persons it called. (Joint Appendix filed with Fourth Circuit, pp. JA660-732, JA940:9-16). As Naomi Johnson, CMS's Contracting Officer's Representative in charge of the contract with GDIT, acknowledged:

> Q. Did CMS ever direct GDIT to make the autodial calls, regarding health insurance and health care exchanges, without obtaining prior [] informed consent?
>
> A. No.
>
> Q. Did – Did CMS ever direct GDIT to make those calls and obtain prior informed consent?
>
> A. No.

(JA940:9-16).

In connection with the contract, GDIT made approximately 2.65 million robocalls to consumers, including plaintiff Cunningham. Op. at 5a-6a, 888 F.3d at 644.

B. Proceedings Before the District Court

On May 16, 2016, Cunningham filed his class action complaint against GDIT, alleging that GDIT violated the TCPA, 47 U.S.C. §§ 227(b)(1)(A)(iii) & (B), because it did not obtain prior express consent to make its robocalls. Op. at 7a, 888 F.3d at 645.

GDIT moved to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), contending that it was immune from suit under *Yearsley*. Op. at 7a-8a, 888 F.3d at 645. On October 18, 2016, the district court issued an interim decision, ruling that the *Yearsley* defense is jurisdictional, but allowing the parties to conduct limited *Yearsley*-related discovery before ruling on whether the defense applied. (App. 39a, 48a-50a).

On May 1, 2017, after the parties conducted limited jurisdictional discovery and filed supplemental briefs, the district court granted GDIT's motion to dismiss for lack of subject matter jurisdiction, App. 22a-38a, and an appeal to the Fourth Circuit ensued.

C. The Fourth Circuit's Decision

On April 24, 2018, the Fourth Circuit affirmed in favor of GDIT. First, the Fourth Circuit determined that the contractor defense articulated in *Yearsley* is a form of sovereign immunity, and therefore a jurisdictional defense. Op. at 3a-4a, 17a-19a, 888 F.3d at 643, 649-51. Based on that determination, the Fourth Circuit ruled that the *Yearsley* defense is a proper

subject of a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction:

> . . . it is clear that "[i]f the basis for dismissing a *Yearsley* claim is *sovereign immunity*, then a *Yearsley* defense would be jurisdictional" because "sovereign immunity deprives federal courts of jurisdiction to hear claims, and a court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction." . . . we treat the *Yearsley* doctrine as derivative sovereign immunity that confers jurisdictional immunity from suit.

Op. at 17a, 888 F.3d at 649 (emphasis in original, and citations omitted). The Fourth Circuit openly acknowledged that its ruling conflicts with the Fifth Circuit's decision in *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 207 (5th Cir. 2009), which the Fourth Circuit described as "ultimately concluding that *Yearsley* immunity does not deprive the court of subject matter jurisdiction." *Id.*

Second, the Fourth Circuit ruled that the *Yearsley* defense shields private contractors from liability for violating *federal* law while performing government contracts. The Fourth Circuit's principal support for that ruling was its assumption that the *Yearsley* Court had provided the private contractor a defense to liability on a federal "claim arising under the Takings Clause of the Constitution." Op. at 10a, 888 F.3d at 646, citing *Yearsley*, 309 U.S. at 22-23.

Third, the Fourth Circuit held that the ACA's general statutory direction to CMS "to establish a system to keep applicants informed about their eligibility for enrollment in a qualified health plan," Op. at 12a-13a, 15a-16a, 888 F.3d at 647-48, citing 42 U.S.C. §§ 18083(a), (b)(2) & (e), constituted a sufficient grant of authority to CMS to empower CMS to direct GDIT to make robocalls in violation of the TCPA, and to render GDIT immune from suit for those violations. *Id*.

REASONS FOR GRANTING THE PETITION

I. By Ruling that the *Yearsley* Defense Is Properly Raised on a Motion to Dismiss for Lack of Subject Matter Jurisdiction – on which the Plaintiff Bears the Ultimate Burden of Proof – the Fourth Circuit Issued a Decision on a Critical Jurisdictional Issue that Directly Conflicts with Decisions by the Fifth, Sixth and Ninth Circuits Ruling that *Yearsley* Establishes an Affirmative Defense – on which the Defendant Bears the Burden of Proof

As this Court has recognized, "th[e] distinction between jurisdictional limitations and claims-processing rules can be confusing in practice. . . . [and] [c]ourts – including this Court – have sometimes mischaracterized claim processing rules or elements of a cause of action as jurisdictional limitations. . . ." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010).

"[P]revailing precedent makes this distinction *critical*" because a jurisdictional limitation "deprives a court of adjudicatory authority over the case, necessitating dismissal – *a drastic result*." *Hamer v. Neighborhood Housing Servs. of Chicago*, 138 S. Ct. 13, 17 (2017) (emphases added and internal quotation marks omitted).

