No. 24-758

IN THE

Supreme Court of the United States

THE GEO GROUP, INC.,

Petitioner,

v.

ALEJANDRO MENOCAL, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* RENOWN HEALTH SUPPORTING PETITIONER

HUGH C. GRIFFIN
Counsel of Record
HALL PRANGLE & SCHOONVELD LLC
200 South Wacker Drive, Suite 3300
Chicago, IL 60606
(312) 345-9600
hgriffin@hpslaw.com

Counsel for Amicus Curiae Renown Health

336756

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[1]

Renown Health (formerly Washoe Health System) ("Renown") was founded in 1862 and transitioned to a private not-for-profit healthcare network in 1984. It is the largest locally-owned, not-for-profit healthcare network in northern Nevada and has more than 7,500 employees system wide. A recent survey reported that Renown's emergency department is the 38th busiest in the country. https://www.beckershospitalreview.com/rankings-and-ratings/hospitals-with-the-most-ed-visits-in-2024.html.

In the course of rendering emergency care, Renown often needs to declare an emergency psychiatric hold to protect the safety of its emergency patients. In Nevada, as in most states, such a procedure is authorized by statute. See NRS 433A.160 (Procedure for placement on mental health hold) and NRS 433A.085 (Forms for detainment, evaluation, admission, treatment, and conditional release). This in turn often requires Renown to file petitions seeking a court-ordered admission under NRS 433A.200 (Filing of petition; certificate or statement concerning alleged mental health crisis). As a result, Renown has been sued under 42 U.S.C. § 1983 for such an involuntary, court-ordered admission under NRS 433A.200 on the theory that Renown and its physicians violated the patient's constitutional rights while they were "state actors." See

1. Pursuant to this Court's Rule 37.2, Amicus provided timely notice to all parties of its intent to file this amicus brief. Further, pursuant to this Court's Rule 37.6, Amicus states that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from Amicus, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Wofford v. Renown Regional Medical Center and Earl Oki, M.D., et al., District Court of Nevada, Reno, 3:21-cv-00520-MMD-CLB, now on appeal to the Ninth Circuit Court of Appeals, Docket Nos. 24-6244 and 24-6245. In *Wofford*, Renown moved for summary judgment on the Section 1983 claims based upon the good-faith immunity defense, suggested in *Wyatt v. Cole*, 504 U.S. 158, 169 (1992), and recognized in *Clement v. City of Glendale*, 518 F.3d 1090, 1096-97 (9th Cir. 2008). The district court denied Renown's summary judgment motion, and Renown immediately filed an appeal relying on the collateral-order doctrine. On January 15, 2025, the Ninth Circuit ordered full briefing on all issues, including "whether this Court has jurisdiction over appeal Nos. 24-6244 and 24-6245 under the collateral-order doctrine."

Unlike government contractors, Renown and other emergency care providers subject to Section 1983 suits often have no choice in rendering services to their emergency room patients. See the Emergency Medical Treatment & Labor Act (EMTALA), 42 U.S.C. § 1395dd; NRS 439B.410 (2024). Thus, Renown has a profound interest in the issue raised in GEO Group's certiorari petition, *i.e.*, whether an order denying a government contractor's claim of derivative sovereign immunity is immediately appealable under the collateral-order doctrine. Renown believes that this Court's resolution of the current split in the circuits on this issue will guide courts in dealing with similar collateral-order doctrine issues in Section 1983 suits against Renown and other similarly situated emergency care providers as well as numerous other entities sued as "state actors" in a myriad of different contexts.

SUMMARY OF ARGUMENT

The current split in the circuits over a government contractor's right to immediately appeal the denial of its derivative sovereign immunity claim under the collateral-order doctrine can be resolved only by this Court. This Court should undertake to do so now and bring about a uniform administration of civil justice to all government contractors, no matter in what circuit they perform their work.

Moreover, this circuit conflict goes far beyond the need for procedural uniformity. The immunity at issue is an *immunity from suit* that is irrevocably lost to a government contractor who cannot take an immediate appeal from an order denying that immunity. Without a right of immediate appeal under the collateral-order doctrine, government contractors whose motions to dismiss on grounds of derivative sovereign immunity are denied must potentially face years of litigation—such that their immunity from suit can never be reinstated, no matter how the immunity issue is ultimately resolved on appeal. That should not be the law in any circuit and certainly should not be the law in some circuits and not others.

