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 CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON IN SUPPORT OF RESPONDENTS**

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## QUESTION PRESENTED

Whether an order denying a government contractor's claim of derivative sovereign immunity is immediately appealable under the collateral-order doctrine.

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## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

"In our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts." *Yick Wo. v. Hopkins*, 118 U.S. 356, 369–70 (1886). The government's conception of its singular purpose to serve the public interest has led it to exclude government contractors from all functions that wield sovereign authority. And yet, as an expedient to obtaining an immediate appeal under the collateral order doctrine, Petitioner seeks to place government contractors as a class on the same legal footing as the federal government itself by granting all federal contractors derivative sovereign immunity from suit. But Petitioner's drastic expansion of sovereign immunity is legally unsupported and contrary to the public's interest in a responsive and efficient government animated solely by the need to serve the American people.

*Amicus Curiae* Citizens for Responsibility and Ethics in Washington (CREW) is a nonpartisan, nonprofit organization that advocates for an ethical, accountable, and open government and for the protection of America's democratic institutions. CREW has an interest in ensuring that the conduct of the federal government is animated solely by its obligation to serve the interests of the American

[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 or its counsel has made a monetary contribution toward the brief's preparation or submission.

people and that the sovereign authority they grant to the government is zealously protected.

## SUMMARY OF ARGUMENT

Hoping to trigger an immediate appeal under the collateral order doctrine, Petitioner asks the Court to recast the defense to liability available to government contractors under *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), as a form of derivative sovereign immunity from suit that applies to every government contractor performing work for, or providing services to, the federal government. Petitioner advances this argument to retroactively transform the district court's rejection of Petitioner's *Yearsley* defense into an order that unjustly requires it to stand trial. In Petitioner's incorrect view, its gambit would render the district court's order effectively unreviewable on appeal from a final judgment, clearing one of three insurmountable hurdles that Petitioner must overcome before the collateral order doctrine applies. *See Will v. Hallock*, 546 U.S. 345, 349–50 (2006); *Digital Equip. Corp. v. Desktop Direct Inc.*, 511 U.S. 863, 865, 867 (1994) (holding that an order denying immunity is only "effectively unreviewable" when the immunity protects from "a right not to stand trial altogether").

The Court need not reach Petitioner's proposed redefinition of sovereign immunity because, as Respondent has argued, the collateral order doctrine cannot apply here because the application of *Yearsley*, whatever its effect, is inextricably entwined with the merits of the action. Brief for Respondents at 7 (citing *Will*, 546 U.S. at

349–50) (requiring, *inter alia*, that a collateral order "resolve an important issue completely separate from the merits of the action"). But if it does, the Court should reject Petitioner's drastic expansion of sovereign immunity from suit and recognize the fundamental incongruity of Petitioner's position.

The Court should reject Petitioner's call to establish sovereign immunity from suit for all government contractors because Petitioner's conception of sovereign *immunity* misunderstands the nature of sovereign *authority* in two crucial ways.

*First*, the people have delegated their sovereign authority exclusively to the federal government and have done so for the sole purpose of advancing their public interests. The Constitution embodies that delegation by binding those in government service to pursuit of the public good, empowering them only to that end, and protecting against the possibility that private interests might interfere with the government's pursuit of the public interest. *See, e.g.*, U.S. Const. Preamble; *id.* art. I, § 6, cl. 2; *id.* art. I, § 9, cl. 1, 7; *id.* art. II, § 1, cl. 7, 9; *id.* art. § V, cl. 3. Federal law, in recognition of the Constitution's mandate, strives to ensure that the government conducts the people's business free from improper influence. Far from conceiving of a world where private actors could contract with (rather than join) the government to wield the people's sovereign authority in advancement of their personal interests, these constitutional and legal provisions set the federal government apart from the private entities with which it conducts business.

