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 FOR AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization with members in all 50 states. Public Citizen appears before Congress, administrative agencies, and courts to promote enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has long sought to preserve and expand access to courts for individuals harmed by corporate or government wrongdoing, and to maintain the federal courts' authority to provide appropriate redress efficiently and effectively. Public Citizen has thus filed amicus briefs in this Court that advocate for legal principles that minimize barriers to individuals' access to court remedies. *See, e.g.*, *Martin v. United States*, 145 S. Ct. 1689 (2025); *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (2023); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023).

Public Citizen submits this amicus brief because it is concerned that corporate defendants are invoking so-called "derivative sovereign immunity" to escape accountability for wrongful actions taken while carrying out government contracts. This Court has held that federal government contractors have a defense to liability when they can show that their challenged actions complied with the government's lawful instructions. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940); *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). But the increasing use of the label

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[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

"derivative sovereign immunity" to describe that defense has led to confusion in the lower courts, potentially increasing the costs to plaintiffs seeking to hold these contractors accountable for wrongs where that defense is unavailable. In this case, petitioner and its amici argue that a district court's rejection of a "derivative sovereign immunity" defense should give rise to an immediate appeal in the same way that an immediate appeal can be taken from the rejection of a defense of sovereign immunity, absolute immunity, or qualified immunity. Public Citizen believes that such an outcome would increase the costs of litigation for plaintiffs, delay the ability of plaintiffs with valid claims to obtain relief, and reduce the incentive of corporations with government contracts to adhere to their legal responsibilities.

SUMMARY OF ARGUMENT

While *Yearsley* provides a defense to liability to government contractors for actions taken pursuant to the government's lawful instructions, this defense is neither "derivative sovereign immunity" nor akin to the immunities that protect discretionary decisions by government officials. The availability of interlocutory appeals in cases involving such governmental immunities thus provides no basis for allowing interlocutory appeals when a trial court declines to dismiss an action or grant a defendant summary judgment based on the *Yearsley* defense.

I. In *Yearsley*, this Court recognized a defense that protects government contractors from liability for harm caused by work performed pursuant to a government contract. To invoke the defense, the contractor must show that the work at issue was within the government's authority and that the

government validly authorized the contractor to perform it. *Yearsley*, however, does not describe that defense as derived from the government's sovereign immunity. To the contrary, *Yearsley* recognized that the question whether a contractor can be held liable is distinct from the question whether a plaintiff has a remedy directly against the government.

The precedents on which *Yearsley* relied confirm that the *Yearsley* defense is not derivative of the sovereign's immunity from suit. Those precedents principally address federal officials carrying out their charge rather than corporate contractors. Nonetheless, the cases consistently confirm that whatever protections government agents have against liability for their conduct are distinct from the immunity from suit to which the government is entitled as sovereign.

Although this Court has occasionally referred to the *Yearsley* defense as an "immunity," it has never endorsed the lower courts' increasingly common practice of treating the defense as based on "derivative sovereign immunity." And in context, the Court's use of the term "immunity" indicates that *Yearsley* establishes a substantive defense to the merits of a claim, rather than an immunity akin to the sovereign immunity of the federal government.

II. This Court has recognized that a government official may invoke certain immunities against suit when named as a defendant, in either an official or personal capacity, in a lawsuit challenging his or her actions. The *Yearsley* defense is not akin to those immunities.

In an official-capacity suit, where the relief sought would run against the government, the official may attempt to invoke sovereign immunity. A government

contractor, though, has no "official capacity" and the relief sought in an action against a contractor does not run against the government. The *Yearsley* defense thus is not and cannot be based on a government official's invocation of sovereign immunity when sued in an official capacity.

