

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**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Respondents' silence on the precedents that control this case speaks volumes. They never discuss the holding in *Filarsky v. Delia*, 566 U.S. 377 (2012), that extended qualified immunity to individual contractors. They have no response to *Mitchell v. Forsyth*, 472 U.S. 511 (1985), permitting immediate appeal of orders denying qualified immunity, apart from suggesting that it was wrongly decided. Resp. Br. 32 n.7. And, although routinely citing *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922), Respondents omit its common-sense observation that "it cannot matter that the agent is a corporation rather than a single man." *Filarsky* held that "a single man" obtains derivative immunity; *Mitchell* permitted immediate appeal of orders denying that immunity; and *Sloan* recognized that a corporate contractor is no different than an individual. Taken together, these precedents and the long history of cases recognizing contractors' immunity when they satisfy the conditions articulated in *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18 (1940), resolve the current case.

In lieu of engaging precedent in this common-law immunity case, Respondents and the Solicitor General attempt to rewrite it. They propose an alternative theory for what this Court and others have been treating as an immunity for over a century: a "privilege" born in the pages of the Restatement and shunned in every court to consider it, beginning with this one in *Campbell-Ewald v. Gomez*, 577 U.S. 153

(2016). Understanding the government’s pivot from supporting contractors’ immunity in *Yearsley* and *Filarsky* to opposing it in recent years is difficult, but spotting the theory’s shortcomings is easy. It repudiates decades of precedent, stretches Restatement sections limited to tort law, and collides with *Mitchell* and the fact that employees are also agents, yet no one contends that qualified immunity is a mere “privilege.” The government was correct 80 years ago, when it told this Court it was “obvious” that “a Government agent acting under authority validly conferred by the Government ***cannot be subjected to suit*** on account thereof.” Br. of the U.S. at 20–21, *Yearsley*, 1939 WL 48388 (emphasis added).

With immunity clarified, the other pieces of the puzzle slide into place. The collateral-order analysis of other immunities, especially qualified immunity, charts the path for this case and highlights the Tenth Circuit’s error in denying appellate jurisdiction based on “overlap” that this Court expressly condoned in *Mitchell*. Compare Pet. App. 20a with 472 U.S. at 527–528. And, as with any immunity, the value “is for the most part lost as litigation proceeds past motion practice.” *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993).

“The public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits is also implicated when individuals other than permanent government employees discharge these duties.”

Filarsky, 566 U.S. at 391. Sadly, those distractions are precisely the point of lawsuits like this one that—across two presidential administrations—aim to use the courts to thwart policies with which plaintiffs disagree. Derivative sovereign immunity refocuses that policy debate in the elected branches that control the sovereign and set its policy. The Court should vindicate the nation’s interest in allowing its elected government to carry out the lawful policies it adopts.

I. Derivative Sovereign Immunity Is a Conditional Immunity from Suit.

Call it the Grand Straw Man. Respondents devote most of their argument on derivative sovereign immunity to attacking a position GEO never asserted and the Court has already rejected. Page after page of Respondents’ brief argues that “sovereign immunity belongs to the sovereign alone.” Resp. Br. 21; see also *id.* 2–8, 16–17, 21–29. That is correct, and GEO agrees that contractors do not share “the Government’s embrative immunity.” *Campbell-Ewald*, 577 U.S. at 166.

“[G]overnment contractors” do, however, “obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States.” *Id.* at 172 (quoting *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943)). Unlike the Government’s “embrative” immunity, contractors’ derivative sovereign immunity is conditional, attaching only if (i) “what was done was within the constitutional power of Congress,” and (ii)

the contractor “performed as the Government directed.” *Id.* at 167 (quoting *Yearsley*, 309 U.S. at 20–21). But like sovereign immunity, derivative sovereign immunity confers immunity “from suit.” *Id.* at 166; see also *Knick v. Twp. of Scott*, 588 U.S. 180, 201 n.7 (2019) (“*Yearsley* was right to hold that the contractors were immune from suit.”).

The Grand Straw Man ignores the immunity that GEO claims; it dismisses decades of precedent describing contractors’ “immunity from suit” as a mere colloquialism; and it fails to address other conditional, non-sovereign immunities that protect those carrying out the government’s work. And despite never raising the point in the lower courts, Respondents and the Solicitor General propose a revisionist and procrustean agency-based “privilege” framework to explain away a century of precedent without citing a single case endorsing that framework or explaining how it can coexist with qualified immunity.

