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 THE PROFESSIONAL SERVICES COUNCIL-THE VOICE OF THE GOVERNMENT SERVICES INDUSTRY IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Professional Services Council–The Voice of the Government Services Industry ("PSC") is the national trade association for the government professional and technology services industry. Many of PSC's more than 400 small, medium, and large member companies directly support the U.S. Government, both domestically and abroad, through contracts with federal agencies. Approximately 40 percent of contracts held by PSC members principally support the Department of Defense, while 60 percent principally provide services to civilian agencies. PSC's members provide a wide range of professional and technology services, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, and scientific, social, and environmental services. Two-thirds of PSC's members qualify as small businesses. Collectively, PSC's members employ hundreds of thousands of Americans in all 50 States, the District of Columbia, and abroad.

The wide range of services provided by PSC members include projects that support inherently dangerous, high-risk, and politically-controversial government functions. As a result of carrying out federal directives under such projects, PSC members face a heightened risk of litigation. Given the potential for protracted litigation, PSC members have a profound interest in certainty and predictability regarding the *early* resolution of the threshold defense of

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[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity, other than amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

derivative sovereign immunity. The availability of a clear procedural pathway to resolving this immunity defense at an early stage is critical for members' willingness to participate in the procurement process at the outset.

The erroneous rule of law adopted by the Tenth Circuit and four other circuits escalates uncertainties faced by PSC members. If left undisturbed, the holding will have grave real-world impacts on the federal procurement system. The holding not only harms PSC members, but also increases costs to the government and hinders the government's ability to carry out essential functions.

SUMMARY OF ARGUMENT

The federal government relies on contractors to support an enormous quantity and wide variety of vital government functions. Our nation's reliance on contractors has become so ubiquitous that the government would not be able to function without a robust business base participating in the federal procurement system.

In recent years, as the government's reliance on contractors has grown, those contractors have become the target of an increased number of lawsuits arising out of contract performance. The proliferation of claims against contractors is, in part, a product of the inherent challenge in suing the government, which enjoys broad immunity and has been remarkably effective at defending itself from suit. As a result, plaintiffs often elect to sue contractors who have partnered with the government, rather than the government itself.

Many suits arising in this context should fail as a threshold matter because, under this Court's longstanding

precedent, contractors are immune from suit for executing the will of the government. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 22 (1940); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 167 (2016).[2] A basic purpose of *Yearsley* immunity is shielding the performance of government functions against disruptive litigation. But that purpose is only served if contractors can resolve immunity claims *early* in the litigation process. And, because that is the purpose, the question of whether *Yearsley* immunity attaches is necessarily a matter separate from the merits of an action.[3]

The Tenth Circuit's holding—that a district court's order denying *Yearsley* immunity is not subject to interlocutory appeal under the collateral order doctrine—is a misapplication of this Court's decision in *Cohen* because it erroneously conflates *Yearsley* immunity with the merits of an action. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (articulating the circumstances in which interlocutory decisions may be appealed prior to a final judgment on the merits). Contrary to the decision below, resolving *Yearsley* immunity does not require a fact-intensive or merits-based inquiry; rather, it requires only a limited inquiry into whether the government authorized the contractor's actions and such authorization was validly

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[2] *See also Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 648-49 (4th Cir. 2018); *Taylor Energy Co., L.L.C. v. Luttrell*, 3 F.4th 172, 176 (5th Cir. 2021).

[3] *See Cunningham*, 888 F.3d at 648-49 ("The purpose of *Yearsley* immunity is to prevent a government contractor from facing liability for an alleged violation of law, and thus, it cannot be that an alleged violation of law per se precludes *Yearsley* immunity.").

conferred.[4] Indeed, resolving application of *Yearsley* immunity *cannot* require a fact-intensive analysis, as the very act of engaging in fulsome discovery and trial defeats a core purpose of the immunity. For similar reasons, a denial of *Yearsley* immunity is effectively unreviewable after final judgment, and thus plainly meets the third *Cohen* condition. *See Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985) (reasoning that, where "[t]he entitlement is an *immunity from suit*," an order denying immunity is immediately appealable because the order is "effectively unreviewable on appeal from a final judgment").

