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 RODERICK & SOLANGE MACARTHUR JUSTICE CENTER, INSTITUTE FOR JUSTICE, AND THE CATO INSTITUTE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The Roderick and Solange MacArthur Justice Center ("RSMJC") is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. Through its Supreme Court and Appellate Program, RSMJC litigates cases before

[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund its preparation or submission. No person other than amici or their counsel made a monetary contribution to fund the preparation or submission of this brief.

this Court and appellate courts nationwide in order to vindicate the civil rights of persons who have been subjected to mistreatment by the criminal legal system.

The Institute for Justice ("IJ") is a nonprofit public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty. IJ pursues these goals in part through its Project on Immunity and Accountability, which seeks to decrease procedural barriers that insulate defendants from lawsuit over violations of individual rights. IJ also pursues these goals through affirmative litigation at all levels on behalf of individuals whose rights have been violated. This case concerns RSMJC and IJ because both organizations regularly litigate issues involving accountability for such violations of individual rights—not only by formal government actors, but also by those who contract with the government.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. This case concerns Cato because it reflects the remarkable extent to which judges have crafted numerous textually and historically baseless legal

doctrines to advantage government officials in litigation.

Although amici might not agree on every issue, all have played a key role in civil rights battles in areas ranging from qualified immunity and conditions of confinement to property rights and economic liberties. In addition to RSMJC and IJ's direct representation of clients whose rights have been violated, all three amici frequently file amicus briefs related to these issues throughout the federal circuits, in state supreme courts, and in this Court.

SUMMARY OF THE ARGUMENT

GEO's claimed entitlement to an immediate interlocutory appeal is based on two false premises: (1) that *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), empowered government bureaucrats to bestow private contractors with "derivative sovereign immunity," and (2) that denials of "derivative sovereign immunity" (if it exists) fit within the exclusive membership of orders that are immediately appealable under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Amici, cross-ideological organizations that routinely represent or support individuals seeking to vindicate their rights and secure accountability, write from experience to share additional reasons why GEO's supercharged view of *Cohen* is wrong—and why its view of *Yearsley* is just as untenable.

As for *Cohen*: Although GEO tries mightily to equate its conception of *Yearsley* with qualified immunity, its comparison ignores the many costs of affording interlocutory appeals of qualified immunity denials. In the qualified immunity context, the Court

has held, those costs are justified by the need to induce government officials to show reasonable initiative where the law is unclear. But no such justification applies here, and GEO's position would improperly invite countless run-of-the-mill disputes into *Cohen*'s "narrow and selective" club. *Will v. Hallock*, 546 U.S. 345, 350 (2006).

As for *Yearsley*: In asserting that "derivative sovereign immunity" would somehow protect the separation of powers, GEO again gets matters backwards. Under this Court's reasoning in several recent cases, "'separation-of-powers principles' . . . counsel *against* recognizing an implied" immunity from suit. *Goldey v. Fields*, 606 U.S. 942, 944 (2025) (per curiam) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 135, 148-49 (2017)) (emphasis added). It is GEO's request to circumvent a legal obligation enacted by Congress, based on a theory of immunity-by-contract, that imperils the separation of powers. That, in turn, threatens the values of liberty and accountability that the separation of powers protects.

ARGUMENT

I. GEO Stretches *Cohen* Beyond its Breaking Point.

The Tenth Circuit rightly refused to extend the narrow and selective class of collaterally appealable orders to encompass GEO's assertion of so-called "derivative sovereign immunity." Even assuming that such a thing exists—it does not, *see infra* Part II—GEO cannot satisfy any one of the *Cohen* doctrine's three strict requirements. *See* Resp. Br. 31-48.

Drawing on their litigation and advocacy experience, amici write to expound on two additional

defects in GEO's attempt to extend *Cohen*. *First*, GEO tries to analogize its *Yearsley* defense to qualified immunity, but a proper comparison of the two doctrines is fatal to GEO's position. GEO's account ignores the substantial costs interlocutory appeals impose and the unique reasons this Court has deemed those costs warranted in the qualified immunity context—reasons that do not apply here. *Second*, GEO's conception of *Cohen* would "swallow the general rule that a party is entitled to a single appeal," flooding the courts of appeals with fact-bound interlocutory disputes arising out of everyday trespasses, personal injuries, and more. *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)).

