No. 24-758

In the Supreme Court of the United States

THE GEO GROUP, INC.,
Petitioner,

v.

ALEJANDRO MENOCAL, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PROFESSOR ALEXANDER VOLOKH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Alexander Volokh is a professor of law at Emory Law School, where he has taught since 2009. His teaching interests cover several areas that overlap in this case: Torts, Administrative Law, and Legal History. His published writings cover federal common law, privatization and delegation of governmental power to private parties (both in general and as it relates to detention facilities), and *Bivens* litigation against private prison contractors.

See, e.g., *The Myth of the Federal Private Nondelegation Doctrine*, 99 Notre Dame L. Rev. 203 (2023); *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 Emory L.J. 1391 (2017); *Prison Accountability and Performance Measures*, 63 Emory L.J. 339 (2014); *Privatization and Competition Policy*, *in* COMPETITION AND THE STATE (Stanford Univ. Press 2014); *The Modest Effect of* Minneci v. Pollard *on Inmate Litigants*, 46 Akron L. Rev. 287 (2013); *Privatization and the Elusive Employee-Contractor Distinction*, 46 UC Davis L. Rev. 133 (2012); *Privatization and the Law and Economics of Political Advocacy*, 60 Stan. L. Rev. 1197 (2008); Note, *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 Harv. L. Rev. 1838, 1868-91 (2002).

He is interested in the sound development of doctrine in this area, and in particular the need for legal

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[1] No counsel for any party authored this brief in whole or in part, and no party or their counsel made a financial contribution intended to fund the preparation or submission of this brief. The Day 1 Alliance made a monetary contribution to fund the preparation and submission of this *amicus* brief.

principles that avoid distorting the government's decision whether to contract out for services.

SUMMARY OF THE ARGUMENT

In *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), this Court held that "there is no liability on the part of the contractor for executing [the] will" of the federal government, provided the "authority to carry out the project was validly conferred," *id.* at 20-21. *See also Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943) ("It is, of course, true that government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States."); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 166 (2016) (whether this "derivative immunity" applies depends on whether the contractor complies with federal law and whether the contractor follows "the Government's explicit instructions").

This Court did not make up the idea of derivative immunity from whole cloth in 1940. The idea that contractors share in governmental immunities has deep roots in pre-1940 common law. In many pre-1940 cases going back to the nineteenth century, plaintiffs have sought to hold government contractors liable for various forms of damage. In those cases, courts have observed (1) that the private contractor was doing what the government asked it to do, (2) that an immunity would apply if the government had kept the work in-house, and (3) and that *therefore*, the private contractor should benefit from the same immunity.

This is more than just a weak principle of derivative non-liability, which would hold a contractor non-negligent when acting at the government's behest.

Many of the cases discussed here support a stronger sort of immunity. Courts have often stated what may be called a Parity Principle: that the private party doing work at the government's behest is the government's agent, which (at least insofar as the party isn't acting in ways that deviate from the government's desire) makes it essentially a public actor—which, in turn, justifies treating it equally to more formally governmental actors. And one comes across not only the term "immunity," but also the stronger term "immunity from suit," *see Engler v. Aldridge*, 75 P.2d 290, 293 (Kan. 1938)—which suggests that a suit against the contractor should not even go forward, not just that the contractor should eventually be relieved from liability. *See, e.g.*, *Faust v. Richland Cnty.*, 109 S.E. 151, 160-61 (S.C. 1921) (distinguishing between the state's absolute "immunity from suit" and mere "immunity from liability"); *Foster v. Wilcox*, 10 R.I. 443, 444 (1873) (referring to a married woman's "immunity from suit" under the doctrine of coverture).

The cases are not uniform, and there are cases taking the opposite position. *See, e.g.*, *Sawyer v. Corse*, 58 Va. (17 Gratt.) 230 (1867). This isn't surprising: in our federal system, every state is allowed to do its own thing, and even within a state, courts are allowed to change their minds. The important point, though, is that the long-standing Parity Principle is most consistent with what this Court endorsed in *Yearsley* and its progeny.

The principle of *Yearsley*—and of the common-law caselaw that gave rise to it—is supported by a simple policy rationale: the government should be able to choose its agents, and legal rules should not bias the decision of whether to produce goods or services in-

house or contract out for their production. The Court reaffirmed and extended this principle in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988):

> The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.

Id. at 511-12. (Of course *Boyle*, which operated against the backdrop of the FTCA's pre-existing waiver of sovereign immunity, concerned only *defenses*, not *immunities*, but the policy considerations are similar.) *See also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001) ("Whether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not us, to decide.").

