No. 15-421

IN THE

Supreme Court of the United States

JACOBS ENGINEERING GROUP, INC.,
Petitioner,

v.

GREG ADKISSON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

Respondents' Brief in Opposition

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held that a government contractor's motion to dismiss on the basis of *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), should be considered under Federal Rule of Civil Procedure 12(b)(6), not Federal Rule of Civil Procedure 12(b)(1).

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INTRODUCTION

Petitioner Jacobs Engineering Corp. seeks review of the Sixth Circuit's determination that the district court should have considered the company's motion to dismiss based on *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, rather than under Rule 12(b)(1) for lack of subject-matter jurisdiction. Jacobs contends that *Yearsley* provides government contractors with "derivative sovereign immunity," that because sovereign immunity is jurisdictional, "*Yearsley* immunity" must be as well, and that claims of immunity under *Yearsley* therefore should be considered under Rule 12(b)(1). However, that *Yearsley* held that government contractors cannot be held liable for certain work does not mean that those contractors have an immunity from suit that is jurisdictional in nature. *Yearsley* itself does not mention immunity. And despite Jacobs's claim of a deep divide among the circuits, Jacobs does not point to a single case in which a federal court of appeals has dismissed a case for lack of jurisdiction based on *Yearsley*.

Although *Yearsley* was decided more than 75 years ago, few courts of appeals have considered whether it deprives courts of jurisdiction. This seldom-raised issue does not require this Court's attention. Moreover, this case does not provide a good vehicle for resolving questions about *Yearsley*. The court below recognized that there are "thorny questions" about *Yearsley*'s scope, Pet. App. 9a, but declined to resolve them. Accordingly, if this Court granted review, it would face the unattractive alternatives of either deciding issues concerning *Yearsley*'s scope that were not passed on below or deciding whether "*Yearsley* immunity" is jurisdictional, when its

application to government contractors such as Jacobs is unclear, and when such "immunity" may not exist at all. This case also does not provide a good vehicle for determining whether motions to dismiss based on *Yearsley* should be decided under Rule 12(b)(1) or Rule 12(b)(6) because the motion here should be denied under either standard.

STATEMENT OF THE CASE

A. Yearsley v. W.A. Ross Construction Co.

In *Yearsley v. W.A. Ross Construction Co.*, a company, acting under a contract with the government, built dikes in the Missouri River and, in doing so, washed away part of the plaintiffs' land. The plaintiffs sought to recover damages from the contractor, alleging that the contractors' actions constituted a taking of their land without compensation in violation of the Fifth Amendment.

The Court held that the contractor was not liable. It stated that if the "authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." 209 U.S. at 20-21. It explained that if the contractor's actions had constituted a taking, "the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims." *Id.* "[A]s the Government in such a case promises just compensation and provides a complete remedy," it concluded, "action which constitutes the taking of property is within its constitutional power and there is no ground for holding its agent liable who is simply acting under the authority thus validly conferred. The action of the agent is 'the act of the government.'" *Id.* (citation omitted).

The Court affirmed the judgment of the Eighth Circuit, which had held that the district court should have directed a verdict in favor of the contractor and remanded.

B. Factual Background

In December 2008, a containment dike at the Kingston Fossil Fuel Plant in Roane County, Tennessee, failed, spilling approximately 5.4 million cubic yards of coal-ash sludge onto adjacent lands. The following February, the Tennessee Valley Authority (TVA), which owns and operates the plant, entered into a contract with Jacobs Engineering Group, designating Jacobs as TVA's "prime contractor providing project planning, management and oversight to assist TVA in overall recovery and remediation" associated with the spill. Ex. A to Def's Mem. of Law in Supp. of Motion to Dismiss at 4, *Adkisson v. Jacobs Eng'g Grp., Inc.*, Doc. 11-1 (filed Nov. 12, 2013) ("Contract").

