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 OF *AMICUS CURIAE* MVM, INC. IN SUPPORT OF PETITIONER

PAUL J. FRAIDENBURGH
Counsel of Record
ALEXANDER P. CARROLL
PILLSBURY WINTHROP SHAW PITTMAN LLP
11682 El Camino Real #200
San Diego, CA 92130
(858) 509-4000
paul.fraidenburgh@pillsburylaw.com

ANNE M. VOIGTS
PILLSBURY WINTHROP SHAW PITTMAN LLP
2550 Hanover Street
Palo Alto, CA 94304

Counsel for Amicus Curiae

131367

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Other Authorities

INTEREST OF AMICUS CURIAE[1]

MVM, Inc. ("MVM") is a private government contractor that, for over 30 years, has provided mission-critical services to over 20 federal agencies throughout the Departments of Defense, Justice, Homeland Security, Health and Human Services, and State. The wide range of services that MVM provides to the government includes, at times, supporting inherently dangerous or politically controversial government functions, subjecting MVM to a heightened risk of litigation for carrying out the government's directives. For example, MVM is currently defending against a class action lawsuit arising out of MVM's execution of contracts with Immigration and Customs Enforcement for the secure and humane transportation of unaccompanied children, part of which was performed while the United States government's family separation policy was in effect. In that case, MVM asserted derivative sovereign immunity under the standard articulated by this Court in *Yearsley v. W.A. Ross Construction Company*, 309 U.S. 18 (1940), at the motion-to-dismiss stage. Although the district court denied MVM's motion without prejudice because the operative federal contract was not attached to the plaintiffs' complaint, MVM will raise the defense again at a later

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

stage once the contract is before the court and the evidentiary record is more fully developed.

The question presented in this case—whether a denial of derivative sovereign immunity is immediately appealable under the collateral-order doctrine—is therefore of acute interest to MVM. If the district court were to deny the defense at summary judgment, MVM would face years of additional litigation with all the associated costs and obligations on claims for which it contends it is immune from suit. That is a waste of the parties' resources and the courts'. Accordingly, the ability to seek immediate appellate review is critical to ensuring contractors can efficiently vindicate their immunity from suit and continue providing essential services on behalf of the federal government without undue litigation risk.

The incorrect rule of law adopted by the Tenth Circuit in this case and four other circuits, including the Ninth Circuit, where MVM's own case sits, breeds uncertainties for MVM and other similarly situated government contractors. And because it relegates a critical threshold issue about whether a government contractor can be sued in the first place to review only after a final judgment is entered, that rule results in severe real-world consequences, including, without limitation, skyrocketing government costs, driving many trusted and experienced contractors out of the industry, and dramatically hindering the government's ability to carry out essential functions. Those costs are not borne by the parties alone, but also by already overbusy courts.

SUMMARY OF ARGUMENT

Derivative sovereign immunity is a fundamental and longstanding protection against suit relied upon by government contractors seeking to provide services to governmental agencies. That immunity is based upon—as the name suggests—sovereign immunity, which is an "elementary" protection for the government, providing immunity from being haled into court, unless and until the government waives that immunity. *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

Derivative sovereign immunity is a simple concept recognized and affirmed in *Yearsley v. W.A. Ross Construction Company*, 309 U.S. 18 (1940). The doctrine stands for the proposition that so long as a government contractor does not violate both federal law *and* the government's explicit instructions under a contract, derivative sovereign immunity provides the government contractor a shield from suit. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016).

Despite this simple rule and the fundamental and important immunity that derivative sovereign immunity provides, the doctrine has become entangled with another affirmative defense, known as the government contractor defense. This separate and distinct defense, which is derived from *Boyle v. United Technologies Corporation*, preempts state "[l]iability for design defects in military equipment." 487 U.S. 500, 512 (1988).

To determine the question at hand and reaffirm that derivative sovereign immunity protects the same fundamental immunities as other immediately appealable immunities,[2] this Court should disentangle *Yearsley's* derivative sovereign immunity from *Boyle's* government contractor defense. That is no easy task: Mapping the history and scope of those two doctrines has been described as a "befuddling task"[3] and "[v]arious courts have recognized the interplay between the two defenses, but many courts find the distinction imprecise." *Anchorage v. Integrated Concepts & Rsch. Corp.*, 1 F. Supp. 3d 1001, 1011 n.67 (D. Alaska 2014).

