No. 18-206

IN THE

Supreme Court of the United States

CRAIG CUNNINGHAM,

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under this Court's ruling in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), a government contractor is entitled to immunity from suit arising out of actions that the government authorized and for which the government validly conferred authorization. 309 U.S. at 20–21.

The questions presented are:

1. Did the district court err by dismissing Petitioner's complaint under Fed. R. Civ. P. 12(b)(1) when, after discovery, the district court determined on the basis of uncontested facts that the government authorized Respondent's actions and that the government's authorization was validly conferred?

2. Should the Court, for the first time, recast *Yearsley* as a preemption doctrine that applies only to claims arising under state law?

3. Should the Court, for the first time, narrow *Yearsley* in the case of alleged violations of federal law, by limiting its application to cases in which Congress itself, as opposed to a federal agency acting pursuant to congressional authority, specifically directs that the contractor perform the acts at issue?

LIST OF PARTIES AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 24.1(b) and Rule 29.6, the following list identifies all the parties to the proceedings before the United States Court of Appeals for the Fourth Circuit:

Petitioner, and plaintiff below, is Craig Cunningham.

Respondent, and defendant below, is General Dynamics Information Technology, Incorporated.

General Dynamics Information Technology, Incorporated is a wholly owned subsidiary of General Dynamics Government Systems Corporation, which is a wholly owned subsidiary of General Dynamics Corporation. General Dynamics Corporation is a public corporation. No publicly held corporation owns 10% or more of the stock of General Dynamics Corporation.

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INTRODUCTION

This case warrants no further review because it presents a straightforward application of the *Yearsley* doctrine to uncontroverted facts. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). Petitioner does not and cannot dispute the basic elements of the *Yearsley* doctrine, which, as this Court articulated just three Terms ago, grants "certain immunity" to government contractors who "perform[] in compliance with all government directions." *Campbell-Ewald Co v. Gomez*, --- U.S. ---, 136 S. Ct. 663, 672, 673 n.7 (2016). The district court and a unanimous panel of the Fourth Circuit found that GDIT was entitled to this immunity because GDIT followed "to a T" the instructions it received from the Centers for Medicare & Medicaid Services ("CMS") regarding delivery of a public service announcement using autodial calls. The application of *Yearsley* to Petitioner's Telephone Consumer Protection Act ("TCPA") claim follows straightforwardly from *Campbell-Ewald* and longstanding Court of Appeals precedent.

Faced with this inevitable result under existing law, Petitioner attempts to manufacture bases for certiorari by raising purported questions about *Yearsley* that are either of no significance to this case, or that invite the Court to narrow the doctrine radically. The Court should decline such an invitation.

As to whether *Yearsley* offers an "affirmative defense" or "jurisdictional immunity," the Fourth Circuit correctly treated it as the latter, but in any event, the question is irrelevant here. Petitioner

asserts that the difference matters because deeming *Yearsley* a "jurisdictional immunity" forces a plaintiff to bear the burden of demonstrating that *Yearsley* does not apply. But whether described as a defense or immunity, courts invariably require a defendant asserting the *Yearsley* doctrine to demonstrate that the requirements of the doctrine are met – including by ordering discovery as appropriate. That is what happened here. In this case, the district court found "strong evidence" that GDIT had satisfied *Yearsley*'s two prongs, but refused to dismiss Mr. Cunningham's claims on the face of the complaint. Instead, the district court ordered the parties to engage in 75 days of discovery, which demonstrated conclusively that the *Yearsley* elements were satisfied, regardless of how the doctrine is characterized. Even if *Yearsley*'s status as a "jurisdictional immunity" were worthy of review – which it is not – this case would not be an appropriate vehicle for that review.

Regarding the supposed inapplicability of *Yearsley* to federal claims, Petitioner invites the Court to disregard more than 70 years of case law applying *Yearsley* by ruling – for the first time – that *Yearsley* implicitly created a preemption-based doctrine that applies only to claims arising under state law. The respondent in *Campbell-Ewald* advanced this very argument, and the Court did not adopt it, proceeding instead to evaluate whether the elements of *Yearsley* were satisfied in the context of a federal TCPA claim. Once again here, there is no reason to upend settled law. Far from demonstrating an unresolved question on this issue,

Petitioner cites no case anywhere that has ever limited the *Yearsley* doctrine to state law claims.

Finally, Petitioner's purported concern that *Yearsley* encourages federal law breaking and implicates "separation of powers" issues is misguided, and in any event, does not arise in the circumstances of this case. Petitioner contends that *Yearsley* applies only if Congress specifically directed by statute the contractor's commission of the allegedly unlawful acts. If accepted, Petitioner's theory would limit *Yearsley*'s application to circumstances when a contractor would not be subject to liability anyway, because the contractor would be acting pursuant to federal law according to a specific direction from Congress. Such a radical narrowing of *Yearsley* would undermine the purpose of the doctrine, which is to facilitate the government's hiring of contractors and to mitigate the chilling effect of potential civil liability for carrying out the government's instructions. And whatever hypothetical concern could arise in another case, no such concern applies here. The TCPA does not apply to the federal government, and thus CMS instructed GDIT to do something that CMS was fully permitted to do on its own. If *Yearsley* means anything, it must mean that a contractor like GDIT is immune from civil liability for carrying out a routine, permissible government function executed in compliance – in this case, perfect compliance – with the government's instructions.