By contrast to an official-capacity lawsuit, a government official sued in his or her personal capacity is the real party in interest and cannot invoke sovereign immunity. The official may, however, attempt to invoke absolute or qualified immunity where the lawsuit challenges the official's exercise of discretionary decisionmaking authority. A contractor, however, can never exercise the type of discretionary government authority that absolute and qualified immunities are designed to protect. And *Yearsley* does not purport to grant contractors protection for making discretionary choices, but rather a defense when their actions are lawfully dictated by the government. The *Yearsley* defense is therefore wholly distinct from the immunities that attach to government officials.

This Court has recognized the critical distinction between government officials and contractors. Military contractors, for instance, are protected through preemption from state tort liability for design defects, but only to the extent a government officer was aware of the risks and approved the design. That protection does not arise because the contractor shares in the immunity that government officials enjoy; it arises because the officials' approval provides the contractor with a defense to liability. Likewise, this Court has rejected the argument that prison guards employed by private prisons operating under a state contract are entitled to the qualified immunity

enjoyed by prison guards employed directly by the state.

In short, there is nothing in this Court's precedents that justifies treating the *Yearsley* defense as derivative of sovereign immunity or akin to the immunities that government officials receive. The Court should clarify that important point for the benefit of the lower courts.

ARGUMENT

This case presents the question whether a government contractor may appeal a district court order before final judgment when the order rejects the contractor's argument that it cannot be held accountable for its allegedly unlawful actions because those actions were performed pursuant to a federal government contract. In *Yearsley*, this Court held that government contractors are protected from liability in certain circumstances for actions taken to carry out their contractual obligations to the federal government. *Yearsley*, however, did not explicate the nature of that protection. In recent years, lower courts have increasingly adopted the term "derivative sovereign immunity" to describe the defense to liability recognized in *Yearsley*. The term "derivative sovereign immunity," however, is a misnomer because the defense neither derives from a sovereign's immunity from suit nor is connected with the immunity that federal officials receive when they exercise discretion in carrying out their constitutional or statutory responsibilities.

Almost a decade ago, this Court rejected "the notion that private persons performing Government work acquire the Government's embracive immunity" when the "contractor violates both federal law and the

Government's explicit instructions." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 166 (2016). To bring clarity to the lower courts, the Court should confirm that the *Yearsley* defense is distinct from and unconnected to the immunities that the government or government officials possess. Instead, the defense operates as an affirmative defense to liability that, like other affirmative defenses to the merits of a claim, can be reviewed on appeal after final judgment.

I. Under *Yearsley*, a government contractor's defense to liability is not tied to the sovereign's immunity from suit.

A. In *Yearsley*, the Court considered whether a contractor could be held liable for work performed "pursuant to a contract with the United States Government, and under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States, for the purpose of improving the navigation of the Missouri River, as authorized by an Act of Congress." 309 U.S. at 19. The case arose when landowners sued the contractor because the work had eroded a portion of their land. *W.A. Ross Constr. Co. v. Yearsley*, 103 F.2d 589, 590 (8th Cir. 1939). The landowners prevailed, and the contractor appealed. On appeal, the court of appeals tied the landowners' ability to "maintain this action against the contractor alone" to the question whether the erosion "constituted an appropriation or taking of property for which compensation should be made." *Id.* at 591–92. The court of appeals reversed the jury verdict because it concluded that the work performed was not a taking. *Id.* at 592–93.

This Court affirmed on different grounds. To start, the Court stated that, "[w]here an agent or officer of

the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred." *Id.* at 21. Because in *Yearsley* the "authority to carry out the project was validly conferred,"—that is, "what was done was within the constitutional power of Congress"—the contractor was not liable. *Id.* at 20; *see id.* at 22. Thus, in the context of "a taking by the Government of private property for public use," the Court explained, "the remedy to obtain compensation from the Government is as comprehensive as the requirement of the Constitution, and hence it excludes liability of the Government's representatives lawfully acting on its behalf in relation to the taking." *Id.* at 22. That is, the contractor had a defense, although the government itself could be held to account.

