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

REPLY BRIEF IN SUPPORT OF CERTIORARI

SCOTT A. SCHIPMA
THE GEO GROUP, INC.
4955 Technology Way
Boca Raton, FL 33431

DOMINIC E. DRAYE
Counsel of Record
WILLIAM E. EYE
CHRISTOPHER M. O'BRIEN
GREENBERG TRAURIG LLP
2101 L Street, N.W.
Washington, DC 20037
drayed@gtlaw.com
(202) 331-3100

May 2, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY BRIEF

The Tenth Circuit held that an order denying a federal contractor derivative sovereign immunity based on this Court's rule in *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), and *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153 (2016), is not a collateral order for which immediate appellate review is available. The last time this Court confronted that issue, it called for the views of the Solicitor General, who concluded that "the question presented warrants this Court's review." United States Br., *CACI Premier Tech., Inc.* v. *Abdulla Al Shimari*, 2020 WL 5094136, at *16 (S. Ct. Aug. 26, 2020) (title-capitalization omitted). In the five years since *CACI*, three more circuits have joined the split. Pet. 13–18. Another circuit noted that "[t]here is no consensus among our sister circuits as to whether *Yearsley* confers an immunity from suit, the denial of which is appealable under the collateral order doctrine." *Posada* v. *Cultural Care Inc.*, 66 F.4th 348, 355–356 & n.5 (1st Cir. 2023) (collecting cases). And those who would use litigation as a weapon to disable federal operations continue to target contractors where sovereign immunity prevents them from suing the government itself.

Respondents oppose certiorari with an amalgam of merits arguments and faux distinctions that the Solicitor General and circuit courts have rejected. They also adopt a repetition-makes-it-so strategy of referring to derivative sovereign immunity as a "defense." In fact, they employ the term "*Yearsley* defense" 46 times in the brief in opposition. Not once, however, do Respondents acknowledge this Court's recognition just eight years ago that the doctrine in question is an immunity: "[G]overnment contractors obtain certain ***immunity*** in connection with work which

they do pursuant to their contractual undertakings with the United States." *Campbell-Ewald*, 577 U.S. at 166 (emphasis added; quotation marks omitted). Like qualified immunity, derivative sovereign immunity is not the "embracive" immunity that the sovereign enjoys, but it is nonetheless an immunity from suit. *Id.* at 166; Pet. 27–28 (collecting cases).

And, like qualified immunity, derivative sovereign immunity encourages qualified people and companies to work for the government. See PSC Amicus Br. 3–4. This Court recognized the importance of immunity for contractors in *Filarsky* v. *Delia*, 566 U.S. 377, 390 (2012), observing that "[t]he government's need to attract talented individuals is not limited to full-time public employees," a fact that justifies the "same immunity" for contractors. That immunity loses its value if private actors cannot appeal its denial the same way their public-sector counterparts can immediately appeal the denial of qualified immunity, notwithstanding some overlap in the facts at issue. *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985).

This Court should grant the petition to resolve the division in the circuits and permit contractors who perform as directed by the government to enjoy the benefits of immunity that are "lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144–145 (1993).

I. The Tenth Circuit's Decision Deepens a Circuit Split on the Appealability of Orders Denying Claims of Derivative Sovereign Immunity.

Respondents attempt to obscure the circuit split based on a false premise: that the source of a contractor's

derivative immunity somehow affects the analysis under *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). No court has held that. Derivative sovereign immunity comes from statutes, *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169 (2d Cir. 2008), the Constitution, *Adkisson* v. *Jacobs Eng'g Grp., Inc.*, 790 F. 3d 641 (6th Cir. 2015), and common law, *McMahon* v. *Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007). This case involves the third of those species, but nothing in *Cohen* turns on the source of the underlying right. Respondents are therefore mistaken in their attempt to segregate circuit decisions based on the source of the government's immunity, a maneuver they hope will make each circuit appear as a category of one. Without that sleight of hand, their remaining efforts to reconcile the split wither.