Properly understood, the *Yearsley* doctrine provides immunity from suit for contractors who satisfy its conditions. And where an immunity is at issue, “it follows that the elements of the *Cohen* collateral order doctrine are satisfied.” *Puerto Rico*, 506 U.S. at 144.

A. The Common Law Has Long Recognized an Immunity from Suit for Obedient Contractors.

1. For more than a century, the Court has recognized contractors as immune from suit for acts taken at the government’s behest, so long as they obey

constitutional directions. See Pet. Br. 14–24. While *Yearsley* is the canonical formulation of the two conditions for that immunity, the doctrine’s roots are deeper in history and wider across jurisdictions. *Id.* at 16–22. See Volokh Br. at 6–24.

Respondents answer that “*Yearsley* itself” did not explicitly confer “a right to avoid suit entirely.” Resp. Br. 21. That is because the contractor in *Yearsley* asserted immunity “[a]t the close of evidence” in a “motion[] for directed verdict.” Br. of the U.S., 1939 WL 48388, at *7. In that posture, there was no occasion for *Yearsley* to hold that derivative sovereign immunity barred a trial that had already occurred.

The Court’s description was not a fluke, however. Just three years later it noted that, “of course. . . government contractors obtain certain *immunity* in connection with work which they do pursuant to their contractual undertaking with the United States.” *Brady S.S. Co.*, 317 U.S. at 583 (emphasis added). And in subsequent years, the Court has consistently characterized the *Yearsley* doctrine as “‘derivative immunity’ shield[ing] the contractor *from suit*.” *Campbell-Ewald*, 577 U.S. at 672 (emphasis added); *Knick*, 588 U.S. at 201 n.7; see also *Boyle v. United Techs. Corp.*, 487 U.S. 500, 524 (1988) (Brennan, J., dissenting) (“In *Yearsley* we *barred the suit* of landowners against a private Government contractor”) (emphasis added).

2. Rather than grapple with contractors’ conditional immunity from suit, Respondents and their

amici resort to the Grand Straw Man or discount the Court’s statements as not meaning what they say.

a. Respondents and their amici devote dozens of pages to the Grand Straw Man, arguing that “those who work for the government are not themselves sovereign.” Resp. Br. 6; see also *id.* at 2–8, 16–17, 21–29; Chemerinsky Br. at 4–9. That has never been GEO’s argument; indeed, GEO expressly repudiated it. Pet. Br. 24. To repeat: contractors obtain immunity from suit only if they satisfy the two conditions articulated in *Yearsley*. *Id.* at 23–24. That protection is less robust than the government’s unconditional immunity.

In a similar vein, Respondents assert that GEO presents “virtually the same argument” as the petitioner in *Campbell-Ewald*. Resp. Br. 25. That is mistaken, and the reason why is informative. In *Campbell-Ewald*, the contractor concededly flouted the government’s directions (and the law) by sending text messages to recipients who had not agreed to receive them. 577 U.S. at 166. The contractor claimed immunity anyway, which required it to spurn the conditional immunity articulated in *Yearsley* in favor of the government’s own, unconditional immunity—exactly the Grand Straw Man. The Court rejected that position: “Do federal contractors share the Government’s unqualified immunity from liability and litigation? We hold they do not.” *Ibid.* It instead affirmed the historic conditions for derivative immunity. *Id.* at 167. GEO accepts those traditional conditions and asks the Court to apply the rule from

Mitchell, *Nixon*, and others by allowing an immediate appeal of a district court’s order finding the conditions for immunity unmet.

b. The bulk of Respondents’ cited cases simply reject the Grand Straw Man and therefore have no relevance. For instance, *Keifer & Keifer v. Reconstruction Fin. Corp.*, held that a government corporation and subsidiary were not entitled to sovereign immunity where Congress provided that they could “sue and be sued.” 306 U.S. 381, 393 (1939); *Hopkins v. Clemson Agric. Coll. of S.C.*, 221 U.S. 636, 647 (1911) (denying status-based immunity for “a tort [not] committed in the prosecution of any governmental function.”). Likewise, Respondents cite *Lewis v. Clarke*, which held that a tribal employee was not entitled to tribal sovereign immunity for an “individual-capacity action[].” 581 U.S. 155, 163 (2017). None of these cases speak to derivative sovereign immunity as articulated in *Yearsley*.