Of particular concern to PSC, the Tenth Circuit's holding creates increased, yet unwarranted, uncertainties for contractors. If this Court adopts the Tenth Circuit's rule, the holding will harm the federal procurement system and will have a substantial and deleterious impact on key government functions. These harms highlight both why suits like this meet the requirements for immediate appellate review under *Cohen*, and why such review is essential to protect important federal interests embedded in *Yearsley* immunity.

First, by denying contractors the right to an immediate interlocutory appeal where *Yearsley* immunity may apply, the rule adopted by the Tenth Circuit and four other circuits will reduce the number of contractors willing to

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[4] *See Cunningham*, 888 F.3d at 650-51 (finding that "75 days of limited discovery on the applicability of *Yearsley* . . . . provided sufficient information for the district court to rule on [the motion to dismiss]."); *Taylor Energy*, 3 F.4th at 176 (relying on three basic contract documents and testimony from one contractor representative to determine that the government authorized and directed the contractor's actions).

compete for contracts that are critical to the functioning of the government. Under the Tenth Circuit's approach, contractors face the risk of insurmountable and enterprise-threatening litigation costs—even in cases where immunity applies but is incorrectly denied. Faced with this increased risk, rational, cost-sensitive contractors will choose not to do business with the government.

Second, the Tenth Circuit's holding will harm the federal government by increasing procurement costs and wasting government resources. A smaller pool of contractors competing for contracts means less competition, which inflates prices. As to those contractors willing to compete for this work, the government will inevitably have to pay higher prices to offset higher potential litigation costs. Beyond that, contractors faced with an increased threat of protracted litigation will be stuck paying higher insurance costs and legal costs, both of which pass on to the government under cost-type contracts or through higher fixed-price offers. Finally, litigation against contractors—even where the government itself is not a party—inevitably impacts the government's ability to execute the affected contracts and programs, and this type of litigation typically requires discovery against the government, which further diverts limited agency resources and personnel.

For these reasons, the Court should hold that orders denying *Yearsley* immunity are immediately appealable under the collateral order doctrine.

ARGUMENT

I. Contractors Provide Critical Support for an Immense Quantity and Wide Variety of Vital Government Functions.

The federal government is the single largest purchaser of products and services in the world. In fiscal year 2023, the federal government obligated $759 billion through six million contracts—over 44 percent of federal discretionary spending for the year. $478 billion of the $759 billion funded service contracts; in one year alone, the government relied on contractors for nearly half a trillion dollars' worth of services provided to and on behalf of the government. *See A Snapshot: Government-Wide Contracting, Gov't Accountability Off.* (2024), https://files.gao.gov/multimedia/Federal_Government_Contracting/index.html; *Discretionary Spending in Fiscal Year 2023: An Infographic*, Cong. Budget Off. (2024), https://www.cbo.gov/publication/59729.

The government's reliance on contractors is growing. Between fiscal years 2008 and 2016, procurement spending fluctuated between $440 billion and $561 billion.[5] Since 2016, coinciding with President Trump's first term in office and continuing through President Biden's presidency, procurement spending consistently increased year over year from $475 billion in 2016 to $759 billion in 2023. With

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[5] These figures are based on data available through USAspending.gov. *Advanced Search*, https://www.usaspending.gov/search (last visited July 15, 2025) (select "Fiscal years" tab in "Time Period" dropdown; select desired fiscal year; select "Contracts" and "Contract IDVs" from "Award Type" dropdown; click "Submit"; scroll down to "Results Over Time" graphic; select "By Year"; hover cursor over graph to view fiscal year total; repeat for each fiscal year).

President Trump's efforts to significantly downsize the federal workforce, procurement spending could continue to rise as the government necessarily relies on contractors to perform an increasing proportion of government functions. *See, e.g.*, *Hiring Freeze: Memorandum for the Heads of Executive Departments and Agencies*, 90 Fed. Reg. 8247, 8247 (Jan. 20, 2025).[6]

Contractors perform a broad array of services in support of agencies and programs that extend across the entire federal government. Of the $478 billion spent on service contracts in 2023, $248 billion—more than half—funded service contracts across the full range of civilian agencies. The most prominent service categories for 2023 included professional support services, health care services, building operation services, and information technology and telecommunications services. $230 billion funded a broad range of service contracts for the Department of Defense, with major service categories including engineering and technical support services, health care services, and logistics support. *See A Snapshot: Government-Wide Contracting, Gov't Accountability Off.* (2024), *supra*.

