

No. 24-

In the
Supreme Court of the United States

TODD BERMAN,

Petitioner,

v.

PENNSYLVANIA HIGHER EDUCATION
ASSISTANCE AGENCY, D/B/A FEDLOAN SERVICING,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Derivative sovereign immunity shields a federal contractor from liability when the contractor's action in question is authorized and directed by the Government's explicit instructions and the authority to carry out the project was validly conferred by Congress. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). In *Campbell-Ewald v. Gomez*, 577 U.S. 153 (2016), the Court held that derivative sovereign immunity is a type of qualified immunity. The Questions Presented, upon the first of which the circuits are in conflict, are:

Whether derivative sovereign immunity is an affirmative defense to be proven on the merits at trial.

Whether the court of appeals erred in holding that Respondent was entitled to derivative sovereign immunity.

RELATED PROCEEDINGS

Berman v. Pennsylvania Higher Educ. Assistance Auth., No. 1:21-cv-63, U.S. District Court for the Middle District of North Carolina. Judgment entered March 16, 2023.

Berman v. Pennsylvania Higher Educ. Assistance Auth., No. 23-1414, U.S. Court of Appeals for the Fourth Circuit. Judgment entered April 15, 2024.

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The Fourth Circuit's opinion is reported at 2024 WL 1615016 and is reproduced in the Appendix at App. 1a-7a. The Middle District of North Carolina's opinion is reported at 2023 WL 2538956 and is reproduced in the Appendix at App. 8a-27a.

JURISDICTION

The Fourth Circuit's judgment was entered April 15, 2024. Petitioner's timely petition for panel and en banc rehearing was denied on May 13, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioner asserts, *inter alia*, that he was subjected to unfair or deceptive acts or practices in or affecting commerce by Respondent, in violation of N.C. Gen. Stat. § 75-1.1 (2018), in connection with misrepresentations made to Petitioner that his then-employer was not a qualified employer under the Public Service Loan Forgiveness program. 20 U.S.C. § 1087e(m) (2018).

20 U.S.C. § 1087e(m) (2018)

(m) Repayment plan for public service employees

(1) In general

The Secretary shall cancel the balance of interest and principal due, in accordance with paragraph (2), on any eligible Federal Direct Loan not in default for a borrower who--

(A) has made 120 monthly payments on the eligible Federal Direct Loan after October 1, 2007, pursuant to any one or a combination of the following --

(i) payments under an income-based repayment plan under section 1098e of this title;

(ii) payments under a standard repayment plan under subsection (d)(1)(A), based on a 10-year repayment period;

(iii) monthly payments under a repayment plan under subsection (d)(1) or (g) of not less than the monthly amount calculated under subsection (d)(1)(A), based on a 10-year repayment period; or

(iv) payments under an income contingent repayment plan under subsection (d)(1)(D); and

(B)

(i) is employed in a public service job at the time of such forgiveness; and

(ii) has been employed in a public service job during the

period in which the borrower makes each of the 120 payments described in subparagraph (A).

(2) Loan cancellation amount

After the conclusion of the employment period described in paragraph (1), the Secretary shall cancel the obligation to repay the balance of principal and interest due as of the time of such cancellation, on the eligible Federal Direct Loans made to the borrower under this part.

(3) Definitions

In this subsection:

(A) Eligible Federal Direct Loan

The term “eligible Federal Direct Loan” means a Federal Direct Stafford Loan, Federal Direct PLUS Loan, or Federal Direct Unsubsidized Stafford Loan, or a Federal Direct Consolidation Loan.

(B) Public service job

The term “public service job” means--

- (i) a full-time job in emergency management, government (excluding time served as a member of Congress), military

service, public safety, law enforcement, public health (including nurses, nurse practitioners, nurses in a clinical setting, and full-time professionals engaged in health care practitioner occupations and health care support occupations, as such terms are defined by the Bureau of Labor Statistics), public education, social work in a public child or family service agency, public interest law services (including prosecution or public defense or legal advocacy on behalf of low-income communities at a nonprofit organization), early childhood education (including licensed or regulated childcare, Head Start, and State funded prekindergarten), public service for individuals with disabilities, public service for the elderly, public library sciences, school-based library sciences and other school-based services, or at an organization that is described in section 501(c)(3) of Title 26 and exempt from taxation under section 501(a) of such title; or

(ii) teaching as a full-time faculty member at a Tribal

College or University as defined in section 1059c(b) of this title and other faculty teaching in high-needs subject areas or areas of shortage (including nurse faculty, foreign language faculty, and part-time faculty at community colleges), as determined by the Secretary.

(4) Ineligibility for double benefits

No borrower may, for the same service, receive a reduction of loan obligations under both this subsection and section 1078-10, 1078-11, 1078-12, or 1087j of this title.

N.C. Gen. Stat. § 75-1.1 (2018)

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, “commerce” includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or

deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

INTRODUCTION

The Government's need for contractors – whether it be to secure the nation's homeland or, in this case, to service student loans – is critical to the effective functioning of the Government. However, the courts must be vigilant to ensure that only deserving federal contractors are immunized from liability for their actions under the doctrine of “derivative sovereign immunity.” Otherwise, victims will be unfairly left without potential judicial remedies, and the Government will have been granted too much administrative power to select contractors and award them with lucrative contracts that carry no risk of legal exposure. That is what happened here. The U.S. Department of Education awarded Respondent with a multi-year, multimillion dollar contract to service student loans, and Respondent was not held accountable for its unauthorized action.

To begin, federal contractors do not acquire, by virtue of their contracts, “the Government's embrative immunity” from liability. *Campbell-Ewald v. Gomez*, 577 U.S. 153, 166 (2016). Instead, a federal contractor's claim to derivative sovereign immunity, *i.e.*, immunity from

liability for taking actions performed pursuant to federal law that are authorized and directed by the Government's explicit instructions, is a type of *qualified* immunity. *Id.* ("Do federal contractors share the Government's unqualified immunity from liability and litigation? We hold they do not.").