Accordingly, *amicus* submits this brief to provide a deeper discussion of derivative sovereign immunity.

---

[2] As noted by Petitioner, this Court has consistently held that the denial of an immunity from suit is a collateral order, including 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, (all collateral orders from which immediate appeal is available).

[3] Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 STAN. L. REV. 969, 979 (2021).

ARGUMENT

I. Derivative Sovereign Immunity Is A Broad Protection That Shields Government Contractors From Suit When Those Contractors Comply With Their Obligations.

The doctrine of derivative sovereign immunity is based on the logical understanding that the sovereign immunity that is traditionally afforded to the government should extend in limited circumstances to parties who carry out the government's will. In *Yearsley*—the case that is generally understood to be the modern affirmation of derivative sovereign immunity—plaintiffs sued a government contractor after work the contractor completed under that contract damaged plaintiffs' land. 309 U.S. at 19-20. The contractor argued that the United States government had authorized and directed the work that caused the damage, and that, as a result, the contractor could therefore not be held liable. *Id.* at 20.

Agreeing with the defendant, *Yearsley* relied upon well-settled law from the mid-1800s and early 1900s to hold that if the "authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress," then "there is no liability on the part of the contractor for executing [the sovereign's] will." *Id.* at 20-21 (citing *United States v. The Paquete Habana*, 189 U.S. 453, 465 (1903) (noting that the Court was "not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the

agent thereafter cannot be pursued"); *Lamar v. Browne*, 92 U.S. 187, 199 (1875) (noting "the plaintiff could only look to the United States for redress" after having property seized by the government's agents who were "appointed under the authority of law"); *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 283 (1855) (noting "a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept" and the agent "cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent").

For years following *Yearsley*, numerous courts of appeals confirmed *Yearsley's* holding immunizes government contractors from suit so long as the contractor's acts amount to the acts of the sovereign. *See In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 343 (4th Cir. 2014) (recognizing *Yearsley* immunity for "contractors and common law agents acting within the scope of their employment for the United States"); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204 (5th Cir. 2009) (noting *Yearsley* "has not been abrogated or overturned" and affirming dismissal of claims where contractor did not exceed his authority and complied with Congress's direction and expectations); *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (extending derivative sovereign immunity to a private contractor for following commands of a foreign sovereign); *Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963) (noting "[t]o the extent that the work performed by [the contractor

defendant] was done under its contract with the [government], and in conformity with the terms of said contract, no liability can be imposed upon it for any damages claimed to have been suffered by the appellants"). That, of course, makes good sense: of necessity, the government cannot carry out every task itself, but if those it hires to do those tasks face the prospect of crushing liability for doing so, the government will find few, if any, takers for that work.

Over 70 years after *Yearsley*, this Court reaffirmed and reinforced this core principle of immunity for executing the government's will in *Campbell-Ewald Corporation v. Gomez*, 577 U.S. at 160. In *Campbell-Ewald*, a government contractor, acting through a subcontractor, sent text message advertisements to would-be candidates for the United States Navy in violation of the Telephone Consumer Protection Act. *Id.* at 157. This Court set out to determine whether a government contractor, simply by being a government contractor, obtained "'derivative sovereign immunity,' *i.e.*, the blanket immunity enjoyed by the sovereign." *Id.* at 156.

The Court recognized that government contractors "obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States." *Id.* at 166. However, the Court restricted that immunity, finding that when "a contractor violates both federal law *and* the Government's explicit instructions," derivative sovereign immunity does not shield that "contractor from suit by persons adversely affected by the violation." *Id.* (emphasis added).

As the cornerstone Supreme Court precedents of *Yearsley* and *Campbell-Ewald* together make clear, derivative sovereign immunity applies to "shield the contractor from suit" if (1) the government's authority to carry out the project was "validly conferred, that is, if what was done was within the constitutional power of Congress," and (2) the contractor "simply performed as the Government directed." *Id.* at 167 (quoting *Yearsley*, 309 U.S. at 20-21.)

II. This Court Should Unwind *Yearsley's* Foundational Immunity From The Preemption Defense With Which It Has Become Improperly Entangled.

A. Derivative Sovereign Immunity And The Government Contractor Defense Are Different Doctrines, With Different Requirements, And Different Foundations.

