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 PETITIONER

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QUESTION PRESENTED

Whether an order denying a government contractor's claim of derivative sovereign immunity is immediately appealable under the collateral-order doctrine.

LIST OF PARTIES TO THE PROCEEDINGS

The parties listed in the caption were parties to the proceeding below. Petitioner The GEO Group, Inc. was the defendant in the district court and appellant in the court of appeals. Respondent Alejandro Menocal was the plaintiff in the district court and the appellee in the court of appeals. The only related proceeding was an earlier appeal on an unrelated issue. *Menocal* v. *The GEO Group, Inc.*, 882 F.3d 905 (10th Cir. 2018).

RULE 29.6 STATEMENT

The GEO Group, Inc. is a publicly traded company. BlackRock Fund Advisors is a publicly held corporation that owns 10% or more of The GEO Group, Inc.'s stock. No other publicly held corporation owns 10% or more of The GEO Group, Inc.'s stock.

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INTRODUCTION

Neither the federal government nor the States rely exclusively on government employees to perform all of their many functions. *Filarsky* v. *Delia*, 566 U.S. 377, 384–389 (2012). In fact, Congress sometimes prefers contractors to government employees, as it does in the context of detention for non-citizens awaiting removal or a decision on removal. 8 U.S.C. § 1231(g)(2). Like many government functions, that work is not without controversy. Whom to detain, for how long, and under what conditions are questions that invite debate and decide elections. Subject to constitutional limits, these are policy choices left to the elected branches. U.S. Const. art. I, § 8, cl. 4. And when those branches arrive at a policy decision and set about implementing it, the federal government is immune from suit unless it has expressly waived its sovereign immunity.

"[O]f course," government contractors also "obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States." *Brady* v. *Roosevelt S.S. Co.,* 317 U.S. 575, 583 (1943). The conditions for that immunity are, like the conditions for qualified immunity, a product of the common law. A contractor's derivative sovereign immunity requires that (i) "'what was done was within the constitutional power of Congress,'" and (ii) the contractor "performed as the Government directed." *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153, 167 (2016) (quoting *Yearsley* v.

W.A. Ross Constr. Co., 309 U.S. 18, 20 (1940)). These conditions distinguish contractors' immunity from the "unqualified" immunity of the government itself. *Id.* at 166.

The task of assessing whether the conditions articulated in *Yearsley* and *Campbell-Ewald* are satisfied falls to the district courts. They must decide in the first instance whether a contractor's work was something that Congress could constitutionally undertake and whether the contractor performed as directed. This inquiry is not abnormal. District courts perform a similar task with respect to claims of qualified immunity, for example, asking whether the defendant violated "clearly established" federal law. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). They do the same for other conditional immunities, including absolute immunity (was the disputed conduct an official act?), Eleventh Amendment immunity (was the defendant an arm of the State?), the Speech and Debate Clause (was the conduct related to legislation?), and double jeopardy (does a current prosecution arise from the same facts as an earlier one?). And when district courts conclude that the conditions for any of these immunities are unmet, those rulings are immediately appealable under the collateral-order doctrine.

The reason is straightforward: the benefit of immunity "is for the most part lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S.

139, 145 (1993). That, of course, is no less true for the "immunity" that contractors obtain "pursuant to their contractual undertaking with the United States." *Brady,* 317 U.S. at 583. That is particularly true where, as here, the contractor works in close cooperation with federal officials and "could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Filarsky*, 566 U.S. at 391; see also *id.* at 398 (Sotomayor, J., concurring). This case illustrates that risk. Contractors often aid the government in implementing controversial policies. While the government's sovereign immunity prevents those who disagree with federal immigration policy from suing the government directly, contractors like GEO are regularly subject to suits that drive up their costs in hopes of driving them from the marketplace and at least temporarily thwarting the policies with which the plaintiffs disagree. Without the ability to swiftly vindicate contractors' immunity, the inevitable result would be fewer capable contractors willing to perform government work. *Id.* at 390. That is judicial gum in the works of democracy.

To prevent this type of proxy war, the Court should vindicate contractors' long-standing immunity for work performed according to the government's directions. Because the value of that immunity is "for the most part lost" without an immediate appeal, *Puerto Rico Aqueduct*, 506 U.S. at 145, the Court should permit a collateral-order appeal, just as it has for numerous other immunities.

OPINIONS BELOW

The Tenth Circuit's unreported decision dismissing the appeal for lack of jurisdiction is available at 2024 WL 4544184 and reproduced at Pet. App. 1a. The district court decision is reported at 635 F. Supp. 3d 1151 and reproduced at Pet. App. 32a.

JURISDICTION

The court of appeals issued its decision on October 22, 2024. A petition was timely filed on January 13, 2025. The Court granted certiorari on June 2, 2025. On June 24, 2025, the Court extended the deadline for Petitioner's opening brief to July 31, 2025.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Immigration and Nationality Act provides for housing non-citizens detained in connection with removal proceedings:

> (g) Places of detention
>
> (1) In general
>
> The Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal. When United States Government facilities are unavailable or facilities adapted or suitably located for detention are unavailable for rental, the Attorney General may expend from the appropriation "Immigration and Naturalization Service-Salaries and

> Expenses", without regard to section 6101 of title 41, amounts necessary to acquire land and to acquire, build, remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for detention.
>
> (2) Detention facilities of the Immigration and Naturalization Service
>
> Prior to initiating any project for the construction of any new detention facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use.

8 U.S.C. § 1231(g).

STATEMENT

I. Regulatory and Factual Background

Congress has adopted volumes of laws establishing who may enter the United States and on what terms. It has furthermore tasked various executive agencies, including Immigration and Customs Enforcement ("ICE"), with implementing those laws. *E.g.*, 6 U.S.C. § 542. On the specific issue of detention, Congress provided that "[t]he Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." 8 U.S.C. § 1231(g)(1). Those "appropriate places" include both government facilities and private facilities operated pursuant to a contract

between ICE and service-providers like GEO. In fact, Congress directed that, before building any new government-run facilities, ICE "shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use." 8 U.S.C. § 1231(g)(2). Elsewhere, Congress gave the Secretary of Homeland Security "authority to make contracts . . . as may be necessary and proper to carry out the Secretary's responsibilities." 6 U.S.C. § 112(b)(2).

Exercising that authority, ICE contracted with GEO to provide the building and associated secure residential care services at the Aurora Immigration Processing Center ("AIPC") in Aurora, Colorado. GEO has owned and operated AIPC pursuant to contracts with ICE since 2004. Each of those contracts required compliance with ICE's Performance-Based National Detention Standards ("PBNDS") or the predecessor Immigration and Naturalization Service's National Detention Standards ("NDS"). The PBNDS is an exhaustive, 450-page document directing all aspects of immigration detention. See U.S. Immigration & Customs Enforcement, Performance Based National Detention Standards 2011 (rev. Dec. 2016), available at https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf [*hereinafter* 2011 PBNDS]. Compliance with the PBNDS is not only a contractual imperative, but also mandated by regulation. 8 C.F.R. § 235.3(e).

Two provisions of the PBNDS are at issue in the underlying case: (i) a detainee housekeeping

requirement that includes a schedule of disciplinary sanctions for noncompliance and (ii) a Voluntary Work Program ("VWP") for which participants receive a stipend of at least $1 per day.