Accordingly, like any other qualified immunity defense, derivative sovereign immunity is an affirmative defense to be proven on the merits at trial. Indeed, when the issue of derivative sovereign immunity was presented in *Campbell-Ewald* upon the defendant's motion for summary judgment, this Court viewed the inferences from the underlying facts in the light most favorable to the non-moving party and held that the defendant was not entitled to summary judgment. *Campbell-Ewald*, 577 U.S. at 168 (citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). By deciding the issue upon a motion for summary judgment, the Court – without expressly saying so – determined that derivative sovereign immunity is an affirmative defense to be proven on the merits at trial.

Nonetheless, the Fourth Circuit stuck to its pre-*Campbell-Ewald* precedents and expressly held that derivative sovereign immunity, like the Government's absolute sovereign immunity, is a *jurisdictional* issue, and not an affirmative defense. *Cunningham v. General Dynamics Info. Tech., Inc.*, 888 F.3d 640, 650 (4th Cir. 2018). As a result, a plaintiff in the Fourth Circuit responding to a contractor's factual assertion of derivative sovereign immunity does not have the inferences from the underlying facts viewed in the light most favorable to the plaintiff. Instead, the court weighs the evidence, and

the plaintiff bears the burden of proving that jurisdiction exists. Since *Cunningham*, no circuit court has joined the Fourth Circuit in its view, and, in this action, when Petitioner requested that it convene an en banc court to revisit *Cunningham*, the Fourth Circuit twice declined to do so – once prior to merits briefing upon a petition for initial hearing en banc and then, again, following the panel’s dismissal for lack of jurisdiction, upon a petition for rehearing en banc.

As a result, there is a clear 2-1 split among the circuit courts that have expressly addressed the issue since *Campbell-Ewald*, with the Fifth and Sixth Circuits unambiguously holding that derivative sovereign immunity is an affirmative defense to be proven on the merits at trial. See *ACT, Inc. v. Worldwide Interactive Network, Inc.*, 46 F.4th 489, 497 n.2 (6th Cir. 2022); *Taylor Energy Co., L.L.C. v. Luttrell*, 3 F.4th 172, 175 (5th Cir. 2021). With the increased reliance by the Department of Education upon unscrupulous contractors to service student loans – which has led to an uptick in lawsuits by borrowers and state attorneys general and in administrative enforcement actions by the Consumer Financial Protection Bureau – and with the increased reliance upon contractors by the Government generally, it is important and urgent for this Court to resolve the split among the circuits.

Regardless of whether derivative sovereign immunity is an affirmative defense, the Court should additionally review the court of appeals’ holding that Respondent was entitled to immunity in this case because it is an important federal question that was decided in a way that conflicts with relevant decisions on federal contract interpretation and that provides unduly excessive power

to administrative agencies. If the Court determines that derivative sovereign immunity is an affirmative defense, then, to get to the merits of the issue, the Court should review, in the first instance, the denial of Petitioner's motion for partial summary judgment on liability. While the district court denied the motion as moot because the case was dismissed for lack of jurisdiction on account of derivative sovereign immunity, the Court should nevertheless review the denial of the motion in the first instance because the evidentiary record is complete and the parties have had the opportunity to make legal arguments on liability. To date, Respondent's only legal argument to counter the undisputed, material facts establishing liability has been that Respondent is entitled to derivative sovereign immunity.

This Court previously determined that there are circumstances in which the Court would be justified in resolving an issue not passed on below, including "where the proper resolution is beyond any doubt" or where "injustice might otherwise result." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). One or both of those considerations apply here to the important federal question of the application of derivative sovereign immunity. For the benefit of Petitioner and the millions of similarly situated current and future student loan borrowers throughout the country seeking loan forgiveness under the congressionally enacted Public Service Loan Forgiveness program, this Court should review Petitioner's motion for partial summary judgment on liability in the first instance to correct the court of appeals' mistakes that led to its holding Respondent was entitled to derivative sovereign immunity.

Consistent with the principles of federal contract interpretation under federal common law, the court of appeals was required to employ a contextual interpretation of the student loan servicing agreement between Respondent and the Department of Education to determine whether Respondent was authorized and directed by the Government to deny Petitioner eligibility for loan forgiveness. Instead, the court of appeals overlooked the numerous provisions that provide chronological context to show that the servicing agreement does not contain explicit instructions regarding the *particular* action of Respondent that is at issue in this case, *i.e.*, Respondent's reversal of employer eligibility *after* Petitioner's loans were already transferred to Respondent from his prior servicer. Since there were no such instructions within the servicing agreement, the court of appeals should not have granted Respondent derivative sovereign immunity to shield it from liability.

Moreover, the court of appeals' determination that, apart from the language of the servicing agreement, Respondent was independently deserving of derivative sovereign immunity owing to emails received from Department employees misapplied *Campbell-Ewald*. In *Campbell-Ewald*, this Court held that, for federal contractors to be immunized from liability, the work in question must have been done "pursuant to their *contractual* undertakings with the United States." *Campbell-Ewald*, 577 U.S. at 166 (quoting *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943)) (emphasis added). The Court nevertheless examined the contractor's extra-contractual verbal instructions and determined that, since those instructions had not been followed, the contractor was not entitled to derivative sovereign

immunity. The Court would have reached the same result by simply acknowledging that the instructions were not within the contractual documents, and the Court can reach that conclusion here, as well. Still, while the instructions at issue in *Campbell-Ewald* were verbal and not within the government contract, the instructions were at least consistent with federal law.

In contrast, in this case, the court of appeals held that emails from Department employees with extra-contractual instructions *to take action in violation of federal law, i.e.*, to deny eligibility for public service loan forgiveness where Petitioner was employed in a public service job, constituted sufficient Government authorization to confer immunity from liability since the instructions were followed. The Court should reject such an extreme assertion of administrative power that would permit a Government employee to so confer immunity from liability via email with the mere click of the “send” button, especially where, as here, there is a Government contract that adheres to procurement guidelines. *Campbell-Ewald* cautioned against the application of derivative sovereign immunity when the contractor violates federal law. *Campbell-Ewald*, 577 U.S. at 166 (“When a contractor violates both federal law and the Government’s explicit instructions, as here alleged, no ‘derivative immunity’ shields the contractor from suit by persons adversely affected by the violation.”).