In particular, contractors perform a large number of critical support functions that are inherently dangerous and involve a high risk of harm to third parties or damage to property. This includes, for example, providing support to military missions in combat zones, cleaning up environmental and industrial incidents, developing and

[6] President Trump has also prioritized reducing bureaucratic checks in the procurement process in an effort to "create the most agile, effective, and efficient procurement system possible." *See*, *e.g.*, Exec. Order No. 14275, 90 Fed. Reg. 16447 (Apr. 15, 2025).

distributing vaccines, and transporting astronauts to the International Space Station. *See, e.g.*, Stephen L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, 6 J. Cont. Mgmt. 9, 12 (Summer 2008) ("[T]he government today relies upon contractors for increasingly critical and sensitive defense-related tasks, and turns more and more to contractors for healthcare, education, welfare, and prison management[,] . . . disaster relief, border security, port security, and policing, [and] . . . military and foreign operations.").

Contractors of all sizes perform work for the federal government, and this includes—by design—a substantial number of small businesses. *See*, *e.g.*, 48 C.F.R. § 19.201(a) (describing the government's policy of providing "maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns"). The government awarded nearly three-million contracts to small businesses in fiscal year 2023 for a total of $177 billion—roughly one quarter of total procurement spending for the year.[7]

Notwithstanding the growth in spending on federal contracts, the total number of contractors performing these critical services is decreasing. Between 2011 and 2020, the number of small businesses receiving Department of

[7] *Advanced Search*, USAspending.gov, *supra* (select "Fiscal years" tab in "Time Period" dropdown; select "FY 2023"; select "Contracts" and "Contract IDVs" from "Award Type" dropdown; expand "Recipient Type" dropdown; select "Small Business" from "General Business" dropdown; click "Submit"; scroll down to "Results Over Time" graphic; select "By Year"; hover cursor over graph to view fiscal year total).

Defense contract awards declined 43 percent, falling at a rate of 6 percent per year. The number of larger businesses receiving contract awards fell at an even higher rate of 7.3 percent per year over the same period. U.S. Gov't Accountability Off., GAO-22-104621, *Small Business Contracting: Actions Needed to Implement and Monitor DOD's Small Business Strategy* 8-9 (2021) ("Overall, DOD awarded contracts to almost 25,000 fewer businesses in 2020 than it did in 2011."). With a shrinking supply of contractors performing an increasing volume of contracts, the federal procurement system is vulnerable to contractors' changing perceptions of the risks involved in contracting with the government.

II. In Recent Decades, Contractors Have Been Increasingly Targeted in Lawsuits Arising Out of a Broad Spectrum of Federal Programs.

As contractors have played a greater role in supporting the government's broad spectrum of mandates, contractors have correspondingly become involved in an increasing number of lawsuits related to their performance of government contracts. This increase is due in large part to the legal landscape that has developed around lawsuits against the government. Plaintiffs often elect to sue contractors, rather than the government dictating the contractors' actions, because the government is generally immune from private civil actions under the doctrine of sovereign immunity. *See, e.g.*, *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 166 (2016); *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 643 (4th Cir. 2018). Aided by numerous statutory defenses and common law rules—such as the *Feres* Doctrine, the *Stencel Aero* rule, and the "discretionary function" exception to the Federal Tort Claims Act—the government is exceptionally

effective at defending itself from suit. *See Feres v. United States*, 340 U.S. 135, 146 (1950) (holding immunity bars claims by servicemembers against the government for injuries incident to military service); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977) (holding the government is not liable under third-party indemnity actions when the injured party is a servicemember); 28 U.S.C. § 2680(a) (providing immunity for government officials performing a discretionary function, even if the discretion is abused); *United States v. Gaubert*, 499 U.S. 315, 334 (1991) (applying discretionary function exception); *cf. Filarsky v. Delia*, 566 U.S. 377, 391 (2012) ("Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag . . . .").