To be sure, the government generally has less control over independent contractors than it has over its own employees and agencies, so it makes sense to be concerned about contractors' independent choices. However, when the contractor is doing what the contract demands, its independent choices are not at issue, so the Parity Principle is at its apex. *See Yearsley*, 309 U.S. at 20 (work complained of was "authorized and directed by . . . governmental officers"); *Boyle*, 487

U.S. at 512 (explaining various limits to federal-contractor immunity, including that "the United States approved reasonably precise specifications" and "the equipment conformed to those specifications").

The treatment of contractors acting as their contract demands should be the same as if the government had kept the work in-house. This implies not only relief from liability, but also application of the same procedural rules that would otherwise apply, including the rules about when to appeal an adverse ruling on the issue of derivative immunity. Allowing governmental organizations and employees to appeal adverse immunity rulings as collateral orders—but requiring that contractors suffer through the ordeal of litigation before appealing—would introduce a wedge between employees and contractors that would violate the Parity Principle and strike at the whole rationale of derivative immunity.

Recognizing immediate appealability is consistent with the Parity Principle as endorsed in the long-standing caselaw leading up to *Yearsley*, is supported by compelling considerations of policy, and is a natural use of this Court's long-recognized power to make federal common law in the handful of areas involving "uniquely federal interests." *See Boyle*, 487 U.S. at 505 ("The present case involves an independent contractor performing its obligation under a procurement contract . . . but there is obviously implicated the same interest in getting the Government's work done.").

ARGUMENT

I. Private Parties Doing Government Work Have Shared in Governmental Immunities.

This Part discusses pre-*Yearsley* caselaw, going back to the nineteenth century, where private parties were often granted immunity in various contexts when they were acting at the behest of government; this included government contractors acting within the scope of their contract.

The following sections illustrate the wide variety of contexts where courts endorsed the Parity Principle. Section A discusses cases where, like in *Yearsley*, the contractor defendant was engaged in various forms of construction work, often related to navigation or railroads. Section B discusses cases where, like in this case, the defendant was running detention facilities. Section C discusses other cases where the defendant was engaged in law enforcement—as a private prosecutor or a member of a law enforcement officer's posse comitatus. Section D discusses various cases where private parties acted in judicial or quasi-judicial capacities. And Section E discusses postal cases, where the issue is whether a postal contractor should be considered a public agent for purposes of liability for the acts of its own servants.

These cases not only state a principle of non-liability but also endorse the Parity Principle: that private parties doing government work should be considered the government's agents and subjected to the same rules as government.

A. Construction Work

In the following cases, contractors were relieved of liability when acting within the scope of their government contracts.

One can imagine a non-liability rule that would relieve contractors of liability only if they were non-negligent. Even such a weak rule would have bite, for instance when the cause of action is trespass (where allegations of negligence aren't required) or in cases involving blasting (where the general rule is strict liability). *See, e.g.*, *Benner v. Atl. Dredging Co.*, 31 N.E. 328 (N.Y. 1892); *Combs v. Codell Constr. Co.*, 52 S.W.2d 719 (Ky. App. 1932); *Nelson v. McKenzie-Hague Co.*, 256 N.W. 96 (Minn. 1934). So such a rule would still sometimes relieve government contractors of liability relative to their counterparts doing non-governmental construction work.

Some of the cases below do indeed focus on the non-negligence of the government contractors. But others—for instance, the Kentucky cases, *Newman v. Bradley Contracting Co.*, 164 N.Y.S. 757 (App. Term 1917), or *Connell v. Yazoo & M.W.R. Co.*, 75 So. 652, 654 (La. 1917)—endorse a stronger principle. In these cases, the courts specifically note that the government wouldn't be liable, and that the contractor would *therefore* be relieved of liability; or they note that the way to figure out the contractor's liability would be to imagine that the state were standing in court in the contractor's stead. The contractor's liability regime is *derivative* of the governmental liability regime, because the contractors are essentially agents of the state.

The equal-treatment principle endorsed in these cases—the Parity Principle—supports a rule of equal treatment for these agents of the state for all manner of procedural rules. For instance, *Engler* characterizes the immunity not just as a defense to liability but as an "immunity from suit," 75 P.2d at 293.