A. GEO's unavailing analogy to qualified immunity only underscores why *Cohen* does not apply.

It's no surprise that GEO tries to analogize the district court's *Yearsley* decision to a denial of qualified immunity. After all, qualified immunity appeals represent the outermost bounds of the *Cohen* doctrine, which is otherwise limited to "rights . . . originating in the Constitution or statutes." *Digital Equip. Corp.*, 511 U.S. at 879; *accord, e.g.*, *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1295-96 (10th Cir. 2011) (Gorsuch, J.) ("[T]he *only* time a claimed 'right not to stand trial' will justify immediate appellate review under *Cohen* is when a 'statutory or constitutional' provision guarantees that claimed right.").

But GEO's analysis is incomplete. GEO ignores the costs of interlocutory appeals in the context of

qualified immunity, the confusion such appeals have precipitated, and the specific reasons the Court has found these challenges justified in the context of qualified immunity. Because those reasons have no application here, a proper comparison with qualified immunity only proves that GEO's proposed extension of *Cohen* is untenable.

Delays. The availability of an interlocutory appeal allows appellants to force litigants to defeat an immunity or defense several times over, impeding accountability and increasing the costs of litigating meritorious claims. *See Joseph v. Bartlett*, 981 F.3d 319, 330-31 (5th Cir. 2020) (explaining that "[a]n official can take multiple immediate appeals because the official can raise qualified immunity at any stage in the litigation—from Rule 12(b)(6) motions to dismiss, to Rule 12(c) motions for judgment on the pleadings, to Rule 56 motions for summary judgment, to Rule 50(b) post-verdict motions for judgment as a matter of law—and continue to raise it at each successive stage"). In the qualified immunity context, the burdens attendant to immunity, including interlocutory appeals, may deter plaintiffs from ever bringing suit (or even deter counsel from representing them). *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 50 (2017); *see also* Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. St. Thomas L.J. 477, 492 (2011) (explaining that "the availability of interlocutory appeal or the likelihood of stays of discovery during resolution of [a] qualified immunity defense" was a substantial factor people considered in deciding whether to pursue claims).

Even when suits are filed, defendants can and do "employ these interlocutory appeals from the denial of qualified immunity for the sole purpose of delaying trial, often to the disadvantage of the plaintiff." *McDonald v. Flake*, 814 F.3d 804, 817 (6th Cir. 2016) (internal quotation marks omitted). "By design, or merely as a result, defendants may defeat just claims by making the suit unbearably expensive or indefinitely putting off the trial." *Id.* Amici have observed parties deploy these tactics time and again, inflicting "disruption, delay, and expense" and "undermin[ing] the ability of district judges to supervise litigation." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985); *see also Mohawk Industries, Inc.*, 558 U.S. at 106 ("Permitting piecemeal, prejudgment appeals, we have recognized, undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges . . . .") (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

Look no further than this very lawsuit, where GEO has delayed proceedings by pursuing multiple stays and interlocutory appeals. *See* Pet. App. 6a-9a; Br. in Opp. 11-12. As a result, this suit—which Respondents filed nearly eleven years ago, *see* Pet. App. 6a—has yet to proceed past summary judgment. GEO's view would allow well-resourced government contractors to emulate this playbook in case after case, deferring accountability or evading it altogether. "[I]t would be no consolation that a party's meritless [*Yearsley*] claim was rejected on immediate appeal; the damage to the efficient and congressionally mandated allocation of judicial responsibility would be done, and any improper purpose the appellant might have had

in saddling its opponent with cost and delay would be accomplished." *Digital Equip. Corp.*, 511 U.S. at 873.

Confusion. Qualified immunity appeals also illustrate the jurisdictional complexity and confusion that proliferate when *Cohen* is stretched to its limits.