As demonstrated below, the Fourth Circuit's ruling on such a critical distinction – that the *Yearsley* defense constitutes a jurisdictional limitation appropriately raised on a Rule 12(b)(1) motion, not on summary judgment or at trial – directly conflicts with the rulings of at least three circuit courts of appeals, and is inconsistent with *Yearsley* itself.

A. In Conflict with the Fourth Circuit's Ruling in this Case, the Fifth, Sixth and Ninth Circuits have Ruled that *Yearsley* Does Not Articulate a Jurisdictional Defense

Three other circuits have specifically ruled that the *Yearsley* defense is *not* jurisdictional.

First, in *Adkisson v. Jacobs Engineering Group, Inc.*, 790 F.3d 641, 643 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 980 (2016), a private contractor asserted the *Yearsley* defense against workers who had become ill as a result of the clean-up and remediation work the contractor had done for the federal Tennessee Valley Authority. The district court granted the contractor's Rule 12(b)(1) motion to dismiss, but the Sixth

Circuit reversed. Tracing the defense back to *Yearsley*, *id.* at 645-46, the Sixth Circuit succinctly framed the issue it first addressed as: "does *Yearsley* immunity pose a jurisdictional bar?" *Id*. at 646. The Sixth Circuit ruled "that *Yearsley* immunity is not jurisdictional in nature," *id.* at 647, reasoning:

> Although the FTCA [the Federal Tort Claims Act, on which the government's own liability would be based in the case] is a jurisdictional statute, . . . Jacob's potential immunity derives not from the FTCA, but from *Yearsley*, which the Fifth Circuit [in *Ackerson*, discussed in the next paragraph] correctly notes does not address sovereign immunity. *Yearsley* immunity is, in our opinion, closer to qualified immunity for private individuals under government contract, which is *an issue to be reviewed on the merits rather than for jurisdiction*.

790 F.3d at 647 (citations omitted, and emphasis added). Accordingly, the Sixth Circuit held that the defense described in *Yearsley* cannot be determined on a motion "under Rule 12(b)(1) for lack of subject-matter jurisdiction," and reversed. *Id.*

Second, in *Ackerson*, 589 F.3d at 202-03, the defendant-private contractors engaged in dredging activities that caused environmental damage to wetlands in the Mississippi River Gulf Outlet during Hurricane Katrina. The contractor defendants, among others, filed a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, which the

district court granted, and dismissed the plaintiffs' claims with prejudice. *Id.* at 203. On appeal to the Fifth Circuit, it was the plaintiffs who argued that *Yearsley* is jurisdictional, in which case, the plaintiffs urged, they should have been permitted to cure such a defect by amending their pleadings. *Id.* at 207. The Fifth Circuit rejected the jurisdictional premise of the plaintiffs' argument, reasoning that

> . . . *Yearsley* itself countenances against its application to deprive the federal courts of jurisdiction. *Yearsley* does not discuss sovereign immunity or otherwise address the court's power to hear the case. . . . we hold that concluding *Yearsley* is applicable does not deny the court of subject-matter jurisdiction.

589 F.3d at 207-08.

Third, in *U.S. ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1146-47 (9th Cir. 2004) the Ninth Circuit rejected a private contractor's argument that *Yearsley* confers a form of jurisdictional sovereign immunity on private contractors, holding that, while "[t]he government contractor defense recognized in *Boyle*[3] and *Yearsley* 'protects a government contractor from liability for acts done by him while complying with government specifications during execution of performance of a contract with the United States,' . . . the government contractor defense does not confer sovereign immunity on contractors."

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[3] *Boyle* is addressed in detail in point II below.

(Citations omitted); *see also Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259, 1265 (9th Cir. 2010) (quoting *Ali* with approval, Ninth Circuit reiterates that "[a]lthough the source of the government contractor defense is the United States' sovereign immunity, we have explicitly stated that the 'government contractor defense does not confer sovereign immunity on contractors' ") (citation omitted).

Moreover, three additional circuits and at least one state supreme court, while loosely using the phrase "derivative sovereign immunity," have undermined the notion that *Yearsley* articulates a jurisdictional immunity by describing *Yearsley* as an affirmative defense as to which the defendant has the burden of proof. *Carley v. Wheeled Coach*, 991 F.2d 1117, 1120, 1123, 1125 (3d Cir.) (describing "government contractor defense" as originating in *Yearsley*, and stating that "[t]he defendant bears the burden of proving each element of the [government contractor] defense"), *cert. denied*, 510 U.S. 868 (1993); *In re World Trade Center Disaster Site Litig.*, 521 F.3d 169, 196 (2d Cir. 2008) (while characterizing *Yearsley* defense as "derivative immunity," addressing what defendants "will have to show" to prevail on that defense); *Burgess v. Colorado Serum Co., Inc.*, 772 F.2d 844, 846, 847 (11th Cir. 1985) (describing *Yearsley* defense as "government contract defense," and stating that defendant could benefit from that defense if it "c[ould] prove the elements of the defense. . . ."); *Miller v. United Technologies Corp.*, 660 A.2d 810, 819, 833 (Conn. 1995) (describing *Yearsley*

defense as the "government contractor defense," and determining that "[t]he government contractor defense is an affirmative defense and the defendant must carry the burden of proving each element by a preponderance of the evidence").