A few cases from New York illustrate the main themes. In *Bellinger v. New York Central Railroad*, 23 N.Y. 42 (1861), a railroad company built a road across a creek, as a result of which a nearby landowner's land was flooded. The New York Court of Appeals held that the railroad company was not liable for this consequential damage:

> [W]here persons are authorized by the legislature to perform acts in which the public are interested, such as grading, leveling and improving streets and highways and the like, and they act with proper care and prudence, they are not answerable for the consequential damages which may be sustained by those who own lands bounded by the street or highway. The doctrine is equally applicable to the construction of a railroad by a private corporation, *for the enterprise is considered a public one*, and the authority is conferred for the public benefit.

Id. at 48 (citing *Radcliff's Ex'rs v. Mayor of Brooklyn*, 4 N.Y. 195 (1850)) (emphasis added). A later New York case further endorsed the Parity Principle. In *Robinson v. Chamberlain*, 34 N.Y. 389 (1866), Justice Peckham denied that there should be any difference between an officer and a contractor in charge of maintaining canals:

> Each agrees to do his duty—the contractor in writing, the officer by implication and by his oath. Upon every principle of sound reason their liability to persons injured by their negligence *should be the same*.

Id. at 395 (Peckham, J.) (emphasis added). Justice Hunt, writing in the same case, agreed:

> I do not discover in these laws any provision that requires the contractor to take the oath required . . . to be taken by every public officer . . . . It is possible that he may not, therefore, be technically a public officer. . . . [H]owever, . . . [h]e is invested with the powers and duties of a public officer, and if he neglects to perform them, and an individual sustains damages thereby, *I think he should be liable as a public officer*.

Id. at 402 (Hunt, J.) (emphasis added).

In *Conklin v. New York, Ontario & Western Railway Co.*, 6 N.E. 663 (N.Y. 1886), the court wrote:

> [The railroad company] may [engage in its construction work] without compensation to the corporation whose land is occupied, and whose convenience is disturbed; and the sole justification is that *it may properly be treated as a public corporation*, engaged in the accomplishment of a public purpose; so that when, under the statute, a railroad company, as it is commanded to do, enters upon the restoration of a highway, *it becomes, for the time and at the place, the constituted public authority to make the restora-*

> *tion*; and, if it does so with reasonable prudence and skill, encounters *no greater liability than would attend the same change if made by the usual public authority*.

Id. at 666 (emphasis added). Of course, the railroad wasn't *actually* a public authority; the court merely said that "it may properly be treated that way" because it was fulfilling "a public purpose . . . under the statute . . . as it is commanded to do." And the measure of its liability was explicitly tied to what the liability would have been if "the same change [were] made by the usual public authority."

Benner is to the same effect. In that case, the vibrations of the air and earth due to a federal government contractor's blasting work caused damage to a house 3000 feet away. The New York Court of Appeals stressed the government's immunity. 31 N.E. at 329. And because the contractor's work "was done under the government, for the government" (and not "for the benefit of private ownership"), the contractor had to be treated the same: "[T]he consequential injury . . . must be remediless. The defendant had the authority of the government and kept within it, and, therefore, is not liable." *Id.* at 330; *see also Meneely v. Kinser Constr. Co.*, 113 N.Y.S. 183, 184 (App. Div. 1908) (mem) ("If the state had the right so to do, its servant acting in its behalf, or one who by contract does its work, is guilty of no wrong in so doing."); *cf. O'Reilly v. Long Island R.R. Co.*, 44 N.Y.S. 264, 265 (App. Div. 1897) ("The liability of the defendant, though a common carrier, was, as to its sidewalks, simply the same as that of a municipality,—the duty of exercising reasonable care."); *Carr v. Degnon Contracting Co.*, 96 N.Y.S. 277, 278 (App. Term 1905) (similar).

And the endorsement of the Parity Principle didn't just extend to the measure of liability. In *Newman*, the appellate court wrote that, "although the work was being done here by a private corporation, it stood in the place of the city, and was entitled to *all of the immunities and privileges* which the city itself would be entitled to were it performing the work . . . ." 164 N.Y.S. at 760. The court understood that to truly "st[and] in the place of" the government, it was necessary to have equal treatment across the board (even if sovereign immunity wasn't on the table in that particular case, which involved a municipal government).

Several other courts have held similarly.

The Louisiana Supreme Court used the same stand-in-the-shoes reasoning as New York's *Newman* court: "[T]he defendant company does not stand in the case as a trespasser and tort-feasor, but stands in the shoes of the city; stands *precisely as the city herself would stand if she had done the work directly, without the intervention of defendant, and were now at the bar instead of defendant*." *Connell*, 75 So. at 654 (emphasis added).

