No. 24-758

In the Supreme Court of the United States

THE GEO GROUP, INC.,

Petitioner,

v.

ALEJANDRO MENOCAL, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE COALITION FOR COMMON SENSE IN GOVERNMENT PROCUREMENT AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Coalition for Common Sense in Government Procurement (Coalition) is a nonprofit, nonpartisan organization comprised of small, medium, and large companies that provide products and services to the federal government.[1] It is a cross-industry group of more than 300 companies. It was founded in 1979 to advocate for a common-sense approach to government contracting.

The Coalition's members provide a wide range of products and services to the federal government, including information technology, healthcare, facilities management, and operations and maintenance. The Coalition includes companies of all sizes. Although the Coalition's members include many of the largest federal contractors, about 25% of the Coalition's members are small businesses.

The Coalition is proud to have worked with government officials for more than 45 years to advance a common-sense approach to government contracting. It seeks to advance the federal government's important and varied missions by ensuring that the government has ready access to the specific knowledge, expertise, and capabilities that contractors provide, in a manner that is efficient and provides the best value to American taxpayers.

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[1] The Coalition's members are identified on its website. See https://perma.cc/CXT7-LPRK.

Pursuant to this Court's Rule 37.6, the Coalition affirms that no counsel for a party authored this brief in whole or in part and that no person other than the Coalition, its members, and its counsel made a monetary contribution to its preparation or submission.

The question in this case is whether a government contractor can appeal a denial of derivative sovereign immunity under the collateral-order doctrine. In the Coalition's view, the answer is yes. This Court consistently has held that government employees can immediately appeal orders denying their claims of immunity. Government contractors work hand-in-hand with government employees, and under their direction. In carrying out that important work, government contractors may claim derivative sovereign immunity. If a district court rejects a contractor's claim of derivative immunity, the contractor should be permitted to immediately appeal that denial, just as government employees themselves are allowed to do.

A contrary rule would severely impede the government's work. Private contractors play a critical role in fulfilling many essential government functions. If contractors are not able to obtain early resolution of their claims of immunity, they could be subjected to substantial litigation burdens. That could increase costs to the government and dissuade qualified individuals from becoming government contractors in the first place. That in turn would prevent the government from effectively carrying out its missions and ultimately would harm the public interest. This Court thus should hold that a denial of derivative sovereign immunity is immediately appealable.

INTRODUCTION AND SUMMARY OF ARGUMENT

Government contractors have long served alongside government employees to help advance the public interest. When pursuing the government's missions, contractors – like government employees – are entitled to immunity from suit. When a governmental contractor asserts that immunity and a court denies

immunity, that order is immediately appealable under the collateral-order rule. A contrary rule would enmesh government contractors in lengthy, burdensome litigation. That in turn could distract contractors and government employees from their tasks, increase costs to the government, dissuade qualified individuals from being government contractors, and ultimately harm the public interest.

I. A denial of a contractor's derivative sovereign immunity is immediately appealable under the collateral-order doctrine.

A. Government contractors have played an essential role in virtually every aspect of government functions since the Founding. They have served alongside government employees and under their direction, performing many important tasks.

Sovereign immunity protects the government and government officials in carrying out the government's business. Just as government employees are entitled to immunity under certain circumstances, the government contractors serving alongside them are entitled to derivative immunity. That derivative sovereign immunity applies so long as the contractor is acting within its delegated authority and that authority was validly conferred. *Yearsley* v. *W.A. Ross Const. Co.*, 309 U.S. 18, 21 (1940). That derivative immunity ensures that the government's agents can focus on promoting the public interest, without fear of burdensome litigation arising out of their work for the government.

B. When a government defendant invokes an immunity and it is denied, the government defendant generally can immediately appeal that denial under the collateral-order doctrine. The collateral-order

doctrine permits immediate review of a district-court order that conclusively determines a disputed issue that is separate from the merits of the litigation, when the issue would be effectively unreviewable on appeal of a final judgment. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-547 (1949).

Applying that test, this Court has held that orders denying presidential immunity, immunity under the Speech and Debate Clause, qualified immunity, and Eleventh Amendment immunity all are immediately appealable. Those orders raise important collateral issues (whether the government or official is immune from the lawsuit); they conclusively answer that question (by finding no immunity); and they are effectively unreviewable after a final judgment (because by then, the government defendant will have had to bear all of the burdens of discovery and trial).