STATEMENT OF THE CASE

A. Background

1. CMS contracts with GDIT to carry out certain CMS obligations under the Affordable Care Act.

The Patient Protection and Affordable Care Act ("ACA") directs CMS to establish a system to keep applicants informed about their eligibility for enrollment in a qualified health plan, *see* 42 U.S.C. § 18083(a), (b)(2), and (e), and mandates that CMS "make a reasonable effort to identify and address the causes of [any] inconsistency" in an application "by contacting the applicant to confirm the accuracy of the information." Pet. App. 53a–56a; *see also* 42 U.S.C. § 18081(e)(4)(A)(i). [1] In order to meet its obligations under the ACA, CMS awarded a contract to GDIT's predecessor, Vangent, Inc., to provide contact center operations supporting CMS programs, including the government's HealthCare.gov website. Pet. App. 5a; *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 644 (4th Cir. 2018).

GDIT's obligations under the contract included making "outbound calls" if CMS required such calls to "support customer service needs." Pet. App. 26a; *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, No. 1:16-cv-00545, 2017 WL 1682534, at *2 (E.D. Va. May 1, 2017). The contract provided that the "outbound calls" that CMS could direct GDIT to

[1] Citations to the Petitioner's Appendix are abbreviated "Pet. App."

make would "include . . . auto-dial message campaigns . . . utilizing system generated call technology." *See* Pet. App. 42a–43a; *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, No. 1:16-cv-00545, Order [Dkt. No. 47] (E.D. Va. Oct. 18, 2016) ("Oct. 18, 2016 Order").

CMS maintains a website, HealthCare.gov, through which individuals may enroll for health coverage under the ACA using an online application. Pet. App. 4a–5a; *Cunningham*, 888 F.3d at 644. To apply for coverage on HealthCare.gov, applicants must provide their name and phone number, among other information. Pet. App. 5a; *Cunningham*, 888 F.3d at 644. The applicant must also accept, by affirmatively clicking an "Accept" box, CMS's privacy policy, which provides that CMS "may use the phone number you provide to call you about Marketplace coverage." Pet. App. 43a; Oct. 18, 2016 Order at 3. CMS collected the telephone numbers provided by applicants to HealthCare.gov for use in its efforts to keep such applicants informed as Congress mandated. *See* Pet. App. 42a–43a; Oct. 18, 2016 Order at 3–4.

2. CMS directs GDIT to autodial Mr. Cunningham.

On Tuesday, December 1, 2015, CMS sent GDIT approximately 2.65 million telephone numbers and directed GDIT to make an autodialed, recorded call to each of those numbers over the next five days. Pet. App. 5a–6a; *Cunningham*, 888 F.3d at 644. These numbers were provided in seven lists; CMS specified the exact day that GDIT was to call the numbers on each list and which of the scripts that

CMS provided GDIT would use for each call. Pet. App. 6a; *Cunningham*, 888 F.3d at 644. One of CMS's lists provided on December 1, 2015, directed GDIT to call Mr. Cunningham's cellular phone (and approximately 680,000 other numbers) the next day (December 2, 2015). Pet. App. 6a; *Cunningham*, 888 F.3d at 644. On December 2, 2015, GDIT made an autodialed, prerecorded call to Mr. Cunningham's cellular phone and left the verbatim message that CMS directed. Pet. App. 6a; *Cunningham*, 888 F.3d at 644.

B. The district court grants GDIT's motion to dismiss following jurisdictional discovery.

Mr. Cunningham commenced this action, alleging that GDIT had made an automated, prerecorded call to Mr. Cunningham and to others "without having received prior express consent," in alleged violation of the TCPA. Pet. App. 39a–41a; Oct. 18, 2016 Order at 1. GDIT moved to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) on the ground that, because GDIT called Mr. Cunningham as directed by CMS, GDIT is immune from suit under the *Yearsley* doctrine. *See* Pet. App. 39a, 44a; Oct. 18, 2016 Order at 1, 4. GDIT supported its motion with, among other materials, the declaration of a CMS employee that attached the contract and described CMS providing Mr. Cunningham's phone number and directing GDIT to place a call to that phone number. Pet. App. 41a–42a, 49a; Oct. 18, 2016 Order at 2–4.

On October 18, 2016, the district court issued an interim order stating that, under *Yearsley*, a

government contractor is immune from suit if (1) the government authorized the contractor's actions, and (2) the government validly conferred that authorization. Pet. App. 45a; Oct. 18, 2016 Order at 5. The district court preliminarily found that GDIT had put forth "strong evidence to support GDIT's claims of immunity" and that CMS "appears to have authorized and instructed GDIT to do *exactly* what it did (to the word) in delivering the message that it left on Mr. Cunningham's message machine." Pet. App. 49a; Oct. 18, 2016 Order at 8. The district court determined, however, that GDIT had not "conclusively" demonstrated that it was authorized to call Mr. Cunningham, and, without shifting the burden to Mr. Cunningham, ordered the parties to conduct discovery regarding GDIT's entitlement to *Yearsley* immunity. Pet. App. 50a; Oct. 18, 2016 Order. at 9. The parties then engaged in 75 days of discovery, which included six subpoenas, four *Touhy* requests, numerous document requests, and six depositions of GDIT and CMS employees. Pet. App. 8a; *Cunningham*, 888 F.3d at 645. Factual discovery firmly established that GDIT performed exactly as instructed and authorized. Pet. App. 28a–29a; *Cunningham*, 2017 WL 1682534, at *3.