Over the past several decades, lawsuits against contractors have arisen under contracts for a broad spectrum of services, including the operation of detention facilities in support of U.S. immigration law as in the present case, the design of nuclear reactors for the Navy, *see Gay v. A.O. Smith Corp.*, No. 23-2078, 2024 WL 2558735, at *1 (3d Cir. May 24, 2024), clean-up operations at the World Trade Center disaster site after the September 11, 2001 terrorist attacks, *see In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 196 (2d Cir. 2008), servicing Department of Education student loans, *see Berman v. Pa. Higher Educ. Assistance Agency*, No. 23-1414, 2024 WL 1615016, at *1 (4th Cir. Apr. 15, 2024), administering the Medicare program, *Sanders v. Dep't of Health & Hum. Servs.*, No. 10-172, 2010 WL 5055823, at *1 (E.D. La. July 16, 2010), informing health insurance applicants about eligibility for qualified health plans under the Affordable Care Act, *Cunningham*, 888 F.3d at 644,

hazardous substance and industrial incident cleanup, *see Taylor Energy Co. v. Luttrell*, 3 F.4th 172, 174 (5th Cir. 2021); *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 643-44 (6th Cir. 2015), waste disposal and water treatment at military bases, *see In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326 (4th Cir. 2014), providing medical services in correctional institutions, *see Simmons v. Naphcare Inc.*, No. CV 19-01329-CJC, 2019 WL 13177046, at *1 (C.D. Cal. Nov. 7, 2019), repairing military vehicles in combat zones, *see Abernathy v. Carlyle Grp., Inc.*, No. 22-3603, 2024 WL 5331993, at *2 (D.D.C. Sept. 27, 2024), developing interrogation techniques for use against captured enemy combatants, *see Salim v. Mitchell*, 183 F. Supp. 3d 1121 (E.D. Wash. 2016), and providing mission support services on the battlefield, *see Equal Emp. Opportunity Comm'n v. Fluor Fed. Glob. Projects, Inc.*, No. 22-cv-1960-HMH, 2022 WL 17406568, at *1 (D.S.C. Oct. 31, 2022); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1333, 1336 (11th Cir. 2007).

Contractors have also increasingly faced the threat of lawsuits brought or funded by interest groups as a means to challenge controversial government policies without engaging Congress or the administrative rulemaking process. *See, e.g.*, *Al Shimari v. CACI Premier Tech., Inc.*, 775 F. App'x 758 (4th Cir. 2019); *Al Shimari, et al. v. CACI*, Ctr. for Const. Rts. (last updated May 15, 2025), https://ccrjustice.org/AlShimari (explaining that Center for Constitutional Rights brought suit on behalf of plaintiffs to challenge the Iraq War); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007); *Corrie et al. v. Caterpillar*, Ctr. for Const. Rts. (last updated Nov. 19, 2018), https://ccrjustice.org/home/what-we-do/our-cases/corrie-et-al-v-caterpillar (explaining that multiple interest groups

brought suit against Caterpillar on behalf of plaintiffs to challenge U.S. policy regarding Israel's demolition actions in Palestinian Territories).

III. By Denying Contractors the Right to Immediate Appellate Review When *Yearsley* Immunity May Apply, the Tenth Circuit's Decision Harms the Contracting Community, Undermines the Government's Ability to Carry Out Critical Functions, and Effectively Eliminates a Fundamental Purpose of the Immunity.

By providing immunity from suit, *Yearsley* immunity shields contractors—and in turn the government—from the deleterious impacts of protracted litigation related to the performance of important government functions. *See Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985) (recognizing, in the context of qualified immunity for government officials, that immunity protects government agents not only from liability for money damages, but also from the disruptive impact of subjecting government officials to trial); *see also Cunningham*, 888 F.3d at 643 ("[*Yearsley*] immunity derives from 'the government's unquestioned need to delegate [certain] functions,' and the acknowledgement that '[i]mposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work.'" (quoting *Butters v. Vance Int'l, Inc.*, 225 F.3d 187, 193-94 (4th Cir. 2009))). But *Yearsley* immunity cannot serve this fundamental purpose without the right to an immediate appeal of an adverse ruling as to the availability of immunity. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."); *see also Cohen*, 337 U.S. at 546 ("When

[final disposition of the merits] comes, it will be too late effectively to review the present order[,] and the rights conferred by [the disputed issue], if it is applicable, will have been lost, probably irreparably.").[8]

In the context of *Yearsley* immunity, the lack of immediate appeal undermines the government's ability to carry out important functions in two key ways: (1) by heightening the already-substantial risks of litigation, such that potential offerors avoid competing for contracts; and (2) by increasing costs and burdens imposed on the government, thereby straining agency resources.