The contract provided that Jacobs would take "necessary measures to avoid accidents or incidents [in] which human health or safety is jeopardized," and would "not permit any person employed by it or any subcontractor . . . to work in surroundings or under working conditions which are unnecessarily dangerous to human safety or health." *Id.* at 30. The contract also provided that TVA would indemnify Jacobs for all claims "arising out of or relating to the presence of any toxic substances . . . which are . . . present on or near the site prior to the commencement of [Jacobs]'s work," but that Jacobs would "indemnify and defend TVA . . . from any and all liability to [Jacobs]'s employees or any third parties for personal injuries, property damage, or loss of life or property caused by the negligence or willful misconduct of [Jacobs] in the performance of this Contract." *Id.* at 8.

Furthermore, the contract provided that Jacobs "shall comply with Federal, State, and local laws (including regulations) affecting performance of its obligations under this contract and will indemnify and defend TVA from all liability resulting from its violation of such laws." *Id.*

Despite the contract's requirements related to safe working conditions, Jacobs exposed workers at the site to hazardous materials in an unsafe manner. Workers at the plant worked long hours in close proximity to toxic fly ash constituents. Compl. ¶ 61, *Adkisson*, Doc. 1 (filed Aug. 22, 2013). Yet Jacobs did not disclose the fly ash's toxic nature, properly monitor the fly ash, adequately train workers, adequately monitor workers' medical conditions, or dispose of toxic substances properly. *Id.* ¶¶ 54-69. Some workers specifically requested that Jacobs provide them with respirators, dust masks, and personal protective equipment, such as specialized protective clothing, but Jacobs denied requests and threatened some workers who made them. *Id.* ¶¶ 63-64; *see also* Exhibit, Pls.' Response to Def.'s Motion to Dismiss at 9, *Adkisson*, Doc. 16-1 (filed Jan. 2, 2014) (Pls.' Exhibit) (affidavit of worker John D. Cox, Jr., explaining he was made to feel "intimidated for asking [Jacobs] to provide me" a respirator or dust mask). When workers were prescribed respirators or protective masks, they were ordered not to wear them. Compl. ¶ 64; *see also* Pls.' Exhibit at 5 (affidavit of worker Kevin Thompson, explaining that, after presenting his prescription for a respirator to safety personnel, "I was informed I could not wear the respirator, despite it being prescribed by my physician. I was prohibited from working and was soon after terminated.").

C. Procedural Background

Individuals who worked on the coal-ash cleanup, along with some of their spouses, filed suit against Jacobs under state law. The workers alleged that, due to their exposure to fly ash constituents and other toxic substances, they suffered health problems, including pulmonary problems, heart problems, eye problems, and sinus problems.

Jacobs moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), contending that it had "derivative sovereign immunity" under *Yearsley*. The district court granted the motion. Pet. App. 16a-53a.

The court of appeals reversed. The court began by stating that the federal government has sovereign immunity, that the government has waived that immunity for tort suits in the Federal Tort Claims Act (FTCA), that there is an exception in the FTCA for discretionary functions, and that TVA, as a federal agency, is a beneficiary of the discretionary functions exception. *Id.* at 7a. The court then explained that the FTCA expressly excludes contractors from its scope. It noted, however, that Jacobs was arguing for immunity, not under the FTCA, but under *Yearsley*. The court described *Yearsley* as "stand[ing] for the position that 'if [the contractor's] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will.'" *Id.* (quoting *Yearsley*, 309 U.S. at 20–21).

The court explained that the sparseness of *Yearsley*'s reasoning has caused "uncertainty as to the scope of the decision." *Id.* at 8a. It noted that this Court, in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505-06 (1988),

"cast *Yearsley* in terms of preemption," and that, if *Yearsley* conferred immunity whenever the government contractor had validly conferred authority and was acting within that authority, "the Supreme Court in *Boyle* would presumably not have invented a new test to govern the liability of military procurement contractors; it could have simply cited *Yearsley* and called it a day." Pet. App. 8a-9a. The Sixth Circuit determined, however, that because the plaintiffs did not challenge *Yearsley*'s applicability to situations in which the contractor was executing Congress's will under validly conferred authority, "we need not resolve the thorny questions these developments present." *Id.* at 9a. Instead, it "assume[d] without deciding that Jacobs benefits from *Yearsley*'s protection on *Yearsley*'s terms." *Id.*

The court then considered whether "*Yearsley* immunity pose[s] a jurisdictional bar." *Id.* The court explained that the Fifth Circuit had recognized that "'*Yearsley* does not discuss sovereign immunity or otherwise address the court's power to hear the case'" and had held that *Yearsley* "'does not deny the court of subject-matter jurisdiction.'" *Id.* at 10a (quoting *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 207-08 (5th Cir. 2009)). The court noted, however, that, in *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000), the Fourth Circuit "characterized *Yearsley* as derivatively extending sovereign immunity to a private contractor," and that, in *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 345-46 (4th Cir. 2014), the Fourth Circuit had not taken "issue with the lower court's review of the case for lack of subject-matter jurisdiction under Rule 12(b)(1)." Pet. App. 9a.