In *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), this Court held that interlocutory appeals were available from certain orders denying qualified immunity. But as the Court later explained, "*Mitchell* found . . . the 'separability' question" under *Cohen*—*i.e.*, "whether or not the 'qualified immunity' issue was 'completely separate from the merits of the action'"—particularly "difficult." *Johnson v. Jones*, 515 U.S. 304, 312 (1995). *Mitchell* thus represented the outer bounds of the *Cohen* doctrine: To take even "a small step beyond *Mitchell* . . . would more than relax [*Cohen*'s] separability requirement—it would in many cases simply abandon it." *Id.* at 315. The Court therefore has distinguished between qualified immunity appeals premised on issues of fact and those premised on issues of law, with only issues of law being reviewable on an interlocutory basis. *See id.* at 319-20.

Despite this Court's guidance, the scope of appellate jurisdiction over such interlocutory appeals has remained the subject of significant "confusion and inconsistency." Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1915-16 (2018). For starters, even at a purely conceptual level, the fact/law divide is not always straightforward. *See* Resp. Br. 45 n.9. Can an appellate court entertain an interlocutory dispute over whether a reasonable jury could draw the same inferences from undisputed facts that a district court

did? Sometimes yes, sometimes no. *See* Blum, 93 Notre Dame L. Rev. at 1916 n.184. And where exactly is the line between "the application of 'clearly established' law to a given . . . set of facts" (reviewable) and "a question of 'evidence sufficiency'" (unreviewable)? *Johnson*, 515 U.S. at 313. "Distinguishing the two has perplexed courts for years." *Peck v. Montoya*, 51 F.4th 877, 885 (9th Cir. 2022) (collecting cases).

In practice, too, parsing out legal disputes from factual ones is difficult because "the determination of the legal question of qualified immunity" is "heavily dependent upon the facts of a particular case." Blum, 93 Notre Dame L. Rev. at 1916. Because appellate jurisdiction will often depend on whether the appellant's arguments align with or diverge from the district court's factual recitation, it may be difficult to evaluate until after a case is fully briefed. Some of amici have expended resources briefing *both* jurisdiction *and* the merits in interlocutory appeals of qualified immunity denials, only to see those appeals ultimately (and correctly) dismissed for lack of jurisdiction.[2]

Given these lessons from experience, it's cold comfort for GEO to argue that "a court need not

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[2] *See, e.g.*, Order at 2, *Calliste v. Lor*, No. 23-2158 (4th Cir. Oct. 22, 2024) (denying motion to dismiss interlocutory appeal for lack of jurisdiction); *Calliste v. Lor*, No. 23-2158, 2025 WL 1743510, at *4 (4th Cir. June 24, 2025) (after receiving full merits briefing and hearing oral argument, dismissing same interlocutory appeal for lack of jurisdiction); *Melendez v. Sec'y of Dep't of Corrs.*, No. 23-12424, 2024 WL 3880013, at *7 (11th Cir. Aug. 20, 2024) (after receiving full merits briefing, dismissing interlocutory appeal for lack of jurisdiction); *Couch v. Brooks*, No. 21-6185, 2022 WL 2963208, at *1 (6th Cir. July 26, 2022) (same).

consider any disputed facts" to resolve GEO's asserted defense *in this case*. Petr. Br. 38-39. That's not true; as Respondents explain, it would be far from straightforward to excise legal issues from factual ones in this case. *See* Resp. Br. 46-47. Nor would it be straightforward in most other cases involving *Yearsley* defenses. *See Digital Equip. Corp.*, 511 U.S. at 868 ("warn[ing] that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs").

If anything, the *Yearsley* analysis is *more* fact-bound than the qualified immunity inquiry; it requires a court to engage in a granular comparison of a contractor's (actual) conduct with the government's (actual) directives. *See* Pet. App. 20a (explaining that *Yearsley*'s second prong "wades into the specific directions that the government gave to the contractor and whether, by failing to closely adhere to those instructions, the government contractor engaged in illegal conduct"). Affording immediate appeals for denials of this merits-entwined, highly fact-dependent defense is destined to cause confusion regarding when such appeals can be taken. That, in turn, will "encourage gamesmanship, . . . diminish the likelihood that results and settlements will reflect a claim's legal and factual merits," and waste "[j]udicial resources." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (urging "[s]imple jurisdictional rules" over "[c]omplex jurisdictional tests").