A. The Tenth Circuit's Decision Heightens the Substantial Business Risks Associated with Performing Federal Contracts, Which Will Reduce the Number of Contractors Willing and Able to Support Key Government Programs.

Litigation poses three key business risks for contractors. First, contractors face the possibility of massive damages if found liable for actions related to contract performance, or if forced to settle claims. *See, e.g.*, Master Settlement Agreement, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885 (N.D. Fla. filed Aug. 29, 2023) (resulting in $6 billion multidistrict litigation settlement). Second, contractors may face significant reputational harm, both with government

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[8] *Cf. McManaway v. KBR, Inc.*, 554 F. App'x 347, 353-54 (5th Cir. 2014) (Jones, J., dissenting) ("At the very least, courts must be required to rule on this exception at the earliest possible stage of litigation. . . . [F]orcing [contractors] to participate, as in this case, in lengthy discovery, depositions, and interpretation of the contractual clauses seriously undermines the law.").

customers and in commercial markets more broadly. Finally, and most critically here, contractors face the risk of incurring enormous—and in some cases insurmountable—costs during the litigation process itself, even before any determination on the merits is reached.[9] Defendants' Status Report on Insurance Coverage Proceedings at 2, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885 (N.D. Fla. filed May 20, 2024) (stating that, as of the date of filing the status report, defendant contractors' defense costs totaled over $370 million). See also, for example, the 17-year litigation timeline in *Al Shimari v. CACI Premier Tech., Inc.*, 775 F. App'x 758, 759-60 (4th Cir. 2019) (denying collateral order review of denial of *Yearsley* immunity).

Early resolution of *Yearsley* immunity mitigates all three of these risks, but especially so the risk of insurmountable litigation costs. Enduring the full expense of discovery and trial before appealing denials of *Yearsley* immunity can deplete company resources and force contractors to dissolve their business or file for bankruptcy even before incurring the cost of liability. *See, e.g.*, *In re Johns-Manville Corp.*, 26 B.R. 405, 407-08 (Bankr. S.D.N.Y. 1983) (filing for bankruptcy due to financial difficulties resulting from manufacturer's position as defendant in more than 2,000 asbestos lawsuits costing approximately $40,000 per case, excluding appeals); *In re Aearo Techs. LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022)

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[9] The risks attendant to litigation, and harms caused by the lack of immediate appellate review, illustrate why suits like this satisfy the collateral order analysis under *Cohen*. *See* 337 U.S. at 546. In particular, the protections afforded by *Yearsley* immunity are irreparably lost if litigating the merits of a suit bankrupts the contractor or causes other irreversible harms. *Id.*

(filing for bankruptcy when faced with approximately 2,700 lawsuits related to contract for Combat Arms Earplugs). Although large, established government contractors may have sufficient revenue streams to withstand district court litigation through discovery and trial—before an appeal can be heard on the issue of *Yearsley* immunity—many contractors, particularly small businesses, do not.

Thus, where contractors face a heightened risk that performance of a government contract will result in costly, protracted litigation, businesses are less likely to offer their services and expertise to the government. For example, with the expectation that the government would seek to award contracts to operate detention facilities in anticipation of mass deportation action following President Trump's inauguration in January 2025, contractors have expressed reluctance to compete for these contracts based on, among other things, the risk of tort litigation and the uncertainty regarding interlocutory appeal of *Yearsley* immunity determinations. Similarly, contractors have also expressed reluctance to compete for contracts in hostile overseas environments for reasons that include liability related to sudden policy changes by the U.S. government that could alter contractual security arrangements.

B. The Tenth Circuit's Decision Increases Costs to the Government and Further Strains Limited Agency Resources.

The Tenth Circuit's ruling will increase costs and burdens imposed on the federal government in numerous direct and indirect ways.