The Fourth Circuit's ruling – that "the *Yearsley* doctrine operates as a jurisdictional bar to suit and not as a merits defense to liability," Op. at 19a, 888 F.3d at 650 – unquestionably conflicts with all of this precedent. In particular, it conflicts with the Sixth Circuit's decision in *Adkisson*, which specifically held that the *Yearsley* defense "is an issue to be reviewed on the merits rather than for jurisdiction." 790 F.3d at 647. As detailed above, *Adkisson* arose in a factual context identical to that of this case – in which a private contractor asserted the *Yearsley* defense on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction – and the Sixth Circuit rejected such a use of a Rule 12(b)(1) motion.

The Fourth Circuit's ruling also plainly conflicts with the Fifth Circuit's decision in *Ackerson*, in which the Fifth Circuit ruled that "concluding *Yearsley* is applicable does not deny the court of subject-matter jurisdiction." 589 F.3d at 208. Indeed, the Fourth Circuit acknowledged this conflict in its parenthetical describing *Ackerson* as "ultimately concluding that *Yearsley* immunity does not deprive the court of subject matter jurisdiction." Op. at 17a, 888 F.3d at 649.

Further, the Fourth Circuit's decision that *Yearsley* confers jurisdictional sovereign immunity also

conflicts with the Ninth Circuit's decision in *Ali*, which held that *Yearsley* does not confer sovereign immunity on private contractors doing work for a state entity.

Finally, the Fourth Circuit's conclusion that *Yearsley* confers a jurisdictional defense is at odds with the additional caselaw cited above confirming that *Yearsley* articulates an affirmative defense that the defendant private contractor must prove at summary judgment or at trial.

B. The Fourth Circuit's Decision also Conflicts with *Yearsley* Itself

In addition to being in conflict with various other circuits' decisions, the Fourth Circuit's decision is incompatible with *Yearsley* itself, which required the private contractor defendant to show in its defense that (i) Congress had passed a constitutional statute that specifically authorized the construction of the dikes the contractor built; (ii) the contractor had abided by the statute and the federal agency's directions in accordance with the statute; and (iii) the construction of the dikes inevitably caused damages in violation of state law. 309 U.S. at 20-21.

Nowhere does *Yearsley* utter a word about that defense being "jurisdictional," "sovereign immunity," or even "derivative sovereign immunity." *Yearsley*, 309 U.S. at 18-23. As the *Adkisson* court correctly observed: "*Yearsley* does not address sovereign immunity." *Adkisson*, 790 F.3d at 647. So too did the

Ackerson court admonish that "the Court's opinion in *Yearsley* itself countenances against its application to deprive the federal courts of jurisdiction. *Yearsley* does not discuss sovereign immunity or otherwise address the court's power to hear the case." *Ackerson*, 589 F.3d at 207.

Moreover, if the *Yearsley* Court had been articulating a jurisdictional immunity, as the Fourth Circuit concluded, the *Yearsley* Court could not have affirmed the "judgment of the [] Court of Appeals," in that case, 309 U.S. at 23, which had "direct[ed] a verdict for the contractor." *W. A. Ross Const. Co. v. Yearsley*, 103 F.2d 589, 593 (8th Cir. 1939), *aff'd*, *Yearsley*, 309 U.S. at 23. Instead, the Court would have had to rule that the lower courts lacked subject matter jurisdiction over the case and directed that the case against the contractor be dismissed on that basis. *E.g.*, *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013) (because petitioners lacked standing, this Court reversed decision of court of appeals with instructions to dismiss appeal for lack of jurisdiction); *Will v. Hallock*, 546 U.S. 345, 355 (2006) (because court of appeals lacked subject matter jurisdiction, this Court vacated judgment and remanded to court of appeals with instructions to dismiss case).

In short, the Fourth Circuit's decision in this case directly conflicts with rulings of several other circuits. Moreover, *Yearsley* itself does not provide any support for the Fourth Circuit's ruling that the *Yearsley* defense is jurisdictional.