The Sixth Circuit agreed with the Fifth Circuit that "*Yearsley* is not jurisdictional in nature." *Id.* at 10a. It

explained that "[a]lthough the FTCA is a jurisdictional statute, . . . Jacobs's potential immunity derives not from the FTCA but from *Yearsley*, which the Fifth Circuit correctly notes does not address sovereign immunity." *Id.* "Yearsley immunity is, in our opinion, closer in nature to qualified immunity for private individuals under government contract, which is an issue to be reviewed on the merits rather than for jurisdiction." *Id.*

Because it determined that *Yearsley* does not deprive courts of subject-matter jurisdiction, the Sixth Circuit concluded that the district court should have considered Jacobs's motion to dismiss under Rule 12(b)(6) for failure to state a claim, instead of under Rule 12(b)(1). *Id.* It remanded to the district court to determine in the first instance whether the motion should have been granted under Rule 12(b)(6). *Id.* at 12a. In particular, the court of appeals instructed the district court to consider whether, based on the pleadings, "(1) Jacobs is eligible for government-contractor immunity under *Yearsley*, and (2) Jacobs's conduct would fall under the corollary of the discretionary-function exception to the FTCA." *Id.* at 15a.

Jacobs petitioned for rehearing en banc. The petition was denied without any judge requesting a vote. *Id.* at 56a.

REASONS FOR DENYING THE WRIT

I. Jacobs Cites No Federal Court of Appeals Case Dismissing a Case for Lack of Subject-Matter Jurisdiction Based on *Yearsley*.

Jacobs's main argument for certiorari is that appellate courts are "deeply divided over whether a government contractor's immunity from suit under *Yearsley* is sovereign in nature." Pet. 17. According to Jacobs, the decision below is in conflict with "at least five courts of

appeals" that "recognize that *Yearsley* immunity is derivative sovereign immunity." *Id.* 10-11. But the relevant question is not whether courts describe *Yearsley*'s holding as derivative of sovereign immunity. Rather, the question is whether *Yearsley* deprives courts of jurisdiction to hear a case, and Jacobs points to no court of appeals decision dismissing a case for lack of jurisdiction based on *Yearsley*.

Jacobs claims that the decision below creates a split with two Fourth Circuit cases, *Butters*, 225 F.3d 462, and *In re KBR*, 744 F.3d 326. As the court below noted, in *Butters*, the Fourth Circuit (in dicta) "characterized *Yearsley* as derivatively extending sovereign immunity to a private contractor." Pet. App. 9a. *Butters*, however, did not concern a claim of immunity under *Yearsley*, but rather under the Foreign Sovereign Immunities Act, and thus does not speak to whether claims of immunity under *Yearsley* should be considered under Rule 12(b)(1) or Rule 12(b)(6).

In *KBR*, military contractors moved to dismiss under Rule 12(b)(1), arguing that claims against them were nonjusticiable under the political question doctrine, that they were immune from suit under *Yearsley*, and that the claims were preempted. The district court granted the motion on all three grounds. On appeal, the Fourth Circuit held, with regard to the *Yearsley* argument, that "the record [did] not contain enough evidence to determine whether [the contractor] acted in conformity" with its contract with the government and that the district court therefore "erred in finding that KBR was entitled to derivative sovereign immunity at this time." 744 F.3d at 345. The court vacated the district court's decision dismissing the claims on that ground. *Id.*