Derivative sovereign immunity provides broad protection and immunity from suit based upon the foundational principle of sovereign immunity. This protection, however, has been slowly chipped away by confusion in the lower courts, especially after this Court's decision in *Boyle v. United Technologies Corporation*, which developed the separate and distinct government contractor defense. 487 U.S. at 512. That separate and distinct defense preempts state "[l]iability for design defects in military equipment." 487 U.S. at 512. Although courts have confused the two, that defense is rooted in a different

doctrine, applies in different (and more limited) circumstances, and provides no basis for reading derivative sovereign immunity narrowly.

More specifically, the Court in *Boyle* created a new immunity, which was based on the preemption doctrine, *not* sovereign immunity. The Court there was confronted with the question of whether a government contractor should be liable under state tort law for harm caused by a defectively designed helicopter.

In answering that question, the Court looked to preemption doctrine to determine whether federal interests preempted state law. The Court first noted that it had generally refused to find federal preemption of state law in the absence of either statutory prescription or a direct conflict between federal and state law. *Id.* at 504. In so doing, the Court relied upon "federal common law," noting it had nonetheless recognized preemption in "a few areas, involving 'uniquely federal interests.'" *Id.* Two of these unique federal interests involved the obligations and rights of the government under its contracts, which are "governed exclusively by federal law," and "the civil liability of federal officials for actions taken in the course of their duty." *Id.* at 504-05. Much of the subsequent confusion between *Yearsley* and *Boyle* likely stems from the Court citing *Yearsley* as an example of a unique federal interest. *Id.* at 506 (citing *Yearsley* and finding "the reasons for considering these closely related areas to be of 'uniquely federal' interest apply as well to the civil liabilities arising out of the

performance of federal procurement contracts. We have come close to holding as much.").

To fashion a mechanism to harmonize the unique federal interests with the state tort law, the Court turned to the Federal Tort Claims Act's discretionary function exception, which it reasoned "demonstrate[d] the potential for, and suggest[ed] the outlines of, 'significant conflict' between the federal interests and state law." *Id.* at 511. The Court reasoned that selecting the appropriate design for equipment was "assuredly a discretionary function" pursuant to that exception. *Id.*

Because government contractors would ultimately pass through costs to the United States to cover or insure against liability for government-ordered designs, the Court found it "makes little sense to insulate the Government" when the government produces equipment, "but not when it contracts for the production." *Id.* at 511-12. Because any state law that would attempt to hold government contractors liable for design defects would conflict with the fundamental federal interest of shielding the United States from liability, those state laws would be displaced or preempted in specific situations. *Id.* at 512.

Based on this determination, the Court articulated the principles underlying the distinct government contractor defense test. Applying those principles, liability for a government contractor would not attach if "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United

States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* Notably, "[t]he second factor requires proof of total conformity." *Pizarro v. Nat'l Steel & Shipbuilding Co.*, No. C 19-08425 WHA, 2021 WL 1197467, at *2 (N.D. Cal. Mar. 30, 2021).

Perhaps the best evidence of all that the preemption defense set out in *Boyle* is not the same as derivative sovereign immunity is in the first footnote of *Boyle*. There, the court noted that the government contractor defense resulted in the preemption of state law, unlike a grant of immunity under *Yearsley*. *See Boyle*, 487 U.S. at 505 n.1 ("Justice Brennan's dissent misreads our discussion here to intimate that the immunity of federal officials might extend to nongovernment employees, such as a Government contractor. But we do not address this issue, as it is not before us." (quotation marks, citations, and alterations omitted)).

Confirming that reading, *Campbell-Ewald* never even addressed *Boyle*. *See Campbell-Ewald*, 577 U.S. at 166-67. Instead, it relied on *Yearsley* and its progeny to explain the basis of derivative sovereign immunity. The fact that it did not even mention *Boyle* further supports the conclusion that the doctrines are separate and distinct.

B. Courts Have Subsequently Improperly Conflated The Two Doctrines.

Despite the different bases and contours for these distinct defenses, courts after *Boyle* soon began to

incorrectly conflate the two. *See Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224, 1242 (D. Or. 2010) (government contractor case, which cited to *Yearsley* based on an assumption that the Ninth Circuit would "apply the government contractor defense to the provision of the kinds of services [defendant] contracted to provide"); *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 419 (D.S.C. 1994) (stating *Boyle* "elaborated on the defense articulated in *Yearsley*."); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1120 (3d Cir. 1993) (noting the *Boyle* Court "relied heavily on" *Yearsley*); *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959, 966 (W.D. Ky. 1993) (noting the *Boyle* Court's "rationale was based largely on" *Yearsley*). And by conflating the two, courts eroded the protections afforded by derivative sovereign immunity.

