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 FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the collateral-order doctrine permits immediate appeal from a summary-judgment ruling denying the so-called "derivative sovereign immunity" defense.

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INTEREST OF THE UNITED STATES

This case concerns whether a pretrial order denying a federal contractor's "derivative sovereign immunity" defense is immediately appealable as a "collateral order." The United States has a substantial interest in the resolution of that question. The federal government relies on contractors to perform a vast array of vital governmental functions, and that defense's availability is critical to those efforts. The government also has an interest in the correct interpretation and application of 28 U.S.C. 1291, the federal statute conferring appellate jurisdiction over "final" orders of the district courts. In *CACI Premier Technology, Inc.* v. *Al Shimari*, 141 S. Ct. 2850 (2021) (No. 19-648), this Court invited the Solicitor General to express the United States' views on the same question presented in this case.

INTRODUCTION

Petitioner, a federal contractor, contends that the summary-judgment order rejecting its "derivative sovereign immunity" claim was immediately appealable. That contention is incorrect. With limited exceptions, appellate courts have jurisdiction to review only "final decisions" of district courts. 28 U.S.C. 1291; cf. 28 U.S.C. 1292 (listing exceptions). Under the "collateral order doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), an order that does not terminate the litigation is a "final decision" only if, among other things, it resolves an issue that would be effectively unreviewable on appeal from a final judgment.

The order here does not qualify. The prototypical example of an "effectively unreviewable" issue is an assertion of immunity from standing trial in the first place—such as absolute executive or legislative immunity, Eleventh Amendment immunity, or foreign or tribal sovereign immunity. A right not to stand trial would be irretrievably lost once trial occurs, even if the defendant ultimately prevails on the merits. Indeed, the defining feature of such an immunity is that it precludes trial regardless of whether the defendant acted lawfully.

Despite its misleading name, "derivative sovereign immunity" is not such an immunity. Instead, it is a defense to liability. Under that defense, a government contractor cannot be held "liable for his conduct" unless "he exceeded his authority" or the authority "was not validly conferred" by the government. *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18, 21 (1940). That reflects the common-law doctrine that a principal who has a privilege to take a certain action (that would be unlawful if committed by others) may delegate that privilege to an agent, who may then lawfully take the privileged

action on the principal's behalf. Under "derivative sovereign immunity," therefore, a government contractor avoids liability only to the extent that—and only because—he acts *lawfully*. That distinguishes it from an actual immunity. And like any other defense to liability, the *Yearsley* defense can be effectively vindicated on appeal by reversal of an adverse final judgment. That basic insight is sufficient to resolve this case.

Although pretrial orders denying *Yearsley* defenses are not immediately appealable, that defense is critically important to government contractors. Interlocutory review of such orders under 28 U.S.C. 1292(b) may therefore be appropriate in many cases. In addition, Congress has authorized this Court to promulgate rules specifying interlocutory orders that may be appealed as of right. See 28 U.S.C. 1292(e). That rulemaking option is preferable to expanding the limited class of collateral orders.

STATEMENT

1. Petitioner operates a private detention facility in Aurora, Colorado, under contract with United States Immigration and Customs Enforcement (ICE). Pet. App. 4a. Under petitioner's sanitation policy, detainees must "keep clean and sanitize all commonly accessible areas of the housing unit, including walls, floors, windows, window ledges, showers, sinks, toilets, tables, and chairs." *Ibid.* (brackets and citation omitted). A detainee who fails to comply is subject to escalating disciplinary sanctions. *Id.* at 4a-5a. Petitioner also offers a voluntary work program under which it pays detainee participants $1 per day to "perform[] various jobs, including preparing food, operating the library, barbering, and doing the laundry." *Id.* at 5a; see *id.* at 5a-6a.

Respondents are a class of detainees who were detained at the Aurora facility. Pet. App. 6a. They allege that the sanitation policy amounts to unlawful forced labor, in violation of 18 U.S.C. 1589 and 1595; and that the $1 daily wage in the voluntary work program violates Colorado's minimum-wage statute and constitutes unjust enrichment. Pet. App. 6a & n.2, 33a. The district court dismissed the minimum-wage claim, 113 F. Supp. 3d 1125, but allowed the forced-labor and unjust-enrichment claims to proceed to discovery. Pet. App. 6a-7a.

The district court granted respondents' motion for summary judgment and denied petitioner's cross-motion, limited to petitioner's assertion of "derivative sovereign immunity." Pet. App. 32a-130a. Citing *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940), the court described "derivative sovereign immunity" as a defense that "protects government contractors, as agents of the government, from liability for actions that were directed or required by the federal government, so long as the government's authority to carry out the contracted-for services was validly conferred by Congress." Pet. App. 67a. The court rejected petitioner's assertion of that defense, finding that "ICE neither directed nor required [petitioner] to improperly compel detainees' labor or to compensate [voluntary work program] participants only $1.00 per day." *Id.* at 69a.

2. The court of appeals dismissed petitioner's appeal for lack of appellate jurisdiction. Pet. App. 1a-31a.

The court of appeals observed (Pet. App. 11a-12a) that an order that does not terminate the litigation ordinarily is not a "final decision[]" over which the court has appellate jurisdiction under 28 U.S.C. 1291. The court explained, however, that an ostensibly non-final

order may nevertheless qualify as "final" for purposes of Section 1291 under the "collateral order doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), if the order (1) "conclusively determines the disputed question"; (2) "resolves an important issue completely separate from the merits of the action"; and (3) "is effectively unreviewable on appeal from a final judgment." Pet. App. 12a (brackets and citation omitted).