ARGUMENT

I. The Certiorari Petition Should Be Granted To Resolve An Acknowledged Split In The Circuits On An Important And Recurring Issue Of Derivative Sovereign Immunity.

The current state of the law on the applicability of the collateral-order doctrine to orders denying government

contractors' claims of derivative sovereign immunity is untenable. Such orders denying a government contractor's derivative sovereign immunity claim are immediately appealable under the collateral-order doctrine in the Second, Sixth, and Eleventh Circuits. See *In re World Trade Center Disaster Site Litigation*, 521 F.3d 169, 176 (2d Cir. 2008); *ACT, Inc. v. Worldwide Interactive Network, Inc.*, 46 F.4th 489, 496 498 (6th Cir. 2022); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1338-39 (11th Cir. 2007). In the Fourth, Fifth, Seventh, Ninth (the circuit in which Renown resides), and also now the Tenth Circuit, such orders are not reviewable until the government contractor is compelled to defend itself during potentially years of discovery, pretrial motions, and ultimately trial itself. See *Al Shimari v. CACI Premier Tech, Inc.*, 775 Fed. Appx. 758, 759-60 (4th Cir. 2019); *Houston Cmty. Hosp. v. Blue Cross and Blue Shield of Tex., Inc.*, 481 F.3d 265, 280 (5th Cir. 2007); *Childs v. San Diego Family Hous. LLC*, 22 F.4th 1092, 1098 (9th Cir. 2022); *Pullman Construction Industries, Inc. v. United States*, 23 F.3d 1166, 1168 (7th Cir. 1994); *Menocal v. GEO Group, Inc.*, 2024 WL 4544184, * 7-11 (10th Cir. 2024).

Sup. Ct. R. 10(a) states that a proper reason for granting a petition for a writ of certiorari is where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Here, the conflict is not just between two court of appeals' decisions, but a fundamental disagreement now involving eight courts of appeals over a most important and recurring immunity issue.

As this Court stated more than a 100 years ago, the Supreme Court's power to grant petitions for writs of

certiorari to review decisions of courts of appeals was intended "first to secure uniformity of decision between those courts in the nine [now eleven] circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Both of these fundamental purposes for certiorari review are present here. There is non-uniformity of decisions among eight of the circuits concerning a government contractor's right to immediate collateral-order review of the denial of its motion for derivative sovereign immunity and, as set forth further below, this issue is of critical importance to the tens of thousands of government contractors who carry out all manner of essential government functions throughout all eleven of the circuits.

The collateral order doctrine allows an appeal if the case falls within "that small class which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The question of whether an order denying a government contractor's claim to derivative sovereign immunity involves rights "separable from, and collateral to, rights asserted in the action too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated," cannot logically have a different answer depending in which federal circuit the government contractor's work occurred. This Court has previously granted certiorari to resolve circuit splits on

important immunity issues. *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985). It should do so again here.

II. The Certiorari Petition Should Be Granted So That *All* Government Contractors Retain The Right To Protect Their Immunity From Suit Before It Is Lost.

The need for this Court to resolve the circuit split on the important issue presented is apparent. However, a government contractor's right to an immediate appeal from an order denying its right to derivative sovereign immunity is not simply a procedural issue. The derivative sovereign immunity claimed here, as in *Mitchell*, 472 U.S. at 526, is an "*immunity from suit* rather than a mere defense to liability," and thus, "it is effectively lost if a case is erroneously permitted to go to trial" before the issue can be appealed. (emphasis in original).