On May 1, 2017, the district court granted GDIT's motion to dismiss for lack of subject matter jurisdiction on the ground that GDIT was immune from suit pursuant to the *Yearsley* doctrine. Pet. App. 22a, 38a; *Cunningham*, 2017 WL 1682534, at *1, *7. The district court held that CMS had "validly conferred" authorization to call Mr. Cunningham because the ACA vested authority in CMS, and CMS itself could not be sued under the TCPA. Pet. App.

32a–34a; *Cunningham*, 2017 WL 1682534, at *5. The district court also concluded that the *Yearsley* doctrine was properly treated as a jurisdictional bar rather than as an affirmative defense, Pet. App. 35a–36a; *Cunningham*, 2017 WL 1682534, at *6, but explained that the distinction had "little practical meaning where, as here, the parties engaged in a fulsome discovery process." Pet. App. 35a; *Cunningham*, 2017 WL 1682534, at *6. The district court therefore concluded that whether the motion had sought relief as a matter of summary judgment or under 12(b)(1) was "of no practical import" because jurisdictional discovery had "conclusively establish[ed] the *merits*." Pet. App. 36a; *Cunningham*, 2017 WL 1682534, at *6.

C. The Fourth Circuit unanimously affirms.

Mr. Cunningham subsequently appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit. Mr. Cunningham's appeal presented three challenges to the district court's ruling: (1) whether the *Yearsley* doctrine shields government contractors from claims arising under federal law; (2) whether GDIT's actions were "duly authorized" by CMS and whether CMS's authority was "validly conferred"; and (3) whether the district court erred by assessing the application of *Yearsley* on a motion under Fed. R. Civ. P. 12(b)(1). The Fourth Circuit unanimously affirmed.

As to the question of whether *Yearsley* bars claims brought pursuant to federal statutes, the Fourth Circuit first examined the *Yearsley* opinion and found "no language indicating that the Supreme Court intended to limit its holding to claims arising

under state law." Pet. App. 9a; *Cunningham*, 888 F.3d at 645–46. The Fourth Circuit also noted that *Yearsley* identified circumstances in which contractors are not immune, and notably did not mention suits under federal law. Pet. App. 9a; *Cunningham*, 888 F.3d at 646. The Fourth Circuit also observed that cases relying on *Yearsley* have never drawn any distinction between actions arising under federal or state law, and cited to the Court's recent decision in *Campbell-Ewald*, where "the Supreme Court [] addressed *Yearsley* in relation to the TCPA – the same federal law at issue here," as a reaffirmation of the basic requirements of *Yearsley* without any implication that the immunity was limited to claims arising from state law. Pet. App.10a–11a; *Cunningham*, 888 F.3d at 646.

The Fourth Circuit addressed Cunningham's argument that GDIT failed to meet the test for *Yearsley* immunity, which requires a showing that (1) the government authorized the contractor's actions and (2) the government "validly conferred" that authorization. Pet. App. 11a; *Cunningham*, 888 F.3d at 646–47. Taking each *Yearsley* prong in turn, the Fourth Circuit first determined that CMS provided GDIT with a detailed series of instructions that "GDIT performed exactly as CMS directed." Pet. App. 13a; *Cunningham*, 888 F.3d at 647. The Fourth Circuit rejected Cunningham's argument that GDIT exceeded its authority by failing to contact Cunningham to obtain his consent before making the autodialed call that CMS directed. Pet. App. 13a–14a; *Cunningham*, 888 F.3d at 647–48. To the contrary, the Fourth Circuit found that CMS did not authorize GDIT to contact individuals other than to

place the automated call as CMS directed, and that CMS did not direct or even expect GDIT to obtain consent. Pet App. 14a; *Cunningham*, 888 F.3d at 647–48. GDIT's actions, according to the Fourth Circuit, contrasted sharply with those of the contractor in *Campbell-Ewald*, in that the contractor there sent text messages to unauthorized numbers despite being instructed to identify individuals who had opted to receive marketing messages and to contact only those individuals. Pet. App. 14a; *Cunningham*, 888 F.3d at 648. All this led the Fourth Circuit to hold that GDIT met the first prong of the *Yearsley* doctrine. Pet. App. 14a; *Cunningham*, 888 F.3d at 648.

Turning to the "validly conferred" prong of *Yearsley*, the Fourth Circuit held that the relevant question was whether Congress had the authority to direct GDIT to place the call at issue, that there was no dispute as to that question, and that Cunningham's argument regarding the supposed impropriety of CMS's authorization "misinterprets the scope of *Yearsley*'s second step." Pet. App. 15a–16a; *Cunningham*, 888 F.3d at 648. As the Fourth Circuit explained, "it cannot be that an alleged violation of law per se precludes *Yearsley* immunity." Pet. App. 15a–16a; *Cunningham*, 888 F.3d at 648–49. Because GDIT demonstrated that it also met the second prong of the *Yearsley* doctrine, the Fourth Circuit concluded that GDIT was immune from suit and affirmed the district court's dismissal for lack of subject matter jurisdiction. Pet. App. 16a; *Cunningham*, 888 F.3d at 649.