C. Denials of derivative sovereign immunity are appealable under the collateral-order doctrine for essentially the same reasons. A denial of a contractor's claim of derivative sovereign immunity conclusively determines that the contractor must face the burdens of the litigation; the question whether the contractor is immune is separate from the question whether the contractor violated the law; and without an immediate appeal, many of the benefits of the immunity will be lost. Accordingly, a denial of a contractor's claim of derivative immunity easily satisfies the criteria for immediate appeal under the collateral-order doctrine.

II. If government contractors are not permitted to immediately appeal denials of derivative sovereign immunity, it ultimately will harm government operations and the public interest.

A. Millions of government contractors operate side by side with government employees in virtually every field. For example, contractors help provide healthcare services to veterans, assist with border security, manufacture military jets and help carry out military operations, and provide information technology services.

B. Absent immediate appeal, contractors who are wrongly denied derivative governmental immunity would face significant costs. They would be subject to the time and expense of litigation, including potentially lengthy discovery, motions practice, and trials. Those burdens and costs could distract them from the tasks they are performing for the government. Those contractors also could face significant collateral consequences, such as substantial reputational harm.

Small businesses may be unable to continue operating when faced with millions of dollars of litigation costs. For larger businesses, those costs could have a material effect on their bottom line and could affect their creditworthiness. Unlike in their other contracts, government contractors usually cannot account for litigation costs in their contracts with the government because of restrictions in the Anti-Deficiency Act.

Faced with the prospect of protracted litigation, government contractors likely would have to either increase costs to the government or stop providing services. Either would harm the public interest. If a contractor has to increase the prices it charges to the government to account for the anticipated cost of litigation, the government would lose the benefits of the cost efficiencies that contractors often provide. Or if the contractor decides to avoid government contracts altogether, that would deny the government valuable

and often irreplaceable sources of services and goods. Either outcome would harm government operations and the public interest.

This Court can avoid those harms by permitting government contractors to obtain early appellate resolution of their claims of derivative governmental immunity.

ARGUMENT

I. A DENIAL OF A GOVERNMENT CONTRACTOR'S DERIVATIVE SOVEREIGN IMMUNITY IS IMMEDIATELY APPEALABLE

A. Government Contractors May Claim Derivative Sovereign Immunity For Their Work On Behalf Of The Government

1. Since the earliest days of this Nation, much of the work of the government has been carried out by private parties, as opposed to government officials. In the eighteenth and nineteenth centuries, "government was smaller in both size and reach," and there was no concept of the civil service. *Filarsky* v. *Delia*, 566 U.S. 377, 384-385 (2012). Instead, "to a significant extent, government was administered by members of society who temporarily or occasionally discharge[d] public functions." *Id.* at 385 (internal quotation marks omitted).

Private contractors were trusted to perform many important government functions. In the late eighteenth century, for example, "the Postmaster General paid * * * contractors to carry mail" across the United States. James F. Nagle, *A History of Government Contracting* 62 (1st ed. 1992). Private companies provided personnel to transport supplies to quell uprisings in

Pennsylvania and Kentucky, and "to design and superintend the construction of * * * frigates" to be used against the Barbary Pirates. *Id.* at 65, 69-70.

Federal and state governments depended on private contractors for many day-to-day operations. "Private citizens were actively involved in government work, especially where the work most directly touched the lives of the people." *Filarsky*, 566 U.S. at 385. The "owner of the local general store" often was tasked with being the "postman[]," and the "local ferryman" sometimes "collect[ed] harbor fees as public wharfmaster." *Ibid.* Similarly, "private lawyers were regularly engaged to conduct criminal prosecutions on behalf of the States." *Ibid.* Indeed, "Abraham Lincoln himself accepted several such appointments." *Id.* at 385-386.

The government's reliance on contractors accelerated during the twentieth century. To help prepare the United States for its entry into World War I, for example, "the navy ordered 664 aircraft from Curtiss, 250 from the Standard Aircraft Corporation, and 200 more from other firms." *A History of Government Contracting* 287. Contractors also provided the labor needed to build the Hoover and Bonneville Dams, *id.* at 384-385, 392-393; helped develop the vehicles for the Apollo space program, *id.* at 486-487; and ensured that the United States had access to the production of weapons and supplies it needed to win World War II, *id.* at 451-464.