1. Three circuits hold that the denial of derivative sovereign immunity is an immediately appealable collateral order. Pet. 12–14; see also United States Br., *CACI*, 2020 WL 5094136, at *17 (identifying same three circuits). Respondents fail to reconcile that division.

a. The Eleventh Circuit in *McMahon* considered a common-law immunity arising from *Feres* v. *United States*, 340 U.S. 135, 146 (1950). *McMahon*, 502 F.3d at 1341. It recognized the contractor's claim "under the theory of derivative sovereign immunity," which "had its origin in *Yearsley*." *Id.* at 1343. Although the Eleventh Circuit ruled against the contractor on its *Feres* claim, the pertinent point is that the court heard the appeal under the collateral-order doctrine. *Id.* at 1339–1340. Respondents seize on the ultimate merits decision to declare that there is no spilt because *McMahon* found that *Feres* immunity "applies only to the government," whereas the immunity

in *Yearsley* and *Campbell-Ewald* that the Tenth Circuit refused to review "applies only to contractors." BIO 17. But the Eleventh Circuit accepted collateral-order review ***before*** reaching the merits. *McMahon*, 502 F.3d at 1339–1340. Indeed, the Eleventh Circuit only decided that *Feres* was inapplicable because it first held that contractors can appeal denials of derivative sovereign immunity. The Tenth Circuit held that they cannot.

b. The Second Circuit permitted a collateral-order appeal when a contractor "derivatively" invoked the government's immunity under the Stafford Act. *In re World Trade Center*, 521 F.3d at 176. The Second Circuit analyzed the *Cohen* factors to conclude that the denial was a collateral order. *Id.* at 187–193. In so doing, it discussed the circuit split on this issue, rejecting the Fifth Circuit's approach in *Houston Cmty. Hosp.* v. *Blue Cross & Blue Shield of Tex., Inc.*, 481 F.3d 265 (5th Cir. 2007), and agreeing with the Eleventh Circuit's holding in *McMahon*. *World Trade Ctr.*, 521 F.3d at 193.

As they do throughout the brief in opposition, Respondents skip over the certiorari-stage question of whether this Court should resolve a split on an important issue to debate instead the merits of the *Cohen* factors. BIO 15–16. Respondents declare that Stafford Act immunity is a "true" immunity, which implicates the availability of effective relief after final judgment, and that a contractor's eligibility is sufficiently separate from the underlying tort claim. *Id.* Putting aside that those arguments go to the *Cohen* merits rather than the existence of a circuit split, neither point distinguishes the current case. The government's immunity from suit by detainees is no less a "true" immunity than its immunity under the Stafford

Act. And whether a contractor is eligible to invoke that immunity derivatively is no more entwined with the tort merits in either context. See Part II infra. In any event, the merits argument does not realign the Second Circuit to the same side as the Tenth when it comes to the split that warrants certiorari.

c. Respondents have even less to say about the Sixth Circuit's holding that "derivative sovereign immunity" is immediately appealable under the "collateral-order doctrine." *ACT* v. *Worldwide Interactive Network, Inc.*, 46 F.4th 489, 496–498 (6th Cir. 2022). They instead pivot again to the merits rather than try to reconcile the circuit split, contending that the collateral-order doctrine should not apply because derivative sovereign immunity "is founded on basic principles of agency, not sovereign immunity." BIO 17; see also *id.* at 4, 6 (citing the Restatement and general principal-agent precedent). But sovereign immunity is what distinguishes the government from ordinary principals, and it is the heart of this controversy. Hence, *ACT* explained that "the immunity government contractors enjoy derives from whatever immunity the relevant government would have 'in the same situation.'" *Id.* at 498 (citing *Adkisson*, 790 F.3d at 645). Because the government would have "enjoy[ed] an immunity from suit itself, the denial of which would be immediately appealable," so too do contractors acting at the government's behest. *Ibid.*; see also *Campbell-Ewald*, 577 U.S. at 166 (noting same derivative "immunity"). Ultimately, Respondents do not refute the fact that the Sixth Circuit would have heard GEO's appeal, while the Tenth Circuit did not.

2. Respondents understandably say little about the other side of the split. They assert that the Seventh Circuit's position is not as clear as GEO maintains and that the Ninth Circuit might be on both sides of the split. BIO 14 n.1, 17. Respondents accept GEO's classification of the Fourth, Fifth, and Tenth Circuits.