Addressing the question of whether *Yearsley* creates a jurisdictional bar or affirmative defense, the Fourth Circuit stated that "the concept of derivative sovereign immunity [stems] from the Supreme Court's decision in *Yearsley*," and that when the *Yearsley* doctrine applies, "'a government contractor is not subject to suit.'" Pet. App. 3a, 18a (citation omitted); *Cunningham*, 888 F.3d at 643, 649 (citation omitted). The Fourth Circuit also recognized that "discovery may be appropriate" before dismissal on *Yearsley* grounds, and found that "the discovery [conducted] provided Cunningham with appropriate procedural safeguards and provided sufficient information for the district court to rule on GDIT's motion." Pet. App. 20a–21a; *Cunningham*, 888 F.3d at 650–51.

REASONS FOR DENYING THE PETITION

The petition does not warrant this Court's review. The district court and Fourth Circuit applied the established elements of the *Yearsley* doctrine to uncontroverted facts in a manner consistent with more than 70 years of case law, including this Court's decision three Terms ago in *Campbell-Ewald*. Petitioner identifies no error committed below, let alone an error of sufficient importance to warrant this Court's review.

Instead, the petition raises purported questions about the *Yearsley* doctrine that are either of no relevance here, or that would require radical and unwarranted changes to settled law. The flaws in each of Petitioner's three arguments for review are discussed below.

I. Whether *Yearsley* is Best Described as a "Jurisdictional Immunity" or "Defense" Does Not Merit This Court's Review.

Petitioner argues that the Fourth Circuit erred by treating the *Yearsley* doctrine as a "jurisdictional immunity" properly adjudicated in the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(1). In Petitioner's view, he was prejudiced by this ruling because it supposedly led the Fourth Circuit to place the burden on Petitioner to *disprove* the application of *Yearsley* immunity, and he argues that this Court's guidance is required to address a supposed "circuit split" on this issue. Petitioner is wrong for at least three reasons.

First, the Fourth Circuit's characterization of the *Yearsley* doctrine as a jurisdictional immunity is supported by case law, including the *Yearsley* decision itself. *See Yearsley*, 309 U.S. at 21 (collecting cases extending sovereign immunity to government officers and agents, discussed in Point II, at page 21, below). *Yearsley* confers a "derivative sovereign immunity" which, as an "immunity from suit" rather than from liability, is jurisdictional. *In re KBR, Inc. Burn Pit Litig.*, 744 F.3d 326, 343–44 (4th Cir. 2014); *see also Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000).[2]

[2] Petitioner's argument that *Yearsley* must not offer a jurisdictional immunity because this Court, in *Yearsley*, affirmed the judgment of the Court of Appeals directing a verdict for the contractor rather than dismissing for lack of subject matter jurisdiction is of no moment; this Court has, in *Campbell-Ewald*, described the *Yearsley* doctrine as offering a "certain immunity" to contractors. 136 S. Ct. at 672.

Second, the characterization of *Yearsley* as a "jurisdictional immunity" had no practical impact on this case, including no resulting burden shifting of the type suggested by Petitioner. Far from requiring Petitioner to disprove the application of *Yearsley*, the district court went to substantial lengths to require *GDIT* to provide evidence that it had followed CMS's directions. The district court declined to afford any benefit of the doubt to GDIT, ordering 75 days of discovery as a conservative, precautionary measure, even after GDIT had adduced "strong evidence" that it was entitled to *Yearsley* immunity, because the court initially could not determine "conclusively" that the *Yearsley* requirements were satisfied. Pet. App. 49a, 50a; Oct. 18, 2016 Order at 8, 9.[3] Discovery provided even further overwhelming, unrebutted evidence that GDIT followed CMS's instructions "to a 'T.'"[4] Pet. App. 33a; *Cunningham*, 2017 WL 1682534, at *5. Nowhere in the record is there any indication

[3] Notably, Petitioner did not challenge the adequacy of this discovery as a means to answer the *Yearsley* question definitively.

[4] In a footnote, Petitioner attempts to challenge the district court's factual finding that GDIT performed exactly as instructed and authorized by CMS, by arguing that CMS did not specifically instruct GDIT to make calls without first obtaining consent. Pet. 31 n.10. Petitioner's argument makes no sense because the failure to do something that was not instructed is not a failure to follow instructions. In any event, review by this Court is not warranted to challenge a factual determination by the district court grounded in substantial discovery and affirmed by the Fourth Circuit, which found that GDIT did not have the authority to contact call recipients to obtain their consent or even to "deviate from the script [CMS] provided." Pet. App. 13a; *Cunningham*, 888 F.3d at 647.

of any burden shifting to Petitioner, and he makes no attempt to identify any. As the district court correctly observed, the result would have been identical regardless of the procedural posture in which the *Yearsley* question was addressed. Pet. App. 36a; *Cunningham*, 2017 WL 1682534, at *6.[5] Accordingly, even if the question of whether *Yearsley* operates as a jurisdictional bar merited the Court's review, which it does not, this case presents a poor vehicle for resolving that question.