Respondents and the Solicitor General also rely heavily on the holdings in *Sloan* and *Brady*. Those cases evaluated whether the United States or its agent was the proper defendant in certain actions under the Suits in Admiralty Act. See *Sloan*, 258 U.S. at 564; *Brady*, 317 U.S. at 577, 584. That statute is not at issue in this case. Relevant here, *Brady* reaffirmed that “[i]t is, of course, true that government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States.” 317 U.S. at 583 (citing *Yearsley*). The contractor in *Brady*

failed to satisfy *Yearsley*’s conditions, but that failure does not undermine the rule. Pet. Br. 17

c. Relatedly, Respondents and their amici labor in vain to explain away the Court’s decisions characterizing derivative sovereign immunity as an immunity from suit. Their attempts take several forms.

First, they insist the Court did not mean what it said in *Brady*, *Campbell-Ewald*, and *Knick* when it characterized the *Yearsley* doctrine as “immunity.” Resp. Br. 27 (“‘immunity’ is a word of many meanings”); U.S. Br. 26 (describing repeated references to “immunity” “from suit” as “stray language” and “colloquial”). This flippant response betrays the weakness of their position. See *Mathis v. United States*, 579 U.S. 500, 514 (2016) (“[A] good rule of thumb for reading our decisions is that what they say and what they mean are one and the same.”).

Second, they seize on language describing the *Yearsley* doctrine as relieving the contractor of “liability.” See Resp. Br. 26–29; U.S. Br. 25–27. The unspoken premise appears to be that avoidance of liability is the hallmark of a defense. But an immunity also spares its holder from liability. What matters, therefore, is *why* the doctrine defeats liability—does it undermine an element of the cause of action, or is it related to the contractor’s service to the government? The parties’ differing approach to *Salliotte v. Knight Bridge Co.*, 122 F. 378 (6th Cir. 1903), is illustrative. Respondents dismiss this historical example of derivative sovereign immunity because it found the “contractor entitled to [an] ‘exemption from

liability.” Resp. Br. 28 (quoting 122 F. at 383). That language does not illuminate whether the contractor had a defense or an immunity, but the court’s full reasoning does. *Salliotte* held that a contractor executing plans approved by local authorities and the Secretary of War was “entitled to any exemption from liability which exists in favor of the supervisors **or of the state itself.**” 122 F. at 383 (emphasis added). That is a derivative immunity, and Respondents err in assuming that cases discussing liability necessarily repudiate an immunity.

On the merits, Respondents fail to distinguish more than a century of precedent supporting GEO’s position. For instance, *Yearsley* cited *Lamar v. Browne*, 92 U.S. 187, 197 (1875), which held the defendants “not liable to suit” because they acted as agents of the government pursuant to authority validly conferred. See Pet. Br. 19–20. Respondents assert that the phrase “liable to suit” “means ‘liable to judgment in [a] given action.’” Resp. Br. 28 (citing *Liable to Action*, Black’s Law Dictionary (4th ed. 1968)). But that argument relies on the definition of a different term (“liable to action”) from a dictionary postdating *Lamar* by a century. Contemporaneous decisions of this Court make clear that one who is “not liable to suit” is “immun[e] from suit.” See *Kawananakoa v. Polyblank*, 205 U.S. 349, 352 (1907) (rejecting contention that “the territory of Hawaii is **liable to suit** like a municipal corporation” (emphasis added)); *Hopkins*, 221 U.S. at 644–645 (an officer who lacks “immunity from suit” is “liable to suit”).

Respondents likewise try to distinguish *Murray's Lessee*—also cited in *Yearsley*—but cite a passage that supports contractors' conditional immunity from suit: “suit may be brought against the [agent]’ and ‘he may be put to show his justification’ by demonstrating that he was acting under a ‘lawful command of the government.’” Resp. Br. 28 (citing *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 283–285 (1856)). Exactly right: plaintiffs can sue contractors over work they perform pursuant to federal contracts, at which point the contractor must “show his justification by demonstrating” *Yearsley's* two conditions. That is why *Yearsley* cites *Murray's Lessee*. If a contractor makes that showing, it is immune for obeying the government’s “lawful command.”

d. While Respondents quarrel at length with the Court’s 19th- and early 20th-century jurisprudence, they essentially ignore its modern precedent supporting GEOs’ position.

Filarsky and *Mitchell* all but dispose of this case. The former affirmed contractors’ entitlement to derivative immunity (there, qualified immunity), and the latter held that orders denying that immunity are collateral orders. GEO asks the Court to combine those insights.