Today, government contractors play a significant and important role in carrying out the work of the federal government. They perform a wide variety of vital tasks, from providing information technology services, to providing military equipment and systems defense, to helping veterans obtain healthcare. Contractors

add significant value to government operations. They often have access to resources that government officials may lack; they can provide specialized knowledge and expertise; and they often can act more quickly than federal officials to provide solutions to particular problems. All of this improves the delivery of government services and saves money for American taxpayers.

2. When private parties carry out government functions, they are entitled to the same type of immunity that the government officials themselves receive, so long as they are acting within validly delegated government authority.

The federal government itself is immune from suit unless it waives its sovereign immunity or Congress validly abrogates that immunity. *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). State governments can claim sovereign immunity under the Eleventh Amendment. *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993). Government officials acting in their official capacities often can claim immunity from suit, albeit a qualified immunity in some cases. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806-807 (1982). These immunities are essential to protecting the government and government officials from the burdens of litigation and ensuring that they are not deterred in performing their government work. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985).

Importantly, these governmental immunities are not simply defenses to liability, but immunities from the lawsuits themselves; a successful government immunity defense means that the defendant is not subject to the burdens of litigation. *E.g.*, *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 144. For example,

the Court explained that qualified immunity protects government officials by acting "both [as] a defense to liability and a[n] * * * entitlement not to stand trial or face the other burdens of litigation." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009) (internal quotation marks omitted).

3. Contractors often work "in close coordination with and under the supervision of [government] employees." *Filarsky*, 566 U.S. at 397 (Sotomayor, J., concurring). Just as the government and government officials can claim immunity to protect their ability to carry out their official responsibilities, a government contractor acting under their direction can claim derivative sovereign immunity.

This derivative immunity was well established as a historical matter. "At common law, those who carried out the work of government enjoyed various protections from liability when doing so, in order to allow them to serve the government without undue fear of personal exposure." *Filarsky*, 566 U.S. at 380. "[T]he common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." *Id.* at 387.

In *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940), this Court explained when a government contractor can claim derivative sovereign immunity for its work on behalf of the government. Two conditions must be met: The contractor must not have "exceeded [the] authority" conferred by the government, and that authority must have been "validly conferred." *Id.* at 21.

The facts in *Yearsley* are illustrative. In that case, landowners sued a company for causing water

damage to their land. 309 U.S. at 19. The contractor "had built dikes in the Missouri River * * * pursuant to a contract with the United States Government, and under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States." *Ibid.* In performing its work, the defendant "had washed away a part of petitioners' land." *Ibid.* The defendant argued that it was immune from suit, and this Court agreed. The Court held 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, there is no liability on the part of the contractor for executing its will." *Id.* at 20-21. Because both factors were met, the defendant was entitled to immunity. *Ibid.*

4. Derivative sovereign immunity is more than a merits defense; it is an immunity from suit. Like the immunities afforded to the government and government officials, it prevents the contractor from being subject to the litigation in the first place. *Knick* v. *Twp. of Scott*, 588 U.S. 180, 201 n.7 (2019) (recognizing that the derivative government immunity recognized in *Yearsley* makes the contractor "immune from suit"); see also, *e.g.*, *ACT, Inc.* v. *Worldwide Interactive Network, Inc.*, 46 F.4th 489, 497-498 (6th Cir. 2022); *McMahon* v. *Presidential Airways, Inc.*, 502 F.3d 1331, 1340 (11th Cir. 2007); *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 180 (2d Cir. 2008).

Derivative governmental immunity is critical to ensuring that government contractors are able to fulfill their missions. It protects them from burdensome litigation and ensures that they will not be distracted or deterred in performing government functions. *Filarsky*, 566 U.S. at 389-390 (noting the "harmful distractions from carrying out the work of government

that can often accompany damages suits"). It is a critical protection for the private citizens who help the government carry out its many important functions.

B. This Court Has Recognized That Orders Denying Governmental Immunity Are Immediately Appealable

The Court has repeatedly recognized that various types of orders denying governmental immunity are immediately appealable under the collateral-order doctrine.

1. Ordinarily, federal courts of appeals only have jurisdiction to review final judgments. *See* 28 U.S.C. 1291. But this rule has exceptions, including the collateral-order doctrine. The collateral-order doctrine allows review of "a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (citation and internal quotation marks omitted). These orders "are immediately appealable because they 'finally determine claims of right 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.'" *Iqbal*, 556 U.S. at 671 (quoting *Cohen*, 337 U.S. at 546).