Justifications. In the context of qualified immunity, this Court has reasoned that *Cohen*'s attendant costs and confusion are worthwhile—if only in "cases presenting more abstract issues of law." *Johnson*, 515 U.S. at 317. But in the context of

Yearsley, the balance tips decidedly in the other direction. The justifications for extending *Cohen* to reach qualified immunity, despite the burdens of immediate appealability, do not apply to *Yearsley* for two reasons.

First, the Court has premised modern qualified immunity doctrine on "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). But contractors are not government officials. There is no public interest in encouraging contractors to exercise policymaking discretion. Nor may contractors wield "official authority" in any relevant sense, *id.*; indeed, the Government "cannot delegate regulatory authority to a private entity" at all. *Texas v. Comm'r of Internal Revenue*, 142 S. Ct. 1308, 1309 (2022) (statement of Alito, J., respecting the denial of certiorari) (quoting *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 61 (2015) (Alito, J., concurring)). Instead, contractors are expected to comply with the terms of their contracts and follow applicable law.

Second, even if contractors were on the same footing as the government itself—and they are not—that still would not suffice to bring *Yearsley* denials within *Cohen*'s narrow scope, because GEO's rule would grant contractors interlocutory appeals without regard to the clarity of the rights they violated. As this Court has explained, "only some orders denying an asserted right to avoid the burdens of trial qualify" for *Cohen* treatment, *Will*, 546 U.S. at 351, since a great many rights "might loosely be described" as such,

Digital Equip. Corp., 511 U.S. at 873. Thus, ascertaining whether a class of orders satisfies *Cohen*'s third requirement entails "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Will*, 546 U.S. at 351-52 (quoting *Digital Equip. Corp.*, 511 U.S. at 878-79).

In the qualified immunity context, this Court has reasoned, the core interest at stake is the "fear of inhibiting able people from exercising discretion in public service if a full trial were threatened whenever they acted reasonably in the face of law that is not 'clearly established.'" *Id.* at 352. In other words, "[t]he nub of qualified immunity" under this Court's cases "is the need to induce officials to show reasonable initiative when the relevant law is not 'clearly established . . . .'" *Id.* at 353. *That* is why the Court has found "a quick resolution of a qualified immunity claim," including the right to an interlocutory appeal, "essential"—"the preservation of initiative," not simply "the avoidance of litigation for its own sake." *Id.*

There is, of course, no equivalent component of *Yearsley*. If GEO's view were to prevail, contractors would enjoy "derivative sovereign immunity" and an immediate right to an appeal regardless of how obviously their actions violated settled law. Perhaps for this reason, GEO argues broadly that requiring contractors to reserve appeals until final judgment would "[h]amstring [g]overnment." Petr. Br. 45; *see id.*

at 45-48.[3] But the same argument could be made regarding litigation against actual government employees—yet even in that context, "simply abbreviating litigation troublesome to Government employees" is not "important enough for *Cohen* treatment." *Will*, 546 U.S. at 353. Otherwise, "28 U.S.C. § 1291 would fade out whenever the Government or an official lost an early round that could have stopped the fight." *Id.* at 354.

"The upshot is that, compared with *Mitchell*, considerations of delay . . . and wise use of appellate resources" counsel against an interlocutory appeal of a district court's *Yearsley* denial. *Johnson*, 515 U.S. at 317. In *Johnson*, such "countervailing considerations" were so forceful that they overcame the justifications for interlocutory qualified immunity appeals set forth in *Mitchell*. *See id.* at 317-18. Here, those justifications are absent, so the answer is even clearer: *Cohen* does not apply.

B. Extending *Cohen* as GEO urges would clog the courts of appeals with quotidian interlocutory disputes.

This Court has often "reiterate[d] that the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Mohawk Industries, Inc.*, 558 U.S. at 113 (quoting *Will*, 546 U.S. at 350). Otherwise, the statutory final judgment rule—and its

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[3] By GEO's own accounting, this is already the majority rule. *See* Pet. for Cert. 14-15. Roughly half of the U.S. population resides in the five circuits that GEO concedes require this—yet the sky has not fallen. *See* U.S. Census Bureau, *2020 Population and Housing State Data* (Aug. 12, 2021), https://www.census.gov/library/visualizations/interactive/2020-population-and-housing-state-data.html.

policy of "efficient judicial administration"—would be lost. *Richardson-Merrell, Inc.*, 472 U.S. at 430; *accord, e.g.*, *Mohawk Industries, Inc.*, 558 U.S. at 106-07. "This admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk Industries, Inc.*, 558 U.S. at 113 (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 48 (1995)); *see also id.* at 114-15, 118-19 (Thomas, J., concurring in part and concurring in the judgment).