The Seventh Circuit in *Pullman Construction Industries, Inc.* v. *United States*, 23 F.3d 1166, 1168 (7th Cir. 1994), denied the existence of sovereign immunity itself, as the Second Circuit noted in *World Trade Ctr.*, 521 F.3d at 191. Its reasoning became the foundation for the Fifth Circuit's refusal to hear a collateral-order appeal of the denial of derivative sovereign immunity. *Houston Cmty Hosp.*, 481 F.3d at 277–278. After all, if federal sovereign immunity does not exist, there is nothing for contractors to derive and no right to appeal its denial.

As for the Ninth Circuit's inconsistent treatment of orders denying derivative sovereign immunity, Respondents have a point: confusion reigns. BIO 17. Notably, however, the two Ninth Circuit cases Respondents identify as permitting collateral-order appeals both predate that circuit's pronouncement in *Childs* v. *San Diego Family Hous. LLC*, 22 F.4th 1092 (9th Cir. 2022). *Childs* held that denials of derivative sovereign immunity are "not immediately appealable under the collateral order doctrine" because "the collateral order doctrine does not apply to orders denying assertions of sovereign immunity of the federal sovereign itself." *Id.* at 1097–1098. That rationale applies to every form of sovereign immunity (and derivative sovereign immunity), regardless of source. But even if the Ninth Circuit has decisions on both sides of the split, that inconsistency only highlights the need for this Court's review.

Ultimately, it comes as no surprise that the Solicitor General and the First Circuit both surveyed this legal landscape and concluded that the circuits are hopelessly divided. United States Br., *CACI*, 2020 WL 5094136, at *1, *17–18; *Posada*, 66 F. 4th at 355–356 & n.5. Three of the cases comprising the circuit split have issued in the years since this Court denied certiorari in *CACI*, presumably on the Solicitor General's suggestion that the then-pending decision in *Nestle USA, Inc.* v. *Doe*, 593 U.S. 628 (2021), would moot *CACI* on the underlying merits. United States Br., *CACI*, 2020 WL 5094136, at *1. There is no prospect of mootness in this case, and the lower courts have only grown more divided. To state the obvious, the federal government and contractors like GEO operate nationwide. It is untenable that derivative sovereign immunity be protected in some circuits but not others.

II. Respondents' Merits Arguments Are Premature and Mistaken.

Unable to explain away the split on whether denials of derivative sovereign immunity are collateral orders, Respondents instead spill ink arguing the merits. See BIO 20–28; see also *id.* 1–2, 12–14, 18. Their arguments are premature. While GEO looks forward to merits briefing explaining why the denial of derivative sovereign immunity satisfies the three-pronged *Cohen* test, the Court need not resolve those merits to determine whether to hear the case.

1. Like the Tenth Circuit, Respondents focus on *Cohen*'s second prong—*i.e.*, whether the issue is "'separate from the merits of the action.'" BIO 12 (quoting *Will* v. *Hallock*, 546 U.S. 345, 349 (2006)); App. 21a. Respondents

argue that determining whether a contractor's actions were "authorized and directed" by the government, as *Yearsley* and *Campbell-Ewald* require, 577 U.S. at 167, will "almost always be core to the merits," BIO 21. That argument crashes on the rocks of qualified immunity. Qualified immunity turns on "whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009). That inquiry overlaps significantly with the merits, but a denial of qualified immunity is an appealable collateral order. *Mitchell*, 472 U.S. at 530.

Mitchell rejected the notion that "any factual overlap . . . is fatal to a claim of immediate appealability." *Id.* at 529 n.10. Instead, "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." *Id.* at 529.

Respondents dismiss that holding as "technical[]" and attempt to escape it by citing *Johnson* v. *Jones*, 515 U.S. 304, 316 (1995). BIO 23–24. But *Johnson* belongs to a different category. It denied collateral-order review where the appellant relied on ***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 Second Circuit echoed that distinction in *World Trade Center*. 521 F.3d at 180 (*Cohen*'s second prong is satisfied where immunity turns on "stipulated facts, facts accepted for purposes of appeal, or the plaintiff's version of the facts").

So it is here. To decide whether the district court correctly denied GEO's claim of derivative sovereign immunity, the Tenth Circuit needed only to consult the undisputed contract between GEO and the government, its incorporated regulations, and Respondents' version of any disputed facts. Those "given facts" bring this case under *Mitchell*, not *Johnson*. GEO has never asked for fact findings to support its immunity. The inquiry is therefore no more fact-bound than interlocutory review of an order denying qualified immunity.

