No. 18-206

# 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

## PETITIONER'S REPLY BRIEF


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## PETITIONER'S REPLY BRIEF

While GDIT urges that this case involves a simple and "straightforward" application of this Court's 1940 decision in *Yearsley v. W. A. Ross Const. Co.*, 309 U.S. 18 (1940), and that Cunningham is trying to "radically" "upend" *Yearsley* "for the first time," the reality is that *Yearsley* is an extremely difficult decision to understand and apply, and has split the circuit courts. This case highlights that reality, as *Yearsley* does not provide clear answers to any of the questions Cunningham has presented in his petition that have split the circuits.

GDIT's opposition inaccurately describes *Yearsley* and the cases construing it to try to explain away and minimize the importance of the two intercircuit conflicts Cunningham has identified that this Court should resolve. One involves whether *Yearsley* establishes a jurisdictional defense that may be a subject of a Rule 12(b)(1) motion to dismiss, on which the plaintiff bears the ultimate burden of proof, or is instead an affirmative defense on which the defendant bears the burden of proof. The other involves whether *Yearsley* articulates a sovereign immunity-based defense to state and federal law liability, or a preemption-based defense only to state law liability.

Moreover, neither GDIT nor the Fourth Circuit has addressed the separation of powers violation caused by construing *Yearsley* to permit executive agencies to shield private contractors from liability for violating federal laws that Congress has enacted. They ignore two centuries of precedent ruling that even the President cannot order officers to violate federal laws.

The stakes are high, with the federal government spending $508 billion annually on private contractors' services. Pet. at 15. This Court should grant this petition to defuse the minefield that the Fourth Circuit's take on the 78 year-old *Yearsley* decision has created.

## I. This Court Should Resolve the Intercircuit Split About Whether *Yearsley* Articulates a Jurisdictional Defense or an Affirmative Defense Because Doing So Will Have a Decisive Practical Impact on Burdens of Proof and Standards of Appellate Review

As Cunningham previously pointed out, whether a defense to a claim is jurisdictional and therefore deprives the court of jurisdiction, or is an affirmative defense to be determined by the trier of fact, is a "critical" concern of this Court. *E.g., Hamer v. Neighborhood Housings Servs. of Chicago*, 138 S. Ct. 13, 17 (2017) (resolving distinction between jurisdictional limitation and merits defense is "critical" because jurisdictional limitation "deprives

a court of adjudicatory authority . . . a drastic result").

GDIT does not deny that the Fourth Circuit's ruling that the *Yearsley* defense is a jurisdictional sovereign immunity defense conflicts with decisions from the Fifth, Sixth, Ninth, Second, Third and Eleventh Circuits providing that the *Yearsley* is an affirmative defense. Pet. at 7-12. Instead, GDIT asserts that that conflict is "illusory" and not worthy of this Court's review because, regardless of whether the defense is a jurisdictional or affirmative defense, the defendant always bears the burden of proving it. Opp. at 13-14. That assertion is false.

### A. Determining Whether *Yearsley* Articulates a Jurisdictional or Affirmative Defense Determines Which Party Bears the Burden of Proof Regarding It

Contrary to GDIT's assertion, the courts of appeals – including the Fourth Circuit itself – have unanimously ruled that when a defendant challenges subject matter jurisdiction under Rule 12(b)(1) based on sovereign immunity, "[t]he plaintiff bears the burden of persuasion" that federal sovereign immunity does not apply. *E.g., Williams v. U.S.*, 50 F.3d 299, 304 (4th Cir. 1995); *Tri-State Hosp. Supply Corp. v. U.S.,* 341 F.3d 571, 575 (D.C. Cir. 2003); *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1005 (9th Cir. 1998); *James v. United States*, 970 F.2d 750, 763 (10th Cir. 1992);

*Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *see also McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) ("the party alleging jurisdiction must justify his allegation by a preponderance of the evidence").

GDIT also cannot point to anything in the Fourth Circuit's decision (or the district court's decisions) that imposed the burden of proof on the defendant. The district court ordered *Yearsley* discovery not because, as GDIT urges, the district court had determined that GDIT must prove the *Yearsley* defense, but to give Cunningham an opportunity to obtain facts concerning GDIT's contract and relationship with CMS. App. 49a-50a.