GEO's position contravenes this admonition to a stunning degree. As GEO admits, the federal government enters into several million contracts each year. *See* Petr. Br. 46; *see also* U.S. Government Accountability Office, *A Snapshot of Government-Wide Contracting for FY 2024* (June 24, 2025).[4] Consider a handful of examples from FY 2024 alone. That year, according to federal government data, the General Services Administration awarded hundreds of contracts involving janitorial, custodial, or snow removal services collectively worth over $300 million.[5] The Department of Education awarded over 70 contracts involving computer systems design and technological support collectively worth roughly $368

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[4] https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2024-interactive-dashboard.

[5] USASpending.gov, *Advanced Search* (last viewed Sept. 20, 2025), https://www.usaspending.gov/search?hash=320d376889bb3cc4d874c65a88a13be5.

million.[6] The Environmental Protection Agency awarded over $4 million in contracts for roof replacements.[7] And the Department of Health and Human Services awarded nearly 70 contracts involving extermination and pest control services totaling $4.6 million.[8]

Under GEO's rule, every single private entity on the other side of these contracts would be entitled to an immediate appeal of a district court's fact-bound denial of an asserted *Yearsley* defense—regardless of whether the contractor in question "provide[s] for the national defense," Petr. Br. 46, or defends against mosquito bites. *See Digital Equip. Corp.*, 511 U.S. at 868 ("warn[ing] that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs," not simply in relation to "the litigation at hand"). By way of example, contractors have *already* invoked *Yearsley* in cases involving:

- Products liability claims against the designer of a bulk USPS mail container that struck a man's heel and overran his foot, *see Reynolds v. Penn*

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[6] USASpending.gov, *Advanced Search* (last viewed Sept. 20, 2025), https://www.usaspending.gov/search?hash=44c1e3fa3839dd237efcf89c2e50d42c.

[7] USASpending.gov, *Advanced Search* (last viewed Sept. 20, 2025), https://www.usaspending.gov/search?hash=233e810f318d0368c279a3c843cd1a58.

[8] USASpending.gov, *Advanced Search* (last viewed Sept. 20, 2025), https://www.usaspending.gov/search?hash=549fc7c62a2ce0c749260942dc80e50c.

Metal Fabricators, Inc., 550 N.Y.S.2d 811, 811-12 (Sup. Ct. 1990);

- Trespass claims against Amtrak and its contractors for filling a neighbor's undeveloped land with contaminated soil, *see Gordon v. Nat'l R.R. Passenger Corp.*, No. 10753, 2002 WL 550472, at *1-4, 13 (Del. Ch. Apr. 5, 2002);
- Tort claims against a contractor operating a synthetic rubber plant, *see Lalonde v. Delta Field Erection*, No. 96-cv-3244, 1998 WL 34301466, at *2, 7-8 (M.D. La. Aug. 6, 1998); and
- An intellectual-property dispute between a skills-testing company and its jilted former-partner-turned-competitor, *see ACT, Inc. v. Worldwide Interactive Network, Inc.*, 46 F.4th 489, 494, 506 (6th Cir. 2022).

See also Br. in Opp. 7 (listing further examples involving unwanted text messages, a tree-removal company, janitorial services, and the architect of an allegedly defective jury box).

Are these disputes of sufficiently compelling importance to overcome "the substantial finality interests § 1291 is meant to further"? *Will*, 546 U.S. at 350. To answer in the negative is hardly to "second-guess[]" these contractors' contributions. Petr. Br. 46. It cannot be gainsaid that their work matters—just as no one could reasonably dispute the value of "the public policy favoring voluntary resolution of disputes," *Digital Equip. Corp.*, 511 U.S. at 881, or the importance of the defense of claim preclusion, *see Will*, 546 U.S. at 355.