C. It is Critically Important that this Court Resolve this Intercircuit Conflict, and Establish Whether a Plaintiff or a Defendant Bears the Burden of Proof Regarding the *Yearsley* Defense

As this Court stated in *Reed Elsevier*, 559 U.S. at 161, resolving whether a defense constitutes a jurisdictional limitation or an affirmative defense is a matter of "critical" concern to this Court. Resolving that type of issue in this case will have a very meaningful practical impact on the parties' respective burdens of proof relating to the *Yearsley* defense. If the defense is jurisdictional, the burden of proof is ultimately on the plaintiff to prove that defense does not apply. *E.g.*, *Hertz Corp v. Friend*, 559 U.S. 77, 96 (2010) (party asserting subject matter jurisdiction has burden of proving it). By contrast, if *Yearsley* articulates an affirmative defense, the burden of proof is on the defendant accused of causing the injury to establish that the defense does apply. *E.g.*, *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2008) ("the burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions.").[4]

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[4] *See also Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 195 n.4 (2012) ("We conclude that the ministerial exception [shielding a religious employer from employment discrimination liability] constitutes an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.").

Just how these burdens of proof are allocated will affect thousands of contractors that receive more than $500 billion per year[5] from the federal government. It is particularly important to resolve this issue correctly in the Fourth Circuit, home to many of those private contractors that perform work for the federal government.

II. The Fourth Circuit's Ruling that *Yearsley* Established a Defense Against Liability for Violating Federal Laws is Inconsistent with (a) *Yearsley's* Actual Holding, which Applied the Defense Only to State Law Claims, (b) Decisions by the Second, Sixth and Ninth Circuits and by this Court Confirming that State-Law Preemption, not Sovereign Immunity, is the Basis for the *Yearsley* Defense, and (c) Separation of Powers Principles Prohibiting Executive Agencies from Undermining Congress's Laws

The Fourth Circuit's erroneous assumption that the *Yearsley* defense confers a form of "sovereign immunity" also infected its holding expansively construing *Yearsley* to shield private contractors against liability for violating state *as well as federal* laws. That holding (a) incorrectly assumes that the *Yearsley* Court itself applied its defense to federal law claims,

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[5] *See* https://datalab.usaspending.gov/contract-explorer.html (reporting that federal government spent $507,922,781,815 on contracts during 2017 fiscal year).

(b) conflicts with the preemption rationale of *Yearsley* identified by this Court in *Boyle*, and in the rulings of at least three circuits, and (c) runs afoul of well-settled separation of powers principles prohibiting executive agencies from authorizing violations of federal statutes enacted by Congress.

A. *Yearsley* did not Articulate a Defense to Violations of Federal Laws

The Fourth Circuit concluded that the *Yearsley* defense shields contractors from liability for violating federal laws based on its characterization of *Yearsley* as establishing a defense to liability on "a claim arising under the Takings Clause of the Constitution." Op. at 10a, 888 F.3d at 646, citing *Yearsley*, 309 U.S. at 22-23. However, the appellate record in *Yearsley* shows that the complaint at issue initially alleged only state law claims for "damages" and "trespass" against the defendant-contractor, supported by factual allegations that the contractor's building dikes along the Missouri River had caused the river to wash away portions of the plaintiff's land, and that the contractor had come on the plaintiffs' property and cut down trees and brush. (App. 66a-67a, ¶¶ 3-5).

The confusion about whether *Yearsley* also involved a federal Takings claim arose because after the defendant had answered and asserted the defense that it had followed the government's instructions, the plaintiffs filed a reply pleading asserting that the defendant's conduct also constituted an unlawful

taking of property for which the plaintiffs were entitled to just compensation. 309 U.S. at 19-20.

While the *Yearsley* Court affirmed the dismissal of the plaintiffs' state law claims against the contractor based on the defense it created, this Court did not reject the plaintiffs' federal Takings claim based on that defense. Instead, this Court rejected the plaintiffs' Takings claim because a taking of property without advance payment to the landowner is not, by itself, a violation of the Takings Clause; only a taking, coupled with the government's failure to provide a procedure to obtain such compensation, and a failure to provide that compensation if it is due, constitutes such a violation. 309 U.S. at 21-22; *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."). Moreover, the only method available to the *Yearsley* plaintiffs for obtaining just compensation was to file an action against the U.S. government itself in the Court of Claims, which the plaintiffs had not pursued. 309 U.S. at 21-22; *Williamson*, 473 U.S. at 194-95.

Accordingly, the *Yearsley* plaintiffs' federal Takings claim against the contractor failed because (a) the plaintiffs' Takings claim had not yet ripened; (b) the plaintiffs had not asserted such claims in the only possible venue for doing so, the Court of Claims; and (c) only the government could be held liable on such a claim – *not* because the Court was creating any private contractor defense to federal law liability.

Indeed, the Fourth Circuit's conclusion that this Court dismissed the Takings claim in *Yearsley* based on the private contractor defense cannot be squared with one of *Yearsley's* requirements for establishing that defense. Specifically, the private contractor must demonstrate that "what was done was within the constitutional power of Congress. . . ." *Yearsley*, 309 U.S. at 20. Because a Takings claim is based on a defendant's *violating* a Constitutional right, not complying with a Constitutional statute, such a claim, by definition, cannot satisfy this element of the *Yearsley* defense, and therefore cannot be covered by the *Yearsley* defense.