*Second*, the federal government expressly bars contractors from wielding sovereign authority because of its recognition that the federal government alone is properly constituted, situated, and motivated to do so, thereby reaffirming that contractors do not possess the power or privileges of the sovereign government. That bar is effectuated by Congress and the Executive Branch's prohibition on engaging contractors to perform "inherently governmental functions" and the mandate of both branches to provide increased management and oversight when contractors approach them. Rather than being an instrument of sovereign authority whose conduct must be protected, federal law treats contractors as what they are—service providers who work at arm's length from the government and whose work on public projects must be rigorously overseen by the government.

## ARGUMENT

The collateral order doctrine permits immediate appeals only when an order (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349–50 (2006). The doctrine's applicability depends on the category of the claim asserted and not on particular facts. *Digital Equip. Corp. v. Desktop Direct Inc.*, 511 U.S. 863, 865, 867 (1994). As part of its bid to obtain immediate review of the district court's order, Petitioner asserts that it, by virtue of being a government contractor, is entitled to sovereign immunity from suit under *Yearsley v. W.A. Ross*

*Constr. Co.*, 309 U.S. 18, 20–21 (1940), which merely provides government contractors with a defense to liability for work that the government validly authorized and was performed at the government's direction.

This Court has foreclosed Petitioner's conception of sovereign immunity by premising it on the law's dual recognition that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*," *Alden v. Maine*, 527 U.S. 706, 715 (1999) (quoting Alexander Hamilton, The Federalist No. 81) (emphasis in both), but that sovereign immunity is "a prerogative of the state itself," rather than its agents. *Hopkins v. Clemson Agric. Coll. of S.C.*, 221 U.S. 636, 642–43 (1911); *see Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388–89 (1939); *Lewis v. Clarke*, 581 U.S. 155, 161–63 (2017).

Petitioner appeals to abandon these precedents and expand sovereign immunity to all private actors that contract with the government to perform its work. But its argument must fail because it ignores (1) that the Constitution instills sovereign authority in the federal government alone for the singular purpose of pursuing the public interest unencumbered by the corrosive effect of private interest, and (2) that the federal government has exercised its sovereign authority to *exclude* contractors from exercising it themselves, making the application of sovereign immunity to contractors as a class incongruous and inappropriate.

## I. The federal government exercises sovereign authority exclusively and only for the public interest.

"The government . . . [is] emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *McCulloch v. Maryland*, 17 U.S. 316, 404–05 (1819). But, "[i]n our system, while sovereign powers are delegated to the agencies of the government, sovereignty itself remains with the people, by whom and for whom all government exists and acts." *Yick Wo. v. Hopkins*, 118 U.S. 356, 369–70 (1886). Because American sovereignty remains with the people for their exclusive benefit, "this Court always has recognized . . . that official immunity comes at a great cost." *Westfall v. Erwin*, 484 U.S. 292, 295 (1988). This Court thus recognized that applications of immunity must accordingly be limited to "when 'contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.'" *Id.* (quoting *Doe v. McMillan*, 412 U.S. 306, 320 (1973)).

Since the time of the founding, there has been universal recognition that the government can only engage in the unyielding pursuit of the public interest that justifies the government's existence if those who exercise its authority do so free from personal interest. The framers not only understood that tension, but also touted the Constitution's structural protections against distractions from the public interest to convince the American people to permit the federal government to exercise their sovereign authority. *See, e.g.*, Alexander Hamilton,

The Federalist No. 31 (explaining that the government must both "contain in itself every power requisite to the full accomplishment of the objects committed to its care" and exercise them "free from every other control but a regard to the public good and to the sense of the people"); James Madison, The Federalist No. 51 ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.").

And while among the framers "there was near unanimous agreement . . . [that corruption] produced a degenerative effect, and that the new Constitution was designed in part to insulate the political system from corruption," James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. Pol. 174, 181 (1994), they had a much broader conception of the risks associated with the influence of private interests both within and outside of the government, *see* Alexander Hamilton, The Federalist No. 68 ("Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption.").