The ICE detainee housekeeping requirement mandates that detainees maintain their bunk and housing unit in an orderly and sanitary condition. This requirement is not GEO's invention. It appears in the PBNDS, the ICE National Detainee Handbook, and the ICE-approved AIPC Handbook. *E.g.*, U.S. Immigration & Customs Enforcement, National Detainee Handbook 2024, available at https://www.ice.gov/doclib/detention/ndHandbook/ndhEnglish.pdf ("You must keep areas that you use clean, including your living area and any general-use areas that you use."). ICE also prescribes an escalating scale of disciplinary sanctions for refusal to comply with those housekeeping requirements. The operative 2011 PBNDS, for example, provides that "[a]ll facilities shall have graduated scales of offenses and disciplinary consequences as provided in this section." Pet. App. 134a. The PBNDS classifies "[r]efusing to clean assigned living area" as a "high moderate" offense. Pet. App. 141a. On the following pages, it lists 13 graduated disciplinary sanctions for "high moderate" offenses. Pet. App. 144a.

Unlike housekeeping, the VWP is, as its name suggests, voluntary. It exists to prevent idleness and improve operations at the facility. ICE requires a VWP at its contract facilities and directs the amount of the stipend paid to volunteers. The 2000 NDS and

2008 PBNDS stated that the stipend "is $1 per day." *E.g.*, U.S. Immigration & Customs Enforcement, 2008 PBNDS, "Voluntary Work Program", at 4, available at https://www.ice.gov/doclib/dro/detention-standards/pdf/voluntary_work_program.pdf. In 2011, the updated PBNDS stated that the stipend is "at least $1.00 (USD) per day." 2011 PBNDS at 407. At its own facilities, ICE pays exactly $1 per day, which is precisely the amount Congress appropriates to reimburse contractors like GEO. See 8 U.S.C. § 1555(d); Publ. L. No. 95-431, 92 Stat. 1021 (1978). At all relevant times, GEO complied with the requirements by paying VWP participants at the AIPC at least $1 per day.

II. Proceedings Below

On October 22, 2014 Respondents commenced this class action, alleging GEO's operation of the AIPC under its contracts with ICE involved: (i) noncompliance with the Colorado Minimum Wages of Workers Act, Colo. Rev. Stat. § 8-6-101, *et seq.*; (ii) violations of the forced-labor provision in the Trafficking Victims Protection Act ("TVPA"), 18 U.S.C. §§ 1589, 1595; and (iii) unjust enrichment. GEO moved to dismiss, and the district court dismissed only the Colorado minimum wage claim. *Menocal* v. *GEO Grp., Inc.*, 113 F. Supp. 3d 1125, 1135 (D. Colo. 2015).

The district court then certified two classes—one alleging unjust enrichment based on the VWP, and another claiming that enforcement of the ICE

detainee housekeeping requirement constitutes forced labor in violation of the TVPA.

The parties then cross-moved for summary judgment. GEO asserted that derivative sovereign immunity barred suit for the actions in question, which it argued were duly authorized and directed by ICE. Respondents, too, sought summary judgment on the issue of derivative sovereign immunity, arguing that GEO was not immune because it had too much discretion in how it implemented the ICE detainee housekeeping requirement and whether to pay more than $1 per day to participants in the VWP.

On October 18, 2022 the district court denied GEO's motion for summary judgment and granted Respondents' motion. App. 32a. It adopted the Ninth Circuit's test in *Cabalce* v. *Thomas E. Blanchard & Assocs.*, 797 F.3d 720 (9th Cir. 2015), to conclude that, to avail itself of derivative sovereign immunity, GEO had to show that it had "no discretion" regarding the VWP stipend. Pet. App. 73a. Under that approach, even if GEO performed "in compliance with all federal directions," *Campbell-Ewald*, 577 U.S. at 167 n.7, GEO nevertheless lost immunity because the government did not ***prohibit*** it from paying more. Pet. App. 76a. Applying that same standard, the district court denied derivative sovereign immunity for the TVPA housekeeping claim on the theory that GEO was "not '*required*' by its contracts with ICE" to tell detainees that refusal to clean their living areas could result in solitary confinement, even though solitary confinement is one of the graduated

disciplinary sanctions set out in the PBNDS. Pet. App. 69a–73a.

GEO appealed to the Tenth Circuit, where Respondents moved to dismiss the appeal for lack of a "final decision" under 28 U.S.C. § 1291. After briefing and argument on both jurisdiction and the merits of whether GEO's actions were authorized and directed by the government, the Tenth Circuit dismissed the case for lack of jurisdiction. The Tenth Circuit reasoned that the denial of derivative sovereign immunity is not a collateral order under this Court's decision in *Cohen* v. *Beneficial Life Ins. Co.*, 337 U.S. 541 (1949), because, "[i]n [its] view, ***there is overlap*** between the second *Yearsley* prong—*viz.*, whether the government directed the contractor's challenged actions—and the merits of a plaintiff's claims challenging the lawfulness of those actions." Pet. App. 20a (emphasis added). The Tenth Circuit did not address the remaining *Cohen* factors.

SUMMARY OF ARGUMENT

The Court gives a "practical" construction to the requirement of "final decisions" by the district courts in 28 U.S.C. § 1291. *Will* v. *Hallock*, 546 U.S. 345, 349 (2006). In addition to final judgments—a different term used elsewhere in the code—"final decisions" encompass "a narrow class of decisions that do not terminate the litigation, but are sufficiently important and collateral to the merits that they should nonetheless be treated as final." *Ibid.* Contractors' derivative sovereign immunity belongs to that class

for a number of reasons. Most directly, it protects the same government functioning that other immediately appealable immunities protect. When district courts conclude that a defendant is ineligible for an asserted immunity because it has not satisfied the conditions for that immunity, collateral-order review permits an immediate appeal. Because a contractor asserting derivative sovereign immunity is "immune from suit in federal court, ***it follows*** that the elements of the *Cohen* collateral order doctrine are satisfied." *Puerto Rico Aqueduct*, 506 U.S. at 144 (emphasis added). Alternatively, even if collateral-order review did not "follow" from the existence of an immunity, the *Cohen* factors point to the same conclusion. For all of the reasons that district court orders denying other conditional immunities are immediately appealable, orders denying contractors' derivative sovereign immunity likewise (i) conclusively determine the immunity, (ii) address an issue distinct from the merits, and (iii) cannot be effectively reviewed in an appeal following trial.

I. This Court has long recognized two principles that provide the framework for resolving this case. First, private parties have long played an integral role in performing government functions. See *Filarsky*, 566 U.S. at 384–389. Indeed, there was "no distinction in the common law 'between public servants and private individuals engaged in public service.'" *Campbell-Ewald*, 577 U.S. at 167 (quoting *Filarsky*, 566 U.S. at 387). When acting pursuant to constitutional government direction, those private

contractors enjoy an immunity from suit. *Filarsky*, 566 U.S. at 391; *Brady*, 317 U.S. at 583; *Yearsley*, 309 U.S. at 20–21. Second, where a defendant asserts immunity from suit and the district court concludes that the conditions for immunity are unmet, that decision is immediately appealable. *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985); *Puerto Rico Aqueduct*, 506 U.S. at 144. Combining these two principles leads *a fortiori* to the conclusion that a district court order finding that a defendant is not immune from suit because it falls short of satisfying one of the conditions in *Yearsley* is an appealable collateral order.