As a result, a close reading of *Yearsley* confirms that it created a defense only to violations of state law, not federal law. As this Court subsequently reconfirmed, "[i]n *Yearsley* . . . we rejected an attempt by a landowner to hold a construction contractor liable *under state law* for the erosion of 95 acres caused by the contractor's work in constructing dikes for the Government." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506 (1988) (emphasis added).

B. *Yearsley's* Defense to State Law Liability is not Based on Sovereign Immunity, as the Fourth Circuit Determined, but instead Is Based on Preemption Principles, as this Court and the Second, Sixth and Ninth Circuits Have Recognized

Compounding its erroneous conclusion that the *Yearsley* Court applied its defense to federal law

claims, the Fourth Circuit concluded that the *Yearsley* defense "stem[s]" from "the concept of derivative sovereign immunity," pursuant to which a contractor, like the federal government itself, might claim immunity from state and federal law claims. Op. at 3a-4a, 888 F.3d at 643. However, the *Yearsley* defense is not "derived" from the government's own sovereign immunity, but is instead related to preemption principles – and therefore shields only against state law liability – as this Court and the Second, Sixth and Ninth Circuits have determined.

1. This Court's Decisions in *Yearsley* and *Boyle* are not Based on Sovereign Immunity

First, as discussed in the preceding section of this petition, nowhere does the *Yearsley* decision utter the words "sovereign immunity" or "derivative sovereign immunity." Moreover, the sole federal claim at issue in *Yearsley* was a Takings claim for which, as discussed in the preceding section, the federal government in fact has no immunity and can be held liable: "if the authorized action in this instance does constitute the taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims." 309 U.S. at 21. Given that the federal government itself lacked sovereign immunity to the Takings claim, the federal government's contractor could not claim any immunity

as "derivative" of the government's immunity, wholly undercutting the Fourth Circuit's conclusion that *Yearsley* involved "derivative" sovereign immunity.[6]

Second, in *Boyle*, 487 U.S. at 502, this Court expanded and refined *Yearsley*, and pointed to preemption of state law, not sovereign immunity, as the source of its defense. In *Boyle*, the plaintiff brought an action under state law against a military helicopter manufacturer for the wrongful death of the plaintiff's U.S. Marine pilot son in a helicopter crash. Unlike the situation in *Yearsley*, no federal statute specifically authorized the defendant to manufacture the helicopter with the feature that led to the pilot's death. Nevertheless, this Court cited *Yearsley* for the proposition that state law claims against private contractors working for the federal government may be barred because of "uniquely federal" interests. *Id*. at 505-06.

This Court then articulated a variant of *Yearsley* designed to address the statute-less situation before it, requiring that the manufacturer prove that "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law. . . .'" 487 U.S. at 507 (citations omitted). The

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[6] *Anchorage v. Integrated Concepts and Research Corp.*, 1 F. Supp.3d 1001, 1008 (D. Alaska 2014) (" . . . *Yearsley* specifically left open the possibility that the private landowners could obtain compensation from the government had there been an unconstitutional taking without just compensation. Thus, this Court does not construe *Yearsley* to involve derivative sovereign immunity.").

Court determined that the manufacturer could do so by showing that "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the [manufacturer] warned the United States about the dangers in the use of the equipment that were known to the [manufacturer] but not to the United States." *Id*. at 512.

Boyle and *Yearsley* together stand for the proposition that under certain circumstances, "unique[ ] federal interest[s]" or policies reflected in federal contracts that "significant[ly] conflict" with state law can "displace[ ] state law," and thereby afford federal contractors immunity from state law liability. *Boyle*, 487 U.S. at 507. In *Boyle*, the significant conflict was between (a) the federal government's interest in procuring equipment manufactured in accordance with government specifications and accompanied by warnings about any dangers, and (b) state law. In *Yearsley*, the significant conflict was between (a) constitutional congressional legislation authorizing the work at issue, and (b) state law. Accordingly, the common denominator in *Boyle* and *Yearsley* is that the federal government's interest in accomplishing the task at issue was sufficiently strong *to preempt state laws* that were violated in pursuing those interests.

2. The Second, Sixth and Ninth Circuits' Decisions Confirm that *Yearsley* is Based on Preemption, and therefore Protects only Against Violations of State Law

At least three circuit courts have confirmed that *Yearsley* and *Boyle* articulate related defenses, and that preemption of state law is the principal rationale for them.