Third, Petitioner identifies nothing to suggest that his purported concern has arisen in any other case. To the contrary, courts uniformly require *defendants* to demonstrate that *Yearsley* applies, regardless of how the doctrine is classified. For example, in *In re KBR*, the Fourth Circuit – which treats *Yearsley* as a "jurisdictional immunity" – reversed dismissal on *Yearsley* grounds and remanded for additional discovery because the defendants had not adduced evidence that *Yearsley*'s requirements were met. 744 F.3d at 345. There, as here, nothing about the characterization of *Yearsley* as "jurisdictional" led the Fourth Circuit to place any burden on the plaintiff or to otherwise grant any

[5] If Petitioner's argument is that the district court should have waited until after merits discovery to adjudicate the issue, even though the outcome would have been the same, that argument fails. Whether "jurisdictional" or not, district courts retain discretion to evaluate threshold issues early to avoid needless litigation. *Cf. Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (urging that qualified immunity, although not jurisdictional, should be addressed "at the earliest possible stage in litigation").

advantage to the defendant in applying the doctrine. *Id.*

Similarly, nothing in the Fifth or Sixth Circuits' categorization of *Yearsley* as non-jurisdictional has led those Circuits to apply a higher substantive bar for the doctrine's application. For example, in *Ackerson v. Bean Dredging LLC*, after describing *Yearsley* as "not jurisdictional in nature," the Fifth Circuit affirmed a district court's decision to dismiss on *Yearsley* grounds, even though the district court had denied plaintiff's request for discovery, having found that the *Yearsley* requirements were clearly "established on the face of Plaintiff's complaint." 589 F.3d 196, 207–08 (5th Cir. 2008). In that case, as in all the *Yearsley* cases cited by Petitioner,[6] the deciding factor was the clarity and strength of the showing that the *Yearsley*

[6] Similarly, nothing in the Ninth Circuit's decision in *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140 (9th Cir. 2004), or the Sixth Circuit's decision in *Adkisson v. Jacobs Engineering Group, Inc.*, 790 F.3d 641 (6th Cir. 2015), suggests that the burden of proof on the applicability of *Yearsley* is dependent on the distinction Petitioner draws. In *U.S. ex rel. Ali*, *Yearsley* immunity did not apply because the defendants were alleged to have defrauded the federal government, not to have injured a third party while complying with all government directives. 355 F.3d at 1147. And in *Adkisson*, the Sixth Circuit remanded for evaluation of whether allegations that the contractor had not followed the government's directions raised a factual issue regarding *Yearsley*'s application – a result similar to that the Fourth Circuit reached in *In re KBR*. *Adkisson*, 790 F.3d at 648 (noting plaintiff alleged contractor "acted in a manner that was converse to statutory authorization and TVA's contractual directives").

requirements were satisfied, not whether *Yearsley* was characterized as an "immunity" or a "defense." Petitioner's claimed "circuit split" is therefore illusory.

Notably, courts applying other types of immunities also routinely allocate to defendants the burden of raising a jurisdictional immunity and of demonstrating that the immunity applies, because such immunities, unlike subject matter jurisdiction, may be waived. *See, e.g.*, *Hutto v. S. C. Ret. Sys.*, 773 F.3d 536, 543 (4th Cir. 2014). As just one example, the Eleventh Amendment immunity of the States is unquestionably jurisdictional – the amendment is a limitation on the "judicial power of the United States." U.S. Const. amend. XI; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996) (describing Eleventh Amendment immunity as a "jurisdictional bar"). Nonetheless, the Courts of Appeals have unanimously concluded that the burden of raising this jurisdictional immunity and showing that it applies lies with the defendant. *E.g.*, *Hutto*, 773 F.3d at 543 ("[W]e join every other court of appeals that has the addressed the issue" and conclude that derivative immunity under the Eleventh Amendment is a "jurisdictional bar . . ., which the defendant bears the burden of demonstrating.").[7]

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[7] *See also, e.g.*, *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Edu.*, 466 F.3d 232, 237 (2d Cir. 2006) (joining "sister courts in holding that the governmental entity invoking the Eleventh Amendment bears the burden of demonstrating that it qualifies" for the immunity, which provides a "jurisdictional bar"); *Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 61, 63 (1st Cir. 2003) ("The Eleventh Amendment has always acted

(….continued)

* * *

In sum, there was no error committed here in classifying *Yearsley* as "jurisdictional," and even if there had been, no review is warranted, because the issue had no practical impact on the rulings below and implicates no meaningful concerns for other cases.

II. The Fourth Circuit's Holding That *Yearsley* Applies to Claims Under State or Federal Law is Not Worthy of Review.

Petitioner's argument for review based on *Yearsley*'s supposed exclusive applicability to state-law claims should also be rejected. In the more than 70 years since *Yearsley* was decided, courts have consistently applied *Yearsley* when its twin requirements are met: a federal contractor is not subject to suit if (1) the government authorized the contractor's actions, and (2) the government "validly conferred" that authorization, meaning that the government acted "within its constitutional power." *See, e.g.*, *In re KBR*, 744 F.3d at 342; *Ackerson*, 589 F.3d at 204–06.

Petitioner contends that this Court and every federal court to have applied *Yearsley* has overlooked a third purported requirement for the application of *Yearsley* limiting its relevance to state-law claims, and that this supposed oversight warrants this

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(continued….)
to restrict the jurisdiction of the federal courts," but "the entity asserting [the] immunity[] bears the burden of showing it").

Court's review. Petitioner's argument lacks merit for the reasons discussed below.

A. Review is not warranted because the Court declined to follow the same argument when it was presented three Terms ago.

Just three Terms ago, in *Campbell-Ewald Co. v. Gomez*, this Court did not accept an identical attempt to limit *Yearsley* to state-law claims. Petitioner does not and cannot offer any reason why this Court should revisit that decision.