Kentucky courts took the same parity position for several decades. In *Moss v. Rowlett*, 65 S.W. 153 (Ky. App. 1901), the state appellate court wrote that "the contractor simply takes the place of the overseer," and there is no cause of action against the contractor "which could not be maintained against a county overseer." *Id.* at 155; *see also Blue Grass Traction Co. v. Grover*, 123 S.W. 264, 266 (Ky. App. 1909) ("In maintaining the bridge [the contractor] simply acts for Fayette county . . . ."); *Schneider v. Cahill*, 127 S.W. 143, 144 (Ky. App. 1910). In *Ockerman v. Woodward*, 178 S.W. 1100 (Ky. App. 1915), the court stressed the

essential identity between the state government and contractors: first, because the state government (through the county) can only act through agents; and second, in terms that would be directly echoed in *Boyle*, 487 U.S. at 511-12, and *Malesko*, 534 U.S. at 72, because any greater expense imposed on contractors is ultimately paid by the government:

> [T]he county, being an arm of the government, is not liable. In taking care of the public roads and bridges, it must exercise its governmental functions either through its officers, agents, and employés or contractors. If the contractor was held liable, then the real burden would fall on the county, because of the excessive price it would be required to pay for the work.

Ockerman, 178 S.W. at 1100. Cases like *Taylor v. Westerfield*, 26 S.W.2d 557, 558-61 (Ky. App. 1930), held that this immunity didn't extend to negligent work, but derivative immunity continued to apply for non-negligent cases. *See, e.g.*, *Combs*, 52 S.W.2d at 720 (in a blasting case that otherwise would have been governed by strict liability, the contractor had "immunity from liability" as long as the work was done non-negligently, because "he is but the agent of a department of the commonwealth").

In *Nelson*, a case about damage to a home due to blasting from bridge construction, the Minnesota Supreme Court explicitly characterized the contractor as the "agent of the state," stressed the contractor's legal duty to act as it did, and tied the contractor's liability to the state's:

> Our state highways are built by the state itself, in its capacity as a sovereign. Their construction is not merely authorized; it is directed. The highway commissioner is the agent of the state for that purpose. Mandatory is his duty to construct roads and the bridges necessary to make them complete. Once he has contracted for their construction, it is the legal duty of the contractor to perform his contract. Such a contract makes the contractor the agent of the state and clothes him with something more than mere authority to proceed. It puts upon him the legal duty to do so. How, then, so long as he is guilty of no negligence or trespass, does he commit a legal wrong in performing, in the only way it can be performed, the affirmative duty he owes the state? . . .
>
> If the contractor in such case is to be held liable for consequential damages, it must follow, irresistibly, that the highway commissioner is equally so. But the latter result we have definitely negatived.

256 N.W. at 98.

In *Engler*, the victim of a bridge and highway contractor's construction activity sued for damage to his land due to the contractor's negligence. He argued "that the state's immunity from suit should not be extended to the contractor." 75 P.2d at 293. The Kansas Supreme Court wrote:

> Appellant concedes that the State Highway Commission is immune from suit under the circumstances and that he has no cause of

> action against it for building the bridge and approaches, but he argues that, while a large number of courts give to independent contractors the same immunity as given the state, the rule is without sound reason to support it and the contractor should be held responsible for damages that result because the improvement was made under plans and specifications alleged to be obviously unsound as a matter of engineering practice; and that such unsoundness was known to the contractor when he performed the work.

Id. at 292. But the court rejected that argument; and it extended to the contractor an immunity that it characterized as an immunity *from suit*.

See also De Baker v. S. Cal. Ry. Co., 39 P. 610, 616 (Cal. 1895); *Salliotte v. King Bridge Co.*, 122 F. 378, 383 (6th Cir. 1903) ("The King Bridge Company was but an agent of the townships in the construction of this bridge, and is entitled to any exemption from liability which exists in favor of the supervisors or of the state itself. . . . The act of the King Bridge Company cannot be regarded as its personal act, but as that of the supervisors authorizing this bridge. If there has been any appropriation, it has been by the public, for the benefit of the public . . . ."); *Lund v. St. Paul, M. & M. Ry. Co.*, 71 P. 1032, 1034 (Wash. 1903) ("The respondent stood in the place of the city, and we should inquire under what circumstances the city would have been liable. . . . [T]he city itself would not have been liable if the work had been necessarily delayed without any neglect of its own . . . . The same was true of respondent . . . ."); *Fitzgibbon v. W. Dredging Co.*, 117 N.W. 878, 880 (Iowa 1908); *Larned v. Holt & Jeffery*,

133 P. 460, 461 (Wash. 1913) ("[T]he fact that appellant was doing public improvement work for the city, which, though appellant was an independent contractor, was under the direction and control of the city, places appellant in the same position that the city would be in had it been prosecuting the work itself, so far as liability for damages to respondent flowing therefrom is concerned; that is, if the city was not liable for consequential damages, upon the same principle appellant would not be."); *Chattanooga & Tenn. River Power Co. v. Lawson*, 201 S.W. 165, 170 (Tenn. 1918).