The Court should, therefore, grant the Petition.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Petitioner Todd Berman is a United States Army veteran who, prior to entering the Army, had obtained two Federal Direct Loans from the U.S. Department of Education to finance his higher education. App. 2a. After Petitioner spent four years in the Army, his student loans were transferred in 2015 to a different loan servicing company, Respondent Pennsylvania Higher Education Assistance Agency. App. 10a. The Department had contracted with Respondent, pursuant to authority granted to the Department under 20 U.S.C. § 1087f, to service any student loans that are eligible for cancellation under the Public Service Loan Forgiveness (“PSLF”) program. *Id.* To be eligible for loan cancellation under PSLF, borrowers must make ten years of monthly payments while “employed in a public service job.” 20 U.S.C. § 1087e(m)(1)(B) (2018). App. 2a.

The student loan servicing agreement between the Department and Respondent contained instructions that authorized and directed Respondent to transfer loans from a borrower’s original servicer(s) to Respondent if, after reviewing the loans’ eligibility for cancellation under PSLF, Respondent determined that, among other things, the borrower was employed by a “qualifying public service organization.” App. 4a-5a. It was pursuant to those instructions that Respondent, upon its receipt from Petitioner of an Employer Certification Form (“ECF”) describing the Army as his employer, had determined and confirmed in writing Petitioner’s eligibility for loan cancellation under PSLF and transferred Petitioner’s loans from his original servicer to Respondent. App. 10a.

Following his honorable discharge from the Army, Petitioner went to work for Blue Cross Blue Shield of North Carolina (“Blue Cross NC”) in 2015. App. 2a. In 2016, he submitted an ECF to Respondent describing Blue Cross NC as his new employer. App. 11a. In response, in December 2016, Respondent determined and confirmed in writing Petitioner’s continued eligibility for loan cancellation under PSLF and that, specifically, Blue Cross NC was a public service organization under PSLF. *Id.* However, in early 2018, while Petitioner was still employed with Blue Cross NC, he received mixed messages in writing from Respondent as to whether he continued to be eligible for loan cancellation under PSLF. App. 3a. This culminated in a March 2018 letter from Respondent that, “after consulting with the Department of Education,” it had determined Blue Cross NC was *not* a public service organization under PSLF and that Respondent was, therefore, reversing its prior employer eligibility determination and revoking credit for all the payments Petitioner had made during his years of employment with Blue Cross NC. *Id.*

In response to receiving Respondent’s March 2018 letter, Petitioner took a series of steps – that he deemed to be in his family’s financial best interests – to move on from his hope of loan cancellation under PSLF. First, he changed his repayment plan to a nonqualifying repayment plan under PSLF in order to pay down his balance more quickly. Compl. at 16 ¶51, *Berman v. Pennsylvania Higher Educ. Assistance Agency*, No. 1:21-cv-63 (M.D.N.C. Mar. 16, 2023) (Dkt. 1) (hereinafter referred to as “Compl.”). Second, he left his job at Blue Cross NC to take a job in the for-profit sector. App. 11a. And third, recognizing the existence of favorable interest rates for private loans at

the time, he ultimately refinanced his federal student loans into a private loan. App. 3a. This last step permanently foreclosed Petitioner’s possibility of ever obtaining loan cancellation under PSLF – or ever obtaining loan cancellation under any later-enacted loan cancellation program for federal loans, including the subsequently enacted COVID-19 payment pause – because a private student loan cannot be unwound back into federal loans. Compl. at 18 ¶56.

Then, in November 2019, nearly one year after Petitioner refinanced his federal student loans into a private loan, Petitioner received another letter from Respondent. App. 3a. This time, Respondent informed him that its March 2018 letter, which had reversed the determination in Respondent’s December 2016 letter designating Blue Cross NC as a qualifying employer under PSLF, was itself “in error” because Blue Cross NC was, in fact, a qualifying employer under PSLF all along. *Id.* However, Respondent’s reversal of its prior reversal was too late to benefit Petitioner.

Petitioner sued Respondent in federal district court, alleging a violation of North Carolina’s Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, as well as common law claims of negligent misrepresentation and breach of contract. App. 3a.

II. PROCEEDINGS BELOW

The court of appeals affirmed the district court’s dismissal of the case for lack of subject matter jurisdiction, agreeing with the district court that Respondent was entitled to derivative sovereign immunity. App. 3a-4a.

In doing so, the court of appeals rebuffed Petitioner’s assertion that the loan servicing agreement did not authorize and direct Respondent’s action in question. App. 4a-5a. Additionally, the court of appeals determined that, “even apart from the language of the contract,” the Department authorized Respondent’s action in question with emails from Department employees. App. 6a.

Although the application of derivative sovereign immunity requires a careful and meticulous examination of the Government contract to determine whether it authorized and directed the *particular* action in question, the court of appeals answered that question in the affirmative without much, if any, analysis. Rather, the court of appeals merely observed that the servicing agreement contained “step-by-step instructions for ‘[v]erifying qualifying employment,’” including a requirement to escalate to the Department for approval any questions about whether a non-501(c)(3), not-for-profit organization, such as Blue Cross NC, qualifies as a public service organization, which Respondent had done. App. 5a.

The court of appeals took issue with Petitioner’s contractual interpretation that those step-by-step instructions spoke only to how Respondent “was to make an *initial* decision about whether a given employer qualified for loan forgiveness and was silent about how [Respondent] should go about ‘chang[ing] its prior determination.’” App. 5a (emphasis in original). Despite Petitioner’s thorough, section-by-section, textual analysis that – consistent with the required principles of contract interpretation under federal common law for federal government contracts – urged a contextual, chronological interpretation, the court of appeals stated Petitioner

“urges an unnatural reading of the contract” and that “[t]he distinction [Petitioner] seeks to draw has no basis in the contract’s text.” *Id.* In addition, the court of appeals stated that Petitioner’s contextual interpretation could not be reconciled with the requirement that, “after a loan was transferred to [Respondent] from a different servicer—something that happened to [Petitioner’s] loans—[Respondent] was required to ‘track the number of . . . *qualifying* payments made after’ the transfer, including by reviewing an employer’s qualified status every time [Respondent] received an employment certification form.” App. 5a (emphasis in original).