The Constitution bears the fruit of that concern by directing the conduct of the government to its officers alone and binding them to the singular pursuit of the public interest. *See, e.g.*, U.S. Const. Preamble (stating that the Constitution is ordained and established "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty[]"); *id.* art. II, § 1, cl. 9 (requiring the Presidential oath to "faithfully execute the Office of the President" and "preserve, protect, and defend

the Constitution[]"); *id.* art. VI, cl. 3 ("[A]ll executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution[.]").

All the while, it empowers each branch of the federal government only to the extent necessary to serve those public interests. *See, e.g.*, *id.* art. I, § 8, cl. 1 (delineating Congress's powers and empowering it to make laws "necessary and proper for carrying into Execution" those powers alone); *id.* art. II, § 3 (compelling the President to "take Care that the Laws be faithfully executed"); *id.* art. III, §§ 1–2 (establishing power and jurisdiction of the federal courts); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

The Constitution also explicitly shields the federal government from the inevitable pull of private interest. *See, e.g.*, U.S. Const. art I, § 6, cl. 2 (forbidding members of Congress from being appointed to offices created or for which "Emoluments . . . have been encreased" during their time in office); *id.* art. I, § 9, cl. 8 (forbidding grants of nobility by the United States and the "accept[ance] of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State" by persons "holding any Office of Profit or Trust" without Congressional authorization); *id.* art I, § 9, cl. 7 (forbidding money from being "drawn from the Treasury, but in Consequence of Appropriations made by Law" and requiring periodic public accounting); *id.* art. II, § 1, cl. 7 (granting the President "a Compensation" and forbidding "any other Emolument from the United States, or any of them").

This construct leaves no room for private parties to invoke the people's sovereign authority or privileges simply because those constitutionally charged with exercising that authority have conducted business with them. "An instrumentality of Government [one] might be and for the greatest ends, but the agent, because he is [an] agent, does not cease to be answerable to his acts." *Sloan Shipyards Corp. v. U.S. Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922); *see also Hopkins*, 221 U.S. at 645 (holding sovereign immunity of the United States "does not protect their officers and agents . . . from being personally liable"). Because Congress has not "grant[ed] immunity to [these] private operators," they do not enjoy immunity from suit within our constitutional framework. *Brady v. Roosevelt Steamship Co.*, 317 U.S. 575, 580, 583 (1943).

Rather than loosening their grip on assertions of sovereign authority and immunity, Congress and the Executive Branch have for the past 150 years striven to ensure that the government's sole animating principle remains the public interest by ensuring that its work is conducted by civil servants who are employed on merit and subject to federal anti-conflict and anti-corruption laws. These provisions reflect "[t]he judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance[.]"*U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 557, 580-81 (1973) (upholding Hatch Act against First Amendment challenge).

Prior to the passage of the Pendleton Act in 1883, federal employment was driven by the spoils system in which patronage and private interests routinely trumped merit in federal hiring at the expense of the public interest. As President Grant lamented when calling for the institution of a merit-based system for federal hiring, "[t]he present system does not secure the best men, and often not even fit men, for public place. The elevation and the purification of the civil service of the Government will be hailed with approval by the whole people of the United States." Ulysses S. Grant, *Second Annual Message* (Dec. 5, 1870).

The Pendleton Act established merit-based hiring for federal positions "as nearly as the conditions of good administration will warrant," which it achieved in part by introducing competitive examinations designed to "test the relative capacity and fitness of the persons examined to discharge the duties of the service." Pub. L. No. 47-27, 22 Stat. 403, § 2 (1883). Congress and the Executive Branch have expanded and refined the competitive service over time, including by establishing the Civil Service Commission to administer it and ultimately committing administration to the Office of Personnel Management in 1978 pursuant to the Civil Service Reform Act, which reiterated that civil service hiring should be merit-based. *See* Katherine Shaw, *Partisanship Creep*, 118 Nw. U. L.R. 1563, 1576 (2024) (citing Pub. L. No. 95-454, 92 Stat. 1111 (1978)). As of January 2025, roughly two-thirds of Executive Branch employees were in the competitive service. Drew Desilver, *What the Data Says About Federal Workers*, PEW Research Center (Jan. 7, 2025), *available at*

https://www.pewresearch.org/short-reads/2025/01/07/what-the-data-says-about-federal-workers/.