In *In re World Trade Center*, 521 F.3d at 196, the Second Circuit observed that "[i]n *Boyle*, the Court refined the [*Yearsley*] requirements for a type of derivative immunity for government military contractors," and underscored that such "immunity flows only where there is a significant conflict between the *state law* and a federal policy or interest." (emphasis added and citation and quotation marks omitted).

Similarly, in *Adkisson*, 790 F.3d at 646, the Sixth Circuit observed that "the Supreme Court has cast *Yearsley* in terms of preemption, explaining that the 'uniquely federal interest' in the performance of government contracts justified displacing state-law liability," quoting *Boyle*, 487 U.S. at 505-06, and *cert. denied*, 136 S. Ct. 980 (2016).

Finally, in *U.S. ex rel. Ali*, 355 F.3d at 1146-47, the Ninth Circuit described the government contractor defense as supporting "[t]he federal interest in protecting its contractors from *state tort liability*," and confirmed that while "[t]he government contractor defense recognized in *Boyle* and *Yearsley* 'protects a

government contractor from liability for acts done by him while complying with government specifications during execution of performance of a contract with the United States,' . . . the government contractor defense does not confer sovereign immunity on contractors." (Citations omitted and emphasis added).[7]

3. The Fourth Circuit Ignored this Court's, as well as the Second, Sixth and Ninth Circuits', Precedent on the Scope of, and Rationale for, the *Yearsley* Defense

The Fourth Circuit's ruling that *Yearsley* protects against violations of federal law is erroneous in five different respects.

First, it ignores Cunningham's showing that the *Yearsley* Court itself applied its defense only to claims for violation of state law.

Second, it ignores this Court's explicit statement in *Boyle* that *Yearsley's* defense pertains only to "liab[ility] under state law. . . ." 487 U.S. at 506.

Third, it ignores the Second, Sixth and Ninth Circuits' precedent underscoring that *Yearsley* and *Boyle*

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[7] *See also Cabalce v. VSE Corp*., 922 F. Supp.2d 1113, 1123 (D. Haw. 2013) ("both defenses have a similar rationale"), *aff'd*, 797 F.3d 720 (9th Cir. 2015); *Hilbert v. McDonnell Douglas Corp.*, 529 F. Supp.2d 187, 197 n.8 (D. Mass. 2008) (holding that "*Boyle* expands and elaborates *Yearsley*, but does not set forth a separate doctrine"); *Schnabel v. BorgWarner Morse TEC*, No. CV 08-04714, 2008 WL 11336462, at *8 n.1 (C.D. Cal. Oct. 6, 2008) (same).

articulate related defenses based on preemption, and hence protect only against violations of state law. Instead, the Fourth Circuit, citing one of its own prior decisions, incorrectly stated that *Yearsley* and *Boyle* articulate different defenses; that derivative sovereign immunity is the rationale for *Yearsley* and preemption is the rationale for *Boyle*; and that therefore, "*Boyle* is inapposite to determining the applicability of derivative sovereign immunity." Op. at 10a-11a n.4, 888 F.3d at 646 n.4 (citation omitted).

Fourth, the Fourth Circuit's ruling uses tenuous reasoning by negative implication to justify its conclusion that *Yearsley* shields against liability for violating federal law. In the Fourth Circuit's words, "we find no language [in *Yearsley*] indicating that the Supreme Court intended to limit its holding to claims arising under state law. . . . Additionally, the Supreme Court identified instances when government contractors were not immune from liability, and notably did not mention federal law claims." Op. at 9a, 888 F.3d at 645-46. The Fourth Circuit's conclusion, however, does not necessarily follow from its premise, and improperly extracts a ruling from *Yearsley* that the *Yearsley* Court did not make. *See, e.g.*, *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 144-45 (2011) (admonishing that when an issue "is neither noted nor discussed in a federal decision, the decision does not stand for the proposition [that the issue has been decided one way or another]").

Fifth and finally, the Fourth Circuit tried to find support for its ruling that *Yearsley* shields against

federal law liability in this Court's recent decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), describing *Campbell-Ewald* as "concluding that *Yearsley* may immunize violations of the [federal] TCPA." Op. at 10a, 888 F.3d at 646, citing *Campbell-Ewald*, 136 S. Ct. at 672. *Campbell-Ewald*, however, did not come to any such conclusion.

In *Campbell-Ewald*, a government contractor had failed to follow the Navy's instructions that the contractor send texts only to those persons who had provided prior express consent to receive them. 136 S. Ct. at 674. Because of that failure, this Court ruled that the contractor could not invoke the *Yearsley* defense. *Id*. The Court nowhere ruled, one way or another, on the underlying legal issue of whether the *Yearsley* defense covers federal law liability in the event that the contractor does in fact follow an agency's specific instructions to violate federal law. The most that might be said is that the Court assumed, without any analysis, that the *Yearsley* defense covered federal TCPA claims, but did not find it necessary to address that legal issue because it dismissed the plaintiff's claims on the alternative factual ground that the contractor did not in any event follow the government's instructions. *E.g.*, *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 752 n.4 (2017) (leaving for another day resolution of unresolved question that Court did not need to resolve); *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986) (same); *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993)

(noting that *stare decisis* is not applicable unless issue was "squarely addressed" in the prior decision).[8]

As a result, the Fourth Circuit's ruling that *Yearsley* shields against violations of federal law runs afoul of this Court's precedent as well as precedent from the Second, Sixth and Ninth Circuits.