Likely the most damaging to derivative sovereign immunity's fundamental nature was the Ninth Circuit's decision in *Cabalce v. Thomas E. Blanchard & Associates, Incorporated*, 797 F.3d 720, 733 (9th Cir. 2015). In that case, the Ninth Circuit affirmed the district court's decision and found that derivative sovereign immunity did not apply because the government contractor exercised some discretion under the applicable contract. In the underlying decision, the district court had attempted to analyze both *Yearsley* and *Boyle*, but had improperly conflated the two defenses noting (incorrectly) that "it is far from clear" whether *Yearsley* was a separate defense from *Boyle*, and that the defenses "have a similar rationale." *Cabalce v. VSE Corp.*, 922 F. Supp. 2d 1113, 1126 (D. Haw. 2013).

The Ninth Circuit ultimately held "that derivative sovereign immunity, as discussed in *Yearsley*, is limited to cases in which a contractor 'had *no* discretion in the design process and *completely followed* government specifications.'" *Cabalce*, 797 F.3d at 732 (emphasis added).

However, the case that *Cabalce* relies upon for this statement of law, *In re Hanford Nuclear Reservation Litigation*, involved the application of the government contractor defense derived from *Boyle*, not derivative sovereign immunity under *Yearsley*. 534 F.3d 986, 1001 (9th Cir. 2008). The latter is, as explained above, a separate defense, with separate elements, based on separate underlying principles.

The only reason *In re Hanford* even addressed *Yearsley*, let alone analyzed it, was that the court was attempting to determine whether the Price-Anderson Act ("PAA"), "preempts reliance on the common law" government contractor defense. *In re Hanford Nuclear Rsrv. Litig.*, 534 F.3d at 1000. To answer *that* question, the court had to determine "whether the government contractor defense was well-established at the time Congress enacted the operative version of the PAA." *Id.* The court found that the *Boyle* defense was not well-established at the relevant time because this Court issued its decision just weeks before the relevant PAA was enacted. *Id.* at 1000-01.

The court continued to discuss *Yearsley* simply to confirm that no cases before *Boyle* established the government contractor defense. *Id.* at 1001. While it

acknowledged that *Yearsley* "arguably planted the seeds of the government contractor defense," the court ultimately concluded that the government contractor defense was not actually defined until *Boyle*. *Id.* As part of this discussion, the court concluded *Yearsley* was limited to "principal-agent relationships where the agent had no discretion in the design process and completely followed government specifications." *Id.* This observation was made when attempting to determine whether the government contractor defense was well-established—not during the application of derivative sovereign immunity—and is therefore dictum with respect to the definition and scope of derivative sovereign immunity. This dictum came at a steep price.

Unfortunately, the "no discretion" standard *Cabalce* created out of whole cloth has been applied broadly, even in the case below. *See Menocal v. GEO Grp., Inc.*, 635 F. Supp. 3d 1151, 1174, 1177 (D. Colo. 2022) (incorporating *Cabalce* into rule statement regarding derivative sovereign immunity). As discussed above, however, it is *Boyle* that requires explicit compliance with government specifications for the government contractor defense to apply. *Yearsley*, on the other hand, sets a different standard for derivative sovereign immunity to apply, as described in this Court's holding in *Campbell-Ewald*.

The "no discretion" requirement that *Cabalce* improperly grafted on to derivative sovereign immunity adds an element that is different than prior

Ninth Circuit cases or indeed other modern cases applying derivative sovereign immunity. *See Myers*, 323 F.2d at 583 (noting that "[t]o the extent that the work performed by [the contractor], was done under its contract with the [government], and in conformity with the terms of said contract, no liability can be imposed upon it for any damages claimed to have been suffered by the appellants"); *Taylor Energy Co., L.L.C. v. Luttrell*, 3 F.4th 172, 176 (5th Cir. 2021) (finding derivative sovereign immunity applied even though the government contractor, and not the government, "designed various components" because the government contractor adhered to the government's directives).