Campbell-Ewald arose out of a marketing contract between the Navy and Campbell-Ewald. 136 S. Ct. at 667. In sharp contrast to this case, where CMS dictated to GDIT the numbers to be called, when they should be called, and the message GDIT was to deliver when it called, Campbell-Ewald proposed to the Navy a campaign to send text messages to potential recruits. *Id.* The Navy agreed, but left to Campbell-Ewald the task of identifying appropriate recipients of the messages, other than to direct Campbell-Ewald to send messages only to those who had "opted-in" to receive messages. *Id.* Plaintiff-respondent in that case, Mr. Gomez, alleged that he had received a message without having opted-in and asserted claims under the TCPA. *Id.*

Campbell-Ewald asserted that, under *Yearsley*, it was immune from suit even though it had allegedly violated the terms of its contract with the Navy, so long as it was acting within the contract's "general scope." Br. for Pet'r, *Campbell-Ewald Co. v. Gomez*, No. 14-857, 2015 WL 4397132, at *47 (S. Ct.

July 16, 2015). In response, plaintiff-respondent argued – as Petitioner does here – that "contractors may have a preemption defense against state-law claims if their federal obligations require them to do something that state law proscribes," but that they have no such defense against federal claims arising out the work performed for the federal government. Br. for Resp't, *Cambpell-Ewald Co. v. Gomez*, No. 14-857, 2015 WL 5064005, at *13–14 (S. Ct. Aug. 24, 2015). This Court declined Mr. Gomez's invitation to limit *Yearsley* to state law claims, and instead canvassed the requirements of *Yearsley* and weighed their application against Mr. Gomez's TCPA claim. *Campbell-Ewald*, 136 S. Ct. at 672–73. The Court then concluded that *Yearsley* offered Campbell-Ewald no protection because Campbell-Ewald had violated the Navy's specific instructions by sending a text message to Mr. Gomez without his consent. 136 S. Ct. at 673–74.

Petitioner has not attempted to distinguish the argument he advances from the argument the Court declined to entertain in *Campbell-Ewald*. All he musters is that the Court "nowhere ruled, one way or another, on the underlying legal issue of whether the *Yearsley* defense covers federal law liability." Pet. 25. But the Court's entire discussion of *Yearsley* in *Campbell-Ewald* would have been superfluous had the Court agreed that *Yearsley* does not apply to federal claims.

B. This question does not warrant review because lower courts are in accord.

Petitioner's purported state-law limitation is also unworthy of the Court's review because there is

no split of authority on this issue. Petitioner identifies no case that has ever limited *Yearsley* to state-law claims. To the contrary, this Court and lower federal courts have consistently applied *Yearsley* to federal claims. *See, e.g.*, *Campbell-Ewald*, 136 S. Ct. at 672–74 (analyzing application of *Yearsley* to a TCPA claim); *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583–84 (1943) (describing *Yearsley* as offering "certain immunity" to federal contractors, in the context of an admiralty claim); *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 266 F. Supp. 3d 1, 47–50 (D.D.C. 2017) (holding that *Yearsley* immunized a federal contractor from suit under state law and the federal Fair Credit Reporting Act); *Ruddell v. Triple Canopy, Inc.*, No. 1:15-cv-01331, 2016 WL 4529951, at *5 (E.D. Va. Aug. 29, 2016) (applying *Yearsley* to a claim under the federal Americans with Disabilities Act).

In an attempt to manufacture disagreement, petitioner argues that the Fourth Circuit's ruling "ignores" Second, Sixth, and Ninth Circuit precedent that, according to Petitioner, "underscor[e] that *Yearsley* and *Boyle* [*v. United Techs. Corp.*, 487 U.S. 500 (1988)] articulate related defenses based on preemption, and hence protect only against violations of state law." Pet. 23–24. Each of these contentions is wrong: *Yearsley* is an immunity, not a preemption-based defense, and so applies to both federal and state law; *Boyle* did not uproot *Yearsley* from immunity law and refashion it as a doctrine of preemption; and the Second, Sixth, and Ninth Circuits do not support Petitioner's misreading of *Yearsley* (and *Boyle*).

First, it is apparent that *Yearsley* created a doctrine of immunity because the *Yearsley* court based its ruling on this Court's longstanding precedent that government agents and officers are immune from suit when acting within the scope of validly conferred authority. *Yearsley*, 309 U.S. at 21 (citing *Phila. Co. v. Stimson*, 223 U.S. 605 (1912); *United States v. The Paquete Habana*, 189 U.S. 453, 465 (1903) ("[W]hen the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued."); *Scranton v. Wheeler*, 179 U.S. 141 (1900); *United States v. Lee*, 106 U.S. 196 (1882); *Lamar v. Browne*, 92 U.S. 187 (1875); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855)). These cases, in turn, grounded the immunity of the government's agents in the government's sovereign immunity. *See, e.g.*, *Lee*, 106 U.S. at 204 ("[N]o action can be maintained against any individual [to recover property] without such consent [of the United States], where the judgment must depend on the right of the United States to property."); *Lamar*, 92 U.S. at 196 (holding treasury agents that allegedly unlawfully seized property "acted for the government, and, while acting within the scope of their powers, were protected by its authority"). None of the cases *Yearsley* cites rests the immunity conferred to government agents on preemption. There is no basis to ignore the *Yearsley* court's own view of the rule it created or to otherwise strain to find that *Yearsley* created a preemption-based doctrine.[8]

[8] Petitioner argues that *Yearsley* is limited to state law claims because it arose out of a state law tort claim. *See* Pet. (….continued)

Second, the "government contractor defense" this Court authorized in *Boyle* did not displace *Yearsley* immunity. 487 U.S. at 513. *Yearsley* creates an immunity for contractors carrying out the federal government's instructions as part of a performance contract. By contrast, in a series of cases in the 1970s and 1980s culminating in this Court's decision in *Boyle*, courts developed a federal common law defense to claims – under both state and federal law – for military contractors who produced goods for the federal government. 487 U.S. at 512; *see also Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983). In *Boyle*, the Court considered how a judicially created federal common law defense could displace or modify state tort

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(continued….)