Because neither the Fourth Circuit nor the district court ruled that the defendant bears the burden of proving the *Yearsley* defense, the Fourth Circuit's ruling that *Yearsley* constitutes a jurisdictional defense – and hence must be disproved by the plaintiff – directly conflicts with numerous other circuits' precedent ruling that *Yearsley* articulates an affirmative defense the defendant must prove. Pet. at 7-12. This Court should resolve this critical conflict.

### B. Determining Whether *Yearsley* Articulates a Jurisdictional or Affirmative Defense also Determines the Proper Standard for Appellate Review of Findings Regarding the Defense

The Fourth Circuit's characterization of the *Yearsley* defense as jurisdictional also impacts the standard of appellate review in cases concerning the defense.

In this case, consistent with the Fourth Circuit's ruling that *Yearsley* articulates a jurisdictional defense, the Fourth Circuit announced that "[i]n reviewing a district court's order dismissing an action for lack of subject matter jurisdiction, this Court reviews conclusions of law de novo and findings of fact for *clear error*." Opp. at 8a-9a, 888 F.3d 640, 645 (emphasis added).

The Fourth Circuit's deferential clear error prism for reviewing the district court's factual findings on a Rule 12(b)(1) motion is very different from the standard of review that would apply had it deemed *Yearsley* an affirmative defense. If it had, it would have had to remand the case to the district court to allow the parties to address the *Yearsley* issue on a motion for summary judgment by GDIT. On appeal of any resulting summary judgment decision, the Fourth Circuit would have to analyze the factual record *de novo*, and further, would have to construe the factual record most favorably to

Cunningham and draw all reasonable inferences in Cunningham's favor. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 465 n.10 (1992) (grant of summary judgment must be reviewed *de novo*); *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) ("in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor'").[1]

Accordingly, determining whether *Yearsley* articulates a jurisdictional or affirmative defense determines whether the standard of appellate review concerning factual determinations is clear error or, on the other side of the spectrum, *de novo* – providing an additional compelling practical reason why this Court should grant certiorari to resolve the intercircuit split on this critical issue. *E.g., Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836-40 (2015) (reversing court of appeals decision for utilizing improper standard for reviewing factual finding).

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[1] In the alternative, if the Fourth Circuit had decided to immediately review the district court's improper *sua sponte* assertion that it would have reached the same result if it had decided the *Yearsley* issue on summary judgment, App. 35a-36a, the Fourth Circuit would have had to use the same standard most favorable to Cunningham.

### C. This Court should Correct the Fourth Circuit's Mistaken Ruling that *Yearsley* Created a Jurisdictional Defense

In addition to arguing that this intercircuit conflict does not have practical impact, GDIT argues that the Fourth Circuit correctly determined that the *Yearsley* Court itself intended that its defense be jurisdictional. Opp. at 12. It did not so intend.

First, as Cunningham previously pointed out, *Yearsley* says nothing about whether its defense is a jurisdictional defense akin to sovereign immunity, nor does *Yearsley* address whether the defense is a proper subject of a Rule 12(b)(1) motion. Pet. at 12-13. As other circuits have correctly observed, "*Yearsley* does not address sovereign immunity." *Adkisson v. Jacobs Engineering Group, Inc.*, 790 F.3d 641, 647 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 980 (2016); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 202-03 (5th Cir. 2009) ("*Yearsley* itself countenances against its application to deprive the federal courts of jurisdiction"); Pet. at 8-9, 12-13.

Second, GDIT has no answer to Cunningham's showing that if *Yearsley* were articulating a jurisdictional immunity for private parties, it would not have affirmed the "judgment of the [] Court of Appeals," 309 U.S. at 23, which had directed a verdict for the contractor. Instead, the *Yearsley*

Court would have had to rule that the lower courts lacked subject matter jurisdiction and directed that the case against the contractor be dismissed on that basis. Pet. at 15.