But those interests were not of such *overriding* importance as to require *Cohen* treatment. *See id.*; *Digital Equip. Corp.*, 511 U.S. at 880-81. Nor are these. And given the sheer scale and breadth of government contracting in the modern era, affording an immediate appeal each and every time a contractor chose to assert a *Yearsley* defense (and a district court rejected it) would impose unprecedented burdens on litigants and courts. It would make a mockery of the requirement that *Cohen* be construed strictly to protect "particular value[s] of a high order"—*i.e.*, that the tough medicine of interlocutory appeal be reserved for a "substantial public interest." *Will*, 546 U.S. at 352-53; *accord Lauro Lines S.r.l. v. Chasser*, 490 U.S. 495, 502 (1989) (Scalia, J., concurring). It would disrespect Congress's determination that rulemaking is the proper mechanism for "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291." 28 U.S.C. § 2072(c); *accord* 28 U.S.C. § 1292(e); *Mohawk Industries, Inc.*, 558 U.S. at 113-14. And it would "needlessly"—and drastically—"perpetuate[] a judicial policy that [the Court] for many years ha[s] criticized and struggled to limit." *Mohawk Industries, Inc.*, 558 U.S. at 115 (Thomas, J., concurring in part and concurring in the judgment).

For all these reasons, this Court should reject GEO's attempt to supercharge *Cohen* and circumvent the final judgment rule.

II. Bureaucrat-Conferred Immunity-by-Contract Imperils the Separation of Powers and Threatens Individual Liberty.

This Court can dispose of this case under *Cohen* alone, regardless of whether the *Yearsley* defense constitutes an outright immunity from suit. But GEO

isn't just wrong about *Cohen*'s scope. GEO's other core premise—that *Yearsley* announced a sweeping form of "derivative sovereign immunity" not found in any statute or constitutional provision—also makes little sense.

As Respondents explain, GEO's theory of immunity-by-contract ignores *Yearsley*'s own terms and contravenes centuries of law establishing that the sovereign's immunity belongs to the sovereign alone. *See* Resp. Br. 4-10, 22-26. Amici write briefly to emphasize that GEO's theory also conflicts with core separation-of-powers principles—principles this Court has recently and repeatedly enforced, even at significant cost. And empowering federal bureaucrats to bestow private actors with the immunity of the sovereign—immunity that sweeps more broadly, in relevant part, than that afforded to government employees themselves—would weaken the very accountability the separation of powers protects.

GEO puzzlingly contends that affirmance would "frustrate the separation of powers" because Congress created the Nation's immigration detention apparatus and authorized privately run detention facilities. Petr. Br. 48. That gets matters exactly backwards. Because "Congress has actively legislated in the area of" government contracting—including, as GEO notes, in the specific context of immigration detention—"but has not enacted a statutory" immunity of the kind GEO urges, "'separation-of-powers principles' . . . counsel against recognizing an implied" immunity here. *Goldey*, 606 U.S. at 944 (quoting *Ziglar*, 582 U.S. at 135).

This Court's recent *Bivens* jurisprudence makes this unmistakably clear. The Court has remarked that

it is "[n]ow long past 'the heady days in which [it] assumed common-law powers to create causes of action,'" and it has "come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'" *Egbert v. Boule*, 596 U.S. 482, 491 (2022) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); *Hernández v. Mesa*, 589 U.S. 93, 100 (2020)). The Court therefore has emphasized that where, as here, "an issue 'involves a host of considerations that must be weighed and appraised,' it should be committed to 'those who write the laws' rather than 'those who interpret them.'" *Ziglar*, 582 U.S. at 135-36 (quoting *United States v. Gilman*, 347 U.S. 507, 512-13 (1954)). The Court has held steadfast to this principle, even as many (including amici themselves) have respectfully expressed concern over restricting the *Bivens* remedy. "[A]bsent utmost deference to Congress' preeminent authority in this area," the Court has reasoned, "the courts 'arrogat[e] legislative power.'" *Egbert*, 596 U.S. at 492 (quoting *Hernández*, 589 U.S. at 100).