As the Sixth Circuit noted below, *KBR* "repeatedly referred to *Yearsley* immunity as 'derivative sovereign immunity,'" and, in vacating the district court's decision, "did not take issue with the lower court's review of the case for lack of subject-matter jurisdiction under Rule 12(b)(1)." Pet. App. 9a. However, no party in that case argued that Rule 12(b)(1) was an inappropriate vehicle for considering the motion. And although the Court characterized *Yearsley* as "derivative sovereign immunity," it did not address whether such immunity is jurisdictional in nature or whether Rule 12(b)(6) would have provided a more appropriate vehicle for analyzing the issue. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (recognizing that decisions stating that a case is dismissed "'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim" are "drive-by jurisdictional rulings that should be accorded no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit" (internal quotation marks and citations omitted)). Moreover, it does not appear that the distinction between the procedural standards for addressing Rule 12(b)(1) and Rule 12(b)(6) motions had any bearing on the outcome of the case: if the court could not determine that the contractor acted in conformity with the contract even considering evidence outside the pleadings, it could not have done so based solely on the pleadings themselves.

Jacobs also claims a conflict between the decision below and decisions of the Second, Third, Seventh, and Eleventh Circuits. In support of its claim, Jacobs cites cases concerning the government contractor defense that say, for example, that "'[t]he rationale behind the defense is an extension of sovereign immunity: in cir-

cumstances in which the government would not be liable, private contractors who act pursuant to government directives should not be liable.'" *Burgess v. Colorado Serum, Inc.*, 772 F.2d 844, 846 (11th Cir. 1985) (quoting *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1045 (5th Cir. 1984)). Rather than conflicting with the decision below, however, these decisions demonstrate that the fact that a rationale for the existence of a defense is that the government would have sovereign immunity under similar circumstances, or that a court refers to a defense as derivative immunity, does not mean that the defense is jurisdictional. Although recognizing a connection between the government contractor defense and the government's sovereign immunity, the Second, Third, Seventh, and Eleventh Circuit cases cited by Jacobs do not treat the government contractor defense as a limit on jurisdiction, but as an affirmative defense. For example, the circuits place the burden of proving the defense on the contractor, not on the plaintiff. *See id.* (stating that a contractor should receive the benefits of the defense if it "can prove the elements of the defense"); *Boruski v. United States*, 803 F.2d 1421, 1430 (7th Cir. 1986) (same); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1125 (3d Cir. 1993) ("The defendant bears the burden of proving each element of the defense."); *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 196 (2d Cir. 2008) (discussing what defendants "will have to show").

Moreover, the line Jacobs quotes from *Burgess* and *Boruski* is actually a quote from a Fifth Circuit case, *Hansen*, 734 F.2d at 1045. The Fifth Circuit has held that *Yearsley* does not deprive courts of subject-matter jurisdiction, demonstrating that there is no conflict between that quote and such a holding. *See Ackerson*, 589 F.3d at 207. Further, *Carley* and *In Re World Trade Center*, the two cases from these circuits cited by Jacobs

that post-date this Court's decision in *Boyle*, 487 U.S. 500, both make clear that they are applying the *Boyle* framework. *See Carley*, 991 F.2d at 1118 ("The issue in this appeal is whether the manufacturer of a nonmilitary product may assert the government contractor defense, recognized in *Boyle* . . . , in a strict products liability action based on a design defect."); *In re World Trade Ctr.*, 521 F.3d at 197 (discussing when "[d]erivative immunity under the *Boyle* framework could apply in the Stafford Act context"). The defense established in *Boyle* is based on preemption, not sovereign immunity. *See Boyle*, 487 U.S. at 504, 505 n.1.[1]

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[1] The three state supreme court cases that Jacobs claims add to the divide likewise do not conflict with the holding that *Yearsley* immunity is not jurisdictional. Like the Second, Third, Seventh, and Eleventh Circuit cases, *Miller v. United Technologies Corp.,* 660 A.2d 810, 833 (Conn. 1995), concerned the government contractor defense and treated the defense as an affirmative one, with the burden of proof on the defendant. *See id.* ("[T]he government contractor defense is an affirmative defense and the defendant must carry the burden of proving each element by a preponderance of the evidence."). *Yellowstone Pipe Line Co. v. Grant Construction Co.*, 520 P.2d 249 (Idaho 1974), discussed a rule "abrogating a contractor's liability to third persons in tort where the contractor follows the plans and specifications of the contract without negligence," which the court stated had roots in sovereign immunity. The court later held that the rule applies to private as well as government contractors, thereby making clear that it is separate from sovereign immunity. *See Craig Johnson Constr., L.L.C. v. Floyd Town Architects, P.A.*, 134 P.3d 648, 653 (Idaho 2006). Finally, *Pumphrey v. J.A. Jones Construction Co.*, 94 N.W.2d 737, 739 (1959), which held that an independent contractor could "share the immunity of the sovereign" if it carries out its contract without negligence, found it "profitless to consider[] that some authorities place the non-liability of the contractor when he is not himself negligent upon the doctrine that the cloak of governmental immunity extends to him, and others put it on the ground of non-liability," *id.* at 743, cited both types of