Instead of addressing *Yearsley* head-on, GDIT dismissively concludes that these facts are of "no moment" because in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), this Court described *Yearsley* as "offering a 'certain immunity.'" Opp. at 12 n.2. However, such a description of the *Yearsley* defense does not render the defense jurisdictional. While absolute and qualified immunity can be described as "certain immunities," they are not jurisdictional defenses. *See, e.g., Nevada v. Hicks*, 533 U.S. 353, 373 (2001). The *Yearsley* defense is no more of a jurisdictional defense that these other immunity defenses.

Accordingly, resolving whether *Yearsley* articulates a jurisdictional or affirmative defense will have a critical impact on the applicable burden of proof, standard of appellate review, and will instruct courts how to apply *Yearsley* correctly and consistently to the burgeoning numbers of private contractors that may assert the defense.

## II. This Court Should Resolve the Intercircuit Conflict About Whether the *Yearsley* Defense is Based on Sovereign Immunity, and thus Protects against Violations of State and Federal Law; or is Based on Preemption, and thus Protects only against Violations of State Law

As previously demonstrated, the Fourth Circuit's conclusion that *Yearsley* is based on sovereign immunity directly conflicts with this Court's holding in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506 (1988), and the rulings of the Second, Sixth and Ninth Circuits that *Yearsley* created a preemption-based defense applicable when unique federal interests conflict with state law. Pet. at 18-23. The issue of whether *Yearsley* is based on sovereign immunity or preemption is critically important because its resolution determines whether *Yearsley* protects against state and federal law liability, or whether it protects against only state law liability.

GDIT first contends that this Court should not review this issue because this Court in *Campbell-Ewald* purportedly "declined to follow the [] argument" that *Yearsley* protects only against state law liability raised by one of the parties in that case. Opp. at 18-19. However, as Cunningham previously explained, the *Campbell-Ewald* Court did not reject that argument. It did not rule on it, one way or

another (or even mention it), because the Court rejected the defendant's *Yearsley* defense on the alternative factual ground that the defendant had not followed the government agency's instructions. Pet. at 25. As this Court has repeatedly held, *stare decisis* is not applicable unless an issue was "squarely addressed" in the prior decision. *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993); *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 144-45 (2011) (if issue "is neither noted nor discussed in a federal decision, the decision does not stand for the proposition [that issue has been decided one way or another]").

GDIT's next assertion – that federal courts are "in accord" that *Yearsley* created a sovereign immunity defense for private contractors that protects them from state and federal law liability – is false. The Fourth Circuit is *not* in accord with this Court in *Boyle* and the Second, Sixth and Ninth Circuits. Pet. at 19-23.

Moreover, contrary to GDIT's assertion that "[Cunningham] cannot identify a single decision that holds that *Yearsley* applies only to state law claims," Cunningham did identify two such decisions by district courts in its filings with the Fourth Circuit: *Bednarski v. Potestivo & Assocs., P.C.*, Case No. 16 CV 02519, 2017 WL 896777, **2-3 (N.D. Ill. Mar. 7,

2017) (ruling that *Yearsley* defense does not apply to protect private debt collector hired by federal government from federal FDCPA liability); and *Pettiford v. City of Greensboro*, 556 F. Supp.2d 512, 539-40 (M.D.N.C. 2008) (rejecting assertion that *Yearsley* immunized city acting at behest of federal government from federal law liability).

GDIT's citation to *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943), does not help its cause because the Court there did not address whether *Yearsley* protects against a contractor's federal law liability. Rather, it ruled that assuming that a federal agency had authority to delegate responsibilities to a private contractor, the contractor could not "escape liability for a negligent exercise of that delegated power," even if the parties' contract "exonerated or indemnified [the contractor] for any damages." *Id.* at 583-84. GDIT's additional cases holding that military contractors may assert the *Yearsley* defense in federal Death on the High Seas Act cases, Opp. at 19-20, all preceded this Court's decision in *Boyle*. Moreover, they neither discuss nor appear to have been presented with the question of whether the *Yearsley* defense is based on sovereign immunity or preemption. Similarly, the two district court cases GDIT cites that post-date *Boyle* do not address this question.