The court of appeals’ secondary holding was that, even apart from the language of the servicing agreement, the Government directed and authorized Respondent’s action for the purpose of derivative sovereign immunity with emails from Department employees directing Respondent to change Blue Cross NC to a non-qualifying employer under PSLF. App. 6a. Without discussion, the court cited *Campbell-Ewald* for support. *Id.* The court of appeals also cited *Butters v. Vance Int’l, Inc.*, 225 F.3d 462, 466–67 (4th Cir. 2000), a Foreign Sovereign Immunities Act case that found immunity from sex-discrimination liability for Saudi Arabia’s contracted security service company after Saudi officials verbally directed the company to not promote a woman because of her sex. App. 6a. The court stated *Butters* stood for the proposition that “even relying on a government official’s verbal authorization can be enough to confer derivative sovereign immunity to a government contractor.” *Id.*

REASONS FOR GRANTING THE WRIT

- I. Whether Derivative Sovereign Immunity Is An Affirmative Defense To Be Proven On The Merits At Trial Is An Important Issue That Merits This Court's Review**
 - A. The Opinion Below Misapplies This Court's Precedent**

The procedural vehicle in which a dispositive issue makes its way to a court for consideration is material because it may impact which party, if any, has inferences drawn in its favor or which party bears the burden of proof. For example, on a motion to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving the existence of jurisdiction, and the court weighs the evidence. *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936). However, on a motion for summary judgment, all justifiable inferences are drawn in the non-movant's favor, and the movant bears the burden of proof. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). If, as a result of the court choosing the wrong procedural vehicle, a case alleging wrongdoing by a federal contractor is dismissed at the outset for lack of subject matter jurisdiction, then the plaintiff is unfairly left without an opportunity for judicial remedies, and the Government will have been granted too much administrative power to select a contractor for a lucrative contract that carries no risk of legal exposure.

In *Campbell-Ewald v. Gomez*, 577 U.S. 153, 166 (2016), this Court held that a federal contractor's immunity – first recognized in *Yearsley v. W.A. Ross Const. Co.*, 309 U.S.

18 (1940) – is a type of qualified immunity. But rather than treat the issue as an affirmative defense to be proven on the merits at trial, the Fourth Circuit subsequently treated it as jurisdictional. Consequently, in this case, rather than having inferences drawn in Petitioner’s favor and Respondent bearing the burden of proof on the issue of immunity, inferences were *not* drawn in Petitioner’s favor, *Petitioner* bore the burden of proof, and the court of appeals dismissed the case for lack of subject matter jurisdiction.

Campbell-Ewald held that federal contractors do not acquire, by virtue of their contracts, “the Government’s embracive immunity” from liability. Instead, a federal contractor’s claim to “derivative sovereign immunity,” *i.e.*, immunity from liability for taking actions performed pursuant to federal law that are authorized and directed by the Government’s explicit instructions, is a type of *qualified* immunity. *Id.* (“Do federal contractors share the Government’s unqualified immunity from liability and litigation? We hold they do not.”).¹ Accordingly, like any

1. The Court equated the term “derivative sovereign immunity” with a failed request from the contractor for federal contractor immunity that would be non-qualified and absolute like sovereign immunity. *See Campbell-Ewald*, 577 U.S. at 156 (“We hold that the petitioner’s status as a Government contractor does not entitle it to ‘derivative sovereign immunity,’ *i.e.*, the blanket immunity enjoyed by the sovereign.”). However, since *Campbell-Ewald*, the lower courts have largely used the term “derivative sovereign immunity” to refer to the *qualified* federal contractor immunity endorsed in that case and first recognized in *Yearsley*. While “federal contractor immunity” might be the better term for this type of immunity, for purposes of this Petition, Petitioner uses the term “derivative sovereign immunity.”

other qualified immunity defense, derivative sovereign immunity is an affirmative defense to be proven on the merits at trial. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (holding that qualified immunity is an affirmative defense).

Campbell-Ewald involved a lawsuit alleging violations of the Telephone Consumer Protection Act (“TCPA”). After the Court determined that the complaint filed by Jose Gomez, a consumer, against Campbell-Ewald Company, a marketer, was not rendered moot by an unaccepted offer of judgment, the Court turned to whether Campbell-Ewald was entitled to derivative sovereign immunity and was, therefore, entitled to summary judgment. *Campbell-Ewald*, 577 U.S. at 166. Campbell-Ewald had contracted with the United States Navy to develop a recruiting campaign that included sending text messages. *Id.* The Court acknowledged that “government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States,” *id.* (quoting *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943)), but noted “that immunity, however, unlike the sovereign’s, is not absolute.” *Id.* (citing *Brady*, 317 U.S. at 580-81). The Court admonished that “[w]hen a contractor violates both federal law and the Government’s explicit instructions, as here alleged, no ‘derivative immunity’ shields the contractor from suit by persons adversely affected by the violation.” *Id.*

The issue of derivative sovereign immunity was presented to the Court upon Campbell-Ewald’s motion for summary judgment, and the Court noted that it, therefore, “construe[s] the record in a light favorable to the party seeking to avoid summary disposition, here, Gomez.”

Campbell-Ewald, 577 U.S. at 168 (citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). By deciding the issue under Rule 56 of the Federal Rules of Civil Procedure upon Campbell-Ewald’s motion for summary judgment, as opposed to recasting it as a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the Court – without expressly saying so – made the unremarkable determination, consistent with *Gomez*, that derivative sovereign immunity, as a type of qualified immunity, is an affirmative defense to be proven on the merits at trial, as opposed to a jurisdictional issue.