(*Footnote continued*)

Thus, in the end, despite its claim of a conflict between the decision below and five circuits, Jacobs points to only one court of appeals case in the 75 years since *Yearsley* was decided that considered a motion to dismiss based on *Yearsley* under Rule 12(b)(1), and, in that case, no one argued that the case should be considered under Rule 12(b)(6), the court did not specifically address the issue, and the court would have vacated the district court's decision under either standard. The Court's review is unnecessary to resolve any conflict here.

II. The Sixth Circuit Correctly Held That Motions To Dismiss Under *Yearsley* Should Be Analyzed Under Rule 12(b)(6), Rather Than Under Rule 12(b)(1).

The decision below correctly holds that *Yearley* does not establish an immunity for government contractors that is jurisdictional in nature. As the Fifth Circuit has explained, "*Yearsley* does not discuss sovereign immunity or otherwise address the court's power to hear the case." *Ackerson*, 589 F.3d at 207. The Court addressed whether the government contractor could be "held to be liable" for its conduct, *Yearsley*, 309 U.S. at 21, not whether it was immune from suit, and the "Court affirmed the reversal of the district court's judgment on the grounds announced," *Ackerson*, 589 F.3d at 207-08, affirming a merits decision, not a jurisdictional one.

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cases in reaching its holding, and gave no indication that whether or not the non-liability stemmed from sovereign immunity would have an effect on the state court's jurisdiction.

Nonetheless, Jacobs argues that *Yearsley* provides government contractors with "the same immunity as the government when they perform the government's functions." Pet. 17. Jacobs cites a statement in *Yearsley* that the "'action of the agent is the act of the government'" and asserts that "[b]ecause the contractor's acts are those of the government, the contractor must enjoy the same immunity." *Id.* (quoting *Yearsley*, 209 U.S. at 22). *Yearsley*'s actual holding, however, rested largely on the premise that the government was *not* immune under the circumstances. *See Yearsley*, 309 U.S. at 21-22 ("As the Government in such a case promises just compensation and provides a complete remedy, . . . there is no ground for holding its agent liable who is simply acting under the authority thus validly conferred.").

Moreover, it is well-established that the exact immunity provided to the government does not extend to all who do work on its behalf. Most notably, although the federal government has immunity against constitutional tort claims, *see FDIC v. Meyer*, 510 U.S. 471, 478 (1994), government employees performing work on behalf of the government do not share in the government's sovereign immunity when they commit constitutional torts. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Instead of having sovereign immunity that deprives the court of jurisdiction over them, federal officials who commit constitutional torts can assert *qualified immunity*. Below, the Sixth Circuit determined that, rather than being "jurisdictional in nature," "*Yearsley* immunity is . . . closer in nature to qualified immunity for private individuals under government contract, which is an issue to be reviewed on the merits rather than for jurisdiction." Pet. App. 10a.

Jacobs contends that, unless government contractors have immunity that deprives courts of jurisdiction over suits against them, the government will not be able "to delegate governmental functions effectively to contractors." Pet. 2. In *Boyle*, however, this Court found the "interest in getting the Government's work done" to be a factor in favor of a preemption defense, not displacement of jurisdiction. 487 U.S. at 505 & n.1.