The court of appeals held that the district court's order did not satisfy the second condition because "an order denying the applicability of the *Yearsley* doctrine" cannot be "reviewed completely separate from the merits." Pet. App. 18a; see *id.* at 17a-29a. The court of appeals explained that "there is overlap between the second *Yearsley* prong—*viz.*, whether the government directed the contractor's challenged actions—and the merits of a plaintiff's claims challenging the lawfulness of those actions." *Id.* at 20a. The court further explained that "factual questions concerning what the government did and did not specifically direct would be at the heart of the *Yearsley* inquiry on the second prong *and* also at the heart of the merits inquiry into the lawfulness of a contractor's challenged actions." *Id.* at 21a. The court concluded that "[b]ecause [petitioner's] failure as to this condition is fatal to our jurisdiction, we need not address" the other *Cohen* conditions. *Id.* at 30a.

SUMMARY OF ARGUMENT

This Court should affirm the judgment below on the alternative ground that the district court's order is effectively reviewable on appeal from a final judgment because "derivative sovereign immunity" is not an immunity from suit, but a defense to liability.

A. In 28 U.S.C. 1291, Congress codified the long-standing rule that only final judgments may be appealed. Under the "collateral order doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), an order that does not terminate the litigation may be "final" under Section 1291 if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits; and (3) is effectively unreviewable on appeal from a final judgment. When the defendant seeks review of an order denying a motion to dismiss the litigation, the third condition generally requires the claimed right to be not merely a defense to liability or guilt, but a constitutional or statutory immunity from standing trial that implicates values of constitutional magnitude.

B. The "derivative sovereign immunity" defense does not satisfy the third *Cohen* condition because it is not truly an immunity from suit. Orders involving true immunities include those denying absolute executive or legislative immunity, Eleventh Amendment immunity, or foreign or tribal sovereign immunity. Such immunities generally are not delegable, as this Court has long held. And their defining characteristic is that they permit the immunity-holder to avoid standing trial irrespective of guilt or liability.

"Derivative sovereign immunity," in contrast, reflects the principle in *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940), that a contractor cannot be held liable for exercising authority validly conferred by the government. When the contractor stays within the bounds of that conferred authority, it acts *lawfully* because the government has delegated to the contractor its privilege to act in the specified manner. That distinguishes the *Yearsley* defense from true immunities,

which shield the holder from liability even when he acts unlawfully. As with all merits defenses, a pretrial order denying a *Yearsley* defense is thus effectively reviewable and vindicable on appeal from a final judgment. And unlike the immunities described above, the *Yearsley* defense does not implicate values of constitutional magnitude.

Petitioner's reliance on qualified immunity is misplaced. Like other immunities, but unlike "derivative sovereign immunity," qualified immunity applies even when the defendant acts unlawfully. And by precluding liability where the law was not clearly established, qualified immunity avoids timidity in public officials. But that rationale is inapplicable to "derivative sovereign immunity," which extends only to the bounds of lawfully delegated authority—whether or not those bounds were clearly established. And while extending qualified immunity to private individuals ensures that they are not deterred from public service, government contractors—who can price litigation risks into their contracts—are unlikely to be substantially deterred by the unavailability of immediate appeal.

C. Because orders denying *Yearsley* defenses do not satisfy the third *Cohen* condition, this Court need not address whether they satisfy the first two conditions (conclusiveness and separateness from the merits). Many collateral orders addressing immunities involve at least some overlap with the merits, and a ruling on the second *Cohen* condition would require exploring exactly how much overlap is permitted. That complication can be avoided by affirming on the alternative ground above. And the parties did not contest the first *Cohen* condition below, making it unnecessary to address in this case.

D. Although orders denying *Yearsley* defenses are not collateral orders, courts should remain open to certifying such orders for interlocutory review under 28 U.S.C. 1292(b) where appropriate. The government relies heavily on contractors for a range of vital services (including immigration detention), and the availability of the *Yearsley* defense is critical to those efforts. Litigation over that defense may present novel issues that warrant certification under Section 1292(b). In addition, Congress has authorized this Court to promulgate rules permitting interlocutory appeal of certain types of orders, 28 U.S.C. 1292(e), which is preferable to judicially expanding the limited class of collateral orders.

ARGUMENT

This Court should affirm the judgment below on an alternative ground. The court of appeals reasoned that it lacked appellate jurisdiction because the district court's order does not involve an issue separate from the merits. Pet. App. 17a-29a. That is correct. But this Court should affirm on the more straightforward ground that the order is effectively reviewable on appeal from a final judgment because "derivative sovereign immunity" is not a true immunity from suit, but instead a defense to liability. Resolving the case on that ground would avoid the need to address the other collateral-order requirements.

A. Collateral Orders Must Involve Issues That Are Final, Completely Separate From The Merits, And Effectively Unreviewable On Appeal From Final Judgment

1. "Finality as a condition of review is an historic characteristic of federal appellate procedure," dating to the Judiciary Act of 1789, ch. 20, §§ 21-22, 25, 1 Stat. 83-87. *Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940). Among other benefits, finality helps to avoid

"clog[ging] the courts through a succession of costly and time-consuming appeals." *Flanagan* v. *United States*, 465 U.S. 259, 264 (1984). It also avoids appellate review "with less developed records" or "appeals that, had the trial simply proceeded, would have turned out to be unnecessary." *Johnson* v. *Jones*, 515 U.S. 304, 309 (1995).

The finality requirement is now codified in 28 U.S.C. 1291, which provides that the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court." *Ibid.* A "'final decision' within the meaning of § 1291 is normally limited to an order" that "'terminates the action' or 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Ritzen Group, Inc.* v. *Jackson Masonry, LLC*, 589 U.S. 35, 37-38 (2020) (brackets and citation omitted). Section 1291 and its predecessors reflect a longstanding and "firm congressional policy against interlocutory or 'piecemeal' appeals," *Abney* v. *United States*, 431 U.S. 651, 656 (1977), which Congress has "departed from only when observance of it would practically defeat the right to any review at all," *Cobbledick*, 309 U.S. at 324-325.