B. Prisons and Jails

Various courts have also recognized immunities for contractors operating detention facilities.

In *Williams v. Adams*, 85 Mass. 171 (1861), the Massachusetts Supreme Judicial Court examined whether prisoners in "common jails and houses of correction" could sue their jailers "to recover damages for alleged injuries arising from their failure to provide suitable and proper food, clothing and warmth of rooms for such prisoners." *Id.* at 171. The Court concluded that there could be liability if there were a "question of personal violence unlawfully inflicted upon the prisoner, or of assault and battery and false imprisonment, or of any want of jurisdiction on the part of the defendant to detain the prisoner in the manner he did," *id.*; but if there were no malice or gross negligence, there could be no liability, *id.* at 176, and accountability was to be provided by the board of overseers, *id.* at 174.

Whether the jailer in *Williams* could be characterized as private isn't clear from the opinion, though

Justice Scalia wrote in his *Richardson v. McKnight* dissent that the case "*appears to have conferred immunity upon an independent contractor*," 521 U.S. 399, 415 (1997) (Scalia, J., dissenting), citing various institutional details of jailers' jobs under Massachusetts law, *id.* at 415 n.1.

Alamango v. Board of Supervisors of Albany County, 32 N.Y. Sup. Ct. 551 (1881), is clearer on the not-formally-public status of the defendants. A prisoner sued the operators of a prison for their negligence in making him approach a circular saw without proper precautions. The prison was "by act of the legislature 'authorized and directed' to establish a penitentiary in the county of Albany for the punishment of persons convicted of crimes and misdemeanors in that county." *Id.* at 551. The New York Supreme Court took pains to stress that the prison operators "do not act in any private capacity" while engaged in their duty; that they were "a mere instrumentality selected by the State" and that their duty—"punishing criminals"—is "inherent in the Sovereign power"; and that those whom the state selects, "while engaged in that duty, stand so far in the place of the State." *Id.* at 552. None of that language would have been necessary if this had been a clearly governmental prison.

The court analogized operating prisons to "the laying out and maintaining of highways" and other types of government contract work, and said that "[i]n the performance of all such duties it is settled by the unanimous agreement of the courts that these agencies are not liable for neglect or misfeasance unless the liability is especially imposed by statute." *Id.*

Alamango thus also endorses the view that a contractor "stand[s] . . . in the place of the State."

C. Law Enforcement

In an age before governmental prosecutors were universal, private prosecutors were kept in line by the action of malicious prosecution. Malice was, of course, a required element of malicious prosecution, so private prosecutors had a built-in (though not absolute) immunity. *See, e.g.*, *Parker v. Huntington*, 68 Mass. 124, 128 (1854). And many cases throughout the nineteenth and early twentieth centuries likewise denied absolute immunity to governmental prosecutors, so this was also an example of the Parity Principle. *See, e.g.*, *Arnold v. Hubble*, 38 S.W. 1041, 1041 (Ky. 1897); *Carpenter v. Sibley*, 94 P. 879, 879-80 (Cal. 1908); *Buhner v. Reusse*, 175 N.W. 1005, 1006 (Minn. 1920).

Issues of immunity have also arisen in the context of private citizens who assist officers—for instance, in executing a warrant as part of the posse comitatus.

In *Reed v. Rice*, 25 Ky. 44 (App. 1829), the owner of property seized pursuant to a search warrant brought an action of trespass against the people who had taken his property. Though the warrant turned out to have been illegal, the court held that "individuals summoned by the officer" could validly obey the officer's commands "without inquiring whether his authority was legal or illegal." *Id.* at 46. This principle applied to anyone summoned, even private individuals:

> There is something which instantly strikes the moral sense, as being wrong, when told that a citizen is regarded a trespasser, for conscientiously aiding to execute the law, as he conscientiously believed at the time. . . . [I]f he acts under the command of another,

> and that other, in cases of the kind, may have lawful authority to command him, then we think he ought not to be responsible. In such cases, *the citizen, obeying the officer, should be looked upon in the light of a servant, acting by compulsion*, and the party injured should seek redress against the officer and those who act "officiously."