It follows, then, that when the court of appeals decided the issue of derivative sovereign immunity in this case upon Respondent’s reframed motion to dismiss under Rule 12(b)(1), which was consistent with the Fourth Circuit’s post-*Campbell-Ewald* treatment of the issue as jurisdictional, see *Cunningham v. General Dynamics Info. Tech., Inc.*, 888 F.3d 640, 650 (4th Cir. 2018); App. 4a, it misapplied *Campbell-Ewald* by using the wrong procedural vehicle to review Respondent’s motion. The court of appeals’ error was material because, unlike the consumer in *Campbell-Ewald*, Petitioner did not have the inferences from the underlying facts viewed in the light most favorable to him, and Petitioner, not Respondent, bore the burden of proof. As a result, a case that would have ostensibly survived summary judgment and progressed to trial was dismissed for lack of jurisdiction and, therefore, did not even “get through the courthouse doors.”

Despite getting “two bites at the apple” to set things right, the court of appeals chose not to do so. Petitioner requested that it convene an en banc court to revisit *Cunningham* prior to merits briefing, Corrected Petition

for Initial Hearing En Banc, *Berman v. Pennsylvania Higher Educ. Assistance Agency*, No. 23-1414 (4th Cir. Apr. 22, 2023) (Dkt. 12), and also following the panel’s dismissal for lack of jurisdiction. Petition for Rehearing and Rehearing En Banc, *Berman v. Pennsylvania Higher Educ. Assistance Agency*, No. 23-1414 (4th Cir. Apr. 23, 2024) (Dkt. 37). The court of appeals denied both petitions. Order, *Berman v. Pennsylvania Higher Educ. Assistance Agency*, No. 23-1414 (4th Cir. Apr. 25, 2023) (Dkt. 13); App. 30a. Now only this Court can set things right for the Fourth Circuit and for the circuits that have not yet considered the issue.

B. The Opinion Below Conflicts With Two Other Circuits

Since *Campbell-Ewald*, two circuits have departed from the Fourth Circuit and expressly held that *Campbell-Ewald*’s recognition of derivative sovereign immunity as a type of qualified immunity necessarily means that it is an affirmative defense to be proven on the merits at trial, and not a question of jurisdiction. *ACT, Inc. v. Worldwide Interactive Network, Inc.*, 46 F.4th 489, 497 n.2 (6th Cir. 2022); *Taylor Energy Co., L.L.C. v. Luttrell*, 3 F.4th 172, 175 (5th Cir. 2021).²

In *ACT*, the Sixth Circuit reviewed the district court’s decision to strike the defendant’s derivative sovereign

2. In addition, the federal government also disagrees with the Fourth Circuit. The Government recently stated within an amicus brief its view that derivative sovereign immunity is a merits defense to liability, and *not* jurisdictional. See *Posada v. Cultural Care, Inc.*, 66 F.4th 348, 353 (1st Cir. 2023). Petitioner encourages the Court to call for the views of the Solicitor General in this case.

immunity defense from its amended answer. *ACT*, 46 F.4th at 506-09. In affirming the district court’s decision to strike the affirmative defense due to the defendant’s significant delay in asserting the defense, the Sixth Circuit first determined the issue was immediately appealable under the collateral-order doctrine. *Id.* at 496-98. While the court determined that it was immediately appealable because the immunity in question “is one from suit” that “derives from whatever immunity the relevant government would have ‘in the same situation,’” *id.* at 497 (quoting *Adkisson v. Jacobs Eng’g Grp.*, 790 F.3d 641, 645 (6th Cir. 2015)), the court also made “clear” that contractor immunity does not function “*exactly* the same as would the sovereign’s immunity.” *Id.* at 497 n.2 (emphasis in original).

Specifically, the Sixth Circuit stated that its pre-*Campbell-Ewald* precedent holds that “contractors’ immunity is not jurisdictional, as might be, for instance, a state’s immunity under the Eleventh Amendment.” *ACT*, 46 F.4th at 497 n.2 (citing *Adkisson*, 790 F.3d at 647; U.S. Const. amend. XI). The Sixth Circuit then referenced *Campbell-Ewald* for implicit support that federal contractor immunity is instead an affirmative defense: “[T]he Supreme Court has described federal contractors’ immunity as ‘qualified,’ given that its applicability hinges on whether the contractor was closely following the government’s precise instructions.” *Id.* (citing *Campbell-Ewald*, 577 U.S. at 166-67). And since derivative sovereign immunity is a type of qualified immunity, the Sixth Circuit noted that “[c]ontractors enjoy no derivative immunity, in other words, for acts that deviate from those instructions.” *Id.*

Likewise, in *Taylor Energy*, the Fifth Circuit held that “*Yearsley* immunity is ‘derivative sovereign immunity,’”

Taylor Energy, 3 F.4th at 175 (quoting *Campbell-Ewald*, 577 U.S. at 160), and “*Yearsley* immunity is an affirmative defense and [the contractor] bore the burden of proof on the defense at trial.” *Id*; see also *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 208 (5th Cir. 2009) (“Based on the Supreme Court’s actions in *Yearsley*, we hold that concluding *Yearsley* is applicable does not deny the court of subject-matter jurisdiction.”). The court then examined (1) whether the contractor’s actions were authorized and directed by the Government, and (2) whether the contractor’s authority was validly conferred by Congress. Answering in the affirmative to both questions, the Sixth Circuit found the contractor was entitled to derivative sovereign immunity and, therefore, affirmed summary judgment in its favor.

The Court should, therefore, grant the Petition to resolve the circuit split on the important issue of whether derivative sovereign immunity is an affirmative defense to be proven on the merits at trial, and not a question of jurisdiction. The Court’s resolution of this issue makes the difference between whether cases alleging wrongful conduct by federal contractors are potentially dismissed for lack of subject matter jurisdiction or proceed to trial with the contractor bearing the burden to prove that it was following explicit Government instructions.