This principle paints a clear path here. For the same reasons this Court has held "creating a cause of action" to be "a legislative endeavor," *Egbert*, 596 U.S. at 491, creating an immunity is one, too. And if "the Legislature is in the better position to consider if 'the public interest would be served' by *imposing* a 'new substantive legal liability,'" Congress is plainly in a better position to consider whether to *immunize* an entity as well. *Ziglar*, 582 U.S. at 136 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 426-27 (1988)) (emphasis added); *see The Apollon*, 22 U.S. (9 Wheat.) 362, 367 (1824) (although "under justifiable circumstances, the Legislature will doubtless apply a

proper indemnity," "this Court can only look to the questions, whether the laws have been violated"). In other contexts, Congress has exercised its judgment to craft such immunities from suit—but it has not done so here. *See, e.g.*, 42 U.S.C. § 247d-6d(a)(1), (e)(10) (congressionally-enacted "immun[ity] from suit" with "interlocutory appeal" not applicable here); 15 U.S.C. § 37(b) (congressionally-enacted "immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial," for certain charitable annuities and trusts).

If anything, a judge-made immunity from suit is *more* intrusive on legislative power than a judge-made cause of action. A judge-made immunity from suit does not just supplement other legal obligations created by Congress; it outright *eliminates* a legal obligation—here, the prohibition on forced labor in the Trafficking Victims Protection Act ("TVPA")—that Congress expressly prescribed. That improperly "substitute[s] [courts'] own policy preferences for the mandates of Congress," and it "represent[s] precisely the sort of 'freewheeling policy choice[]'" this Court has often "disclaimed the power to make." *Ziglar*, 582 U.S. at 159-60 (Thomas, J., concurring in part and concurring in the judgment); *accord, e.g.*, *McMellon v. United States*, 387 F.3d 329, 352 (4th Cir. 2004) (Wilkinson, J., concurring) (cautioning against substituting "a judicially-derived doctrine for congressionally-crafted language"). Just as this Court "urge[s] caution" when it comes to creating new remedies not authorized by Congress, it should hesitate further still before creating new immunities from suit "in the absence of affirmative action by Congress." *Ziglar*, 582 U.S. at 136 (opinion of the

Court) (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)).

And if that were not enough to justify judicial restraint, GEO's theory of derivative sovereign immunity would enable agency contracting officials to endow private corporations with even *more* immunity than actual government officials. Public officials enjoy qualified immunity only for violations of rights that are not clearly established. *See, e.g.*, *Mitchell*, 472 U.S. at 524. In contrast, under GEO's theory, private contractors like GEO would enjoy "derivative sovereign immunity" even for obvious, settled violations of rights like those established in the TVPA. It would defy logic and common sense if contracting bureaucrats could confer private entities with the immunity of the sovereign and, in doing so, vest those private entities with broader immunity than the officials themselves enjoyed. *Cf. Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583-84 (1943) (explaining that recognizing an "[i]mmunity from suit" or indemnity "by reason of concessions made by contracting officers of the government" would improperly "subtract from the legal remedies which the law has afforded" and "complicate and delay the enforcement of rights").[9]

Ultimately, although amici do not see eye-to-eye on every issue, they agree on a fundamental premise:

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[9] Moreover, GEO's theory seemingly would afford interlocutory appeals to private contractors on issues of fact *and* law. In this respect, too, it would perversely offer contractors more protection than government officials themselves, and it would "interfere" even more with the final judgment rule than qualified immunity appeals "limited to . . . neat abstract issues of law," *Johnson*, 515 U.S. at 317 (quoting 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.10, p. 664 (1992)).

"Liberty requires accountability." *Dep't of Transp.*, 575 U.S. at 57 (Alito, J., concurring). These "values of liberty and accountability" motivate amici's litigation efforts. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 696 (2015) (Roberts, C.J., dissenting). The separation of powers protects these values at a structural level, *see id.*—and it dooms GEO's theory of delegated immunity, which would place these values at grave risk. Government contracting officials cannot weaken accountability for violations of individual liberties by endowing private corporations with the immunity of the sovereign through their contracting decisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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