II. Even if the Court were encountering contractors' derivative immunity without the benefit of precedent holding that other forms of immunity trigger the collateral-order doctrine, direct application of the *Cohen* factors confirms that denials of this immunity are collateral orders. First, an order finding that a contractor cannot satisfy one or both of *Yearsley*'s conditions conclusively determines the question of immunity, and the contractor must then endure discovery and trial. Second, the *Yearsley* conditions, like the conditions for qualified immunity in *Mitchell*, are "conceptually distinct" from the underlying cause of action. 472 U.S. at 527–528. Although there may be, in some circumstances, "overlap" in certain ***facts*** relevant to both the immunity question and the merits, any such overlap is no barrier to collateral-order review. *Ibid.* Third, because the value of an immunity "is for the most part lost as litigation proceeds past motion practice," *Puerto Rico Aqueduct*,

506 U.S. at 144, its denial is not effectively reviewable on appeal from a final, post-trial judgment. This straightforward walk through *Cohen*'s three factors confirms what the Court has long held in the context of analogous immunities: immediate appeal is appropriate.

III. Finally, providing an efficient path for vindicating an immunity honors the separation of powers at the heart of American government. Congress and the executive branch are responsible for creating and implementing the nation's laws. If they choose to use contractors—or, as here, Congress affirmatively prioritizes the use of contractors, 8 U.S.C. § 1231(g)(2)—the "practical" construction of Section 1291 weighs in favor of immediate appeal, particularly in light of precedent permitting such appeals of other analogous conditional immunities. *Merck Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."). Because litigation against contractors impairs the government's ability to discharge its current duties and to recruit capable contractors in the future, the Court should resist efforts to use the judiciary to frustrate policy choices constitutionally assigned to the other branches.

ARGUMENT

I. Derivative Sovereign Immunity Is an Immunity from Suit, the Denial of Which Is Immediately Appealable Under the Court's Collateral-Order Jurisprudence.

This Court has consistently held that the denial of an immunity from suit is a collateral order. Specifically, denials of absolute immunity, *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), qualified immunity, *Mitchell*, 472 U.S. at 530, double jeopardy, *Abney* v. *United States*, 431 U.S. 651 (1977), and Eleventh Amendment immunity, *Puerto Rico Aqueduct*, 506 U.S. at 144, are all collateral orders from which immediate appeal is available. Derivative sovereign immunity is no different. Like other immunities the denial of which this Court has held is a collateral order, derivative sovereign immunity confers immunity from suit—a right that is effectively lost if not vindicated before trial. *Id.* at 145. If a case proceeds past motions practice, it distracts from the performance of government functions, threatens timidity in future operations, and discourages capable people from working for the government. *Filarsky*, 566 U.S. at 389–390.

Those concerns are equally true whether the party invoking immunity is a private contractor or a government employee. The Court has therefore long recognized a derivative, conditional form of immunity for contractors carrying out the government's directions. And it has held that a district court's denial

of other conditional immunities, including qualified immunity, are immediately appealable. *Mitchell*, 472 U.S. at 530. All that remains is to combine these lines of precedent to conclude that denials of a contractor's derivative sovereign immunity are appealable collateral orders.

A. Derivative Sovereign Immunity Is a Right Not to Stand Trial.

This Court has long held that the government as sovereign is immune from suit unless it has waived immunity. See, *e.g.*, *Schooner Exch.* v. *McFaddon,* 11 U.S. (7 Cranch) 116 (1812); *United States* v. *Mitchell,* 445 U.S. 535, 538 (1980). For nearly as long, the courts have applied derivative sovereign immunity—in one form or another—to government employees, private citizens, and private contractors performing work on the government's behalf. See, *e.g.*, *Filarsky,* 566 U.S. at 384 (describing this protection as anchored in the common law).

These derivative forms of immunity are not "the Government's embracive immunity" but rather apply only when certain conditions are met. *Campbell-Ewald*, 577 U.S. at 166. Qualified immunity, for example, immunizes government employees and agents acting within the scope of their duties, provided they do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

For contractors, the conditions for derivative sovereign immunity appear in *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). *Yearsley*'s canonical formulation imposes two conditions: (1) "what was done was within the constitutional power of Congress"—*i.e.*, the government cannot use contractors to circumvent the Constitution—and (2) the government's contractor "execut[ed] its will." *Id.* at 20–21. When these conditions are met, contractors enjoy "immunity." *Brady*, 317 U.S. at 583. And once an immunity is established, the Court has universally held that orders denying an immunity are immediately appealable collateral orders. It should now apply that rule to contractors' immunity under *Yearsley*.

1. *Yearsley* is neither the first case to address contractors' derivative sovereign immunity, nor the latest. But because of its canonical formulation, it is a logical place to begin. In *Yearsley*, a landowner sued a government contractor whose work building dikes on the Missouri River washed away part of the plaintiff's land. 309 U.S. at 19. The contractor responded "that the work was done pursuant to a contract with the United States Government." *Ibid.* Presented with the question whether the United States' sovereign immunity extends to private contractors performing work for the government, this Court held that "it is clear that 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.* at 20–21. The rationale for that rule reflects both common sense and settled agency

principles; where a private contractor acts at the government's behest, "[t]he action of the agent is 'the act of the government.'" *Id*. at 22 (quoting *United States* v. *Lynah*, 188 U.S. 445, 465 (1903)).

Just three years later, the Court affirmed *Yearsley*'s two conditions—(i) that the agent's work was constitutionally "authorized" and (ii) that the contractor performed as directed—in *Brady,* 317 U.S. at 583. In *Brady*, the Court found a contract's indemnification clause insufficient to satisfy the second *Yearsley* condition because the indemnification alone did not direct the allegedly negligent actions giving rise to the suit. *Id.* at 583–584. The Court nevertheless affirmed *Yearsley* as "a recent example" of the rule that "of course . . . government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States." *Id.* at 583.

2. While *Yearsley* is the canonical articulation of contractors' derivative sovereign immunity, the doctrine's roots are much older. Indeed, the government in *Yearsley* contended not only that extant caselaw supported the proposition that "an agent of the Government cannot be held accountable for actions lawfully authorized or ratified by the Government," but described that rule as "obvious as a matter of principle." Br. of the U.S. at 19–21, *Yearsley* v. *W.A. Constr. Co.,* 309 U.S. 18 (1940) (No. 156), 1939 WL 48388. In support, the government cited several cases applying derivative sovereign immunity and observed that "in every case, so far as has been found,

in which this Court has held that a suit could be maintained against an agent or officer purporting to act for the Government the Court has had reference to a suit based on . . . acts either not authorized by the Government or unconstitutionally authorized." *Id*. at 21. That observation is correct, and the Court formalized it in *Yearsley*'s two-part test.

At common law in England and in American jurisprudence antedating *Yearsley*, those who performed work at the behest of the sovereign derived the same immunity the sovereign itself would enjoy in the same action. For example, English sheriffs enlisted the *posse comitatus*, a group of private individuals, to aid the sheriff in executing warrants. See 1 W. Blackstone, Commentaries on the Laws of England 332 (1765). That tradition continued in the United States. *In re Quarles,* 158 U.S. 532 (1895). And "[w]hile serving as part of this 'posse comitatus,' a private individual had the same authority as the sheriff, and was protected to the same extent." *Filarsky*, 566 U.S. at 388 (citing *Robinson* v. *State,* 93 Ga. 77, 83, 18 S.E. 1018, 1019 (1893), *State* v. *Mooring,* 115 N.C. 709, 710–711, 20 S.E. 182 (1894), *North Carolina* v. *Gosnell,* 74 F. 734, 738–739 (C.C.W.D.N.C. 1896), and *Reed* v. *Rice*, 25 Ky. 44, 46–47 (App. 1829)).