To begin with, as explained *supra*, the ruling will reduce the number of participants in the federal marketplace. A

smaller pool of contractors means less competition, which typically results in higher average procurement costs for the government. *See* Competition in Contracting Act, 41 U.S.C. § 253 (prescribing requirements for full and open competition and generally seeking to maximize the number of qualified offerors); *Am. Fed'n of Gov't Emps., Local 2119 v. Cohen*, 171 F.3d 460, 472 (7th Cir. 1999) (recognizing that, by requiring full and open competition in the procurement process, the statute "was meant to save money, curb cost growth, promote innovation and the development of high quality technology and to maintain 'the integrity of the expenditure of public funds.'" (quoting S. Rep. No. 98-50, at 2-4 (1984))); *cf. McManaway v. KBR, Inc.*, 554 F. App'x at 354 (Jones, J., dissenting) ("The United States ultimately pays the judgment, if not by indemnifying [the contractor], then by having to pay ever-higher costs for private contractors . . . .").

Contractors bidding on many projects will be forced to seek higher prices to offset potential litigation costs. As the Court noted in *Boyle v. United Techs. Corp.*, "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the government, or it will raise its price. Either way, the interests of the United States will be directly affected." 487 U.S. 500, 507 (1988). With the increased risk of protracted litigation in which threshold issues may not be resolved for a matter of years, contractors are only further incentivized to seek higher prices in their proposals to counterbalance their potential exposure.

The heightened risk of protracted litigation has especially significant consequences for the government in the context of cost-reimbursement contracts, where the

costs of insurance and legal fees are generally passed on to the government. *See* 48 C.F.R. § 52.228-7 (requiring the government to reimburse contractors for the cost of liability insurance in cost-reimbursement contracts); 48 C.F.R. § 31.205-19 (providing that self-insurance and purchased insurance are generally allowable costs that can be charged to the government); 48 C.F.R. § 31.205-47 (describing allowable and unallowable legal costs). Insurance costs rise because insurers must account for the heightened chance of protracted litigation in addition to potential liability. *See* Defendants' Status Report on Insurance Coverage Proceedings at 1-3, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885 (N.D. Fla. filed May 20, 2024) (demonstrating that insurance companies will protect their interests when faced with large insurance payouts in contractor tort lawsuits). Legal costs rise because, as discussed, the lack of immediate appeal forces contractor defendants to endure the full extent of proceedings, including discovery and trial on the merits, even where denial of immunity was inappropriate.

Lengthy litigation against contractors also strains agency resources and distracts officials from their duties. When a suit arises out of performance of a government contract, litigation on the merits, including discovery, almost always requires extensive involvement by agency officials, even when the government is not itself a party to the lawsuit. *See, e.g.*, *In re KBR, Inc., Burn Pit Litig.*, 268 F. Supp. 3d 778, 787-88 (D. Md. 2017) (requiring participation by dozens of government attorneys to appear at hearings and depositions and review and produce hundreds of thousands of contracting records), *aff'd in part*, *vacated in part*, *In re KBR, Inc., Burn Pit Litig.*, 893 F.3d 241 (4th Cir. 2018); *see also Mitchell v. Forsyth*, 472 U.S. at

526 ("[E]ven such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982))). Here, for example, further litigation would likely place substantial demands on ICE officials involved in overseeing the Aurora Immigration Processing Center and monitoring GEO's implementation of its contract if, as the Tenth Circuit held, the defendant cannot appeal the district court's denial of *Yearsley* immunity before a full trial on the merits. *See* Pet. at 31. Agencies that are forced to divert resources and personnel to support private litigation cannot devote full attention and capacity to executing critical programs and mandates.

CONCLUSION

As long as some circuits do not recognize an immediate appeal right for denials of derivative sovereign immunity under *Yearsley*, the federal government contracting community must evaluate and account for increased uncertainties and significant, business-altering threats. The Tenth Circuit's ruling only further elevates and expands these risks.

The rule adopted by the Tenth Circuit harms contractors and the government. Contractors faced with an increased risk of protracted litigation will be discouraged from performing government projects. Fewer businesses competing for contracts restricts the government's choices and reduces price competition, thereby increasing costs and potentially lowering the quality of services provided to the government. Contractors that continue to bid on high-risk projects will be forced to demand higher prices. The result will be higher procurement costs and greater

burdens—all of which will be ultimately borne by the government. For small business and cost-sensitive contractors, the risks are particularly acute, as those entities could face bankruptcy or dissolution—solely from being haled into court, and regardless of the ultimate merits of the claims.

In light of the government's increasing reliance on contractors to perform a growing quantity and variety of critical functions, the current uncertainty regarding interlocutory appeals under these circumstances substantially undermines the government's ability to efficiently and effectively serve the public.

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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