To say that government contractors are essential to U.S. government operations is arguably an understatement. The U.S. government depends on contractors at every level. Various studies estimate that over 50% of the "government" work force—approximately 3.7 million people—are contract workers employed by government contractors, and that there are approximately 205,500 government contractors in the United States. The government signs over 11,000,000 contracts a year, 95% of which are awarded to small and medium sized business entities. The contracts range from food provision and janitorial services to complex flight-systems development and, as here, prison operations. The federal agencies who enter into the most government contracts are the Department of Veterans Affairs, the Department of

Energy, the Department of Health and Human Services, General Services Administrations, the Department of Homeland Security, the National Aeronautics and Space Administration, the Department of State, the Department of Agriculture, the Department of Treasury, the Navy, the Army, and the Air Force.[2]

Derivative sovereign immunity exists to spare these contractors from the time, expense, and distraction of defending against protracted litigation. Again, the immunity is intended to be an immunity *from suit*. An immunity from suit grants "an entitlement not to be forced to litigate the consequences of official conduct." *Mitchell*, 472 U.S. at 527. See *ACT, Inc.*, 46 F.4th at 497 (holding that the collateral-order doctrine permitted an immediate appeal of an order denying a government contractor's claim to derivative sovereign immunity "since the relevant immunity is one from suit"); *McMahon*, 502 F.3d at 1339 (noting that an assertion of derivative sovereign immunity is an immunity from suit "that would be irrevocably lost if the holder of the immunity were erroneously required to stand trial").

Subjecting government actors to such suits before their denied claims of immunity can be reviewed on appeal is contrary to the public's interest in having these government contractors act "with independence and without fear of consequences." *Mitchell*, 472 U.S. at 525.

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2. See https://usafacts.org/articles/how-many-people-work-for-the-federal-government/; https://www.findrfp.com/Government-Contracting/Contract-Facts.aspx; https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2023-interactive-dashboard; https://verticaliq.com/product/government-contractors/ (last visited 2/11/2025).

(citation omitted). Suits against government contractors distract them from their governmental duties, inhibit discretionary action, and deter people from entering into public service. *Id.* at 526.

Contractors forced to fully litigate cases through potentially years of discovery and trial before they can appeal the denial of their immunity claim may be compelled to charge higher prices to the government (*i.e.*, taxpayers) for their critical services, or stop contracting with the government altogether—a result clearly not in the public interest. See *Filarsky v. Delia*, 566 U.S. 377, 383, 390-91 (2012), noting *inter alia* that:

- "[a]t common law, government actors were afforded certain protections from liability based on the reasoning that the public good can best be secured by allowing officers charged with the duty of deciding upon the rights of others, to act upon their own free, unbiased convictions, uninfluenced by any apprehensions," and without being "unduly hampered and intimidated in the discharge of their duties by a fear of personal liability;"

- "[t]he government's need to attract talented individuals is not limited to full-time public employees" as often there is a "particular need for specialized knowledge or expertise" that forces the government to "look outside its permanent work force to secure the service of private individuals;" and

- "[t]he 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." (all internal quotation marks omitted).

Amicus recognizes that the merits of petitioner's derivative sovereign immunity claim is not the issue before the Court at this time. However, as reflected in the rationale of those courts upholding government contractors' derivative sovereign immunity claims, the right to seek immediate review of an order denying a government contractor's immunity claim is a right of substance that all government contractors, not those just working in the Second, Sixth, and Eleventh Circuits, should have. Thus, this Court's supervisory power over the administration of civil justice in federal courts, *Burns v. Wilson*, 346 U.S. 137, 147 (1953) (concurring opinion), should be exercised here so that *all* government contractors working in all eleven circuits can obtain collateral-order review of their immunity from suit and not have that immunity effectively lost before the issue is finally decided.

In *Henderson v. United States*, 568 U.S. 266, 274 (2013), this Court noted the need to correct "unjustifiably different treatment of similarly situated individuals." That same principle should compel this Court to grant GEO's certiorari petition here. The existing different treatment of government contractors seeking to obtain immediate appellate review of orders denying their claims for derivative sovereign immunity is an "unjustifiably different treatment of similarly situated" entities that should not be permitted to continue.

CONCLUSION

Amicus Renown Health respectfully requests that this Court grant The GEO Group Inc.'s Petition for Writ of Certiorari.

Respectfully submitted,

HUGH C. GRIFFIN
Counsel of Record
HALL PRANGLE & SCHOONVELD LLC
200 South Wacker Drive, Suite 3300
Chicago, IL 60606
(312) 345-9600
hgriffin@hpslaw.com

Counsel for Amicus Curiae
Renown Health

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