Federal law further establishes prescriptive duties and proscriptive rules that affirm the obligation of government institutions and officials—whether hired through the competitive service or otherwise—to serve the public interest. Under their own constitutional authority, each branch of government acts under a code of conduct setting forth duties, obligations, and limitations on its officials. *See, e.g.*, H. Comm. on Ethics, 119th Cong., Rules of the Comm. on Ethics, House Rule XXIII - Code of Official Conduct (2025); S. Select Comm. on Ethics, 117th Cong., Senate Code of Official Conduct (2021); Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635; Guide to Judiciary Policy, Vol. 2, Pt. A, Ch. 2, Code of Conduct for United States Judges, (Admin. Off. of the U.S. Courts), *available at* https://www.uscourts.gov/sites/default/files/2024-12/guide-vol02a-ch02-2014-03-19.pdf.

The Ethics in Government Act, passed by Congress in the wake of the Watergate scandal, created a system of mandatory government ethics regulations that contain preventative measures against the influence of private interests through disclosures of personal interests and responsive measures addressing the actual or apparent risk of conflicts between official duties and personal interests. *See* Pub. L. 95-521, 92 Stat. 1824 (1978) (establishing, *inter alia*, requirements for government officials in senior and policymaking positions to file financial disclosures and processes

to resolve conflicts of interest through financial divestiture and disqualification from certain work).

Executive branch employees are further subject to Standards of Ethical Conduct requiring them to work only in accordance with the public interest. 5 C.F.R. § 2635; *see, e.g.*, *id.* at §§ 2635.802 (prohibiting federal employees from engaging in outside activities that conflict with official duties), 2635.702 (prohibiting officials from using their positions for the personal gain of themselves or others). Those ethical standards are further buttressed by statutes imposing prohibitions and civil and criminal liability on various types of conduct that place private interest above public duty. *See, e.g.*, 18 U.S.C. §§ 201 (criminalizing requests or demands by officials for things of value to influence official acts); 203 (prohibiting federal officials from receiving compensation for representational services in certain matters involving the United States or its interests); 205 (prohibiting federal employees from acting as agents or attorneys on behalf of others in certain matters involving the United States or its interests); 208 (prohibiting federal employees from working on matters that implicate their financial interests); 209 (prohibiting federal employees from accepting any salary or supplementation of salary for their work from any non-governmental source).

Taken together, these provisions of the Constitution and federal law ensure that the federal government has sole authority to exercise sovereign authority, a singular focus on serving the public interest, and institutions and personnel that operate without hope or expectation that the conduct of their

official duties will advance their private interests at the expense of the public's. They also inherently separate the federal government from the private parties with which it does business and that this Court has long recognized do not enjoy sovereign immunity as a matter of course. *See, e.g.*, *Sloan*, 258 U.S. at 567–68; *Brady*, 317 U.S. at 583–84; *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 105 (1940).

## II. Extending sovereign immunity from suit to government contractors is contrary to their limited role in the functions of the government.

Extending sovereign immunity from suit to contractors would contradict the government's longstanding prohibition—itself an exercise of sovereign authority—against contractors exercising sovereign authority themselves. The federal government, in keeping with its singular mandate to serve the public interest, has long kept contractors well clear of the "inherently governmental functions" through which sovereign authority is exercised. It bars federal contractors from performing those functions, mandates heightened diligence by agencies who hire contractors for work adjacent to them, and requires agencies to track and publicly report the non-inherently governmental functions that they permit government contractors to perform. That affirmative exclusion is driven by the historical recognition, instilled in federal law described *supra*, that only the federal government, endowed with authority by the people for the sole purpose of serving the public interest, is authorized,

properly motivated, and adequately regulated to wield the people's sovereign authority.