To qualify for immediate appeal under the collateral-order doctrine, three requirements must be met. First, the order at issue must "conclusively determine the disputed question." *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 431 (1985) (internal quotation marks omitted); *Cohen*, 337 U.S. at 546. In other words, the trial court's order must definitively address

the issue in a way that renders the court's decision final and conclusive.

Second, the order must "resolve an important issue completely separate from the merits of the action." *Richardson-Merrell, Inc.*, 472 U.S. at 431 (internal quotation marks omitted); *Cohen*, 337 U.S. at 546. The issue must be significant and distinct from the merits of the plaintiff's claims, so that an appellate court can decide the issue without addressing the merits.

And third, the order must "be effectively unreviewable on appeal from a final judgment." *Richardson-Merrell, Inc.*, 472 U.S. at 431 (internal quotation marks omitted); *Cohen*, 337 U.S. at 546. That is, it will be too late if the defendant appeals the order after a final judgment, because the defendant will have lost the protections of the claimed defense.

When these factors are present, "[i]mmediate appeals from such orders * * * do not go against the grain of § 1291, with its object of efficient administration of justice in the federal courts." *Digital Equip. Corp.*, 511 U.S. at 867-868.

2. This Court consistently has held that district court orders denying assertions of governmental immunity are immediately appealable under the collateral-order doctrine.

It has so held for orders denying absolute presidential immunity, *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982); congressional immunity under the Speech and Debate Clause, *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979); qualified official immunity, *Mitchell*, 472 U.S. at 530; and a State's Eleventh Amendment immunity, *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 144-145. Courts of appeals likewise have

determined that denials of the federal government's sovereign immunity are immediately appealable as collateral orders. See, *e.g.*, *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d at 191; *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1000 (D.C. Cir. 1999) (per curiam), but see *Childs* v. *San Diego Fam. Hous. LLC*, 22 F.4th 1092, 1097 (9th Cir. 2022).

An order denying an assertion of governmental immunity "easily meets" the first two *Cohen* requirements for collateral review. *Mitchell*, 472 U.S. at 527. Such an order "conclusively determines" that the case can go forward and "that the defendant must bear the burdens of discovery." *Iqbal*, 556 U.S. at 672 (internal quotation marks and alterations omitted).

Such an order also resolves an important question that is separate from the merits. Whether the defendant is immune from suit "is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Mitchell*, 472 U.S. at 527-528. The appellate court does not have to address whether the plaintiff has stated a claim against the defendant or whether the claim has merit; the only question is whether an immunity applies. And the question is important, because it implicates the government's ability to function without disruption due to litigation.

Finally, an order denying an immunity from suit is "effectively unreviewable on appeal from a final judgment." *Richardson-Merrill*, 472 U.S. at 431 (internal quotation marks omitted). Because derivative governmental immunity is "an *immunity from suit* rather than a mere defense to liability," "it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526. Without access to immediate appeal, "the central benefits of * * * immunity – avoiding the costs and general consequences of

subjecting public officials to the risks of discovery and trial – would be forfeited." *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 143-144.

In sum, denials of government immunity generally are appealable under the collateral-order doctrine. As the Court explained, where a governmental defendant is "immune from suit in federal court, it follows that the elements of the *Cohen* collateral order doctrine are satisfied." *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 144.

C. Denials Of Derivative Sovereign Immunity Are Immediately Appealable For Essentially The Same Reasons

The same legal and practical considerations that make denials of government immunity immediately appealable also apply to denials of derivative sovereign immunity.

1. Denials of derivative sovereign immunity satisfy the factors for collateral-order review.

First, a denial of a government contractor's derivative sovereign immunity conclusively resolves an important disputed issue. *Cohen*, 337 U.S. at 546. Once the district court denies an assertion of derivative sovereign immunity, the contractor has no choice but to proceed to discovery and eventually to summary judgment or trial. Thus, an order denying an assertion of derivative sovereign immunity, like a denial of qualified immunity, "conclusively determines that the defendant must bear the burdens of discovery." *Iqbal*, 556 U.S. at 672 (citation omitted). At the court of appeals, the parties agreed that this factor is satisfied. See Pet. Br. 33, Pls.'-Appellees' Mot. to Dismiss 8; *Menocal* v. *The Geo Group, Inc.*, No. 22-01409 (10th Cir. Nov. 30, 2022); see also Pet. App. 18a n.5 ("The

parties do not appear to dispute that the first *Cohen* condition is satisfied.").[2]