Id. at 47 (emphasis added). The private citizen was treated as though he was "a servant," having a duty to act as he did; and all such servants were entitled to the same immunity.

The idea that a warrant is enough to protect the law enforcement officer's posse—generally ordinary citizens, not officers—runs through the caselaw, and courts speak generally in terms of anyone aiding the officer. *See, e.g.*, *Kirbie v. State*, 5 Tex. App. 60, 63 (1878) ("[A]t the time of the interference by these defendants a warrant had issued for the arrest of Parker, the validity of which is not questioned, and that the warrant, agreeably to the charge, was sufficient to protect the posse of the constable."); *State v. James*, 80 N.C. 370, 372 (1879) ("[T]he protection which [the warrant] affords is not restricted to the officer to whom it is directed, but equally extends to all who may aid him in its execution. . . . [T]he justification is full to the officer and all who co-operated with him . . . ."); *State v. McMahan*, 103 N.C. 379 (1889) ("It is the duty of those present, when necessary and called upon, to aid the officer, and the protection extended to the officer extends to persons so aiding."); *State v. Mooring*, 20 S.E. 182, 182 (N.C. 1894) ("[I]f [an officer] act in good faith in [executing process], both he and his posse comitatus will be protected.").

The Georgia Supreme Court, in *Robinson v. State*, 18 S.E. 1018 (Ga. 1893), was explicit in treating the posse member acting under the sheriff's orders as no longer a private citizen and entitled to the same immunities as the sheriff himself:

> When citizens are thus summoned by the sheriff, they are, while co-operating with him and acting under his orders, not themselves officers, nor are they mere private persons, but their true legal position is that of a posse comitatus. . . . A member of a posse comitatus summoned by the sheriff to aid in the execution of a warrant for felony in the sheriff's hands *is entitled to the same protection in the discharge of his duties as the sheriff himself*; and to this end a person so summoned may do any act to promote or accomplish the arrest *which he could lawfully do were he himself the sheriff*, having personal custody of the warrant, and bound to execute the same.

Id. at 1019 (emphasis added). The court limited this protection to those who were commanded by the officer, and the officer had to be "in some sense present," even if only "constructively." *Id.* But if the officer is constructively present (even if a great distance away), the private individual assisting him is merely an extension of the officer:

> [W]e think the sheriff was at least constructively present when Powell was attempting to arrest Robinson, although the officer was not in sight at that time. He was using Powell to accomplish the arrest, just as though he had reached out his own arm, supposing

> it was physically possible for him to do so, over the entire distance, and had taken hold of the person of Robinson himself. *Powell was really a mere physical agency employed by the sheriff*, by means of which the officer was enabled to extend his presence to the scene of action.

Id. at 1019-20 (emphasis added); *see also North Carolina v. Gosnell*, 74 F. 734, 738 (C.C.W.D.N.C. 1896) ("Duly-summoned assistants of an officer are under the same protection of the law which is afforded to the officer who has process in his hands. Both judicial and ministerial officers, in the execution of the duties of their office, are under the strong protection of the law; and their legally summoned assistants, for such time as in service, are officers of the law.").

D. Judicial and Quasi-Judicial Functions

Private parties have also enjoyed immunity when they have exercised judicial or quasi-judicial functions. Various cases show that immunity for judicial or quasi-judicial functions was determined by function, not formal public or private status.

For instance, in *Henderson v. Smith*, 26 W. Va. 829 (1885), a deed was declared void because of mistakes made by a notary public. The victim of the notary's mistake sued the notary, alleging the notary's "gross negligence and unskilfulness." *Id.* at 829. The West Virginia Supreme Court of Appeals wrote that "the official act of taking the privy examination of a married woman, whether done by a court, justice, or notary, is a judicial act, or as it is sometimes designated a *quasi*-judicial act," *id.* at 834. ("An officer possessing such discretionary powers is spoken of as a judicial or

quasi-judicial officer from the likeness of his discretionary functions to those of a judge who decides controversies between individuals," *id.* at 836—as opposed to someone with merely ministerial duties, that is, ones that involve no discretion.) And a person who performs a quasi-judicial act "is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them where no corruption or malice can be imputed, and he keeps within scope of authority." *Id.*

The court continued, clearly adopting a functional approach: "*Persons exercising judicial functions, by whatever name they may be called*, enjoy the protection of this judicial privilege. . . . Thus jurors, in determining their verdict act judicially. So do courts martial, election-officers, commissioners in bankruptcy, &c." *Id.* at 836-37 (emphasis added).