Rather than empowering contractors with sovereign authority and thereby bringing them within the scope of the government, federal law recognizes contractors as what they are—private parties necessarily driven by their own financial priorities who have entered into arm's length agreements to provide services to the government for their private benefit—and manages its relationship with them accordingly.

### *A. Contractors cannot perform inherently governmental functions.*

The federal government denies sovereign authority to contractors through a general prohibition against using contractors who provide goods and services to the United States "for the performance of inherently governmental functions." That prohibition is effectuated through the Federal Acquisition Regulation (FAR). 48 C.F.R. § 7.503(a) ("Contracts shall not be used for the performance of inherently governmental functions."). The FAR "is the primary regulation for use by all executive agencies in their acquisition of supplies and services with appropriated funds[,]" and applies to the vast majority of federal acquisition contracts. Foreword, FAR (2019), *available at* https://www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf.

The Office of Federal Procurement Policy (OFPP), in government-wide guidance mandated by Congress that also bans contractors from performing them, *see* Pub. L. No. 110-417, 122 Stat. 4356, § 321 (2008), has defined "inherently governmental

functions" as any "function that is so intimately related to the public interest as to require performance by Federal Government employees." OFPP Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, § 3 (Sept. 12, 2011) (hereafter referred to as "OFPP Policy Letter 11-01"). Such functions expressly include those that "involve the exercise of sovereign powers of the United States . . . without regard to the type or level of discretion associated with the function." *Id.* § 5-1(a)(1)(i).

They also include any function "requiring the exercise of discretion" that "commits the government to a course of action where two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that: (i) identify specified ranges of acceptable decisions or conduct concerning the overall policy or direction of the action; and (ii) subject the discretionary decisions or conduct to meaningful oversight and, whenever necessary, final approval by agency officials." *Id.* § 5-1(a)(1)(ii).

Those standards are meant to capture, and exclude contractors from performing, "functions that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government." *Id.* § 3(a). By way of example, they include "the interpretation and execution of the laws of the United States so as" among other things, "(1) to bind the United States to take or not take some action[,] . . . (2) to determine, protect, and advance United States economic, political, territorial,

property or other interests[,] . . . [and] (3) to significantly affect the life, liberty, or property of private persons." *Id.*

The FAR, for its part, provides twenty exemplar categories of inherently governmental functions that cover the full range of areas in which the federal government exercises its sovereign authority, including the conduct and control of criminal investigations, 48 C.F.R. § 7.503(c)(1), prosecutions and adjudicatory functions, *id.* at § 7.503(c)(2), command of military forces, *id.* at § 7.503(c)(3), the conduct of foreign relations, *id.* at § 7.503(c)(4), determinations of agency policies and budget priorities, *id.* at § 7.503(c)(5)–(6), direction, control, evaluation, and selection of federal employees and positions, *id.* at § 7.503(c)(7), (9)–(10), direction and control of intelligence and counter intelligence operations, *id.* at § 7.503(c)(8), approval of Freedom of Information Act responses and appeals that involve discretion, *id.* at § 7.503(c)(13), conducting hearings to determine any person's eligibility for government programs or security clearances, *id.* at § 7.503(c)(14), control and administration of treasury accounts and public trusts, *id.* at § 7.503(c)(18)–(19), and drafting communications on behalf of the Executive Branch to those with oversight or audit authority over it, *id.* at § 7.503(c)(20).

These standards must be applied by all executive agencies and departments to "ensure that contractors do not perform inherently governmental functions," OFPP Policy Letter 11-01, § 4(a)(1)–(2); *see id.* § 5-1 ("Agencies must ensure that inherently governmental functions are reserved exclusively for

performance by Federal employees."), and thereby effectuate "the policy of the Executive Branch to ensure that government action is taken as a result of informed, independent judgments made by government officials" and "that the act of governance is performed, and decisions of significant public interest are made, by officials who are ultimately accountable to the President and bound by laws controlling the conduct and performance of Federal employees that are intended to protect or benefit the public[.]" *Id.* § 4.