GDIT also tries to get mileage out of *Yearsley* itself, pointing to several old cases *Yearsley* cites for the proposition that government agents or officers can be held liable for their actions if they "either . . . exceeded [their] authority or [] it was not validly conferred." Those cases do not illuminate whether *Yearsley* created a sovereign immunity defense to state and federal law liability, or a preemption-based affirmative defense to only state law liability. Opp. at 21, 12, citing *Yearsley*, 309 U.S. at 21. While the *Yearsley* Court appears to have been implicitly reasoning that the defense government officials may raise so long as they act within their authority and Congress has validly conferred that authority is analogous to the defense that the Court was creating for private contractors, the Court nowhere stated whether the contractor's defense is a jurisdictional or preemption-based affirmative defense. All the Court discussed was the circumstances under which "there is no liability" for government contractors and when government contractors can be "held to be liable." 309 U.S. at 20-21. More importantly, and ignored by GDIT and the Fourth Circuit, the *Yearsley* court *did not dismiss any federal claims* before it based on the defense it was creating, Pet. at 16-18, strongly suggesting that the defense is only to state law liability.

GDIT also incorrectly contends that Cunningham is arguing that *Boyle*'s reasoning "supplants" *Yearsley*. Instead, Cunningham has explained that *Boyle* "expanded and refined" *Yearsley*, as subsequent decisions have explicitly stated. Pet. at 20, 22-23. As such, *Boyle* explained that the defenses both decisions address are based on preemption principles that protect against only violations of state law. Accordingly, *Boyle* too contradicts GDIT's sweeping assertion that the courts have applied *Yearsley* to protect against violations of federal law. In *Yearsley* itself, *Boyle* and numerous other cases, the courts have applied *Yearsley* to protect only against state law liability – in conflict with the Fourth Circuit's decision in this case.

## III. Because the Fourth Circuit's Interpretation of *Yearsley* Allows Executive Agencies to Trump Congress in Determining Who may be Liable for Violating Federal Laws, the Decision Violates Separation of Powers Principles

If courts construe *Yearsley* to permit agencies to direct contractors to act in violation of federal laws, those executive agencies will be empowered to intrude into the legislative province of Congress to declare such conduct illegal. Pet. at 26-28. As Cunningham previously demonstrated, even the

President lacks power to direct conduct that violates Congress's statutes. *Little v. Barreme*, 6 U.S. 170, 176-79 (1804) (President could not, through order to naval officer, authorize officer to act in violation of federal law or shield officer from being held individually liable for damage for those actions); *Butz v. Economou*, 438 U.S. 478, 489-90 (1978) (describing *Little* as having "held that the President's instructions could not 'change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass'").

Moreover, this Court has explicitly ruled that "[a]n agency may not reorder federal statutory rights[, including private causes of action under federal law,] without Congressional authorization." *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2241 (2014). Indeed, even when Congress itself passes subsequent legislation that may be construed to affect prior legislation, this Court has held that the later legislation will not suspend the operation of a prior federal statute unless the new legislation expressly contradicts the previous statute, or unless such a construction is absolutely necessary to give meaning to the words of the later statute. Pet. at 32-33.

The Fourth Circuit and GDIT ignore this authority. Instead, GDIT argues that because the TCPA excludes the federal government from its ambit, so too does it exclude GDIT, as the government's contractor, from its ambit. However, GDIT may not make such a merits argument regarding Cunningham's TCPA claims on a Rule 12(b)(1) motion, or on an appeal from such a motion. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) ("[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.'"). In any event, Congress has manifested its intent that private individuals and corporations be held liable for violating the TCPA – irrespective of whether a federal agency has hired them to engage in that conduct. 47 U.S.C. § 153(39) (for purposes of TCPA, "[t]he term 'person' includes an individual, partnership, association, joint-stock company, trust, or corporation").

For these reasons, this Court should put a stop to the Fourth Circuit's dangerous blessing of federal agencies' directing private contractors to act in violation of Congress's laws.

## CONCLUSION

This Court should grant this petition.

Respectfully submitted,

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