C. The Fourth Circuit's Ruling that *Yearsley* Protects Against Federal Law Liability Enables Federal Agencies to Authorize Private Parties to Violate Acts of Congress, Violating Separation of Powers Principles

The Fourth Circuit's ruling that *Yearsley* shields contractors from liability for violating federal laws cannot stand for an additional reason: it authorizes executive agencies to intrude into Congress's powers.

A fundamental separation of powers principle is that members of the Executive Branch cannot engage in conduct, or authorize others to engage in conduct, that violates federal statutes enacted by the Legislative Branch. This principle dates back two centuries, to *Little v. Barreme*, 6 U.S. 170, 176-79 (1804), in which this Court ruled that even the President could not, through an order to a naval officer, authorize that officer to act in violation of federal law or shield that officer from being held liable for individual damages

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[8] *Brecht* was superseded by statute on other grounds as stated in *Zappulla v. New York*, 391 F.3d 462, 466-67 (2d Cir. 2004), *cert. denied*, 546 U.S. 957 (2005).

for those illegal actions. *See also Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536 (1988) ("discretionary function" immunity, which immunizes federal government from liability for discretionary acts of government employees under Federal Tort Claims Act, "will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. . . . the employee has no rightful option but to adhere to the directive").[9]

Similarly, any provision in a federal agency contract with a private contractor that violates federal law is outside the contracting authority of the agency that enters into it, and is unenforceable. *E.g.*, *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-86 (1947) (purported contract with federal government agent void because it conflicted with federal law); *Office of Personnel Management v. Richmond*, 496 U.S. 414, 420 (1990) ("' . . . the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.'") (citation omitted); *Total Medical Mgmt., Inc. v. United States*, 104 F.3d 1314, 1321 (Fed. Cir.) ("Neither the Secretary of Defense nor any of his designated representatives had the authority to [enter into a contract that violated federal law.]"), *cert. denied*,

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[9] *See also Westfall v. Ervin*, 484 U.S. 292, 297 (1988) ("Because it would not further effective governance, absolute immunity [from state-law tort liability] for nondiscretionary functions finds no support in the traditional justification for immunity"). *Westfall* was superseded by statute on other grounds in 28 U.S.C. § 2679.

522 U.S. 857 (1997); 48 C.F.R. § 1.602-1(b) (requiring all federal contracts to abide by "all requirements of law, executive orders, [and] regulations").

Along the same lines, this Court has held that a federal agency order, rule or regulation that violates federal law is invalid. *E.g.*, *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2241 (2014) ("An agency may not reorder federal statutory rights[, including private causes of action under federal law,] without Congressional authorization."); *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2466 (2014) (federal agency rule that conflicted with federal statute was void); *Brown v. Gardner*, 513 U.S. 115, 117-22 (1994) (invalidating agency regulation that created nonstatutory defense to private right of action established by federal statute).

In contravention of these longstanding separation of powers principles and the caselaw construing them, the Fourth Circuit in this case ruled that federal agencies not only have the authority to direct private contractors to violate federal laws, but also that that those federal agency directions will shield those contractors from liability for those federal law violations. Op. at 9a-11a, 888 F.3d at 645-46. Despite the fact that Cunningham addressed these separation of powers principles at length, the Fourth Circuit completely ignored them – another compelling reason why this Court should hear this appeal.

III. By Diluting *Yearsley's* Threshold Requirement that a Federal Statute Must Specifically Authorize an Agency to Direct a Contractor to Violate Other Laws, the Fourth Circuit has Enabled Executive Agencies to Subvert Congress's Will in Other Federal Laws

Even if *Yearsley* could be construed to immunize against liability for violating federal laws – which it cannot – the Fourth Circuit also improperly construed *Yearsley's* threshold requirement that the federal statute pursuant to which the federal agency was acting authorize the agency to direct the contractor to engage in the specific conduct at issue – in this case, to make robocalls without obtaining prior express consent in violation of the TCPA. Instead, the Fourth Circuit construed the ACA's general authorization to CMS to market health insurance plans and "make a reasonable effort" to contact applicants for health insurance to correct errors or inconsistencies in their applications, 42 U.S.C. § 18081(e)(4)(A)(i), as carte blanche for CMS to direct contractors to violate the TCPA and other federal laws. Op. at 12a, 15a-16a, 888 F.3d at 648-49. That conclusion also is incorrect as a matter of law.