Numerous other cases predating *Yearsley* recognized that agents acting for the government were entitled to the same immunities as the government itself. For instance, the *Yearsley* Court cited *Murray's Lessee* v. *Hoboken Land & Imp. Co.*, 59 U.S. 272

(1855), which concerned the constitutionality of a distress warrant issued pursuant to a federal statute. There, the Court distinguished between "extrajudicial redress of a private wrong" by a private person, on the one hand, and an "agent[] who acts pursuant to the command of a legal precept," on the other. *Id.* at 283. While the former "is directly responsible for his acts to the proper judicial tribunals," the latter "cannot be made responsible in a judicial tribunal for obeying the lawful command of the government." *Ibid.* This formulation reflects the same two conditions that *Yearsley* applied: a lawful command from the government and compliance with that command. The result—*i.e.,* the agent "cannot be made responsible in a judicial tribunal"—is an immunity from suit.

The *Yearsley* Court also cited *The Paquete Habana*, 189 U.S. 453 (1903), which concerned fishing vessels captured in the Spanish-American War. Because the United States had ratified the vessels' seizure, the plaintiff was barred from bringing suit against the captors themselves: "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.

In support of that holding, the Court cited *Lamar* v. *Browne*, 92 U.S. 187, 196 (1875), which involved the wartime seizure of cotton. Although the military seized the cotton, its former owner brought suit against the agents who took custody of the cotton on behalf of the Treasury. The Court held that because

the defendants acted as agents of the government and pursuant to authority validly conferred, they were not "liable to suit." *Id*. at 199.

Other pre-*Yearsley* examples abound. In *Salliote* v. *Knight Bridge Co.*, 122 F. 378 (6th Cir. 1903), the plaintiff brought suit against a private contractor that constructed a bridge pursuant to a contract with two Michigan townships. After determining the "bridge was lawfully constructed, the townships having obtained the consent of the proper authority," the Sixth Circuit extended the municipalities' immunity to the contractor: "The King Bridge Company was but an agent of the townships in the construction of this bridge, and is entitled to any exemption from liability which exists in favor of the supervisors or of the state itself." *Id*. at 379, 383. Likewise, in *Newman* v. *Bradley Contracting Co.*, 164 N.Y.S. 757 (App. Term 1917), the court considered claims against a private contractor working on construction of the New York City subway. Presaging *Yearsley*, the court explained that the contractor was immune if it "had the authority of the government, and, as long as it kept within the limits thereof." *Id.* at 760. Because those conditions were met, "it did not become liable for consequential damages, for although the work was being done here by a private corporation, it stood in the place of the city, and was entitled to all of the immunities and privileges which the city itself would be entitled to were it performing the work." *Ibid.* (citing cases).

Moreover, this Court in *Filarsky* recounted the long history of government contractors receiving derivative immunity and noted that, even in the mid-nineteenth century, "the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." 566 U.S. at 387. Indeed, "examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself." *Id*. at 388–389. As just a few examples: *Gregory* v. *Brooks*, 37 Conn. 365, 372 (1870) (public wharfmaster not liable for ordering removal of a vessel); *Henderson* v. *Smith*, 26 W.Va. 829, 836–838 (1885) (notaries public given immunity for discretionary acts taken in good faith); *Chamberlain* v. *Clayton*, 56 Iowa 331, 9 N.W. 237 (1881) (trustees of a public institution for the disabled not liable absent a showing of malice); *Rail* v. *Potts & Baker*, 27 Tenn. 225, 228–230 (1847) (private individuals appointed by the sheriff to serve as judges of an election were not liable for refusing a voter absent a showing of malice); *Jenkins* v. *Waldron*, 11 Johns. 114, 120–121 (N.Y.Sup.Ct. 1814) (same). And in an 1861 case involving a "master of a house of correction"—which Justice Scalia described as equivalent to an "independent contractor," *Richardson* v. *McKnight*, 521 U.S. 399, 415 & n.1 (1997) (Scalia, J., dissenting)—the Supreme Judicial Court of Massachusetts extended derivative immunity to the contractor for claims that he failed "to provide suitable and proper

food, clothing, and warmth" to detainees. *Williams* v. *Adams*, 85 Mass. 171 (1861). Like any contractor, the defendant's immunity was conditional on his caring for detainees as "directed by the county commissioner." *Richardson*, 521 U.S. at 415 n.1 (Scalia, J., dissenting) (citing Mass. Gen. Stat. ch. 143, § 45 (1835)). That immunity matches the "authorized and directed" standard this Court articulated in *Yearsley*.

3. The Court's modern jurisprudence embodies the same principle that the sovereign's immunity from suit applies derivatively to those who act at its direction. In *Filarsky*, this Court observed that immunity from suit extends "not only to public employees but also to others acting on behalf of the government." 566 U.S. at 390. In that case, the defendant was a private lawyer hired by a fire department to investigate whether an employee was malingering. *Id.* at 381. When the employee sued both his government supervisors and the lawyer for an allegedly unconstitutional search of his property under 42 U.S.C. § 1983, the Ninth Circuit affirmed summary judgment in favor of all defendants except the contractor, whom it reasoned was not entitled to immunity because he was not a government employee. *Id.* at 382.

This Court considered "whether an individual hired by the government to do its work is prohibited from seeking such immunity." *Id.* at 380. The Court held that the attorney was entitled to derivative immunity mirroring that of a government employee, notwithstanding his status as a private citizen. Any result to the contrary would leave contractors

"holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Id.* at 391. "Under such circumstances, any private individual with a choice might think twice before accepting a government assignment." *Ibid.*

Most recently, in *Campbell-Ewald*, the Court reaffirmed the rule from *Yearsley*. In that case, a private business entered a contract with the Navy to develop a recruiting campaign that included sending text messages to persons in a targeted demographic who had opted in to receive such messages. 577 U.S. at 157. However, in contravention of the Navy's instructions, the text messages went to recipients who had not agreed to receive them, including the plaintiff, who sued the contractor under the Telephone Consumer Protection Act. *Ibid.*

Citing *Yearsley*, *Brady*, and *Filarsky*, the contractor asserted that its "status as a Government contractor" entitled it to "the blanket immunity enjoyed by the sovereign." *Id.* at 156. In assessing that claim, the Court returned to its longstanding rule: "'[g]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.'" *Id.* at 166 (quoting *Brady*, 317 U.S. at 583). The Court reaffirmed *Yearsley*'s two-part test, the second half of which requires that the contractor "performed as the Government directed." *Id.* at 167. Because the contractor in *Campbell-Ewald* failed to follow the government's "explicit instructions" not to

send text messages to persons who had opted out, it was not entitled to "'derivative immunity' shield[ing] the contractor from suit." *Id.* at 166. The Court rejected the contractor's more permissive test for immunity, which rested on its mere "status as a federal contractor." *Ibid.*

To be clear, the contractor's argument in *Campbell-Ewald* is detached from history and tradition. The Court has never extended the government's unconditional and "embracive" immunity to private parties. The contractor in *Campbell-Ewald* had no choice but to stake out an extreme position because it had disobeyed the government's explicit directions by sending text messages to individuals who had opted out of receiving them. Had the government directed its contractor to send messages to everyone between the ages of 18 and 24, the case would have been different, and the contractor could have argued under the traditional *Yearsley* framework.

Campbell-Ewald confirms what has been the law for centuries: those who act at the behest of the government derive an immunity from suit, so long as the work they perform is within Congress's constitutional purview, and they "perform[] in compliance with all federal directions." *Campbell-Ewald*, 577 U.S. at 167 n.7. The result is that the government's obedient agents "cannot be made responsible in a judicial tribunal for obeying the lawful command of the government." *Murray's Lessee*, 59 U.S. at 283.