The Court's opinion in *Yearsley* does not use the word "immunity," much less "sovereign immunity" or "derivative sovereign immunity." Further, its reasoning is inconsistent with the notion that a government contractor's protection from liability is connected to governmental immunity from suit. Rather, *Yearsley* rests on the Fifth Amendment requirement that the government pay just compensation when it takes property and the availability of a mechanism for obtaining compensation directly from the government. Thus, *Yearsley* recognizes that, although the government could be sued to obtain compensation for a taking, the contractor had a defense to liability because it followed the government's lawful instructions in undertaking the work. Unlike the court of appeals, this Court's decision recognized that the government's duty to pay

compensation and the contractor's liability were distinct questions.

From *Yearsley*, it follows that if the government had authorized its agent to take action that would be *unconstitutional*, the contractor could not assert a defense to liability. 309 U.S. at 20 (requiring "what was done" to be "within the constitutional power of Congress"). Sovereign immunity, by contrast, generally "shields the government and its agencies" from damages actions for constitutional torts absent its consent, regardless of their merits. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *Murray's Lessee v. Hoboken Land & Imp. Co.*, 18 How. (59 U.S.) 272, 283 (1856). Thus, *Yearsley* contemplates that a government contractor may be held liable even where the government may not be—an outcome that further indicates that the *Yearsley* defense is not based on sovereign immunity principles.

B. The cases on which *Yearsley* relies do not suggest that the contractor's protection from liability is derivative of the government's immunity from suit. *Yearsley* quotes *United States v. Lynah* for the principle that the "action of the agent is 'the act of the government.'" 309 U.S. at 22 (quoting 188 U.S. 445, 465 (1903)). But *Lynah* does not hold that an agent becomes clothed in the government's immunity when it acts on behalf of the government. Rather, *Lynah* holds that the federal government becomes obligated to provide just compensation when it authorizes its officers and agents to take actions that constitute a Fifth Amendment taking. *Id.* at 465–66, 468. The liability of the officers and agents was not considered in that case.

In *Murray's Lessee*, also cited in *Yearsley*, the Court considered whether a distress warrant issued by the government to a tax collector was an unconstitutional exercise of judicial power. 18 How. (59 U.S.) at 274–75. The government's agents there were officials, not corporations operating under a government contract. *Id.* at 274 (referring to a U.S. marshal and the solicitor of the Treasury). In upholding Congress's authority to create new liabilities to which the judicial power could apply, the Court noted the background principle that a public agent "cannot be made responsible in a judicial tribunal for obeying the lawful command of the government." *Id.* at 283. But the Court described the government's immunity differently: "[T]he government itself, which gave the command, cannot be sued without its own consent." *Id*. Thus, *Murray's Lessee*, like *Yearsley*, treats the defense of the agent as distinct from the sovereign immunity of the government.

Lamar v. Browne, 92 U.S. 187 (1875), also involved only federal officials. There, a colonel in the Union Army, acting pursuant to orders, seized Lamar's cotton and turned it over to agents of the U.S. Treasury specially appointed by statute to receive and collect captured property. *Id.* at 188–89. In an action to recover the value of the cotton, the Court held that the agents could not be held liable for their actions "[i]f they followed the law after the property came into their hands," where they received "specific" instructions from the Treasury Department to guide their actions. *Id.* at 199. *Lamar* observed that Congress had authorized the court of claims to provide redress to owners of captured property and concluded that "[t]hose aggrieved must look to the government, and

not to the agents, for their indemnity." *Id.* at 195–96. Thus, in *Lamar*, as in *Yearsley*, the officials had a defense to liability because they obeyed the government's lawful command—not because they shared in the government's (waived) immunity.