Jacobs also argues that government contractors should have the same immunity as the government because the government may indemnify them and therefore ultimately pay for their defense. Pet. 2-3. This Court rejected a similar argument in *Brady v. Roosevelt Steamship Co.*, 317 U.S. 575 (1943). There, the Court held that the Suits in Admiralty Act, which provided an exclusive remedy against the United States and the U.S. Marine Commission, did not make private operators who operated vessels for the Marine Commission "non-suable for their torts." *Id.* at 577. In response to the argument that, because of the terms of its contract with the operator, the Commission would ultimately have to pay any judgment, the Court responded that, "it is difficult to see how [petitioner] could be deprived of [her cause of action] by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so readily obtained." *Id.* at 583; *cf. United States v. New Mexico*, 455 U.S. 720, 734 (1982) (explaining that federal government's immunity from taxation is not conferred on other entities, such as contractors, "simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy"). Moreover, this Court has rejected the notion that determinations of sovereign immunity should turn on whether the state will end up ultimately having to pay the judg-

ment. *See Regents of the Univ. of California v. Doe*, 519 U.S. 425, 431 (1997).

In any event, it is far from clear that, under the contract between TVA and Jacobs, the government would have to indemnify Jacobs. Jacobs relies on a provision in the contract stating that TVA will indemnify Jacobs for claims arising out of the presence of toxic substances on or near the site prior to the commencement of Jacobs's work. However, another provision—which Jacobs entirely ignores in its petition—states that *Jacobs* will indemnify *TVA* "from any and all liability to [Jacobs]'s employees or any third parties for personal injuries, property damage, or loss of life or property caused by the negligence or willful misconduct of [Jacobs] in the performance of this Contract" and that Jacobs will pay all judgments in such actions. Contract at 8. The complaints at issue here alleged claims of negligent and willful misconduct by Jacobs, based on Jacobs's actions *after* the commencement of its work. Moreover, the contract provides that Jacobs will indemnify TVA "from all liability resulting from its violation" of any "Federal, State, and local laws (including regulations) affecting performance of its obligations under this contract." *Id.* The complaints in this case include allegations that Jacobs violated applicable laws.

In short, *Yearsley* did not establish or recognize jurisdictional immunity for government contractors. Because *Yearsley*'s holding was not jurisdictional in nature, the court of appeals correctly held that Jacobs's motion to dismiss should have been decided under Rule 12(b)(6), not under Rule 12(b)(1).

III. Undecided Questions About *Yearsley*'s Scope Make this Case a Poor Vehicle for Considering Whether "*Yearsley* Immunity" Is Jurisdictional.

As the Sixth Circuit noted below, there is uncertainty as to the scope of *Yearsley*'s holding. For example, Jacobs argues that *Yearsley* confers immunity whenever government contractors "perform government tasks under validly conferred authority," Pet. i, but the Sixth Circuit pointed out that, if *Yearsley* stretched that far, "*Boyle* would presumably not have invented a new test to govern the liability of military procurement contractors; it could have simply cited *Yearsley* and called it a day." Pet. App. 9a.

These uncertainties about *Yearsley* include questions about whether *Yearsley* confers "immunity" at all. The Solicitor General, for example, interprets *Yearsley* as standing for the proposition that, "if the United States possesses a privilege to take an action that others could not lawfully take, and if that privilege is not a 'personal' (*i.e.*, non-delegable) one, a contractor may perform the action on the government's behalf if the government so directs. The contractor in such circumstances is insulated from liability, not because it possesses an 'immunity' from suit, but because its conduct is *lawful*." Br. for the U.S. as Amicus Curiae Supporting Respondent at 29, *Campbell-Ewald Co. v. Gomez*, No. 14-857 (U.S. Aug. 31, 2015).

Below, the court declined to resolve "thorny questions" about Yearsley's scope, instead "assum[ing] without decid[ing]" that *Yearsley* immunity stretches broadly. Pet. App. 9a. Jacobs argues that this situation makes this case "a perfect vehicle" because it "allows the Court to choose whether to decide the scope of *Yearsley* immunity on either a broad or limited basis." Pet. 24. To

the contrary, these questions about *Yearsley* make this case a particularly poor one for this Court's attention. This case would present this Court with a dilemma: either it would have to decide issues that were not passed on below, *see City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1773 (2015) ("The Court does not ordinarily decide questions that were not passed on below."), or it would have to decide whether "*Yearsley* immunity" is jurisdictional, when *Yearsley* immunity may not apply to government contractors such as Jacobs, and when such immunity may not exist at all.