This Court has "long given" Section 1291 a "practical rather than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Accordingly, a "small class" of ostensibly non-final orders are treated as "final" if they "finally determine claims of right separable from, and collateral to, rights asserted in the action," which are "too important to be denied review." *Ibid.* In applying that "collateral order doctrine," the Court "look[s] to categories of cases, not to particular injustices." *Van Cauwenberghe* v. *Biard*,

486 U.S. 517, 529 (1988); see *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100, 107 (2009) ("[O]ur focus is on * * * the class of claims, taken as a whole.") (citation omitted).

This Court has emphasized that the collateral-order doctrine "must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.'" *Mohawk*, 558 U.S. at 106 (citation omitted). Accordingly, the Court has repeatedly described the collateral-order doctrine as "narrow," *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989); "stringent," *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994); and of "modest scope," *Will* v. *Hallock*, 546 U.S. 345, 350 (2006). And "although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, [it] ha[s] instead kept it narrow and selective in its membership." *Ibid.*

2. "[T]o come within the collateral order doctrine of *Cohen*, the order must satisfy each of three conditions: it must (1) 'conclusively determine the disputed question,' (2) 'resolve an important issue completely separate from the merits of the action,' and (3) 'be effectively unreviewable on appeal from a final judgment.'" *Van Cauwenberghe*, 486 U.S. at 522 (citation omitted).

a. The first *Cohen* condition—conclusiveness as to the disputed question—ensures that the decision on the issue truly is final and not amenable to revisiting in the district court. For example, an order denying a motion to dismiss an indictment on speedy-trial grounds fails that condition because any pretrial "estimate of the degree to which delay has impaired an adequate defense tends to be speculative," and therefore a denial "does not indicate that a like motion made after trial—when

prejudice can be better gauged—would also be denied." *United States* v. *MacDonald*, 435 U.S. 850, 858-859 (1978). Likewise, an order denying class certification—even one that might as a practical matter sound the "death knell" of the litigation—is not a collateral order because "such an order is subject to revision in the District Court." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 (1978).

b. The second *Cohen* condition—that the issue be truly collateral—is "a distillation of the principle that there should not be piecemeal review of 'steps towards final judgment in which they will merge.'" *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 12 n.13 (1983) (citation omitted). To effectuate the congressional policy of avoiding "repetitive appellate review of substantive questions," the issues in a collateral order must be "completely" separate from the merits. *Van Cauwenberghe*, 486 U.S. at 527-528. Where the issues in a pretrial order are "enmeshed in the merits of the dispute," allowing appeal "would waste judicial resources." *Id.* at 528. For example, an order denying a motion to dismiss an indictment for failure to state an offense fails that condition because it "goes to the very heart of the issues to be resolved at the upcoming trial." *Abney*, 431 U.S. at 663. So too a denial of a motion to dismiss on *forum non conveniens* grounds, because "in the main, the issues that arise in *forum non conveniens* determinations will substantially overlap factual and legal issues of the underlying dispute." *Van Cauwenberghe*, 486 U.S. at 529.

c. The third *Cohen* condition requires that the asserted right "be 'irretrievably lost' absent an immediate appeal." *Van Cauwenberghe*, 486 U.S. at 524 (citation omitted); see *Midland Asphalt*, 489 U.S. at 799 (requir-

ing "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial") (citation omitted). Courts must focus on "the substance of the right[]," not merely on the general "advantage to a litigant in winning his claim sooner." *MacDonald*, 435 U.S. at 860 n.7.

For example, an order requiring a defendant to be involuntarily medicated satisfies that condition because "[b]y the time of trial [the defendant] will have undergone forced medication—the very harm that he seeks to avoid." *Sell* v. *United States*, 539 U.S. 166, 176-177 (2003). But an order compelling disclosure of material allegedly protected by attorney-client privilege fails that condition —even though disclosure cannot be undone—because the "substance of the right[]," *MacDonald*, 435 U.S. at 860 n.7, is to protect candid attorney-client communications, not to avoid disclosure for its own sake, and "in deciding how freely to speak, clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal." *Mohawk*, 558 U.S. at 110.

Where (as here) the order involves a defendant's claim that the litigation should be dismissed, the "critical question" for the third *Cohen* condition "is whether 'the essence' of the claimed right is a right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524 (citation omitted). The defendant also must identify "some particular value of a high order * * * in support of the interest in avoiding trial." *Will*, 546 U.S. at 352; cf. *Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495, 502 (1989) (Scalia, J., concurring) (claimed right must be "*important enough* to be vindicated" by immediate appeal). Accordingly, the asserted right to avoid suit generally must "rest[] upon an explicit statutory or constitutional

guarantee that trial will not occur." *Midland Asphalt*, 489 U.S. at 801. For example, an asserted "privately conferred right" to avoid trial under a settlement agreement generally does not qualify, as it does not "originat[e] in the Constitution or statutes." *Digital Equipment*, 511 U.S. at 879.

B. Orders Denying "Derivative Sovereign Immunity" Are Effectively Reviewable On Appeal From Final Judgment

The order denying petitioner's "derivative sovereign immunity" defense does not satisfy the third *Cohen* condition because "derivative sovereign immunity" is not a genuine immunity from suit, but instead only a defense to liability. Like other defenses, that defense may be effectively reviewed and vindicated on appeal from a final judgment. The court of appeals did not address that separate ground for affirmance, see Pet. App. 30a, but because "the *Cohen* requirements go to an appellate court's subject-matter jurisdiction," this Court may independently "assess whether each condition was met." *Digital Equipment*, 511 U.S. at 869 n.3.

1. Collateral orders generally involve true immunities from suit

Orders denying a defendant's motion for dismissal generally satisfy the third *Cohen* condition only if they rest on a true "*immunity from suit* rather than a mere defense to liability." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). This Court has recognized that "in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524. Because a case can never be "untried," "almost every pretrial or trial order might be called 'effectively unreviewable' in

the sense that relief from error can never extend to rewriting history." *Digital Equipment*, 511 U.S. at 872. But that has never been sufficient to circumvent the finality requirement.