Second, whether a contractor is entitled to derivative sovereign immunity is a question that is separate from the merits of the case. *Cohen*, 337 U.S. at 546. Here, respondents challenged the legality of petitioner's actions operating an immigration detention center at the direction of the federal government. The question whether petitioner is entitled to derivative sovereign immunity turns on a different question, namely, whether petitioner acted within a validly delegated authority. *Yearsley*, 309 U.S. at 21. Whether petitioner violated the law and whether petitioner can claim derivative immunity are two separate questions. Determining whether immunity applies does not require assessing whether the plaintiff's merits allegations are true or even adequate to state a claim.

It does not matter that some of the facts may help answer both of the immunity and liability questions. As this Court has explained, when a defendant asserts immunity, "a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue," but the "question of immunity" nevertheless "is separate from the merits of the underlying action for purposes of the *Cohen* test." *Mitchell*, 472 U.S. at 528-529. That is true even though the availability of immunity may involve consideration of the same facts that govern "whether * * * a plaintiff has alleged * * * violation of a constitutional right." *Pearson* v.

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[2] In opposing certiorari, respondents for the first time argued that this factor is not met because a contractor can reassert derivative sovereign immunity at trial. Br. in Opp. 28. But that ignores that a district court's denial of immunity conclusively determines that the defendant must bear the burdens of discovery and eventually trial.

Callahan, 555 U.S. 223, 232 (2009). Thus, the mere fact that derivative sovereign immunity may require some consideration of the same facts as the merits does not defeat application of the collateral-order doctrine.

Third, an order denying derivative immunity cannot effectively be remedied on final judgment. *Cohen*, 337 U.S. at 546. Once a district court denies a contractor's assertion of immunity, the contractor is left with no choice but to contest the plaintiff's suit. The contractor then becomes subject to discovery and summary judgment or a trial. Those proceedings could take years, and the cost could be enormous. But the defendant has no way to unwind these proceedings or otherwise recover its costs once they are expended, even if it successfully overturns the denial of derivative sovereign immunity after a final judgment. In those circumstances, the contractor's right to "avoid[] the costs and general consequences of subjecting [them] to the risks of discovery and trial[] would be forfeited." *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 143-144.

Accordingly, an order denying derivative governmental immunity is immediately appealable under the collateral-order doctrine. Indeed, it would not make sense to preclude contractors from seeking immediate review when identically situated government defendants are permitted to take an immediate appeal.

II. DENYING CONTRACTORS IMMEDIATE REVIEW WOULD IMPEDE CRITICAL GOVERNMENT FUNCTIONS AND UNDERMINE THE PUBLIC INTEREST

Collateral-order review of denials of derivative immunity is necessary to protect contractors and to safeguard important government interests. The government relies on contractors to perform a wide variety of necessary functions. Derivative immunity protects those contractors when they are acting within the scope of their validly conferred authority.

If contractors cannot immediately appeal denials of that immunity, many of the protections of that immunity will be lost. That could increase the costs for government contracts and dissuade private parties from agreeing to work for the government, which ultimately would harm the government and those who depend on the government's services.

A. Contractors Play A Critical Role In Every Aspect Of The Government's Work

1. Government contractors contribute to virtually every government function. From a quantitative perspective, government contractors make up a significant percentage of the federal workforce. According to one study, of the estimated 9.1 million individuals who performed federal work in 2015, 3.7 million were contractors. Paul C. Light, *The True Size of Government: Tracking Washington's Blended Workforce, 1984-2015*, at 3 (2017), https://perma.cc/EHU8-JNLQ. That number has increased year by year: One report estimated that in 2023, there were 5.2 million federal contractors, about half of the federal workforce. Elaine Kamarck, *Is Government Too Big? Reflections on the Size and Composition of Today's Government*,

Brookings (Jan. 28, 2025), https://perma.cc/DT4N-XDN2.

Contractors are involved in almost everything the government does, providing a nearly limitless range of goods and services. To offer just a few examples, they assist the government with day-to-day management of its information technology products, aid the government in providing healthcare to veterans, ensure that government facilities are kept clean and well-maintained, assist with border security and military operations, conduct cybersecurity offensive and defensive operations, perform background checks for security clearances, and manage databases containing personal information on American citizens.