B. This Court Has Repeatedly Held that Denials of Immunity Are Collateral Orders, and the Same Rationale Extends to Derivative Sovereign Immunity.

This Court has consistently held that the denial of immunity is a collateral order because absent immediate appeal, the rights associated with such immunity would be effectively lost once the defendant is forced to endure discovery and trial. Thus the Court has held that denials of absolute immunity, qualified immunity, and Eleventh Amendment immunity are all collateral orders from which immediate appeal is permitted. There is no principled reason to treat the denial of a contractor's derivative sovereign immunity differently.

1. In *Nixon* v. *Fitzgerald*, 457 U.S. 731, 741 (1982), the Court considered the collateral-order appeal of an order denying the President's motion for summary judgment on the basis of absolute immunity. It held that the order was appealable, noting that "[a]t least twice before this Court has held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria." *Id.* at 742 (citing *Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (absolute immunity under the Speech and Debate Clause), and *Abney* v. *United States*, 431 U.S. 651 (1977) (absolute immunity against double jeopardy)).

Likewise, the Court has held that orders denying qualified immunity are immediately appealable collateral orders. *Mitchell*, 472 U.S. 511. In *Mitchell*, the plaintiff sued John Mitchell, then the Attorney

General of the United States, for damages stemming from a warrantless wiretap. *Id.* at 513. Mitchell appealed the district court's denial of qualified immunity, and the court of appeals held the denial was not a collateral order subject to immediate appeal. *Id.* at 517–518. This Court reversed. *Id.* at 530.

The *Mitchell* Court reasoned from analogy to other immunities. It observed that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Id.* at 525 (citing *Nixon*, 457 U.S. 731, and *Helstoski*, 442 U.S. 500)). The *Mitchell* Court therefore framed the question as "whether qualified immunity shares th[e] essential attribute of absolute immunity—whether qualified immunity is in fact an entitlement not to stand trial under certain circumstances." 472 U.S. at 525.

To answer that question, the *Mitchell* Court looked to the nature of qualified immunity and the purposes it serves. Specifically, the Court drew on *Harlow*, which counseled that qualified immunity serves to shield those doing Government work from "consequences . . . not limited to liability for money damages," but also "'the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'" *Id.* at 526 (quoting *Harlow*, 547 U.S. at 816). Indeed, "even such pretrial matters of

discovery are to be avoided if possible," because they inevitably disrupt government functioning. *Ibid.* (quoting *Harlow*, 547 U.S. at 817). The Court concluded that qualified immunity was "an entitlement not to stand trial or face the other burdens of litigation." *Ibid.* And because this "entitlement is an *immunity from suit* rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Id.* In other words, "the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable." *Id.* at 526–527.

Notably, *Filarsky*, although not a collateral-order case, applied *Mitchell*'s policy rationale in holding that the same qualified immunity applicable to government employees also protects individual contractors: "avoid[ing] 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." 566 U.S. at 389–390. While *Filarsky* did not ask whether the denial of a contractor's immunity is an immediately appealable collateral order, its reasoning rests on *Mitchell*'s assessment of that very issue for government employees.

Finally, consistent with *Nixon* and *Mitchell*, the Court held in *Puerto Rico Aqueduct* that the collateral-order doctrine includes denials of Eleventh Amendment immunity. There, the Puerto Rico

Aqueduct and Sewer Authority asserted that it was an arm of the Territory and therefore immune from suit for an alleged breach of contract. The district court disagreed, denying the Authority's motion to dismiss on the ground that it was not an arm of the government (because it could raise funds independent of government appropriations). 506 U.S. at 142. The First Circuit dismissed the appeal for not coming within the collateral-order doctrine. *Ibid*. This Court reversed, holding that "[o]nce it is established that a State and its 'arms' are, in effect, immune from suit in federal court, ***it follows*** that the elements of the *Cohen* collateral order doctrine are satisfied." *Id.* at 144 (emphasis added). The Court devoted just one sentence each to *Cohen*'s three factors, confirming what it had already concluded "follows" from the fact that the district court had denied a claim of immunity. *Id.* at 144–145.

In short, this Court's precedent dictates that denials of immunity are quintessential collateral orders. That makes sense because immunity from suit is hollow if its vindication is possible only after the immune party endures the burdens of discovery and trial.

2. The immediate appealability of an order denying derivative sovereign immunity follows *a fortiori* from the foregoing precedent. The crucial case in that vein is *Mitchell*. See *Puerto Rico Aqueduct*, 506 U.S. at 143 ("*Mitchell* bears particularly on the present case."). It, like *Puerto Rico Aqueduct*, concluded that an immunity's dependence on "certain

circumstances" being present is no obstacle to immediate review. And withholding that review destroys the immunity's value. The same is true for a contractor's derivative sovereign immunity.

Like qualified immunity in *Mitchell*, derivative sovereign immunity shares the same "essential attribute" as absolute immunity: it is an entitlement not to stand trial. *Mitchell*, 472 U.S. at 525; *see supra* Part I.A. And like qualified immunity, *Yearsley*'s derivative sovereign immunity attaches when "certain circumstances" are met. *Ibid*. Confirming the existence of those conditions did not preclude immediate appeal in *Mitchell*. Nor should it here. In order to preserve the value of the immunity, district courts can evaluate whether the contractor's actions were within the scope of conduct Congress may constitutionally undertake and whether the contractor performed as directed. *Yearsley*, 309 U.S. at 20–21. That inquiry into the prerequisites for an immunity is what *Mitchell* prescribes in cases of qualified immunity, and it will work just as effectively here.

Making the application of this Court's immunity precedents even more straightforward is the recognition of qualified immunity for contractors in *Filarsky*. Had the contractor in *Filarsky*, who enjoyed the "same" qualified immunity as government employees, 566 U.S. at 387, appealed the denial of that immunity before trial, is there any doubt that he could have done so under the collateral-order doctrine? Of course not. *Filarsky* confirms the existence of a derivative immunity from suit for contractors, and

Mitchell permits the immediate appeal of an order denying that "same" immunity. The only remaining step—combining those insights to allow contractors to obtain collateral-order review—is the question presented in this case.

As the Court recognized in *Filarsky*, Petitioner's status as a private contractor as opposed to a government official is of no moment: "the common law did not draw a distinction between public servants and private individuals engaged in public service." 566 U.S. at 387. That makes sense because the same values underlie both immunities: "avoid[ing] 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Id.* at 389–390. But, as noted above, those reasons come from *Mitchell*'s analysis of appealability. 472 U.S. at 526. It therefore "follows" that district court orders denying contractors' immunity are immediately appealable. *Puerto Rico Aqueduct*, 506 U.S.at 144. A contrary rule would uniquely penalize contractors, leaving them "holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Filarsky*, 566 U.S. at 391.

* * *

The Court has seen conditional immunities before. GEO asks the Court to confirm that the denial of government contractors' conditional immunity

from suit is a collateral order for which immediate appeal is available. The existence of conditions (articulated in *Yearsley*) makes contractors' immunity different from the sovereign's. See *Campbell-Ewald*, 577 U.S. at 156. But that difference does not affect appealability. Conditional immunities are the norm for collateral-order review. Qualified immunity depends on whether a defendant acted within the scope of his employment and did not violate clearly established federal law. *Harlow*, 457 U.S. at 818. Likewise, an entity is immune under the Eleventh Amendment if it is an "arm" of the State. *Puerto Rico Aqueduct*, 506 U.S. at 144. And members of Congress are immune for "things generally said or done in the House or the Senate in the performance of official duties." *United States* v. *Brewster*, 408 U.S. 501, 512 (1972). Each of these immunities entails conditions that must be satisfied before the defendant gains the benefit of avoiding trial. Yet, in each instance, the Court has recognized that a district court's conclusion that the conditions are not met is an immediately appealable collateral order.