Granting review in this case would place the Court in a similar position with regard to determining the extent to which TVA itself has discretionary function immunity, given its "sue-and-be-sued" clause, 16 U.S.C. § 831c(b). Any immunity Jacobs has would, under its own theory, derive from immunity of the TVA. However, courts disagree on whether TVA has discretionary function immunity for actions related to its power plants. *Compare*, *e.g.*, *N. Carolina ex rel. Cooper v. TVA*, 515 F.3d 344, 350 (4th Cir. 2008) (holding that "the broad waiver of sovereign immunity effected by the TVA's 'sue-and-be-sued' clause is not restricted by a discretionary function exception in this case," a common-law nuisance action against TVA based on emissions from its plants), *with Mays v. TVA*, 699 F. Supp. 2d 991, 1009 (E.D. Tenn. 2010) (applying "the discretionary function doctrine to TVA and its conduct relating to its power production purpose and function"). Below, the Sixth Circuit stated that discretionary function immunity applied to TVA under the FTCA, without discussing TVA's sue-and-be-sued clause. Pet. App. 7a. Thus, this Court would either have to address TVA's immunity under that clause, even though it was not discussed by the Sixth Circuit, or it would have to consider whether TVA's discretionary function immunity

extends to Jacobs, when, if the Fourth Circuit's decision in *North Carolina ex rel. Cooper* is correct, TVA itself does not have such immunity.

IV. Regardless of Whether Rule 12(b)(6) or Rule 12(b)(1) Applies, Jacobs Is Not Entitled to Immunity.

This case also presents a poor vehicle for deciding whether courts should analyze claims of immunity under *Yearsley* under Rule 12(b)(6) or Rule 12(b)(1) because Jacobs is not entitled to immunity under either standard. Regardless of whether *Yearsley* establishes a jurisdictional immunity or not, it does not apply when contractors act outside the scope of their authority. *See KBR*, 744 F.3d at 344 ("[T]he *Yearsley* rule . . . asks us to consider whether the government authorized KBR's actions in this case."). This case involves claims that Jacobs acted outside of the scope of the authority granted to it by its contract with TVA, which, for example, provided that Jacobs would "comply with Federal, State, and local laws (including regulations) affecting performance of its obligations under this contract." Contract at 8.

V. This Case Should Not Be Held For *Campbell-Ewald*.

On May 18, 2015, this Court granted the petition for a writ of certiorari in *Campbell-Ewald Co. v. Gomez*, No. 14-857. Among the questions presented in that case is "[w]hether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damage caused by public works projects." Pet. for a Writ of Certiorari at i, *Campbell-Ewald*, No. 14-857 (U.S. Jan. 16, 2015).

Jacobs asserts that, "[a]ny resolution of that issue . . . will bear on the issues Jacobs presents in its petition," and that, "at the very least," this case should be held for the decision in that case. Pet. 29. But because the court below assumed without deciding that *Yearsley*'s holding was not limited to claims arising out of property damage caused by public works projects, the question presented in *Campbell-Ewald* is not implicated here. Likewise, the question whether *Yearsley*'s holding is jurisdictional is not at issue in *Campbell-Ewald*. Indeed, in its reply, the government contractor seeking immunity in *Campbell-Ewald* repeatedly quoted the decision below for the proposition that "'*Yearsley* immunity' is a form of 'qualified immunity'"—a theory that is at odds with Jacobs's argument that *Yearsley*'s holding is jurisdictional. Reply Br. for Pet'r at 12, *Campbell-Ewald*, No. 14-857 (U.S. Sept. 22, 2015) (quoting Pet. App. 10a)*; see also id.* at 13. Moreover, the briefing in *Campbell-Ewald* largely addressed the fact-bound issue whether the contractor in that case acted within the scope of its authority under the contract. And to the extent the decision in *Campbell-Ewald* clarifies the scope of *Yearsley*'s holding, the district court will be able to apply *Campbell-Ewald*'s holding on remand, where the immunity issue remains to be decided. This Court's attention to this case is not needed, and the case should not be held pending the decision in *Campbell-Ewald*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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