Courts must therefore be wary of "a party's agility" in "characterizing the right asserted" as one not to stand trial, and should "view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equipment*, 511 U.S. at 872-873. For example, an asserted "right not be sued at all except in a [specified] forum" does not satisfy the third *Cohen* condition because it is not a right "to avoid suit altogether." *Lauro Lines*, 490 U.S. at 501 (forum-selection clause); see *Van Cauwenberghe*, 486 U.S. at 524 (*forum non conveniens*).

Courts also must rigorously enforce the requirement that appeal vindicate "some particular value of a high order." *Will*, 546 U.S. at 352. Examples include "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual." *Id.* at 352-353.

The small class of orders that satisfy those stringent requirements thus involve constitutional immunities from trial or statutory immunities from trial that implicate constitutional concerns. The former include orders denying presidential immunity from criminal process, *Trump* v. *United States*, 603 U.S. 593, 635 (2024); other claims of absolute executive or legislative immunity, *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979); Eleventh Amendment immunity, *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-147 (1993);

tribal sovereign immunity, *e.g.*, *Gingras* v. *Think Finance, Inc.*, 922 F.3d 112, 119-120 (2d Cir. 2019), cert. denied, 140 S. Ct. 856 (2020); and a double-jeopardy defense to retrial, *Abney*, 431 U.S. at 656-662. The latter include orders denying qualified immunity on legal grounds, *Mitchell*, 472 U.S. at 530; substitution of the United States as a defendant under the Westfall Act, *Osborn* v. *Haley*, 549 U.S. 225, 238-239 (2007); and foreign sovereign immunity, cf. *Bolivarian Republic of Venezuela* v. *Helmerich & Payne International Drilling Co.*, 581 U.S. 170, 185 (2017); *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 854 (2009).

In each of those situations, the asserted right is not merely to an acquittal or a finding of non-liability; it is a statutory or constitutional right not to stand trial *irrespective* of guilt or liability, to vindicate values of constitutional magnitude. The claimed immunities in such cases both would be "irretrievably lost" once trial occurs, *Van Cauwenberghe*, 486 U.S. at 524 (citation omitted), and are "*important enough* to be vindicated" by immediate appeal, *Lauro Lines*, 490 U.S. at 502 (Scalia, J., concurring). In contrast, merits defenses may be fully vindicated on an appeal from (and by a reversal of) a final judgment of liability or guilt.

2. Immunities from suit generally are not delegable

One feature of a true immunity from suit is that the immunity holder generally may not transfer the immunity to someone else. For example, at common law, "[a]n agent does not have the immunities of his principal although acting at the direction of the principal." 2 Restatement (Second) of Agency § 347(1), at 110 (1958) (Restatement vol. 2). Immunities generally "are not delegable" because they arise from "the relation between the parties or the status or position of the actor."

1 Restatement (Second) of Agency § 217 cmt. b, at 469-470 (1958) (Restatement vol. 1); see Restatement vol. 2, § 347 cmt. a, at 111 ("[Immunities] are strictly personal to the individual and cannot be shared."). Accordingly, the "overriding public policy" that justifies "protect-[ing]" the holder of the immunity does not justify extending similar protection to others who lack the requisite relationship, status, or position. Restatement vol. 2, § 347 cmt. a, at 111.

Federal law reflects that principle. Federal contractors do not "share the Government's unqualified immunity from liability and litigation" in U.S. courts. *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153, 166 (2016).* As Justice Holmes long ago explained, while the federal government generally "cannot be sued for a tort, * * * its immunity does not extend to those that acted in its name." *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 568 (1922); see *Brady* v. *Roosevelt Steamship Co.*, 317 U.S. 575, 583 (1943) ("Immunity from suit * * * cannot be * * * obtained" through "a contract between [the defendant] and the [government].").

In *Sloan*, the Court rejected the government's contention that the Emergency Fleet Corporation—a corporation wholly owned by the government and vested by the government with "enormous powers"—"share[d] the immunity of the sovereign from suit." 258 U.S. at 566; see *id.* at 565. The Court explained that because the United States' "immunity does not extend to those that acted in its name," an "agent [of the government],

* Whether the government may invoke sovereign immunity to shelter a contractor in a proceeding in a foreign or international court or tribunal pursuant to applicable foreign or international law is not presented in this case.

because he is agent, does not cease to be answerable for his acts." *Id.* at 567-568.

The Court reached the same result in *Brady*, in which a private contractor operated a government-owned vessel on behalf of the United States Maritime Commission. When a customs inspector died from an accident on that vessel, the contractor argued that it was "nonsuable for [its] torts" because it could be sued only pursuant to the statutory waiver of the government's sovereign immunity in the Suits in Admiralty Act, ch. 95, 41 Stat. 525. *Brady*, 317 U.S. at 577. The Court rejected that contention, holding that the contractor could not obtain "[i]mmunity from suit" "by reason of a contract between [it] and the [federal government]." *Id.* at 583. Although the Court assumed that Congress "would have the power to grant immunity to private operators of government vessels for their torts," it found "not the slightest intimation" that Congress intended to make "such a basic change in one of the fundamental laws of agency" by "abolish[ing] all remedies which might exist against a private company for torts committed during its operation of government vessels under [government] agency agreements." *Id.* at 579-581.

3. "Derivative sovereign immunity" is a defense to liability, not an immunity from suit

a. Because a contractor cannot inherit or derive the government's immunity from suit, "derivative sovereign immunity" is something of an oxymoron. The defense known by that name instead reflects the conceptually distinct principle articulated in *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940): A contractor cannot be held liable for exercising authority validly conferred by the government.

In *Yearsley*, the government contracted with a construction company to redirect the Missouri River as specified in the contract, which resulted in the erosion of about 95 acres of the plaintiffs' land. 309 U.S at 19-20. That land "was intended to be washed away as a necessary part of the federal project" "up to a point predetermined by the Government" under the contract's "detailed specifications." U.S. Amicus Br. at 5-6, *Yearsley*, *supra* (No. 39-156); see Pet. Br. at 6, 21, *Yearsley*, *supra* (No. 39-156). The washing away of the land thus "was all authorized and directed by the Government." *Yearsley*, 309 U.S. at 20.