2. Respondents briefly argue the two other *Cohen* prongs, but their arguments reflect confusion over the nature of an immunity from suit. Respondents assume a false dichotomy in which the government enjoys sovereign immunity but everything short of sovereign immunity is just a defense to liability. BIO 25–27. Hence, they refer even to qualified immunity as a "defense." BIO 19, 26. They are mistaken. While the government alone holds "embracive" immunity as the sovereign, employees and contractors enjoy derivative immunity that attaches only when certain conditions are met. *Campbell-Ewald*, 577 U.S. at 166. As countless courts have held, those forms of immunity are nonetheless immunities from suit that are effectively lost if not vindicated before trial. *Puerto Rico Aqueduct*, 506 U.S. at 144; see also Pet. 12–14 (collecting cases). Respondents' mistaken dichotomy leads them to contradict this authority on nothing more than their mantra-like repetition of "defense."

Alternatively, Respondents assert that "even if the *Yearsley* defense were a right not to stand trial," avoiding the burdens of trial is not a strong enough interest. BIO 26–27. Not only does *Mitchell* disagree, 472 U.S. at 526,

but *Filarsky* also recognized that "[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." 566 U.S. at 389 (quotation omitted); see also Pet. 30–31.

3. Finally, Respondents assert that *Cohen*'s third prong—*i.e.*, that the order "conclusively determine the disputed question"—is not met because a defendant can reassert *Yearsley* immunity during trial. BIO 28. Respondents misunderstand *Cohen*. The question is not whether the district court's order conclusively determines liability but whether it conclusively determines the defendant's asserted right not to stand trial. See *Mitchell*, 427 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* on the plaintiff's allegations[.]"). Here, it unquestionably does. Pet. 18a n.1.

Respondents' merits arguments fail to distract from the circuit split that has consumed a majority of the circuit courts. They also backfire by highlighting how the Tenth Circuit's reasoning departs from this Court's precedents.

III. The Question Presented Is Important, and This Case Is an Ideal Vehicle to Decide It.

Facing a clear circuit split on the question presented, Respondents downplay the question's importance and this case's suitability as a vehicle to resolve it. Their efforts are unavailing.

A. The Question Presented Is Important.

Respondents deny that the question presented has "any practical impact," but this Court has recognized the concerns that attend subjecting government officials and contractors alike to the distractions of litigation. *Filarsky*, 566 U.S. at 391. That makes sense because litigation against contractors frustrates government functioning. See Pet. 30–31. Amici ably demonstrate that forcing contractors to await final judgment before vindicating their immunity drives contractors out of the public-sector market, reduces competition, and increases procurement costs. See PSC Amicus Br. 12–16; Renown Health Amicus Br. 7–8.

While Respondents stress that the government has not "advocated for *Yearsley* orders to be immediately appealable," BIO 18, they conveniently ignore that the government believes "[t]his Court's review is warranted" as to both "appealability" and related "disagreement about the nature of the 'derivative sovereign immunity'" recognized in *Yearsley*. United States Br., *CACI*, 2020 WL 5094136, at *16.

B. This Case Is a Suitable Vehicle to Decide the Question Presented.

Respondents advance two vehicle arguments. First, they observe that "[t]he decision below is unpublished." BIO 20. That is both true and irrelevant. *C.I.R.* v. *McCoy*, 484 U.S. 3, 7 (1987) ("[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in [this Court's] decision to review the case.").

Second, Respondents argue that the Court should wait for a "run-of-the-mill case[]" to answer the question presented. BIO 20. According to Respondents, this case is too interesting precisely for the reason they brought it: because GEO operates an immigration detention facility pursuant to a contract with ICE. *Ibid.* But for immunity cases especially, the connection to an important government function militates ***in favor*** of granting review. In fact, Respondents' argument that *Yearsley* immunity arises in myriad cases—both "run-of-the-mill" and otherwise—underscores the ubiquity of government contracting and the importance of resolving the circuit split on the question presented.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Scott A. Schipma
The GEO Group, Inc.
4955 Technology Way
Boca Raton, FL 33431

Dominic E. Draye
Counsel of Record
William E. Eye
Christopher M. O'Brien
Greenberg Traurig LLP
2101 L Street, N.W.
Washington, DC 20037
drayed@gtlaw.com
(202) 331-3100

Counsel for Petitioner

May 2, 2025