Given the breadth of their work for the government, contractors often face lawsuits. For example, in *Cunningham* v. *General Dynamics Information Technology, Inc.*, the defendant was sued for work it did pursuant to a contract with the Center for Medicare and Medicaid Services to advertise the commercial availability of health insurance. 888 F.3d 640, 643 (4th Cir. 2018). Another contractor faced a suit after it was retained by the government to help provide employment opportunities for people who are blind or have other disabilities. *PRIDE Indus.* v. *VersAbility Res., Inc.*, 670 F. Supp. 3d 323, 328 (E.D. Va. 2023). Still another case involved a contractor's provision of software to States that helped assess job performance. *ACT, Inc.*, 46 F.4th at 494-495. Contractors also have faced litigation based on their work for the military, ranging from the manufacturing of helicopters, *e.g.*, *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 502 (1988), to serving alongside military personnel in military operations, *e.g.*, *McMahon*, 502 F.3d at 1336.

2. The federal government relies on contractors for many reasons. Often, contractors have specialized expertise that the government needs but government employees lack. See Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, 8 J. Contract Mgmt. 9, 13 (2008); *Filarsky*, 566 U.S. at 390 ("[I]t is often when there is a particular need for specialized knowledge or expertise that the government must look outside its permanent work force to secure the services of private individuals.").

Contractors can provide specialized expertise and then deploy it in targeted projects. For example, a contractor can train its employees to become experts in different information technology systems that increase efficiency. In turn, the contractor can then enter into an agreement with the government to provide a particular information technology system, and provide personnel to the government who know how to effectively use that system.

Contractors also can significantly reduce costs for the government. One study "estimate[d] that for outsourced projects * * * average private firm costs are 23 percent lower than government costs." Aaron Barkley, *Cost and Efficiency in Government Outsourcing: Evidence from the Dredging Industry*, 13 Am. Econ. J. 514, 517 (2021). For example, the United States Army Corps of Engineers often relies on contractors for its dredging projects, meaning projects to keep waterways navigable. *Id.* at 518. In that sector, contractors compete with each other and with the government to offer the best dredging services possible at the lowest cost. *Id.* The result is that the government can obtain "substantial private sector firm cost advantages for outsourced projects." *Id.* at 541. This is just one

example of how contracting results in significant competition and cost savings for the government.

Because contractors are not permanent federal employees, their use often allows the government "to supplement limited government resources far more quickly, efficiently, and effectively than the existing federal personnel or acquisition regimes permit." Schooner & Greenspahn, 8 J. Contract Mgmt. at 13. Again, the dredging context is illustrative. The Army Corps' dredges must satisfy numerous requirements regarding the "amount of stored fuel on board, and other equipment requirements that are not present for private sector firms." Barkley, 13 Am. Econ. J. at 519. Because contractors do not have to meet these requirements, their dredges often are smaller and more nimble, which allows them to mobilize more quickly. *Ibid.* And while private dredges are not subject to all of the same rules as the Army Corps, they still are "closely monitored by the [Army Corps]," and "[m]any contracts have provisions that the contracted firm supply office space" for Army Corps engineers. *Ibid.* Thus, contractors often can provide the government flexibility to more quickly address problems than if the government developed its own internal solutions.

B. Denying Contractors Immediate Review Of An Adverse Derivative Sovereign Immunity Ruling Would Harm The Government And The Public Interest

Just like government employees, contractors depend on immunity to advance the government's mission without interference and distraction. But without immediate review of orders denying derivative sovereign immunity, contractors may no longer be able to effectively rely on that immunity to protect

themselves from undue interference in their work for the government.

1. First, without an immediate appeal, contractors who are entitled to but denied derivative sovereign immunity would have to undergo the burdens of trial. Those contractors would be "subjected to the costs of trial [and] the burdens of discovery." *Nevada* v. *Hicks*, 533 U.S. 353, 400 (2001) (O'Connor, J., concurring in part). Those costs can be significant, as contractors would have to retain counsel for discovery and trial, review what could be millions of pages of documents, prepare their employees as witnesses, engage in motions practice, and eventually prepare for summary judgment or trial. Immunity from suit protects against this threat. And that benefit of immunity is "lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 145.

For the smaller government contractors, the prospect of protracted litigation can present an existential threat. Smaller companies typically cannot afford to be mired in years of expensive litigation, and they may go out of business well before they have the opportunity to appeal a final judgment. For larger contractors, litigation expenses could run into the millions of dollars, which could materially affect their bottom line. See, *e.g.*, 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).