II. The Opinion Below Decided An Important Federal Question – Derivative Sovereign Immunity – In A Way That Conflicts With Relevant Decisions

The Court should additionally review whether the court of appeals erred in holding that Respondent was entitled to derivative sovereign immunity. If the Court

determines that derivative sovereign immunity is an affirmative defense, then, to get to the merits of the immunity issue, the Court should examine, in the first instance, the denial of Petitioner's motion for partial summary judgment on liability. The district court denied the motion as moot because the case was dismissed for lack of jurisdiction on account of derivative sovereign immunity, but this Court is in an advantageous position to consider Petitioner's motion in the first instance. While "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below," *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), here, the Court should review Petitioner's motion on liability in the first instance because it involves the same evidence and the same legal arguments that the parties made in the lower courts and because it would resolve an important federal issue.

The fact that there is a full record before the Court in this case significantly differs from the limited record before the Court in *Singleton* where the Court stated, in connection with a legal challenge to a statute, "We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence." *Singleton*, 428 U.S. at 120. In contrast, the evidence in connection with Petitioner's motion on liability is precisely the same evidence that the parties proffered in the district court and the court of appeals and which the parties discussed in their lower court briefs in connection with the purported jurisdictional issue of derivative sovereign immunity.

Additionally, Respondent had the opportunity in the lower courts, and would have the opportunity here,

to make legal arguments on liability in response to Petitioner's motion. To date, Respondent's only legal argument to counter the undisputed, material facts establishing liability has been that Respondent is entitled to derivative sovereign immunity. While it prevailed on that argument for purposes of its motion to dismiss for lack of jurisdiction, the court of appeals' analysis conflicted with this Court's decisions and with multiple circuits.

This Court determined that there are circumstances in which the Court would be justified in resolving an issue not passed on below, including "where the proper resolution is beyond any doubt" or where "injustice might otherwise result." *Singleton*, 428 U.S. at 121. As discussed below, one or both of those considerations apply here to the important federal question of the application of derivative sovereign immunity. For the benefit of Petitioner and the millions of similarly situated current and future student loan borrowers throughout the country seeking loan forgiveness under the congressionally enacted Public Service Loan Forgiveness program, this Court should review Petitioner's motion for partial summary judgment on liability in the first instance to correct the court of appeals' mistakes on the application of derivative sovereign immunity.

A. The Opinion Below Conflicts With Decisions Of This Court And Multiple Circuits Regarding The Principles For Interpreting Federal Contracts Under Federal Common Law

In examining whether the loan servicing agreement between Respondent and the Department of Education contained explicit instructions regarding Respondent's

action in question, the court of appeals failed to adhere to the principles for interpreting federal contracts under federal common law. The court's error was material because it left the court of appeals without the ability to properly examine the contract's PSLF eligibility instructions *in their chronological context*. Consequently, the court of appeals determined the employer eligibility instructions that required Respondent to obtain approval from the Department for eligibility determinations relating to non-501(c)(3), not-for-profit organizations applied to Respondent's reversal of eligibility for Blue Cross NC.

Yet the employer eligibility instructions, properly viewed *in their chronological context* with surrounding eligibility instructions, only applied to circumstances in which the borrower's loans had not yet been transferred from the original servicer(s) to Respondent for servicing. The preamble language of the PSLF eligibility instructions, Requirements 203 and 204, and Part 5 of Appendix B, when all read together with the employer eligibility instructions of Requirement 202 and Part 3 of Appendix B, *see* Joint App. Vol. 1 at JA139-45, JA156-62, *Berman v. Pennsylvania Higher Educ. Assistance Agency*, No. 23-1414 (4th Cir. June 30, 2023) (Dkt. 17-1) (hereinafter referred to as "Joint App. Vol. 1"), show that the employer eligibility instructions are chronological. Thus, Departmental approval of eligibility for non-501(c)(3), not-for-profit organizations was required *only in the limited circumstance in which the borrower's loans had not yet been transferred to Respondent for servicing from the original servicer(s)*.

Since Petitioner's loans had undisputedly already been transferred to Respondent for servicing by the

time Respondent took the action in question, *i.e.*, its reversal of employer eligibility for Blue Cross NC, App. 10a, the employer eligibility instructions did not apply to Respondent's action in question. Instead, Respondent was to simply exercise its discretion to follow the general terms of the contract, which required Respondent to comply with "all legislative and regulatory requirements for the Direct Loan program." App. 20a.

While the court of appeals determined that Petitioner "urges an unnatural reading of the contract" and "[t]he distinction [Petitioner] seeks to draw has no basis in the contract's text," App. 5a, the sole basis for Petitioner's distinction, consistent with the principles of federal contract interpretation under federal common law, *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996); *Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1245 (Fed. Cir. 2007), was the "language of the written agreement." *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004); *see Craft Mach. Works, Inc. v. United States*, 926 F.2d 1110, 1113 (Fed. Cir. 1991) ("[T]he plain and unambiguous meaning of a written agreement controls."). Indeed, as noted above, Petitioner analyzed the loan servicing agreement's preamble language of the PSLF eligibility instructions, Requirements 203 and 204, and Part 5 of Appendix B, together with the employer eligibility instructions of Requirement 202 and Part 3 of Appendix B.

In addition, Petitioner's distinction drew upon the textual context in which the employer eligibility instructions appeared in the contract because "a court must give reasonable meaning to all parts of the contract and not render portions of the contract meaningless."

Price v. United States, 46 Fed. Cl. 640, 647 (2000), *aff'd*, 10 F. App'x 801 (Fed. Cir. 2001) (citing *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985)). Indeed, “[t]o ascertain the intentions of the parties, the contract should be construed in its entirety ‘so as to harmonize and give meaning to all its provisions.’” *Id.* (quoting *Thanet Corp. v. United States*, 591 F.2d 629, 633 (Ct. Cl. 1979)). “An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous.” *NVT Techs.*, 370 F.3d at 1159 (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). Importantly, “an inquiring court must avoid tunnel vision: instead of focusing myopically on individual words, it must consider contractual provisions *within the context of the contract as a whole*.” *Amyndas Pharms., S.A. v. Zealand Pharma A/S*, 48 F.4th 18, 31 (1st Cir. 2022) (emphasis added).