Finally, *The Paquete Habana*, 189 U.S. 453 (1903), expressly states that a government agent's protection from liability is not tied to sovereign immunity. In an earlier iteration of that case, this Court rejected a libel brought by the government to seize fishing vessels. *Id.* at 464 (citing *The Paquete Habana,* 175 U.S. 677 (1900)). After remand for calculation of damages, the government sought this Court's review and argued that "the decrees should have gone against the captors [of the vessels] and not against the Government." *Id.* Rejecting the government's argument, the Court explained that, "when the act of a public officer is authorized or has been adopted by the sovereign power, *whatever the immunities of the sovereign*, the agent thereafter cannot be pursued." *Id.* at 465 (emphasis added; citing *Lamar*, 92 U.S. at 199). In other words, an agent's protection from liability for its lawful compliance with governmental directions is not derived from sovereign immunity and applies even when the government may not be immune from suit by the plaintiff.

C. Although this Court has referred to the *Yearsley* protection as an "immunity" enjoyed by government contractors, *see Campbell-Ewald*, 577 U.S. at 166 (quoting *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943)), the unadorned term "immunity" does not suggest that government contractors have "derivative sovereign immunity." The phrase "derivative sovereign immunity" began to appear in the lower courts decades after *Yearsley* to describe the protection from

liability that *Yearsley* affords. *See*, *e.g.*, *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000); *Bynum v. FMC Corp.*, 770 F.2d 556, 564 (5th Cir. 1985); *Pratt v. Hercules, Inc.*, 570 F. Supp. 773, 802 (D. Utah 1982). This Court has never endorsed the phrase, however. *See Campbell-Ewald*, 577 U.S. at 166–67 (using the term with quotation marks while holding that a contractor does not acquire the government's "embracive" immunity).

The term "immunity," moreover, covers any "exemption from a duty, liability, service of process, or possibility of prosecution." Black's Law Dictionary (12th ed. 2024). This Court has thus used the phrase "immunity from liability" to describe circumstances where defendants are entitled to substantive protection from liability for their actions, without suggesting that they are also immune from suit. *See, e.g.*, *Washington Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925, 927 (1984); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *Farmers v. WDAY, Inc.*, 360 U.S. 525, 527 (1959).

Moreover, the context of *Brady* indicates that the immunity at issue was protection against liability. *Brady* addressed whether the "managing agent" of a vessel for the United States Maritime Commission was "non-suable" in tort except to the extent authorized by the Suits in Admiralty Act against the government. 317 U.S. at 576–77 & n.1. In concluding that the agent *was* suable, the Court explained that, "when it comes to the utilization of corporate facilities" by the government, "immunity from suit is not favored" because it "would result at times in a substantial dilution of the rights of claimants." *Id.* at 580–81. The Court also rejected the argument that "a contract between [the agent] and [the government]"

could produce an "[i]mmunity from suit on a cause of action which the law creates." *Id.* at 583. Then, addressing *Yearsley*, which had been decided three years earlier, the Court reiterated that "government contractors obtain certain immunity in connection with work they do pursuant to" a federal contract. *Id.* But the Court described the *Yearsley* "immunity" as one that ensures that "the contractor [is] not liable" if the conditions of the defense are satisfied. *Id.* Nothing in *Brady*'s reasoning and outcome suggests that the Court understood *Yearsley* to recognize that government contractors derived their defense to liability from the government's immunity from suit.

This conclusion is buttressed by *Brady*'s reliance on *Sloan Shipyards Corp. v. U.S. Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922). *See Brady*, 317 U.S. at 580, 584. In *Sloan Shipyards*, the Court considered the governmental status of the Emergency Fleet Corporation, which was a government-controlled corporation created to assist the war effort during World War I. 258 U.S. at 564. Throughout the war and afterwards, Congress and the President delegated "enormous powers" to the corporation, such that the corporation argued that "it was so far put in place of the sovereign as to share the immunity of the sovereign from suit." *Id.* at 566. The Court considered this argument a "very dangerous departure" from the "general rule" that "any person within the jurisdiction is always amenable to the law." *Id.* at 566–67. "An instrumentality of government [it] might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts." *Id.* at 567. Thus, the Court explained, even though "the United States cannot be sued for a

tort, … its immunity does not extend to those that acted in its name." *Id.* at 568.