This Court held that the contractor could not be held liable for eroding the land. The Court assumed that the actions would constitute a lawful "taking" of property because the government by statute had "impliedly promised to pay [just] compensation." *Yearsley*, 309 U.S. at 21-22; cf. *Knick* v. *Township of Scott*, 588 U.S. 180, 200-201 & n.7 (2019). The Court further held that because the government could lawfully take the property, it could "validly confer[]" on its contractor the authority to do so. *Yearsley*, 309 U.S. at 22. The Court explained that "no ground [existed] for holding [a government] agent liable who is simply acting under the authority thus validly conferred" because, in such circumstances, "[t]he action of the agent is 'the act of the government.'" *Ibid.* (citation omitted).

Yearsley thus did not hold that the government could confer its own immunity on a government contractor. Rather, the case recognized that the government could lawfully authorize its contractor to take actions that the government itself could lawfully take. At the same time, the Court acknowledged that a contractor could be held liable if it "exceeded [the] authority" conferred by the

government or where the authority "was not validly conferred." *Yearsley*, 309 U.S. at 21. As the Court later explained in *Campbell-Ewald*, "[w]hen a contractor violates both federal law and the Government's explicit instructions, * * * no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation." 577 U.S. at 166.

The principle reflected in *Yearsley*—that when the government employs contractors, it generally can authorize them to take actions that the government could lawfully perform itself—flows not from any derivative "immunity" for unlawful acts, but from the common-law rule that a principal may delegate to its agents its own *privilege* to take certain actions lawfully, including "an otherwise tortious act" that would be unlawful if committed by others. Restatement vol. 2, § 343 cmt. c, at 105; see Restatement vol. 1, § 217 cmt. a, at 469 ("A privilege may result from the consent of another" or "may be created by the law irrespective of consent."). At common law, "[a]n agent is privileged to do what otherwise would constitute a tort if his principal is privileged to have an agent do it and has authorized the agent to do it." Restatement vol. 2, § 345, at 108; see Restatement vol. 1, § 17 & cmts. a and b, at 85-86 (discussing delegable privileges).

Generally, "[m]ost of these privileges are delegable," such that the privilege holder may lawfully authorize another to perform the privileged act on the holder's behalf. Restatement vol. 1, § 217, at 469. And when those privileges are delegated to an agent, "[w]hatever the agent does, within the scope of his authority, binds his principal, and is deemed his act." *United States* v. *Gooding*, 25 U.S. 460, 469 (1827) (Story, J.); see Re-

statement vol. 1, § 140, at 349 (liability for contracts); § 221, at 492 (liability for torts).

Thus, for example, a sheriff has "the privilege * * * to arrest" and interrogate people whom he has probable cause to believe have committed crimes, even though such arrests and interrogations generally would be unlawful if undertaken by a private party. Restatement vol. 1, § 217 cmt. a, at 469. And "the sheriff can procure assistance in" exercising that privilege from others, who then likewise act lawfully when they help to detain or interrogate a criminal suspect. *Ibid.*; see *Filarsky* v. *Delia*, 566 U.S. 377, 388-389 (2012). But if the agent exceeds the scope of the privilege delegated by the principal—or if the principal never had the asserted privilege to begin with—the agent's conduct may give rise to liability. Restatement vol. 2, § 343 cmt. c, at 105. That is precisely the principle described in *Yearsley* and *Campbell-Ewald*. See Elengold & Glater, *The Sovereign Shield*, 73 Stan. L. Rev. 969, 991 (2021) ("*Yearsley* is rooted in traditional principal-agent concepts.").

b. That understanding of "derivative sovereign immunity" distinguishes it from actual immunities, including the federal government's sovereign immunity. The critical feature of "an immunity" is that it "frees one who enjoys it from a lawsuit *whether or not he acted wrongly*." *Richardson* v. *McKnight*, 521 U.S. 399, 403 (1997) (emphasis added). For example, "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell*, 472 U.S. at 525. Likewise, where the government has not waived it, sovereign immunity serves as "an impregnable legal citadel where government * * * may operate undisturbed by the demands of litigants." *United States* v. *Shaw*, 309 U.S. 495, 501

(1940). Although "sovereign immunity shields the Federal Government and its agencies from suit" absent a waiver, *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994), a determination that the government is immune from a particular suit does not mean that the challenged governmental conduct was lawful. It simply means that courts are not authorized to grant *relief* based on the asserted violation of a legal duty.

An immunity is thus quite different from a privilege, which serves to legitimize the conduct of the privilege-holder or his appropriate delegee. When a government contractor acting as an agent of the government exercises a validly delegated privilege, the contractor is not immune from suit for unlawful conduct; rather, the contractor is protected from liability only to the extent—and only because—it is acting lawfully. *Yearsley*, 309 U.S. at 21; see *Campbell-Ewald*, 577 U.S. at 166.

Accordingly, "derivative sovereign immunity" is best understood not as an immunity from suit—much less one that derives from the government's own sovereign immunity—but instead as a defense to liability on the merits. And, as a class, pretrial orders rejecting that defense—as with all merits defenses—are not "effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349 (citation omitted). Instead, the essence of the right encapsulated by that defense is fully vindicable by a reversal on appeal of any judgment of liability. See *Swint* v. *Chambers County Commission*, 514 U.S. 35, 43 (1995) ("An erroneous ruling on liability may be reviewed effectively on appeal from final judgment."); cf. *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 268 (1982) (per curiam) (same, for erroneous rulings in criminal proceedings, where "reversal of the conviction and * * * a new trial free of prejudicial

error normally are adequate means of vindicating the constitutional rights of the accused").