Using these principles of federal contract interpretation under federal common law, Petitioner demonstrated by a preponderance of the evidence – his burden of proof to demonstrate the existence of subject matter jurisdiction – that the employer eligibility instructions, properly read within their chronological context, were limited to circumstances in which the borrower’s loans had not yet been transferred to Respondent for servicing from the original servicer. Yet the court of appeals “painted with a broad brush” and seemingly found that the instructions covered *all* determinations of employer eligibility regardless of where they fell in the servicing chronology.

The court’s one attempt to substantively undermine Petitioner’s contextual interpretation actually supported it. Quoting from Requirement 204 of the loan servicing

agreement, the court noted that, “after a loan was transferred to [Respondent] from a different servicer – something that happened to [Petitioner’s] loans – [Respondent] was required to ‘track the number of . . . qualifying payments made after’ the transfer, including by reviewing an employer’s qualified status every time [Respondent] received an employment certification form.” App. 5a. The fact that the court of appeals acknowledged that Requirement 204 necessarily applied “after a loan was transferred to [Respondent] from a different servicer,” App. 5a, which is the instruction contained within Requirement 203, *see* Joint App. Vol. 1 at JA140, demonstrates the correctness of Petitioner’s interpretation that the instructions are in chronological order. And since the employer eligibility instructions of Requirement 202 precede the loan transfer instructions of Requirement 203, it follows that the employer eligibility instructions at issue in this case only apply when the loans have not yet transferred to Respondent.

Even more, the fact that Requirement 204 required Respondent to track the number of qualifying payments made by the borrower after the loans transferred to Respondent, including by reviewing the employer’s eligibility each time Respondent received an ECF, is not probative of the view that Respondent was *always* required to obtain Department approval for eligibility of non-501(c)(3), not-for-profit organizations. It only means that Respondent had to perform the task of determining employer eligibility each time. Since Requirement 204 did not refer back to Requirement 202, the court of appeals tacitly acknowledged that Requirement 204 did not speak to *how* Respondent would determine employer eligibility post-loan transfer. In the absence of an explicit instruction, Respondent would simply observe the general

terms of the contract to comply with “all legislative and regulatory requirements for the Direct Loan program.” App. 20a.

The fact that the loan servicing agreement only authorized and directed Respondent on employer eligibility determinations with explicit instructions in this narrow circumstance, *i.e.*, prior to the borrower’s loans transferring to Respondent for servicing, is unsurprising. At the outset of a borrower’s process to obtain loan forgiveness under PSLF – and *prior* to the borrower’s loans being transferred to Respondent for servicing, which triggered Respondent’s ability to earn money on the servicing of those loans – Respondent was understandably instructed by the Department to obtain the Department’s approval for *every* determination of employer eligibility for non-501(c)(3), not-for-profit organizations. After all, the Department did not want its servicers unnecessarily or mistakenly pulling loans from other servicers. Doing so would diminish those other servicers’ earnings.

But after the loans have been transferred to Respondent from the borrower’s other servicer(s), the Department was understandably comfortable with Respondent exercising its discretion – with respect to employer eligibility determinations for PSLF *and with respect to the numerous other servicing activities not covered by an explicit instruction* – under the general terms of the loan servicing agreement to service the loans in accordance with “all legislative and regulatory requirements for the Direct Loan program.” App. 20a. Respondent admitted as much in, among other places, its March 2018 and November 2019 letters to Petitioner in which it indicated that *Respondent* made the employer eligibility determinations as to whether Blue Cross NC

was an eligible employer under PSLF. *See* Joint App. Vol. 1 at JA131, JA133.

B. The Opinion Below Misapplies This Court’s Precedent And Conflicts With Multiple Circuits Regarding The Source Of Government Authority That Confers Derivative Sovereign Immunity

The court of appeals’ determination that, apart from the language of the servicing agreement, Respondent was independently deserving of derivative sovereign immunity owing to emails received from Department employees misapplied *Campbell-Ewald*. In *Campbell-Ewald*, this Court held that, for federal contractors to be immunized from liability, the work in question must have been done “pursuant to their *contractual* undertakings with the United States.” *Campbell-Ewald*, 577 U.S. at 166 (quoting *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943)) (emphasis added). The issue is, thus, whether the contractor complied with the instructions *in its Government contract*.

To be sure, *Campbell-Ewald* ultimately examined the Government’s extra-contractual, verbal instructions and determined that, since those instructions had not been followed by Campbell-Ewald, which, again, was contracted to conduct a marketing campaign for the Navy, it was not entitled to derivative sovereign immunity. However, the Court would have reached the same result by simply noting that the Government contract did not include the instructions, which were to only send marketing text messages to individuals who have provided consent (opted in) to solicitations. That is not to say that Campbell-Ewald

could have gone ahead and properly texted individuals without their consent. Doing so would have violated federal law, the TCPA, 47 U.S.C. § 227(b)(1)(A), which, in accordance with the Federal Acquisition Regulation, every Government procurement contract forbids of contractors.³ 48 C.F.R. § 52.212-4(q) (“The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.”). Rather, it simply recognizes that the “derivative” nature of derivative sovereign immunity exists by virtue of the contractor performing as it was instructed to perform within the Government specifications of the contract. *Yearsley*, 309 U.S. at 20-21. Since verbal and written communications – other than those formally memorialized in writing as an amendment to the contract – do not modify the specifications within a Government contract, 48 C.F.R. § 52.212-4(c), a contractor should not be immunized from liability by virtue of following instructions within such communications.