As explained in the preceding sections of this petition, *Yearsley* requires a contractor to demonstrate that a federal law specifically authorizes the conduct for which a private party seeks to hold the contractor liable. In *Yearsley*, a federal statute specifically authorized the construction of dikes along the Missouri

River that "inevitabl[y]" caused damage to the plaintiffs' land. *Yearsley*, 309 U.S. at 20 ("the work which the contractor had done in the river bed was all authorized and directed by the government of the United States . . . [and] the work . . . was performed pursuant to the Act of Congress of January 21, 1927. . . ."). As several courts, including the Fourth Circuit itself, have since admonished, a private contractor cannot invoke *Yearsley* or *Boyle* just because it was "staying with the thematic umbrella of the work the government authorized." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 345 (4th Cir. 2014), *cert. denied sub nom. KBR, Inc. v. Metzgar*, 135 S. Ct. 1153 (2015); *L-3 Communics. Corp. v. Serco Inc.*, 39 F. Supp.3d 740, 751 (E.D. Va. 2014) ("a federal contractor must . . . have been authorized by the government to commit *the specific acts* of which the plaintiff complains") (emphasis added).

Severely weakening this requirement, the Fourth Circuit attempted to tease Congressional authorization for CMS to direct GDIT to make unconsented-to robocalls in violation of the TCPA out of the portion of the ACA that generally "directs CMS to establish a system to keep applicants informed about their eligibility for enrollment in a qualified health plan." Op. at 12a, 888 F.3d at 647, citing 42 U.S.C. §§ 18083(a), (b)(2) & (e). Neither those provisions nor anything else in the ACA utters a word about the TCPA, much less empowers CMS to establish a system by which

CMS's contractors are entitled to make robocalls in violation of the TCPA.[10]

Moreover, the Fourth Circuit's indulgent view that the *Yearsley* defense is available to a private contractor whenever the agency hiring it is acting within its general statutory authority to implement a government program effectively renders this Court's decision in *Boyle* superfluous. *Boyle* concerned a U.S. Navy contract with a helicopter manufacturer that the Navy indisputably had authority to enter into. Despite this broad authority, and despite the fact that the contractor had abided by the Navy's specifications in the contract, this Court *further* required the contractor to show that "the [contractor had] warned the United States about the dangers in the use of the equipment that were known to the [contractor] but not to the United States." *Boyle*, 487 U.S. at 512. As the Sixth Circuit observed in *Adkisson*, 790 F.3d at 646, if *Yearsley* could be interpreted to cover any work an agency is generally authorized to hire a contractor to perform where the contractor generally follows the

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[10] Not only is there no Congressional authorization in the ACA permitting CMS to authorize GDIT to make robocalls in violation of the TCPA, but CMS never in fact specifically directed GDIT to make robocalls without obtaining the prior express consent required by the TCPA, as the *Yearsley* defense also requires. As CMS itself conceded:

> Q. Did CMS ever direct GDIT to make the autodial calls, regarding health insurance and health care exchanges, without obtaining prior [ ] informed consent?
>
> A. No.

(JA940:9-16).

agency's directions, "the Supreme Court in *Boyle* would presumably not have invented a new test to govern the liability of military procurement contracts; it could have simply cited *Yearsley* and called it a day."

Finally, the only way in which the Fourth Circuit's broad interpretation of the ACA's authorizing provisions could be reconciled with the TCPA's prohibitions would be to conclude that the ACA has repealed the TCPA by implication. This Court has long held, however, that "repeals by implication are not favored and will not be presumed unless the intention of the legislature [is] clear and manifest." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (internal quotation marks omitted); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("[W]e come armed with the 'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute.") (citations omitted). Accordingly, courts

> will not infer a statutory repeal unless a later statute *expressly contradicts* the original act or *unless such a construction is absolutely necessary* . . . in order that [the] words [of the later statute] shall have any meaning at all. Outside these limited circumstances, a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.

National Ass'n, 551 U.S. at 662-63 (emphasis added, and internal citations and quotation marks omitted).

Nothing in the ACA "expressly contradicts" any of the TCPA's prohibitions against robocalls. Moreover, far from being "absolutely necessary" to reconcile the ACA with the TCPA, the Fourth Circuit's construction of the ACA to implicitly repeal the TCPA is entirely unnecessary. The portion of the ACA requiring "reasonable effort[s]" to contact applicants for health insurance can easily be interpreted to mean efforts that are consistent with other federal laws such as the TCPA. Accordingly, the ACA does not, explicitly or implicitly, authorize CMS or GDIT to violate the TCPA, contrary to the Fourth Circuit's ruling.

CONCLUSION

Given the circuit splits and confusion concerning the scope of, and rationale for, the *Yearsley* defense – which is applicable to over $500 billion worth of government contracts per year – this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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