They are also mandated by Congress, which tasked OFPP to evaluate whether previous definitions of "inherently government functions" were "sufficiently focused to ensure that only officers or employees of the Federal Government or members of the Armed Forces perform inherently governmental functions or other critical functions necessary for the mission of a Federal department or agency[,]" and to "develop a single consistent definition" that would "address any deficiencies in the existing definitions[,]" "reasonably apply to all Federal departments of agencies," and ensure, along with criteria to be developed by OFPP, that agency heads could identify them. Pub. L. No. 110-417, 122 Stat. 4356, § 321(a)(1)–(3) (2008).

The previous definitions of "inherently governmental functions" tracked the government's long practice of barring federal contractors from exercising sovereign authority. As early as 1979, Executive Branch policy was revised to "reaffirm[] the Government's general policy of reliance on the private sector for goods and services, while recognizing that governmental functions must be

performed by Government personnel" and therefore barred contractors from performing "government functions," which included "value judgments," and were "defined to clearly embrace the activities that should always be performed by Government personnel because they involve exercising governmental authority, controlling monetary transactions and entitlements, and maintaining needed core capabilities." Acquiring of Commercial or Industrial Products and Services Needed by the Government, 44 Fed. Reg. 20556 (Apr. 5, 1979).

In 1992, OMB and OFPP issued a standalone policy on "Inherently Governmental Functions" that instituted an almost identical definition of them as adopted by OFPP in 2008. *See* OFPP Policy Letter 92-1, Inherently Governmental Functions, 57 Fed. Reg. 45096, § 5 (Sept. 30, 1992) (defining them as any "function that is so intimately related to the public interest as to mandate performance by Government employees"). It also clarified that the "value judgments" indicative of inherent government functions include "(1) the act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlements." *Id.*

That definition was adopted by Congress in the 1998 Federal Activities Inventory Reform Act (FAIR Act), which requires agencies to annually create and provide to Congress and the public lists of non-inherently governmental functions that they perform, Pub. L. No. 105-270, 112 Stat. 2382, § 5 (1998), and in 1999 reaffirmed by OMB and OFPP, *see* Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular No. A-76, Performance of Commercial Activities, §§ 5(b), 6(e) (Revised 1999).

OFPP's 2008 guidance, as Congress directed, built on these definitions and provided criteria to strengthen the wall between inherent governmental functions and the work of contractors. OFPP Policy Letter 11-01, § 5-1(a)(1)(i)–(ii).

Federal law also recognizes and mandates vigilance over the risk associated with allowing contractors to perform functions "closely associated with inherent government functions," which are those that are not considered to be inherently governmental but "may approach being in that category because of the nature of the function and the risk that performance may impinge on Federal officials' performance of an inherently governmental function." OFPP Policy Letter 11-01, § 5-1(a)(2). OFPP's guidance mandates that agencies "give special consideration to" government performance of closely associated functions and "when such work is performed by contractors, provide greater attention and an enhanced degree of management oversight of the contractors' activities to ensure that contractors' duties do not expand[.]" *Id.* § 4(a)(2); *see* Policy Letter 92-1, § 6(a)(2) (requiring the same).

Congress has also repeatedly mandated that agencies similarly plan for, and protect the public interest, when contractors perform such duties. *See, e.g.*, 10 U.S.C. § 2463(b) (requiring the Department of Defense to create guidelines and procedures to give special consideration to using federal employees for, *inter alia*, "critical function[s]" and functions "closely associated with the performance of an inherently government function."); Pub. L. No. 111-8, 123 Stat 524, § 736(b)(2)(A)(ii) (2009) (requiring the same of all "executive agencies" subject to the FAIR Act).