If it were otherwise, the immunity's purposes would be lost to the burdens of litigation and the discouragement of capable people from serving the government. All of that is equally true for contractors and their derivative sovereign immunity. The Court should apply the same rule from *Mitchell*, *Puerto Rico Aqueduct*, *Nixon*, and *Helstoski* to permit immediate review of orders finding the *Yearsley* conditions unmet.

II. The Denial of Derivative Sovereign Immunity Satisfies *Cohen*'s Three Factors.

Consistent with precedent, the Court can hold that the denial of derivative sovereign immunity is a collateral order based solely on a finding that derivative sovereign immunity is an immunity from suit. See Part I.B *infra*; *Puerto Rico Aqueduct*, 506 U.S. at 144 (given an "immun[ity] from suit . . . it follows that the elements of the *Cohen* collateral order doctrine are satisfied."). Nevertheless, an independent analysis of each of *Cohen*'s three prongs confirms that denials of such immunity are collateral orders.

Under the traditional three-factor test, a collateral order must (i) "conclusively determine the disputed question," (ii) involve a claim "separable from . . . rights asserted in the action," and (iii) be "effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct*, 506 U.S. at 144. The Court applies a categorical approach to assess whether a class of orders qualifies as collateral. See *Digital Equip. Corp.* v. *Desktop Direct, Inc.,* 511 U.S. 863, 868 (1994) ("[T]he issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs.").

A. Denial of Derivative Sovereign Immunity Conclusively Determines the Disputed Question.

Cohen's first prong considers whether the class of orders in question "conclusively determine[s] the disputed question." *Puerto Rico Aqueduct*, 506 U.S. at

144. The "disputed question" is whether a private contractor is entitled to immunity from suit. The denial of derivative sovereign immunity "conclusively determines" that question because it dictates whether the contractor must continue to litigate the claims against it. Immunity from suit is lost as soon as the district court denies it and litigation proceeds. *Mitchell*, 472 U.S. at 527 ("[T]he court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial*." (citing *Abney*, 431 U.S. at 659)); *Puerto Rico Aqueduct*, 506 U.S. at 145 ("Denials of States' and state entities' claims to Eleventh Amendment immunity purport to be conclusive determinations that they have no right not to be sued in federal court.").

Here, neither party disputed before the Tenth Circuit that the district court's order denying GEO's motion for summary judgment on derivative sovereign immunity and granting Respondents' motion on the same issue satisfied this element. Pet. App. 18a (noting no dispute). While Respondents argued for the first time in opposing certiorari that this prong is not met because a defendant can reassert *Yearsley* immunity during trial, BIO 28, that argument misses the point. The question is not whether the district court's order conclusively determines liability, but whether it conclusively determines the defendant's asserted immunity from suit. Under this Court's precedent in *Mitchell* and *Puerto Rico Aqueduct*, the answer to that question is unequivocally yes.

B. Derivative Sovereign Immunity Is Separate from the Merits.

1. *Cohen*'s second prong asks whether the issue "is separate from the merits of the action." *Will*, 546 U.S. at 349. The *Mitchell* Court held that this prong was satisfied in the context of qualified immunity because "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim." 472 U.S. at 527–528. That was true notwithstanding some overlap between the conditions for immunity and the underlying merits. *Id*. at 528–529 ("The Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue.").

Notably, the *Mitchell* Court expressly rejected the proposition, advanced by the dissent, that "any factual overlap between a collateral issue and the merits of the plaintiff's claim is fatal to a claim of immediate appealability." *Id*. at 529 n.10. If that were so, the Court reasoned, much of the Court's collateral-order jurisprudence would be wrong:

> To be sure, the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief; the same is true, however, when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit because the complained of conduct falls within

> the protections of the Speech and Debate Clause. In the case of a double jeopardy claim, the court must compare the facts alleged in the second indictment with those in the first to determine whether the prosecutions are for the same offense, while in evaluating a claim of immunity under the Speech and Debate Clause, a court must analyze the plaintiff's complaint to determine whether the plaintiff seeks to hold a Congressman liable for protected legislative actions or for other, unprotected conduct. In holding these and similar issues of absolute immunity to be appealable under the collateral order doctrine . . . the Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test . . . .

Id. at 528–529.

This is where the Tenth Circuit erred below. It dismissed GEO's appeal because "there is overlap between the second *Yearsley* prong—*viz*., whether the government directed the contractor's challenged actions—and the merits of a plaintiff's claims challenging the lawfulness of those actions." Pet. App. 20a. Based on the existence of "overlap," the court held that GEO could not meet the second prong of the *Cohen* test. As *Mitchell*'s reasoning demonstrates, that is mistaken. In fact, *Mitchell* uses the same word—"overlap"—in reaching the opposite conclusion. 472 U.S. at 529 n.10. As *Mitchell*'s litany of examples illustrates, every form of immunity for which the

Court has permitted collateral-order appeals entails some overlap between the plaintiff's claims and the relevant test for the defendant's immunity. The Tenth Circuit erred in finding this overlap dispositive.

2. This Court's decision in *Johnson* v. *Jones*, 515 U.S. 304 (1995), sheds additional light on the permissible overlap between the merits and a conditional immunity. The *Johnson* Court considered whether an order denying qualified immunity on the grounds of "evidence sufficiency"—*i.e.*, "which facts a party may, or may not, be able to prove at trial"—is a collateral order. *Id.* at 313. The Court denied collateral-order review because the appeal concerned ***disputed*** facts, while noting that collateral-order review is permitted where the issue is "whether or not certain ***given*** facts showed a violation of 'clearly established' law." 515 U.S. at 311 (emphasis added). The *Johnson* Court distinguished the case before it from *Mitchell* because the latter "turn[ed] on an issue of law." *Id.* at 313 (quoting *Mitchell*, 472 U.S. at 530). In other words, "overlapping" facts present a problem for collateral-order review of immunity cases when they are "disputed" and would therefore require the appellate court to assume the role of a district court to determine "the existence, or nonexistence, of a triable issue of fact." *Id.* at 316; see also *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 180 (2d Cir. 2008) (*Cohen*'s separateness prong is satisfied where immunity turns on "stipulated facts, facts accepted for purposes of appeal, or the plaintiff's version of the facts."). Where the only facts are "given

facts," applying the legal test for an immunity—whether it be qualified immunity, Eleventh Amendment immunity, double jeopardy, the Speech and Debate Clause, or *Yearsley*—does not offend *Cohen*'s second prong.

3. Viewed through the correct lens, it is clear that a contractor's entitlement to derivative sovereign immunity is "conceptually distinct" from the merits of the underlying claims. *Mitchell*, 472 U.S. at 527–528. Derivative sovereign immunity turns on the two factors articulated in *Yearsley*: whether "'what was done was within the constitutional power of Congress,'" and whether the contractor "performed as the Government directed." *Campbell-Ewald*, 577 U.S. at 167 (quoting *Yearsley*, 309 U.S. at 20). This case is illustrative. The question whether ICE directed GEO to perform certain actions—*i.e.*, require detainees to maintain tidy living areas, and offer a Voluntary Work Program in accordance with PBNDS requirements—is distinct from the merits of whether GEO's actual performance of those duties amounted to forced labor under the TVPA or resulted in unjust enrichment. Indeed, the essence of immunity is that the defendant might have violated the law, but a court need not reach that question because the defendant is not susceptible to suit. That basic premise illustrates the separateness of a defendant's eligibility for immunity from the underlying merits in any immunity case.