Although *Sloan Shipyards* did not address the defense that the corporation had acted pursuant to the government's lawful instructions, its rationale refutes the suggestion that, by referring to the *Yearsley* defense as an "immunity," *Brady* transformed that defense into an immunity akin to the sovereign immunity of the federal government. *See also Hopkins v. Clemson Agric. Coll. of S.C.*, 221 U.S. 636, 642–43 (1911) ("[I]mmunity from suit is a high attribute of sovereignty—a prerogative of the state itself—which cannot be availed of by public agents when sued for their own torts.").

II. The *Yearsley* defense for government contractors is distinct from the immunities of government officials.

This Court has recognized that government officials may be entitled to immunity from suit for actions taken in their official roles, and that they may immediately appeal an order rejecting those immunity defenses. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 742–43 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). To the extent that the Court's official immunity precedents are relevant here, those cases confirm that the *Yearsley* defense is not derived from sovereign immunity. Those cases do not otherwise speak directly to the liability of government contractors, especially corporations, or to the right to an immediate appeal of an order rejecting a *Yearsley* defense. Their reasoning and analytical bases, however, strongly indicate that the Court should reject calls to analogize *Yearsley* to the immunity that

attaches to the actions taken by individuals appointed to public office.

A. A federal official may be sued in either an official capacity or a personal capacity. *Lewis v. Clarke*, 581 U.S. 155, 162 (2017). An official-capacity lawsuit can be viewed as "an action against the entity of which an officer is an agent," *i.e.*, an action against the government itself. *Id.* (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). In that circumstance, because the government is the real party in interest, an official-capacity lawsuit may be barred by sovereign immunity. *Id.* Absent a waiver of sovereign immunity, official-capacity lawsuits against government officials are generally permitted only to restrain the official from violating a plaintiff's constitutional or legal rights; they generally cannot be used to seek damages against the government. *See, e.g.*, *Hafer v. Melo*, 502 U.S. 21, 30 (1991) (citing *Ex parte Young*, 209 U.S. 123 (1908)); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–90 (1949).

A defendant invoking *Yearsley* as a defense is not comparable to a government officer defendant sued in an official capacity. To begin with, a corporate defendant can never be sued in an official capacity because corporations cannot be appointed as government officials. Moreover, the *Yearsley* defense requires the contractor to obey the government's instructions. *Campbell-Ewald*, 577 U.S. at 167–68 & n.7; *Yearsley*, 309 U.S. at 20–21. An official capable of being sued in an official capacity, however, can invoke sovereign immunity even if the official was the

individual *giving* the instructions.[2] Whether such a defense would succeed, moreover, would not turn on whether the defendant was obeying lawful government instructions, but on whether the relief sought (for example, money damages) would be barred by sovereign immunity. The conditions of the *Yearsley* defense are irrelevant to that question. Thus, despite being characterized by some courts as based on "derivative sovereign immunity," the *Yearsley* defense has no relationship to official-capacity suits that implicate sovereign immunity considerations.

B. Personal-capacity suits against government officials do not implicate sovereign immunity. Personal-capacity suits "seek to impose *individual* liability upon a government officer for actions taken under color of … law." *Lewis*, 581 U.S. at 162 (quoting *Hafer*, 502 U.S. at 25); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). In such suits, "sovereign immunity 'does not erect a barrier'" because the real party in interest is the individual official, not the government. *Id.* at 163 (quoting *Hafer*, 502 U.S. at 30–31).

An official sued in a personal capacity, however, may "assert *personal* immunity defenses." *Id.* at 163. Personal defenses include absolute and qualified immunity. *See Graham*, 473 U.S. at 166–67. "For officials whose special functions or constitutional status requires complete protection from suit," this Court has "recognized the defense of 'absolute immunity.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 807

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[2] That official need not be a permanent employee; an individual may be appointed on a temporary or volunteer basis to carry out the duties of an office. *See Filarsky v. Delia*, 566 U.S. 377, 384–86 (2012).