Ironically, the Fourth Circuit is seemingly considered the leading circuit on the view that the proper question with respect to the applicability of derivative sovereign immunity is whether *the language of the contract* contains an explicit instruction relating to the contractor’s action in question. It held that view prior to *Campbell-Ewald*, see *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 345 (4th Cir. 2014) (“KBR is entitled to derivative sovereign

3. Government procurement contracts also preclude an addition or deletion to a contract that is not formally memorialized in writing as a mutually agreed amendment to the contract. 48 C.F.R. § 52.212-4(c) (“Changes in the terms and conditions of this contract may be made only by written agreement of the parties.”).

immunity only if it adhered to the terms of its contract with the government.”), and it continued to hold that view after *Campbell-Ewald. Cunningham*, 888 F.3d at 648 (“Consequently, because GDIT adhered to the terms of its contract with CMS, we conclude that the government authorized GDIT’s actions, satisfying step one of the *Yearsley* analysis.”). Indeed, in a post-*Campbell-Ewald* decision, the Fifth Circuit relied upon the Fourth Circuit to hold that “[t]he appropriate inquiry is whether [the contractor] adhered to the Government’s instructions as described in the contract documents.” *Taylor Energy*, 3 F.4th at 176 (citing *In re KBR*, 744 F.3d at 345). In fact, the Fourth Circuit understandably requires careful scrutiny of the Government contract to ensure that the contractor’s *particular* action in question was specifically addressed in the contract. See *In re KBR*, 744 F.3d at 345 (“[S]taying within the thematic umbrella of the work that the government authorized is not enough to render the contractor’s activities ‘the act[s] of the government.’”).

These Fourth Circuit precedents, which were surprisingly not addressed by the court of appeals in the decision below, establish an important and logical limiting principle that we commend to the Court: Since the determination as to whether to confer derivative sovereign immunity upon a federal contractor is based, in part, upon whether the Government “authorized and directed” the contractor’s actions, to ensure that “the Government” did, indeed, authorize and direct the actions, courts should limit their examination to whether there are explicit instructions *within the contract* relating to the contractor’s actions in question, and, if so, then whether those instructions were followed. A Government contract, such as the loan servicing agreement here, is a

formal procurement contract that contains obvious indicia of reliability that its instructions were authorized and directed by “the Government,” and, under federal law, such contracts are only amended through a formal written process, and not with verbal or written communications, such as the emails from Department employees in this case. *See* 48 C.F.R. § 43.102(a) (“Only contracting officers acting within the scope of their authority are empowered to execute contract modifications on behalf of the Government. Other Government personnel shall not—(1) Execute contract modifications; (2) Act in such a manner as to cause the contractor to believe that they have authority to bind the Government; or (3) Direct or encourage the contractor to perform work that should be the subject of a contract modification.”).

Otherwise, if verbal and written communications, such as emails, are deemed sufficient for purposes of identifying “Government authorization” of a contractor’s actions and conferring immunity, then those communications may end up immunizing a contractor from harmful actions that were contemplated and intentionally excluded from the contract. It would also create a slippery slope for courts to additionally immunize contractors that claim to be following extra-contractual instructions in text messages, telephone calls, voicemails, meetings, and perhaps even social media posts, all under the guise of “Government authorization.”

To be clear, federal contractors that receive these types of informal verbal or written instructions from the Government are not left with a Hobson’s choice, *i.e.*, the lack of true choice. Instead, in the absence of an explicit instruction within the contract authorizing and

directing the action being urged by the Government’s verbal or written communications, the contractor simply exercises its discretion in following the general terms of the contract, albeit without the protection of derivative sovereign immunity for its actions. *See Posada*, 66 F.4th at 358 (“[W]hile *Yearsley* recognizes that an ‘agent or officer’ may enjoy protection from liability when ‘authorized and directed’ by the Government to take the action for which it is alleged to be liable, *Yearsley* does not hold that an ‘agent or officer’ necessarily also enjoys protection from liability for *not* taking other actions that the Government left it free to take while acting as it had been so ‘authorized and directed.’”) (emphasis in original); *Cabalce v. Thomas Blanchard & Assocs., Inc.*, 797 F.3d 720, 732 (9th Cir. 2015) (holding that derivative sovereign immunity is “limited to cases in which a contractor ‘had no discretion in the design process and completely followed government specifications.’”); *In re Katrina Canal Breaches Litig.*, 620 F.3d 455, 464-65 (5th Cir. 2010) (“By providing only general instructions regarding the compaction method, the [Government] ensured that [the contractor] would have significant discretion over the method chosen. The exercise of that discretion by [the contractor] is not protected by the [government-contractor-immunity] doctrine.”); *see* Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 Stan. L. Rev. 969, 1003 (2021) (“Providing only general directives, without more specific instructions, allows a contractor significant discretion, which undercuts the contractor’s demand for immunity.”).

In the alternative, if this Court were to determine that the requisite Government authorization *can* be found in extra-contractual instructions, then, at the very least, the Court should limit the conferral of Government

authorization to only those instructions that are consistent with federal law. Otherwise, a federal contractor could be immunized from liability for following an extra-contractual instruction to violate federal law. *See Campbell-Ewald*, 577 U.S. at 166 (“When a contractor violates both federal law and the Government’s explicit instructions, as here alleged, no ‘derivative immunity’ shields the contractor from suit by persons adversely affected by the violation.”). The extra-contractual, verbal instructions in *Campbell-Ewald*, *i.e.*, to only send text messages to individuals who had consented (opted in) to receive solicitations, were at least consistent with the TCPA. *See* 47 U.S.C. § 227(b)(1) (A).

In contrast, in this case, the court of appeals held that emails from Department employees with extra-contractual instructions *to take action in violation of federal law*, *i.e.*, to deny eligibility for public service loan forgiveness where Petitioner was employed in a public service job, in violation of the Higher Education Act of 1965, 20 U.S.C. § 1087e(m)(1)(B) (2018), constituted sufficient Government authorization to confer immunity from liability. The Court should reject such an extreme assertion of administrative power that would permit a Government employee to so confer immunity from liability via email with the mere click of the “send” button, especially where, as here, there is a Government contract that adheres to procurement guidelines. *Campbell-Ewald* properly cautioned against the application of derivative sovereign immunity when the contractor violates federal law. *See Campbell-Ewald*, 577 U.S. at 166.

The Court should grant the Petition to review whether the court of appeals erred in holding that Respondent

was entitled to derivative sovereign immunity under circumstances in which its action in question followed extra-contractual instructions, including instructions that directed it to violate federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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