Further, if a contractor is forced to litigate to final judgment, the contractor must pay not only the costs of litigation, but also potentially a substantial appeal bond, which could be so large that it effectively

precludes the contractor from appealing even in a meritorious case. *Cf.* Fed. R. Civ. P. 62(b); 11 *Wright and Miller's Federal Practice & Procedure* § 2905 (3d ed. 2025). In that instance, the contractor would never have the opportunity to appeal the denial of its derivative immunity.

Contractors often cannot protect themselves against these litigation costs by seeking indemnification from the government. The Anti-Deficiency Act precludes the government from entering into "a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. 1341(a)(1)(B). Congress generally does not appropriate funds to cover litigation costs, so the government cannot agree to indemnify contractors absent specific statutory authorization and appropriation. And in the situations where Congress has provided such appropriations, indemnification often is capped. See Indemnification Agreements and the Anti-Deficiency Act, 8 Op. O.L.C. 94, 98 (1984). As a result, even those situations where indemnification is permitted provide little solace to contractors, who would almost invariably be left footing most of the bill.

Contractors facing the prospect of litigation expenses that cannot be avoided or indemnified could have no choice but to bake those expenses into the contract costs at the outset, increasing the government's costs. As the Court has noted, "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline" to enter into a contract with the government "or it will raise its price." *Boyle*, 487 U.S. at 507. This means "[t]he financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the

United States itself," as contractors raise their prices to cover that risk in liability. *Id.* at 511-512. Although the *Boyle* Court was addressing the imposition of liability, the same thing is true of litigation costs. "Either way, the interests of the United States will be directly affected." *Id.* at 507.

2. In addition to the direct costs of a lawsuit, a contractor could face substantial indirect costs if denied immunity and not permitted an immediate appeal. If a contractor is a publicly traded company, it is required to publicly disclose material pending litigations. 17 C.F.R. 229.103(a). Those disclosures can detrimentally affect the contractor's risk profile, which could in turn hurt the contractor's stock value. Significant litigation exposure also could affect the company's ability to raise capital or to borrow money. Further, a company could face significant reputational harm from ongoing litigation.

Contractors mired in litigation could be forced to redirect some employees' attention from their work – including work for the government – to preparing for litigation. The contractor's "performance of any ongoing government responsibilities [could] suffer from the distraction of lawsuits." *Filarsky*, 566 U.S. at 391. Rather than focus on fulfilling their objectives for the government, the contractor's employees would have to spend time meeting with lawyers, reviewing documents, and preparing for depositions and trial testimony.

These burdens would fall on government employees as well. "If the suit against [a government contractor] moves forward, it is highly likely that" any government employee involved in the dispute "will be * * * required to testify." *Filarsky*, 566 U.S. at 391. The government employees who supervise or work

alongside the contractor could face many of the same burdens of litigation, impairing their ability to do their work serving the public interest. Thus, the denial of the contractors' immunity also would "'subject[] [government] officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'" *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 816).

3. The ultimate result will be that government contractors either will have to raise their prices or simply stop providing services to the federal government.

If contractors cannot rely on valid assertions of immunity to avoid trial-court litigation, they naturally will account for those anticipated litigation costs in contracts with the government. They likely will "raise their prices to cover, or to insure against," the additional costs that could arise from litigation due to their work for the government. *Boyle*, 487 U.S. at 512. As discussed, contractors usually cannot contract for indemnification from the government. So they may have to either obtain private insurance to protect against litigation costs or account for those costs in the prices they charge to the government. Regardless, the costs to the government will increase.

Other contractors could rethink their relationship with the government altogether. Contractors could opt to "decline to" enter into contracts with the government and take their business elsewhere. *Boyle*, 487 U.S. at 507. "[A]ny private individual with a choice" between contracting with private parties and with the government "might think twice before accepting a government" contract if they know they "could be left holding the bag" – facing protracted

litigation "for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Filarsky*, 566 U.S. at 391. That means that some contractors may decide that the risk of protracted litigation is not worth the government contract.

Either of those outcomes would injure the government and the public. Contractors play an essential part in every aspect of the government's work to advance the public interest. They add significant value by providing expertise and resources in a cost-effective way. But without immediate review of claims of derivative immunity, contractors will face significant risks and costs, which could impair the government's ability to carry out its missions and lead to higher costs for the American taxpayer.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2025