(1982). Officials entitled to absolute immunity include the President, legislators, judges, prosecutors, and others performing quasi-judicial functions. *Mitchell*, 472 U.S. at 520. "For executive officials in general, however, … qualified immunity represents the norm." *Harlow*, 457 U.S. at 807. Under qualified immunity, "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

The *Yearsley* defense is different in kind from the defenses of absolute immunity and qualified immunity available to government officials sued in their personal capacities. As this Court has explained, "[a]mong the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official cautious in the discharge of his official duties." *Nixon*, 457 U.S. at 752 n.32. Immunity is designed to "shield [officials] from undue interference with their duties and from the potentially debilitating threats of liability." *Harlow*, 457 U.S. at 806. Thus, "[i]mmunity generally is available only to officials performing discretionary functions." *Id.* at 816.

While individuals can become government officials or employees without being hired on a permanent basis, *Filarsky*, 566 U.S. at 384–86, a corporate government contractor is not a federal official and cannot exercise a discretionary governmental function on behalf of the Executive Branch. Rather, a contractor can exercise a governmental function only with approval by and oversight from a properly appointed federal officer. *See FCC v. Consumers'*

Research, 145 S. Ct. 2482, 2491 (2025) ("As long as an agency thus retains decision-making power, it may enlist private parties to give it recommendations."); *United States v. Arthrex, Inc.*, 594 U.S. 1, 16 (2021) (holding that the Constitution requires the government to make decisions through "a politically accountable officer [who] must take responsibility").

The *Yearsley* defense honors the constitutional division between a governmental decisionmaker and a private entity obeying contractual directives. It was critical in *Yearsley* that "the work [was] authorized and directed by … government officers." 309 U.S. at 20. *Yearsley* protects an agent that executes the government's "will" by following the lawful instructions of federal officers acting pursuant to Congress's "constitutional power," and it denies protection to an agent who "exceed[s] his authority" or where his authority "was not validly conferred." *Id.* at 20–21; *see Campbell-Ewald*, 577 U.S. at 166 (explaining that the defense does not apply "[w]hen a contractor violates both federal law and the Government's explicit instructions."). Thus, far from seeking to protect and encourage exercises of discretion by the contractor, the *Yearsley* defense does exactly the opposite: It protects only adherence to explicit directions from government officers.[3] The protection that *Yearsley* affords is thus divorced from the immunities that constitutionally appointed federal officers, or those working under them, may invoke when sued for

[3] In addition to contractors, a subordinate official or government employee sued in a personal capacity for following the lawful instructions of a superior official may be able to invoke a *Yearsley*-style defense. *See, e.g.*, *Lamar*, 92 U.S. at 199.

discretionary decisions they make in carrying out their official duties.

C. Two of this Court's decisions confirm the distinct status of corporate contractors compared to that of government officers and employees.

First, in *Boyle*, the Court addressed "when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect." 487 U.S. at 502. The Court recognized that the dispute at issue was "one between private parties," not one to which the government was a party. *Id.* at 506. Nonetheless, the Court held that military procurement was "an area of uniquely federal interest" such that a "significant conflict" between federal and state law could preempt state tort law. *Id.* at 507 (internal quotation marks omitted). On that point, the Court recognized that state-law duties that were "not identical to" but "not contrary to" a procurement contract did not conflict with federal law, while state-law duties "precisely contrary to the duty imposed by the Government contract" did conflict and were preempted. *Id.* at 509.