The Tenth Circuit reached a contrary conclusion by adopting the theory from the *Mitchell* dissent: "In

our view, ***there is overlap*** between the second *Yearsley* prong—*viz.*, whether the government directed the contractor's challenged actions—and the merits of a plaintiff's claims challenging the lawfulness of those actions." Pet. App. 20a (emphasis added). That is precisely the approach that *Mitchell* rejected. As the Court explained, the view that "***factual overlap*** . . . is fatal to a claim of immediate appealability" is incorrect because it "fails to account for our rulings on appealability of denials of claims of double jeopardy and absolute immunity." 472 U.S. at 529 n.10 (emphasis added). Both absolute immunity and double jeopardy—and, after *Mitchell*, qualified immunity—"require an inquiry into whether the plaintiff's (or, in the double jeopardy situation, the Government's) factual allegations state a claim that falls outside the scope of the defendant's immunity." *Ibid.* The *Mitchell* Court thus held that "factual overlap" does not defeat the second *Cohen* factor. The Tenth Circuit held the opposite. It overlooked that every form of immunity for which this Court has authorized collateral-order review entails a certain amount of overlap between the defendant's eligibility for immunity and the merits of the plaintiff's claims. *Mitchell* could not have been clearer that this overlap is not a problem under *Cohen*. *Ibid.*

Consistent with *Cohen*'s categorical analysis, the presence of some overlap between the immunity question under *Yearsley* and the merits of a particular case is no bar to collateral-order treatment. To determine whether GEO meets the two conditions in *Yearsley*, a court need not consider any disputed

facts. *Johnson*, 515 U.S. at 313. Instead, the court need only review "given facts:" Respondents' allegations, the statute directing ICE to utilize private detention facilities, 8 U.S.C. § 1231(g), the contract between ICE and GEO, and ICE's directives to GEO (*e.g.*, the PBNDS and the ICE National Detainee Handbook). GEO is entitled to derivative sovereign immunity so long as (i) the statute validly authorized ICE to engage GEO for the work it performed and (ii) the acts alleged in Respondents' complaint complied with ICE's directions. Those are purely legal questions applied to given facts. This inquiry is no more fact-bound than the assessment of whether a defendant is entitled to a host of other immunities. See *Mitchell*, 528–529 (summarizing legal criteria for double jeopardy and Speech and Debate Clause immunities).

Critically, nothing about this inquiry turns on "disputed facts" or requires an appellate court to determine whether GEO's alleged actions satisfy the elements of Respondents' two asserted causes of action. Precedent makes this question easy. The test for qualified immunity—whether the defendant violated clearly established federal law—is immediately appealable despite its near-perfect overlap with the merits of a claim under 42 U.S.C. § 1983 or *Bivens* v. *Six Unknown Agents*, 403 U.S. 388 (1971). The inquiry under *Yearsley*—whether the defendant's actions were constitutionally authorized and complied with the government's directions—entails much less overlap than qualified immunity.

In fact, it is difficult to imagine a claim against a contractor that would overlap the *Yearsley* criteria as thoroughly as a Section 1983 claim overlaps *Harlow*'s criteria. Such a claim would have to combine a constitutional challenge to the government's action with a breach-of-contract claim, which, of course, only the government itself would have standing to bring. Following *Mitchell*, the overlap between a contractor's eligibility for immunity and the merits of an underlying claim is a straightforward question. If qualified immunity was sufficiently distinct, contractors' derivative sovereign immunity is necessarily sufficiently distinct as well.

In light of the foregoing, the Tenth Circuit erred in dismissing GEO's appeal based on the presence of some overlap between its claim to immunity and the merits of Respondents' claims. A claim to *Yearsley*'s derivative sovereign immunity is just as "conceptually distinct" from the merits as a claim to other forms of immunity, the denials of which this Court has held are collateral orders. Thus, *Cohen*'s separateness prong poses no obstacle to recognizing the denial of a contractor's derivative sovereign immunity as a collateral order.

C. Denial of Derivative Sovereign Immunity Is Effectively Unreviewable on Appeal from a Final Judgment.

Cohen's third prong asks whether the class of orders at issue is "effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct*, 506

U.S. at 144. This is perhaps *Cohen*'s most important requirement. See *Mitchell*, 472 U.S. at 525 ("A major characteristic of the denial or granting of a claim appealable under *Cohen*'s 'collateral order' doctrine is that 'unless it can be reviewed before [the proceedings terminate], it can never be reviewed at all.'") (quoting *Stack* v. *Boyle*, 342 U.S. 1, 12 (1952)).

The denial of immunity from suit is the quintessential example of an order that is "effectively unreviewable" after final judgment because the right to immunity is effectively lost if not vindicated before trial. The *Mitchell* Court explained that both absolute and qualified immunity conferred "immunity from suit" and thus are effectively "lost if a case is erroneously permitted to go to trial." 472 U.S. at 526. The Court applied identical reasoning in holding that the denial of Eleventh Amendment immunity was effectively unreviewable after final judgment: "the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct*, 506 U.S. at 145. And in the same vein, the Court in *Abney* considered whether the denial of a defendant's double-jeopardy claim was a collateral order. The Court held it was, reasoning that "if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Abney*, 431 U.S. at 662.

That rationale applies with equal force here. A contractor asserting that it "cannot be made responsible in a judicial tribunal," *Murray's Lessee*, 59 U.S. at 283, is asserting an immunity from suit. See Part I.A *supra*. The value of that right is lost if the contractor can vindicate it only after enduring the very burden it is designed to prevent.

To be sure, the "mere avoidance of trial" is not sufficient to satisfy *Cohen*'s third prong, "lest 'every right that could be enforced appropriately by pretrial dismissal [be] loosely . . . described as conferring a 'right not to stand trial.'" *Will*, 546 U.S. at 351 (quoting *Digital Equip.*, 511 U.S. at 873). To avoid expanding *Cohen* to permit interlocutory appeal of virtually "every pretrial or trial order" that might terminate litigation, this Court requires "not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest." *Id.* at 353.

The denial of derivative sovereign immunity satisfies that standard for the reasons articulated in *Mitchell* and *Filarsky*. The *Mitchell* Court held that denial of qualified immunity risked not only "money damages," but also "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." 472 U.S. at 526. And *Filarsky* held that those same risks apply in the context of a contractor: "The public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits is also implicated

when individuals other than permanent government employees discharge these duties." 566 U.S. at 391 (quotation omitted). Moreover, as the United States pointed out as *amicus curiae* in *Filarsky*, these factors impact not only contractors' work on behalf of the government, but the government's own work. For example, the loss of derivative sovereign immunity "not only may tend to produce unduly cautious decisions and actions on the [contractor's] part, but such timidity in turn would necessarily affect the *public officials* with whom the [contractor] works." Br. of the U.S., 2011 WL 5908946, at *18 (Nov. 21, 2011); *accord Richardson*, 521 U.S. at 419–420 (Scalia, J., dissenting) (explaining that financial incentives make contractors more prone to timidity because lawsuits erode profits).

Ultimately, the denial of derivative sovereign immunity imperils the same public interest that was sufficient to warrant collateral-order review in *Mitchell*, notwithstanding a defendant's status as a private contractor.