The rampant confusion in the courts between *Yearsley* and *Boyle* has been addressed various times, including implicitly by this Court. Some courts have gotten it right. For instance, the Southern District of Mississippi recently noted (correctly) that this Court has treated *Yearsley* "immunity as separate and distinct from *Boyle* in every way except specifically saying it is separate, setting out a distinct two-prong test" in *Cambell-Ewald*. *Webb v. 3M Company*, 627 F.Supp.3d 612, 621 (S.D. Miss. 2022). *Webb* noted that even though the two doctrines "may consider similar facts in application," court precedents confirm that the defenses are separate and any argument to the contrary is "invalid." *Webb v. 3M Company*, 627 F.Supp.3d 612, 621–622 (S.D. Miss. 2022).

Similarly, the Fourth Circuit has also specifically (and correctly) recognized the differences between the

two, noting that *Boyle* is "inapposite" where a party "asks for derivative sovereign immunity rather than preemption under the discretionary function exception[.]" *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 342 (4th Cir. 2014). And four years later, the Fourth Circuit reaffirmed that *Yearsley* operates as a jurisdictional bar from suit, not just a defense to liability, further distinguishing it from *Boyle*. *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 650 (4th Cir. 2018).

Likewise, the Fifth Circuit has affirmed the distinction between derivative sovereign immunity and the government contractor defense by applying the two-part test enumerated in *Yearsley*, rather than the distinct *Boyle* test. *See Taylor Energy Co., L.L.C.*, 3 F.4th at 175 (noting "*Yearsley* immunity is 'derivative sovereign immunity[]' that shields contractors whose work was 'authorized and directed by the Government of the United States' and 'performed pursuant to [an] Act of Congress.'")

Simply put, derivative sovereign immunity under *Yearsley* is a fundamental immunity based on sovereign immunity that offers broad protection against suit. By contrast, the government contractor defense recognized in *Boyle* is a narrower defense against liability based on preemption. But courts' erroneous conflation has led to the narrowing of derivative sovereign immunity. In deciding this case, this Court should clarify the difference between the two and restore derivative sovereign immunity to its full force.

III. The Right To Immediate Appeal Is Crucial To Support The Underlying Purpose Of The Immunity.

As courts have repeatedly recognized, derivative sovereign immunity arises out of "the government's unquestioned need to delegate governmental functions," and the acknowledgment that "[i]mposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work." *Cunningham*, 888 F.3d at 643 (citing *Butters*, 225 F.3d at 466).[4]

Withholding the ability to immediately appeal a denial of derivative sovereign immunity only weakens this defense further and is inconsistent with the principles and policies behind it. The consequences of such a rule are not limited to contractors. To the contrary, derivative sovereign immunity is a basic and fundamental immunity that protects not just government contractors, but the United States and its various agencies as well. The protection provided is meant to allow the government to hire contractors to complete tasks in a cost-effective manner. Making the defense more difficult to apply or otherwise forcing a government contractor to go all the way through trial will undoubtedly make prices for all projects to rise as

---

[4] Petitioner's reliance on *Boyle* for the proposition that the imposition of liability will impact government contracts by increasing prices does not change the distinction between *Yearsley* and *Boyle* because, as seen, that observation was also made in derivative sovereign immunity cases.

government contractors anticipate the need to defend lawsuits they have been named in simply by following the government's orders, and clog courts' already overcrowded dockets with cases that should never have been allowed to make it out of the gate.

CONCLUSION

Because derivative sovereign immunity is a fundamental immunity, which broadly shields government contractors from suit when they comply with the government's instructions, it is akin to other immunities that are immediately appealable. Accordingly, this Court should reverse the decision below and remand for the Tenth Circuit to determine whether GEO is shielded from suit because the government's authority to carry out the project was "validly conferred" and GEO "simply performed as the Government directed."

Respectfully submitted,

PAUL J. FRAIDENBURGH
Counsel of Record
ALEXANDER P. CARROLL
PILLSBURY WINTHROP
SHAWPITTMAN LLP
11682 El Camino Real #200
San Diego, CA 92130
(858) 509-4000
paul.fraidenburgh@pillsburylaw.com

ANNE M. VOIGTS
PILLSBURY WINTHROP
SHAW PITTMAN LLP
2550 Hanover Street
Palo Alto, CA 94304

Counsel for Amicus Curiae

August 7, 2025