4. Orders denying "derivative sovereign immunity" do not vindicate constitutional interests

In addition, delaying appellate review until final judgment of orders denying *Yearsley* defenses, as a class, would not "'imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk*, 558 U.S. at 107 (citation omitted). As noted, the classes of orders held to satisfy that requirement generally have involved constitutional immunities or statutory immunities of constitutional magnitude, such as the "dignitary interests" of States in protecting their Eleventh Amendment immunity; the analogous interests of federal, foreign, and tribal governments in protecting their respective sovereign immunities; the "separation of powers" concerns attendant to respecting absolute presidential immunity; and the need to protect citizens' constitutional double-jeopardy rights against "the enormous prosecutorial power of the Government." *Will*, 546 U.S. at 352 (citing, among others, *Fitzgerald*, *supra*; *Puerto Rico Aqueduct*, *supra*; and *Abney*, *supra*).

Yearsley rests on common-law principles, not the Constitution or statutes. And though unquestionably important, it does not implicate interests of sufficient magnitude to satisfy the collateral-order doctrine. That contractors perform work for the government itself is insufficient, as evidenced by cases holding that even government employees generally are not entitled to immediate appeal from orders denying defenses to liability. See, *e.g.*, *Will*, 546 U.S. at 353-354; *Swint*, 514 U.S. at 43. Although a contractor who successfully appeals the denial of its *Yearsley* defense following a final judgment "will have been put to unnecessary trouble and ex-

pense" of a trial, "this Court has declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order." *Lauro Lines*, 490 U.S. at 499.

5. Petitioner's analogy to qualified immunity is inapt

a. Petitioner's contrary view principally relies (Br. 21-24) on an analogy to qualified immunity and on this Court's holding in *Filarsky* that private individuals "acting on behalf of the government" may be entitled to qualified immunity in damages suits under 42 U.S.C. 1983. 566 U.S. at 390; see *id.* at 383-392. That reliance is misplaced. The very existence of qualified immunity as a separate limit on potential liability underscores that persons who act on the government's behalf do not automatically share (a derivative version of) the government's own immunity from suit. See *Campbell-Ewald*, 577 U.S. at 166; cf. Restatement vol. 1, § 217 & cmt. b, at 468-470. And the analogy is flawed even on its own terms.

Under qualified immunity, even where "the plaintiff's claim * * * in fact has merit," the defendant is entitled to have the suit dismissed unless his conduct violated a "'clearly established'" right. *Camreta* v. *Greene*, 563 U.S. 692, 705 (2011) (citation omitted). Like other forms of immunity, therefore, a valid invocation of qualified immunity permits a defendant to avoid suit even when he acts unlawfully. In contrast, when a contractor acts within the bounds of lawfully conferred governmental authority, he necessarily acts *lawfully*. See *Yearsley*, 309 U.S. at 21. "Derivative sovereign immunity" is thus different in kind from qualified (or other) immunity.

In addition, the rationales for qualified immunity do not apply to the *Yearsley* defense. By precluding liabil-

ity unless the governing law was clearly established, qualified immunity serves "the government interest in avoiding 'unwarranted timidity' on the part of those engaged in the public's business." *Filarsky*, 566 U.S. at 390 (citation omitted). And extending that immunity to individuals "acting on behalf of the government similarly serves to 'ensure that talented candidates are not deterred by the threat of damages suits from entering public service.'" *Ibid.* (brackets and citations omitted). The *Yearsley* defense, in contrast, extends only to the bounds of lawfully conferred authority—whether or not those bounds are clearly established. Accordingly, it does not alleviate timidity on contractors' part to the same degree. And any concerns about deterring public service are mitigated by contractors' potential ability to price litigation risks into their contracts. Cf. *Richardson*, 521 U.S. at 409 ("[T]he most important special government immunity-producing concern—unwarranted timidity—is less likely present, or at least is not special, when a private company subject to competitive market pressures operates a prison.").

The analogy to qualified immunity is especially inapposite in the prison context. Unlike private individuals performing law-enforcement functions on the government's behalf, cf. *Filarsky*, 566 U.S. at 387-389, employees of a privately run prison facility are not entitled to qualified immunity, even though analogous employees of public prisons are. *Richardson*, 521 U.S. at 410-411; cf. *Procunier* v. *Navarette*, 434 U.S. 555 (1978). And the prison itself would not be entitled to qualified immunity, which generally is available only to individuals. See *Richardson*, 521 U.S. at 409; cf. *Owen* v. *City of Independence*, 445 U.S. 622, 638 (1980). Treating peti-

tioner's *Yearsley* defense as if it were a qualified immunity from suit would undercut those limitations.

Finally, even orders denying qualified immunity are not collateral orders when they turn on factual disputes. *Johnson*, 515 U.S. at 316-317. Orders denying *Yearsley* defenses, as a class, are likely to be fact-intensive. The defense requires the contractor to have acted within the bounds of lawfully delegated governmental authority. *Yearsley*, 309 U.S. at 21-22. That inquiry often might involve resolving factual disputes about exactly what the government's instructions were and whether the contractor in fact followed them. This case illustrates the point: the parties' dispute about whether the *Yearsley* defense applies may turn on whether a detainee's "living area" includes common areas used by others, and whether petitioner's contract with ICE prohibits it from paying detainee participants in the voluntary work program more than $1 per day. See Pet. App. 70a-73a, 75a-78a.

b. Petitioner errs in relying (Br. 15-20) on snippets from various cases that describe the *Yearsley* defense in language that might, in isolation, evoke an immunity from suit akin to that secured by a successful invocation of qualified immunity. For example, petitioner reads (Br. 18-19) the statement in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1855), that a government agent "*cannot be made responsible* in a judicial tribunal for obeying the lawful command of the government," *id.* at 283 (emphasis added), as describing "an immunity from suit," Pet. Br. 19. But the very sentence containing the italicized phrase seems to draw a distinction between "cannot be made responsible" and "cannot be sued": "[The agent] cannot be made responsible in a judicial tribunal for obeying the lawful com-

mand of the government; and the government itself, which gave the command, cannot be sued without its own consent." *Murray's Lessee*, 18 How. at 283. In context, therefore, "made responsible" is best read to mean "held liable," not "made to suffer suit."