The *Henderson* court mentioned the privilege enjoyed by jurors; on that subject, the New York Supreme Court (the highest court in New York at the time) similarly wrote, in *Weaver v. Devendorf*, 3 Denio 117 (N.Y. Sup. Ct. 1846):

> [N]o public officer is responsible in a civil suit, for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer, for what he does in the performance of a judicial duty. The rule extends to judges from the highest to the lowest, to jurors, and to all public officers, *whatever*

> *name they may bear*, in the exercise of judicial power.

Id. at 120 (emphasis added).

And the same is true for grand jurors. In *Turpen v. Booth*, 56 Cal. 65 (1880), the California Supreme Court interpreted a state statute to mean "that no grand juror shall be held liable for damages in a civil action for anything done by him in the grand-jury room," and noted that "this is but a statutory declaration of the principle as it existed at common law." *Id.* at 67. The Supreme Court of Indiana held the same in *Hunter v. Mathis*, 40 Ind. 356 (1872), and gave the following policy rationale, based on society's need for grand jurors:

> Few persons would be willing to act as grand jurors, if, upon the testimony of their fellows or others who are entrusted with the performance of duties in connection with their deliberations concerning the manner in which they discharged their duties, whether with too much activity and zeal or not, they would be liable to be subjected to an action and to the payment of damages.

Id. at 358. And this Court has noted that the similarity of immunities is due to the "functional comparability" of the grand jurors' (and various others') judgments to those of the judge. *See Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976) (also citing *Turpen*, *Hunter*, and other cases); *Richardson*, 521 U.S. at 417 (Scalia, J., dissenting) (citing *Imbler*).

This Court in *Briscoe v. LaHue*, 460 U.S. 325 (1983), likewise noted that "[t]he immunity of parties and witnesses from subsequent damages liability for

their testimony in judicial proceedings was well established in English common law." *Id.* at 330-31 (citing *Cutler v. Dixon*, 76 Eng. Rep. 886 (K.B. 1585); *Anfield v. Feverhill*, 80 Eng. Rep. 1113 (K.B. 1614)); *id.* at 331 n.11 (citing many American nineteenth- and early-twentieth-century decisions to this effect); *see also Gardemal v. McWilliams*, 9 So. 106, 108 (La. 1891) ("This privilege extends to parties, counsel, witnesses, jurors, and judges in a judicial proceeding, to proceedings in legislative bodies, and to all who, in the discharge of public duty or the honest pursuit of private right, are compelled to take part in the administration of justice or in legislation.").

To all these functions, one could add arbitrators chosen by the parties, who were exempt from liability as quasi-judicial officers. *See, e.g.*, *Jones v. Brown*, 6 N.W. 140, 143 (Iowa 1880); *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424 (1884).

"In short, the common law provided absolute immunity from subsequent damages liability for all persons—governmental or otherwise—who were integral parts of the judicial process." *Briscoe*, 460 U.S. at 335; *see also Richardson*, 521 U.S. at 418 (quoting *Briscoe*).

E. Postal Delivery

While the cases discussed above illustrate instances where private parties were held to be immune, the principle is true more generally: various courts have often held private parties doing governmental work to be subject to the same rules as government agents, *whatever those rules might be.*

Two postal cases illustrate the principle in the context of liability for the negligence of one's servants. In *Conwell v. Voorhees*, 13 Ohio 523 (1844), defendants,

contractors to carry U.S. mail, were sued for losing a package due to their negligence and that of their agents. The issue was whether the contractor was a public or private agent—a determination that affected various aspects of his liability, such as whether he was liable to anyone injured or only to his principal, and whether he was liable for the negligence of his servants. The court concluded that the mail contractor was a public agent:

> A mail carrier has no contract with those who transmit articles by the public mail; he receives no fee or reward from them. His contract is with the government of the United States, for the performance of acts in execution of a public function. He is remunerated by the government. The duty he takes upon himself by the contract he is sworn to perform. He acts for the general government in the performance of a function which the government is charged to have executed. So far, then, as the transmission of the mail is concerned, a mail contractor is a public agent . . . .

Id. at 542. And because the contractor was a public agent, he was subject to the same rules as government actors. *Id.* at 542-43.