To help determine which contractual requirements preempted state law, the Court looked to the discretionary function exception to federal tort liability in the Federal Tort Claims Act (FTCA). That exception bars claims against the government arising from "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." *Id.* at 511 (quoting 28 U.S.C. § 2680(a)). The Court concluded that state law was preempted "when (1) the United States approved reasonably

precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512. As the Court explained, this test ensures that "the design feature in question was considered *by the Government officer*, and not merely by the contractor itself." *Id.* at 512 (emphasis added).

In so holding, the Court did not suggest that the military contractor entitled to the preemption defense could directly invoke the FTCA's discretionary function exception. Indeed, this Court has made clear that the actions of government contractors generally fall outside of the scope of the FTCA. *See United States v. Orleans*, 425 U.S. 807, 814 (1976); *Logue v. United States*, 412 U.S. 521, 528 (1973)); 28 U.S.C. § 2671 (defining "Federal agency" to exclude "any contractor with the United States"). And although (as in *Brady*), the Court described the contractor's protection from state tort liability as a kind of "immunity," *see, e.g.*, 487 U.S. at 504, 510, the Court did not suggest that military contractors somehow shared in the qualified immunity that attaches to government officers who make discretionary choices. Indeed, the Court's preemption test recognized that the interests of officers and military contractors did not necessarily align. *Id.* at 512 (requiring contractor to warn officers of risks to address "incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability"); *compare Filarsky*, 566 U.S. at 392 (explaining that non-permanent government officials entitled to qualified immunity are "individuals working for the government in pursuit of

government objectives"). Accordingly, *Boyle* was not concerned about state tort suits that called into question the reasonableness of contractors' judgments, but held that preemption of state law was needed to prevent courts from "second-guessing" discretionary judgments made by federal officials. *Id.* at 510 (internal quotation marks omitted).

Second, *Richardson v. McKnight*, 521 U.S. 399 (1997), drives home the distinction between government officials and corporate contractors. In an earlier case, *Procunier v. Navarette*, 434 U.S. 555 (1978), this Court had extended qualified immunity to state-employed prison guards. *Id.* at 405. In *Richardson*, the Court held that prison guards employed by private prisons did not possess the same immunity. *Id.* at 401. After finding no "historical tradition of immunity" for private prisons, *id.* at 404–07, the Court looked to the purpose of immunity doctrine and concluded that granting immunity to private prison contractors did not advance the purpose of protecting public officials from being deterred from exercising their authority, *id.* at 408–09. The Court also noted that private contractors were more likely to be disciplined by "marketplace pressures." *Id.* at 409. And although the Court acknowledged that litigation may "distract" prison guards "from their duties" to some extent, it rejected the idea that "the risk of 'distraction' alone [can] be sufficient grounds for an immunity." *Id.* at 411 (cleaned up). Anticipating *Filarsky*, *Richardson* also explained that its decision regarding private, for-profit prison firms did not address the case of "a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id.* at 413; *see Filarsky*, 566 U.S.

at 393 (distinguishing *Richardson*). In short, *Richardson* makes clear that government contractors occupy a legal status that is distinct from that of government officials and are not necessarily entitled to the same immunities that officials can invoke.

The upshot is that this Court's precedents on the immunities that can be invoked by individuals who are government officers are separate and apart from the *Yearsley* defense, including the question whether a court's rejection of the defense may be immediately appealed. *Yearsley* is not designed to protect government decisionmaking "whether or not [the official] acted wrongly." *Richardson*, 521 U.S. at 403. Instead, the *Yearsley* defense ensures that a "contractor's performance in compliance with all federal directions," *Campbell-Ewald*, 577 U.S. at 167 n.7, is not treated as wrongful when those directions were lawful. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366–67 (2011) (noting that an employer can demonstrate that an employment action is lawful through an affirmative defense). *Yearsley*'s protection from liability extends to individual and corporate contractors alike, but it has no connection to the immunities afforded to government officials. And for the reasons stated above, the *Yearsley* defense does not "derive" from the sovereign's immunity from suit in federal courts—a point that this Court should clarify for the benefit of the lower courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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