In *Brady*, the Court cited *Yearsley* as holding that "government contractors obtain certain immunity" when performing work under government contracts. 317 U.S. at 583. The Court in *Brady* also observed, however, that in *Yearsley* the government had "validly conferred" authority to take the actions at issue. *Ibid.* (citation omitted). *Brady*'s passing use of "immunity" thus appears to reflect a more colloquial use of the term. Cf. 2 Restatement (Third) of Agency § 7.01, at 136 (2006) (noting that courts sometimes imprecisely "use 'immunity' language interchangeably with 'privilege' in the context of an agent's individual liability for tortious interference"). And *Campbell-Ewald*, which also used "immunity," simply quoted and echoed the use of that term in *Brady* and the contractor's own brief. 577 U.S. at 166.

At all events, those cases neither addressed nor depended on the difference between an immunity from suit and a defense to liability, and appellate jurisdiction was not in question. Petitioner thus overreads the stray references to "immunity" in those cases. This Court has repeatedly cautioned against overreading stray language in prior opinions in such a manner, including with respect to jurisdictional issues. See, *e.g.*, *Wilkins* v. *United States*, 598 U.S. 152, 159-160 (2023); *Thryv, Inc.* v. *Click-To-Call Technologies, LP*, 590 U.S. 45, 59 (2020). Indeed, in *Hollywood Motor Car*, the Court applied that principle in the collateral-order context, explaining that language in a prior opinion describing the asserted

right as one "not to be haled into court at all" should not be taken to mean that the right described an immunity from suit for purposes of the third *Cohen* condition. 458 U.S. at 268 (citation omitted). Just so here.

C. Orders Denying "Derivative Sovereign Immunity" Do Not Satisfy The Other Collateral-Order Requirements, But This Court Need Not Rule On Those Grounds

Orders denying *Yearsley* defenses, as a class, also do not satisfy the first or second *Cohen* conditions (conclusiveness and separateness from the merits), though the Court need not reach either issue.

1. The court of appeals held that the order denying petitioner's *Yearsley* defense failed the second *Cohen* condition because it did not "resolve an important issue completely separate from the merits of the action," *Will*, 546 U.S. at 349 (citation omitted). See Pet. App. 17a-29a. The court's reasoning is sound; whether a defendant is entitled to "derivative sovereign immunity" often will be coterminous with the merits of the action because that defense applies only where and to the extent that the defendant acted *lawfully*—not, as with the sorts of true immunities discussed above, even where the defendant acted unlawfully. See Resp. Br. 39-42.

Nevertheless, this Court need not resolve whether orders denying *Yearsley* defenses fail the second *Cohen* condition. That condition is somewhat more complicated because the rule it sets forth is not absolute, as this Court has recognized. See *Mitchell*, 472 U.S. at 527-529. Many categories of pretrial orders are collateral orders even though they resolve issues that cannot fairly be said to be *completely* separate from the merits. They include, for instance, certain denials of qualified immunity, see *ibid.*; denials of foreign sovereign immunity under the Foreign Sovereign Immunities Act of

1976, cf. *Helmerich & Payne*, 581 U.S. at 185; *Beaty*, 556 U.S. at 854; and denials of presidential immunity from criminal process, see *Trump*, 603 U.S. at 635-637. In those and in other cases "where trial itself threatens certain constitutional interests," the Court has "treated the trial court's resolution of the issue as a 'final decision' for purposes of appellate jurisdiction" notwithstanding some overlap with the merits. *Id.* at 654 (Barrett, J., concurring in part); cf. *Mitchell*, 472 U.S. at 527 (using "conceptually distinct from the merits" rather than "completely separate" to describe the second *Cohen* condition).

Here, of course, a trial would not threaten any constitutional interests because the *Yearsley* defense is neither constitutional—Congress could abrogate (or expand) it by statute—nor an immunity against standing trial. But as explained above, those features also mean that the district court's order fails the third *Cohen* condition. That is sufficient to resolve this case; and such a resolution would avoid having to address the more complicated question of exactly how much overlap with the merits (and under what circumstances) the second *Cohen* condition tolerates. Cf. Pet. Br. 34-40.

2. Orders rejecting a *Yearsley* defense also, as a class, do not satisfy the first *Cohen* condition because they often will not "conclusively determine the disputed question," *Will*, 546 U.S. at 349 (citation omitted). In particular, where the defense's availability turns on disputed facts, the order will generally just defer final resolution of the defense until trial. And because that defense relies both on the government's actual instructions and on whether the contractor in fact complied with those instructions, orders rejecting the defense may not infrequently be based on such factual disputes,

as this case illustrates. That said, because the parties here have not joined issue as to the first *Cohen* condition, see Pet. App. 18a n.5, the Court need not address that requirement if it affirms under the third *Cohen* condition, as the government urges.

D. Courts Should Address Petitioner's Valid Concerns Through Other Avenues

1. Petitioner overstates (Br. 44-50) the potential ramifications of a holding that orders denying *Yearsley* defenses are not collateral orders. The government is unaware of any empirical basis to conclude that district courts routinely deny meritorious derivative-sovereign-immunity claims. To the contrary, none of the appellate decisions cited in the petition as having permitted appeal of pretrial orders denying such claims found the claims to be meritorious, indicating that immediate appeal is likely to increase costs and decrease litigation efficiency. See *Posada* v. *Cultural Care, Inc.*, 66 F.4th 348, 363 (1st Cir. 2023); *In re World Trade Center Disaster Site Litigation*, 521 F.3d 169, 198 (2d Cir. 2008) ("Stafford Act immunity"); *McMahon* v. *Presidential Airways, Inc.*, 502 F.3d 1331, 1343, 1356 (11th Cir. 2007) ("derivative *Feres* immunity"); cf. *ACT, Inc.* v. *Worldwide Interactive Network, Inc.*, 46 F.4th 489, 507-509 (6th Cir. 2022) (state contractor's immunity).