Similarly, in *Hutchins v. Brackett*, 22 N.H. 252 (1850), the court held that a mail contractor was not liable for the negligence of its servant, because that servant "acts as a public agent, in the discharge of a public duty, and not as the mere servant of the contractor, who employs him." *Id.* at 256.

II. Contractors Doing Government Work Should Be Treated Like Government Officials.

The cases discussed in Part I *supra* are just a sampling of the cases where private parties had immunity for governmental work they did; there are more. *See, e.g.*, *Richardson*, 521 U.S. at 407 ("Apparently the law did provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.").

There are cases going the other way, as one would expect in a federal system; states are allowed to develop their own policies and can overrule themselves over time. For instance, the Virginia Supreme Court of Appeals disapproved of the postal cases *Conwell* and *Hutchins* in *Sawyer*, 58 Va. (17 Gratt.) at 245-46, and the Kentucky Court of Appeals cut back on contractor immunity in construction cases in *Taylor*, 26 S.W.2d at 558-61. But the cases catalogued here are more consistent with the Parity Principle—and with the approach that this Court finally adopted in *Yearsley* and later reaffirmed and extended in *Boyle*.

These cases do not merely show that contractors doing government work should not be held liable. They also illustrate the following broader principles.

1. Government employees may be required to do what the government tells them to do. But—once they have agreed to a contract—the same is true of contractors. *See, e.g.*, *Conwell*, 13 Ohio at 542 ("The duty [the mail carrier] takes upon himself by the contract he is sworn to perform."); *Nelson*, 256 N.W. at 98 ("[I]t is the legal duty of the contractor to perform his contract.").

This is also true in the posse comitatus and the quasi-judicial function cases. Even though the courts often justify immunities in those cases by treating the participants as though they were acting on compulsion, not all of the people involved are truly compelled to participate. However, they are still immune because of the role they play in the system.

2. When a private party does what the government has asked of him, his act—as this Court said in *United States v. Lynah*, 188 U.S. 445 (1903)—is "the act of the government," *id.* at 465. It may make practical sense, in tort law and elsewhere, to distinguish between employees (i.e., "servants") and independent contractors based on the degree of control that the principal exercises, because we are rightly concerned that contractors' incentives may not be fully aligned with the government's. But this consideration is minimized when the contractor is doing what the government contract requires; then, the distinction between different kinds of government agents fades, and their acts should be attributed to the government.

See, e.g., *Hutchins*, 22 N.H. at 256 (1850) (mail contractor "acts as a public agent, in the discharge of a public duty"); *Conklin*, 6 N.E. at 666 (the contractor "becomes, for the time and at the place, the constituted public authority to make the restoration"); *Combs*, 52 S.W.2d at 720 (the contractor "is but the agent of a department of the commonwealth").

3. Such contractors should not only have a defense to liability but also benefit from the full panoply of procedural advantages that the government would have, as though the government were standing in their place.

See, e.g., *Newman*, 164 N.Y.S. at 760 (corporation "was entitled to all of the immunities and privileges which the city itself would be entitled to were it performing the work"); *Connell*, 75 So. at 654 ("[T]he defendant company . . . stands precisely as the city herself would stand if she had done the work directly . . . and were now at the bar instead of defendant."); *Engler*, 75 P.2d at 293 (characterizing contractor's immunity as the state's "immunity from suit").

4. The idea of immunity for private parties is backed by various policy considerations, including the governmental interest in attracting people to do government work while preserving public resources. *See, e.g.*, *Ockerman*, 178 S.W. at 1100 ("If the contractor was held liable, then the real burden would fall on the county . . . ."); *Hunter*, 40 Ind. at 358 ("Few persons would be willing to act as grand jurors, if . . . they would be liable to be subjected to an action and to the payment of damages.").

These ideas are very ancient and at the same time very modern. *See Boyle*, 487 U.S. at 511-12 ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself . . . ."); *Malesko*, 534 U.S. at 72 ("Whether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not us, to decide.").

CONCLUSION

This Court recognized a derivative immunity for government contractors in *Yearsley*. It reaffirmed and extended this principle in *Boyle*. And it relied on similar policy considerations in cases like *Malesko*. This idea—the Parity Principle—has deep roots in pre-

Yearsley common law. And it cannot be fully implemented unless private parties acting at the government's behest can benefit from the full range of procedural advantages that the government itself would have, including—in the modern context—immediate appealability of adverse immunity determinations under the collateral-order rule.

For these reasons, this Court should reverse and remand.

Respectfully submitted,

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