In sum, the policy of the federal government is clear. Not only has Congress withheld immunity against suit from government contractors as a class, *see Brady*, 317 U.S. at 580, 83 (requiring extension of immunity by law), but the government has affirmatively ensured that federal contractors are neither a part of the government to which the people have granted sovereign authority, nor capable of exercising the sovereign authority that might justify their treatment as the government itself, *see, e.g.*, *Lewis*, 581 U.S. at 161–63 (stating that "sovereign immunity is not implicated" when "the real party in interest is the individual"); *Sloan*, 258 U.S. at 567; *Hopkins*, 221 U.S. at 643–45.

### *B. Federal law recognizes and accounts for government contractors as arm's-length counterparties.*

The federal government's exclusion of contractors from the sovereign authority of the United States is coupled with extensive regulation of the government's relationship with them. *See generally, e.g.*, 48 C.F.R. Ch. 1 (Federal Acquisition Regulation); 2 C.F.R. Pt. 930 (regulating "Other Transaction Agreements" by Department of Energy); 32 C.F.R. Pt. 3 (regulating "Transactions Other Than Contracts, Grants, or Cooperative Agreements" by Department of Defense). Those regulations logically proceed from the premise that contracts for goods and services are arm's-length agreements defined by the terms of the contract. *See Chevron Chemical Corp. v. U.S.*, 5 Cl. Ct. 807, 811 (Cl. Ct. 1984) ("If an agency enters into contracts to facilitate administration of a program sovereign in

nature, the agreements are enforceable under general contract principles.") (citing *Sunswick Corp. of Del. v. United States*, 109 Ct. Cl. 772, 798 (Ct. Cl. 1948), *cert. denied*, 334 U.S. 827 (1948)). They preserve the public interest and ensure that the interests of contractors, who exist and operate outside of the government and are necessarily bound by their own priorities, which may not align with those of the public, are properly accounted for and do not undercut them. They also reaffirm the separation between the government and contractors and undercut any claim that contractors should wield the government's sovereign immunity.

As they must, the FAR and federal law account for the private interests of contractors and bidders by both protecting them and protecting the government from them. For example, they prohibit unauthorized disclosure of contractor bid or proposal information and the source selection information that agencies use to award contracts. 48 C.F.R. § 3.104-4; 41 U.S.C. § 2102(a) (prohibiting unlawful obtainment and dissemination of contractor bid and source selection information before the contract is awarded). They also commit the government to protecting the trade secrets and private business data of contractors and contract bidders, an explicit recognition of the inherently commercial nature of government contracting. *See* 48 C.F.R. §52.215-1(e) (establishing procedures for contract bidders to mark data "that they do not want disclosed to the public for any purpose, or used by the Government except for evaluation purposes"); 48 C.F.R. § 3.104-4(d) (requiring notice and opportunity to respond before marked data is disclosed).

Conversely, they also protect the public from the very real dangers inherent in offering taxpayer funds in exchange for goods and services to the government rather than, as would be required for sovereign immunity, conducting that business in-house. FAR's prohibition on "Improper Business Practices and Personal Conflicts of Interest," for example, contains provisions attempting to blunt the effect on the public interest in government contract administration of improper gifts and gratuities, 48 C.F.R. §§ 3.101-2, subpart 3.2; promises of future employment to federal employees involved in contract awards, *id.* at § 3.104-3, anti-trust violations, *id.* at subpart 3.3, "buying-in" (the practice of underbidding on costs and artificially inflating the value of the contract once obtained), *id.* at § 3.501, subcontractor kickbacks, *id.* at § 3.502, and contracts with government employees and organizations owned or controlled by them, *id.* at subpart 3.6.

Many of these provisions are underpinned by federal laws prohibiting or even criminalizing conduct undertaken to influence government action. *See, e.g.*, 18 U.S.C. § 201 (criminalizing bribery of public officials), 10 U.S.C. § 4651 (allowing cancellation of Department of Defense contracts issued if gratuity offered or given); 41 U.S.C. § 2103 (establishing mandatory reporting requirements when agency officials involved in contract procurement are contacted by a bidder regarding non-Federal employment).