III. Immediate Appeal of Orders Denying Derivative Sovereign Immunity Protects the Performance of Government Functions and Preserves the Separation of Powers.

Undermining contractors' derivative sovereign immunity, as the Tenth Circuit opinion does, runs headlong into the separation of powers. Cases like *Nixon*, *Puerto Rico Aqueduct*, and *Mitchell* recognize the complexity of performing government functions

and the importance of respecting policy choices by the other branches of government. Those choices include the decision to hire contractors, an option that is especially important "when there is a particular need for specialized knowledge or expertise that the government must look outside its permanent workforce to secure the services of private individuals." *Filarsky* 566 U.S. at 390.

Here, Congress specifically elected to use contractors. It charged the Attorney General with arranging "appropriate places of detention" and further instructed that "[p]rior to initiating any project for the construction of any new detention facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use." 8 U.S.C. § 1231(g). Consistent with that mandate, ICE entered a contract with GEO to operate the facility at issue in this case—and to do so according to the 450-page PBNDS. GEO's role in carrying out the country's immigration policy is therefore a feature rather than a bug in the system designed by the other branches. Respondents disagree with those policy choices, which is their right, but no one disputes that ICE would be immune from suit if it operated GEO's facilities itself or that it could vindicate that immunity through a collateral-order appeal. Congress's decision to use contractors to perform the same, constitutional function according to ICE's oversight and direction should not open the door for those who oppose federal policies to nullify those policies by using the courts to impose costs on

contractors and drive them out of the market. "The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to [perform as] specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 507 (1988).

The separation of powers therefore dovetails with the traditional immunity for those who carry out the government's constitutional work. Without it, the judiciary becomes a tool for obstructing the other branches' work.

A. Subjecting Government Contractors to Trial Before Vindicating Their Immunity Would Hamstring Government.

"Immunity 'protect[s] government's ability to perform its traditional functions.'" *Filarsky*, 566 U.S. at 389 (quoting *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992)). Recognizing that fact, *Filarsky* extended qualified immunity to private contractors. That holding rested on the long history of contractors performing government functions and their entitlement to the "same immunity" that government employees enjoy when doing the same work. 566 U.S. at 387; see generally *id.* at 384–389; *Campbell-Ewald*, 577 U.S. at 166–168; *Yearsley*, 309 U.S. at 20; see also Part I.A *supra*. As the scope of government and the work it performs have expanded, the importance of contractors has

likewise increased. As amicus Professional Services Council noted in its brief in support of certiorari, the federal government in fiscal year 2023 entered six million contracts worth $759 billion and involving the broadest imaginable array of products and services. See PSC Amicus Br. at 4–5. Providing those services is the responsibility of the other branches of government, and this Court has long resisted second-guessing the use of contractors to accomplish that work.

GEO operates a detention facility to house non-citizens pending removal while they await due process—an important government objective. But this is just one of a multitude of critical functions for which the government turns to private contractors. These non-employees provide for the national defense, *McMahon* v. *Presidential Airways, Inc.*, 502 F.3d 1331, 1341 (11th Cir. 2007), respond to disasters, *World Trade Ctr*, 521 F.3d at 176, and administer educational programs, *ACT, Inc.* v. *Worldwide Interactive Network, Inc.*, 46 F.4th 489, 493 (6th Cir. 2022). At Congress's invitation, they provide healthcare to the nation's veterans, 38 U.S.C. § 1703, protect federal networks from cybersecurity threats, 44 U.S.C. § 3554, and clean up polluted sites across the country, 42 U.S.C. § 9604. Contributions by private contractors to government operations are as important as they are varied.

This important work depends on recruiting talented and honest people who could instead pursue other ventures. Indeed, "the most talented

candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts." *Filarsky*, 566 U.S. at 390. Discussing the same immunity, the Court noted in *Mitchell* that immediate appeal is necessary in the case of qualified immunity to avoid "deterrence of able people from public service." 472 U.S. at 526.

The burdens of litigation are no less serious—and, if anything, more serious—for private contractors than for the government itself. Private parties do not, after all, have the federal treasury to pay the costs of litigation and any judgments against them. That is not to say that litigation against contractors spares the government; to the contrary, such lawsuits embroil government officials as witnesses and often impair federal policy while courts determine contractor liability. *Filarsky* recognized this very ripple effect: "such distractions will also often affect any public employees with whom [contractors] work by embroiling those employees in litigation." 566 U.S. at 391. Again, this case is a prime example. If GEO cannot appeal the denial of derivative sovereign immunity, the case will inevitably entail burdensome discovery and litigation, including testimony of the ICE officials who oversee the AIPC—those who maintain offices at the facility as well as those ICE employees who reviewed, approved, and monitored GEO's implementation of ICE's policies. In other words, government contractors do not operate in a vacuum, and litigation against them entails the same harm to government functioning as litigation against the government itself.

Given the ubiquity of government contracting and the inevitable toll that denials of immunity take on "[t]he public interest in ensuring performance of government duties free from the distractions" of litigation, *Filarsky*, 566 U.S. at 391, the Court should hold that such denials are collateral orders and vindicate the immunity that it has recognized for at least 80 years.

B. Subjecting Government Contractors to Trial Before Vindicating Their Immunity Would Frustrate the Separation of Powers.

The Constitution empowers Congress "[t]o establish an uniform Rule of Naturalization." U.S. Const. art I, § 8, cl. 4. Congress has exercised that power to require the detention of certain non-citizens and to confer broad authority on the Attorney General and Secretary of Homeland Security to identify "appropriate places of detention," including facilities operated under contract. 8 U.S.C. § 1231(g)(1); 6 U.S.C. § 112(b)(2). Beyond that broad delegation to the executive branch, Congress specifically instructs ICE to use contracted facilities before constructing new ones. 8 U.S.C. § 1231(g)(2).

These detention operations are squarely "within the constitutional power of Congress." *Yearsley*, 309 U.S. at 20. The fact that *Yearsley* integrates the question of congressional power into the test for derivative sovereign immunity—but does not ask whether using a contractor was advisable or even

necessary—highlights the connection between immunity and the separation of powers. *Ibid.* (asking only whether "what was done was within the constitutional power of Congress"). No one in this litigation questions that Congress can constitutionally detain aliens pending removal or that it can authorize an agency of the federal government to use contractors to do so. The constitutional path is therefore clear for GEO to comply with the government's directions and thereby obtain the immunity that Congress expected when adopting the legislation at issue. See *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles.").

Congress, not the courts, decides whether and when the federal government waives sovereign immunity. The Federalist No. 81 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."). This Court has long required that the waiver be "'unequivocally expressed' in statutory text." *FAA* v. *Cooper*, 566 U.S. 284, 290 (2012). Here, Congress has done no such thing. If ICE employees directly operated the AIPC, Respondents unquestionably could not have stated a claim against the federal government. That Congress chose to prioritize contractors over direct federal operation of immigration detention facilities is merely another decision within its constitutional authority over immigration. As this Court has long recognized, those who carry out that policy are immune from suit, and that immunity

precludes plaintiffs from using the judiciary to burden the other branches' constitutional policy choices.

CONCLUSION

The Court should reverse the decision below and remand for the Tenth Circuit to decide whether ICE's housekeeping policy and Voluntary Work Program were within Congress's power to authorize and whether GEO's implementation of those policies complied with ICE's directions. Evaluating those conditions mirrors the inquiry that courts perform for numerous other immunities. As in those contexts, the conditions in *Yearsley* are "conceptually distinct" from the merits and warrant collateral-order review.

Respectfully submitted.

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