The government also is unaware of reluctance on the part of contractors to work with the government in circuits that do not treat pretrial orders denying *Yearsley* defenses as collateral orders. Any effect the availability of immediate appellate review might have on ex ante incentives to contract with the government likely is less significant than the fact that contractors can generally press a *Yearsley* defense at some point. Cf. *Mohawk*, 558 U.S. at 109 (observing that "deferring review until

final judgment does not meaningfully reduce the *ex ante* incentives" associated with the claimed right). And that defense itself seems to be less important and less successful than stronger applicable defenses, such as intragovernmental immunity and preemption. Cf. *Nwauzor* v. *GEO Group, Inc.*, 127 F.4th 750, 783 & n.14 (9th Cir. 2025) (Bennett, J., dissenting) (opining that petitioner should have prevailed on as-applied Supremacy Clause and preemption arguments, but not addressing "derivative sovereign immunity"). Indeed, although petitioner has been a defendant in dozens of reported federal appellate cases, this case and *Nwauzor* appear to be the only two involving the *Yearsley* defense.

2. That said, although orders denying the *Yearsley* defense, as a class, do not satisfy the conditions for collateral-order review, they may be important enough to warrant interlocutory review in particular circumstances. The federal government relies heavily on contractors to support a variety of vital government functions. That is (and has long been) especially apparent in the prison context. The First Congress adopted joint resolutions recommending that States enact laws "making it expressly the duty of the keepers of their gaols, to receive and safe keep therein" federal prisoners in exchange for 50 cents per month per prisoner, Resolution No. 2, 1st Cong., 1st Sess., 1 Stat. 96 (Sept. 23, 1789), and authorizing federal marshals to "hire a convenient place to serve as a temporary jail" in the meantime, Resolution No. 5, 1st Cong., 3d Sess., 1 Stat. 225 (Mar. 3, 1791). See *Randolph* v. *Donaldson*, 9 Cranch 76, 86 (1815) (Story, J.).

In more modern times, a commission appointed by President Reagan concluded that "[c]ontracting appears to be an effective method for the management and

operation of prisons and jails at any level of government," and "encouraged" the Immigration and Naturalization Service in particular "to continue to experiment and to evaluate the cost and effectiveness of contracting its detention facilities." President's Commission on Privatization, *Privatization: Toward More Effective Government* 149, 153 (Mar. 1988). Congress has since expressly recognized the need for contracting immigration detention facilities. See 6 U.S.C. 112(b)(2); 8 U.S.C. 1231(g). And this Office has been informed that today, *all* of ICE's immigration detention facilities are owned or operated by private contractors.

Lawsuits that threaten to impose massive liability on contractors thus risk erecting a substantial obstacle to federal governmental objectives, especially with respect to immigration enforcement. Cf. *Nwauzor* v. *GEO Group, Inc.*, 146 F.4th 1280, 1289 (9th Cir. 2025) (Bumatay, J., dissenting from the denial of rehearing en banc). In addition, although the "unnecessary trouble and expense" of a trial is insufficient to satisfy the collateral-order doctrine, *Lauro Lines*, 490 U.S. at 499, those costs ultimately are likely to be passed on to the government (and thus the taxpayers) in the form of higher contracting costs. And while this case has proceeded relatively straightforwardly, some suits involving a *Yearsley* defense might impose significant discovery burdens on the government, potentially implicating sensitive confidential or even classified information. Cf. *Al Shimari* v. *CACI Premier Technology, Inc.*, 775 Fed. Appx. 758 (4th Cir. 2019), cert. denied, 141 S. Ct. 2850 (2021).

Accordingly, interlocutory appeal of orders denying a *Yearsley* defense may well be warranted under 28 U.S.C. 1292(b), which authorizes district courts to cer-

tify an order for interlocutory appeal when it "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "immediate appeal from the order may materially advance the ultimate termination of the litigation." As the Fifth Circuit has observed in a related context, the concerns set forth above make it important for district courts to "freely certify[] orders denying" dispositive motions for interlocutory appeal under Section 1292(b) "where the law is unsettled but, after refinement on appeal, might warrant dismissing plaintiffs' claims." *Martin* v. *Halliburton*, 618 F.3d 476, 488 (2010). For instance, the government generally opposes the potential imposition of state-law liability on federal immigration detention contractors for paying detainees in voluntary work programs $1 per day. See, *e.g.*, *Nwauzor*, *supra*. And the scope of the federal forced-labor statute in this context also is unsettled. Cf. *Owino* v. *CoreCivic, Inc.*, 60 F.4th 437, 454 (9th Cir. 2022) (VanDyke, J., dissenting from denial of rehearing en banc), cert. denied, 143 S. Ct. 2612 (2023).

3. In addition, Congress has authorized this Court to prescribe rules "to provide for an appeal of an interlocutory decision." 28 U.S.C. 1292(e). For example, following the decision in *Coopers & Lybrand*, *supra*, this Court promulgated a rule permitting appeal, when certified, from interlocutory orders "granting or denying class-action certification." Fed. R. Civ. P. 23(f). Federal contractors, like any member of the public, may submit proposals to the Rules Advisory Committee to authorize interlocutory appeal from orders denying *Yearsley* defenses.

This Court has repeatedly refused "to expand the 'small class' of collaterally appealable orders," *Will*, 546

U.S. at 350, in part because "Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect," *Swint*, 514 U.S. at 48. Such rulemaking "draws on the collective experience of bench and bar" and "facilitates the adoption of measured, practical solutions." *Mohawk*, 558 U.S. at 114. Accordingly, "rulemaking, 'not expansion by court decision,' [i]s the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Id.* at 113 (citation omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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