When those prophylactic measures fail, the FAR empowers designated officials at contracting agencies to, within specific parameters, temporarily

suspend or permanently debar contractors from receiving government contracts for a variety of reasons, including the commission of fraud or a criminal offense in obtaining or performing under a government contract, 48 C.F.R. §9.406-2(a)(1) (debarment); 48 C.F.R. §9.407-2(a)(1) (suspension), willful failure to perform, 48 C.F.R. § 9.406-2(b)(1)(i)(A), or "any cause of so serious or compelling a nature that it affects the present responsibility of the contractor" to perform under a government contract. 48 C.F.R. § 9.406-2. Suspension and debarment are also required by various statutory provisions in specific contexts. *See, e.g.*, 33 U.S.C. § 1368; 40 U.S.C. § 3144; 41 U.S.C. §§ 6504, 6706; 42 U.S.C. § 7606.

The False Claims Act further imposes civil liability against contractors that, among other things, knowingly present materially false claims for payment or approval, or knowingly make false records or statements material to a false or fraudulent claim. *See* 31 U.S.C. §§ 3729(a)(1)(A)–(B); *id.* at §§ 3729(a)(1)(B), (G) (requiring materiality). The Program Fraud Civil Remedies Act similarly permits the application of civil penalties for false or fraudulent claims that do not exceed $150,000 after an administrative adjudication. *See* 31 U.S.C. § 3802–3805.

The FAR also protects the public interest by ensuring that the government only makes contracts that by their express terms give the United States a free hand to protect the public interest as a matter of contract execution. Those measures include, for example, requirements that contracts contain clauses that allow the government to terminate

them for convenience, *see, e.g.*, 48 C.F.R. §§ 52.249-2, 52.249-4, 52.249-6, 52.249-5, and to unilaterally change the terms of certain contracts without approval of the contractor, *see, e.g.*, 48 C.F.R. §§ 52.243-1, 52.243-2, 52.243-3, 52.243-4, 52.243-5. And they are one part of a large mosaic of often mandatory contract terms that contractors must accept (rather than negotiate around) to protect the public interest. *See, e.g.*, 48 C.F.R. §§ 52.203-16 (creating contractors to maintain procedures to manage potential personal conflicts of interest) 52.246-2, 52.246-9 (both establishing rights to inspect supplies and performance); 52.204-21 (requiring contractors to implement security controls for systems handling federal contract information).

Finally, to manage disputes between the government and contractors as counterparties, Congress instituted the Contract Disputes Act. *See* 41 U.S.C. §§ 7101–7109 (as amended). The CDA establishes a comprehensive and tiered system of dispute resolution and adjudication, which progresses from an initial decision by the agency's contracting officer, *id.* § 7103, through specially-established agency boards of contract appeal, *id.* § 7105, or the Court of Federal Claims, *id.* § 7104(b), and on to the Federal Circuit, *id.* § 7107.

The award and performance of government procurement contracts are also intensely overseen by, among others, the Government Accountability Office, *see* Government Accountability Office, *Federal Contracting*, *available at* https://www.gao.gov/federal-contracting (compiling GAO reports on contractor performance), and

Offices of Inspectors General, *see, e.g.*, Office of Personnel Management Office of Inspector General, *Office of Audits*, *available at* https://oig.opm.gov/organization/office-audits (describing Office of Audits' "core responsibility" as "auditing the activities of OPM contractors"); Department of Health and Human Services Office of Inspector General, *Contract Fraud*, *available at* https://oig.hhs.gov/fraud/contract-fraud/ (describing responsibility for investigating "fraud, waste, and abuse involving HHS programs, including HHS contracts").

These provisions and oversight practices solidify that the federal government neither views nor treats government contractors who provide goods and services to it, as a class, as part of the government itself. Rather, they are external contract counterparties unauthorized to wield the sovereign authority of the United States, *supra*, and whose financial interests in their contract with the government are accounted for by *Yearsley*'s assurance that they will not be held liable for damages that a contract directed them to cause. *Yearsley*, 309 U.S. at 20–21. Any expansion beyond that is improper.

## CONCLUSION

The Court should affirm.

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