16–18. But nothing in *Yearsley* supports Petitioner's contention that it articulated a rule limited to state law claims. As the Fourth Circuit noted below, Pet. App. 10a; *Cunningham*, 888 F.3d at 646, the *Yearsley* Court explained that government agents may be held liable in two circumstances: "either that [the agent] exceeded his authority or that it was not validly conferred." 309 U.S. at 21. Had *Yearsley* recognized a third circumstance for liability – i.e., a violation of *federal* law regardless of the other circumstances – presumably it would have said so. It did not. Petitioner's attempt to infer such a limitation is no more sound than the attempt to limit *Yearsley* to "public works" projects that this Court rejected in *Campbell-Ewald*. 136 S. Ct. at 673 n.7 (rejecting the Ninth Circuit's description of *Yearsley* as a "narrow rule regarding claims arising out of property damage caused by public works projects": "Critical in *Yearsley* was not the involvement of public works, but the contractor's performance in compliance with all federal directions").

liability consistent with principles of federalism. *See Boyle*, 487 U.S. at 504–05. The *Boyle* Court concluded that the "uniquely federal interests" presented by military procurement contracts permitted the federal common law defense for military contractors to preempt state tort law. *Id.* at 505–06. In support of its conclusion that the performance of federal procurement contracts is a matter of federal concern, the *Boyle* court cited *Yearsley*'s holding that "there is no liability" for a contractor faithfully executing a federal performance contract. *Id.* at 506. This limited reference to *Yearsley* in *Boyle* does not suggest that this Court meant to supplant *Yearsley*'s doctrine of immunity with the preemption-based doctrine articulated in *Boyle*, or to instruct future courts to disregard the *Yearsley* court's own understanding of the rule it created. Moreover, to hold otherwise would be inconsistent with *Campbell-Ewald*, where the Court applied *Yearsley* without reference to *Boyle*.[9]

Third, Petitioner cannot identify a single decision that holds that *Yearsley* applies only to state law claims, or that *Boyle* has somehow supplanted

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[9] Petitioner's reading of *Boyle* would upend settled law for the additional reason that it would limit the military contractor defense *Boyle* articulated to state law claims. But federal courts have applied the military contractor defense to claims arising under both state and federal law. *See, e.g.*, *Tozer*, 792 F.2d at 408–09 (applying the "military contractor defense" to a claim arising under the Death on the High Seas Act, 46 U.S.C. § 30302 (formerly 46 U.S.C. § 761)); *Koutsoubos v. Boeing Vertol, Div. of Boeing Co.*, 755 F.2d 352, 354–55 (3d Cir. 1985) (same); *McKay*, 704 F.2d at 451 (same).

Yearsley. Not one of the cases Petitioner cites declines to apply *Yearsley* to a claim arising under federal law, and not one states that *Boyle* has supplanted *Yearsley*.[10]

III. The Fourth Circuit's Holding that Congress Validly Conferred Authority on CMS Does Not Warrant Review.

Petitioner's third argument for review also fails. Here again, Petitioner requests that this Court grant review to impose yet another limitation on the *Yearsley* doctrine: that *Yearsley* protects contractors from liability only if Congress expressly directs, by statute, both that the agency carry out the "specific conduct at issue" and that the agency carry out that conduct through a contractor. Pet. 29. Applied to this case, Petitioner's theory is that *Yearsley* would

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[10] Petitioner quotes language from three cases, *Adkisson, In re World Trade Center Disaster Site Litigation*, 521 F.3d 169 (2d Cir. 2008), and *U.S. ex rel. Ali*, as supporting his view that *Yearsley* and *Boyle* are both defenses based on state-law preemption. Pet. 22–23. But the language he quotes from *In re World Trade Center* explains only that "derivative immunity under the *Boyle* framework" is based in federal preemption. 521 F.3d at 197. Similarly, *U.S. ex rel. Ali* states only that the *Boyle* "government contractor defense" is based on the "federal interest in protecting its contractors from state tort liability." 355 F.3d at 1146–47. Finally, Petitioner cites *Adkisson*'s statement that this Court, in *Boyle*, "cast *Yearsley* in terms of preemption." Pet. 22 (citing 790 F.3d at 646). But the *Adkisson* court recognized that *Boyle* "invented a new test to govern the liability of military procurement contractors," *id*., and went on to consider *Yearsley* and its two-part test rather than conflating *Yearsley* and *Boyle* or holding that *Boyle* had supplanted *Yearsley*, *id.* at 647–48.

apply only if Congress specifically directed CMS to hire a contractor to "make robocalls" regarding coverage under the ACA *and* specifically directed that the contractor make such robocalls "without obtaining prior express consent in violation of the TCPA." *Id.* According to Petitioner, this limitation is necessary to protect the constitutional separation of powers, because otherwise executive agencies would be permitted to direct contractors to violate federal laws. Pet. 27–29. This argument fails for multiple reasons.

As an initial matter, the current case presents no "separation of powers" issue for the simple reason that the TCPA does not apply to the federal government or any of its agencies. The TCPA's prohibition applies to "any *person* within the United States." 47 U.S.C. § 227(b)(1) (emphasis added). As Petitioner has never attempted to refute, under basic rules of statutory construction, the phrase "any person" does not encompass the United States or its agencies. *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000) (applying "our longstanding interpretive presumption that 'person' does not include the sovereign"); *see also* 1 U.S.C. § 1 (excluding government entities from definition of "person").[11] CMS was therefore free to make the calls at issue.

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[11] The FCC has also ruled that the TCPA does not apply to the federal government. *In re Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991*, 31 F.C.C. Rcd. 7394, 7400 (2016) (ruling that the federal government is not "included within the persons" covered by the TCPA's prohibitions).

Unsurprisingly, Petitioner cites no authority for the proposition that CMS could not authorize a contractor to do that which it could lawfully do itself. If accepted, Petitioner's argument would eviscerate the core purpose of *Yearsley*, which is to facilitate the hiring of private contractors to carry out permissible government functions. *See, e.g.*, *Campbell-Ewald*, 136 S. Ct. at 673 (explaining that immunities "reduce[] the risk that contractors will shy away from government work"); *Butters*, 225 F.3d at 466 ("Imposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work."); *cf. Filarsky v. Delia*, 566 U.S. 377, 391 (2012) ("The public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits is also implicated when individuals other than permanent government employees discharge these duties.").

Moreover, Petitioner cites no authority for his novel contention that *Yearsley* immunity applies only if Congress directs the contractor's actions and directs that they be performed in a manner that violates the law. It is well-settled that *Yearsley*'s second requirement – that the government "validly confer" authority – is met, and authority is "validly conferred," so long as the government agency was authorized by Congress to undertake the acts in question and the conferral of such authority was within the constitutional power of Congress. Pet. App. 16a; *Cunningham*, 888 F.3d at 648–49; *see also Yearsley*, 30 U.S. at 20 (explaining that authority is "validly conferred" if "what was done was within the constitutional power of Congress"); *In re KBR*, 744

F.3d at 342 (holding that authority is "validly conferred" if the government "acted within its constitutional power"); *Ackerson*, 589 F.3d at 204 (holding that the "authority to carry out the project was validly conferred . . . if what was done was within the constitutional power of Congress") (quoting *Yearsley*, 309 U.S. at 20–21).

Indeed, *Yearsley* itself would not pass Petitioner's test for immunity. In *Yearsley*, the manner in which the work was performed, which allegedly resulted in the injury to the plaintiff in that case, was "authorized and directed by the governmental *officers*," not by Congress. 309 U.S. at 20 (emphasis added).[12] Similarly, the lower court cases Petitioner cites in support of his contention, like *Yearsley*, require that the government agency directing the contractor – not Congress – authorize the contractor to perform the tasks at issue. *See, e.g.*, *In re KBR*, 744 F.3d at 345 (remanding for factual development on whether "the military" – not Congress – dictated exactly how the contractor was to carry out the delegated tasks); *L-3 Commc'ns Corp. v. Serco Inc.*, 39 F. Supp. 3d 740, 751 (E.D. Va. 2014) (examining whether contractor's actions had been authorized and directed by the Air Force); *see* Pet. 30 (citing *In re KBR* and *L-3 Commc'ns Corp.*); *see also, e.g.*, *Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963) (affirming dismissal, on *Yearsley* grounds,

[12] This point is underscored by the Court of Appeals decision, which states that work was "set and defined by the Government Engineers." *W.A. Ross Constr. Co. v. Yearsley*, 103 F.2d 589, 591 (8th Cir. 1939).

where contractor performed work "under its contract with the Bureau of Public Lands, and in conformity with the terms of said contract").

At bottom, Petitioner appears to misapprehend the basic purpose of immunity in his argument that granting immunity for alleged violations of federal law "authorizes executive agencies to intrude into Congress's powers." Pet. 26. The purpose of immunity is to shield those who carry out government work from interference by suits alleging that they violated the law in the discharge of their duly-authorized duties. The purpose is not, as Petitioner suggests, to "authorize" the immunized party to violate the law.[13]

Finally, Petitioner's theory would not merely modify *Yearsley* but effectively abolish the doctrine altogether. Under his argument, a contractor could obtain immunity only if Congress, by statute, mandated that a contractor carry out the specific task performed and that the contractor do so in a

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[13] For example, absolute or qualified immunity is not bestowed on judicial or law enforcement personnel to "authorize" them to violate the Constitution or established rights. Rather, immunities are bestowed because "the threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties," *Forrester v. White*, 484 U.S. 219, 223 (1988), and imposes "social costs includ[ing] the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). *See also Filarsky*, 566 U.S. at 391 (immunity ensures that officials will discharge their duties "free from the distractions that can accompany even routine lawsuits").

way that violates the law under which the contractor is being sued. But under those circumstances, immunity would be entirely unnecessary because the contractor would be acting pursuant to federal law as specifically directed by Congress. Petitioner is thus asking this Court to narrow the doctrine to the point of extinction. The Court should decline that invitation.

CONCLUSION

For the foregoing reasons, Cunningham's petition should be denied.

Respectfully submitted,

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