Filarsky is a cornerstone of GEO’s case. Pet. Br. 11–12, 22–23, 27; 29–30, 42–48. Respondents never discuss it. They offer no response to its twin teachings that “the common law did not draw a distinction between public servants and private individuals

engaged in public service,” and that refusing to confer immunity on contractors would leave them “holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity.” 566 U.S. at 387, 391; *id.* at 398 (Sotomayor, J., concurring).

Respondents likewise fail to meaningfully address *Mitchell*, which held that denials of qualified immunity are collateral orders. 472 U.S. at 526–527. *Mitchell* devastates Respondents’ theory that immediately appealable immunities are found only in “a statute or in the Constitution.” Resp. Br. 32; U.S. Br. 22. *Mitchell* disproves that assertion. Like derivative sovereign immunity, qualified immunity is a common-law immunity. The same is true of the presidential immunity held to be a collateral order in *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982), and foreign officials’ immunity, *Yousef v. Samantar*, 699 F.3d 763, 768 n.1 (4th Cir. 2012) (noting that statutory immunity reaches only the state itself). That leaves Respondents with a half-hearted argument that *Mitchell* was wrongly decided. Resp. Br. 32 n.7 (asserting *Mitchell* was decided “before this Court began to rein in its expansive approach to the collateral-order doctrine”); *id.* at 44 (similar). The Court, however, has relied on *Mitchell* as recently as last Term. *Trump v. United States*, 603 U.S. 593 (2024)

3. Prior to a stark about-face, the government had long agreed that contractors are immune from suit for acts taken at its behest. Pet. Br. 17–18. Indeed, the Solicitor General contended in *Yearsley* that

based on extant caselaw and “as a matter of principle,” it was “obvious” that “a Government agent acting under authority validly conferred by the Government cannot be subjected to suit on account thereof.” Br. of the U.S., 1939 WL 48388, at 20–21; see also *id.* at 19. Likewise, in *Filarsky*, the Government recognized that “[a]ffording [qualified] immunity” to contractors “promotes the same policy considerations that animate the doctrine’s application to public officials.” Br. of the U.S. at 15, *Filarsky*, 2011 WL 5908946. And in its petition-stage brief in *KBR, Inc. v. Metzgar*, 574 U.S. 1120 (2015), the Government observed that *Yearsley* supported “derivative sovereign immunity” without intimating there was anything amiss with the doctrine. Br. of the U.S. at 18–19.

As the Court knows, beginning with *Campbell-Ewald*, the government pivoted 180 degrees to opposing derivative sovereign immunity. See Part I.B.2 *infra*. Perhaps the government seeks to guard its prerogative to defend the constitutionality of congressional directives, which *Yearsley*’s first condition implicates. But sooner or later, the courts must pass on that question in every *Yearsley* case, whether the doctrine is labeled an immunity or a privilege. In any event, the government now derides the doctrine of derivative sovereign immunity as an “oxymoron,” neither acknowledging its previous position nor offering any justification for the change. U.S. Br. 17; see also *id.* at 2.

Ultimately, Respondents and their amici fail to escape more than a century of precedent conferring

immunity from suit on the government’s obedient contractors. From the Grand Straw Man to linguistic games around “liability” and deafening silence on *Mitchell* and *Filarsky*, they fail to blunt the precedential and logical force of extending immunity to those who carry out the government’s directions.

**B. Respondents’ “Derivative-Privilege”
Theory Is Both Forfeited and Wrong.**

Respondents and the Solicitor General rewrite history by advancing a revisionist theory that the Restatement’s principal-agent guidelines animate more than a century of this Court’s precedent. The theory is as follows: immunity from suit is a nondelegable “personal immunity;” in that circumstance, an agent can derive only a “privilege” from a principal; as a result, contractors invoking *Yearsley* cannot derive immunity for doing what the government instructs. See Resp. Br. 9, 23–24; U.S. Br. 15–17, 19–23.

That theory has the makings of a great law review article, but no court—and certainly not this Court—has ever endorsed it. Indeed, the Court has never breathed the word “privilege” in a century of precedent discussing immunity for contractors. To the contrary, the Solicitor General has been advancing this theory for nearly a decade, and neither this Court nor any of the circuits have taken the bait. The effort to rebrand derivative sovereign immunity as a “derivative privilege” is both forfeited and wrong.

1. Respondents’ derivative-privilege theory fails at the outset because they never presented it below. The word “privilege” never appears in their briefs, so

neither the district court nor the Tenth Circuit considered the argument. See Pet. App. 1a–131a. As a result, the issue is not preserved and should not be considered for the first time here. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004) (“The Court of Appeals, however, did not address this argument, and, for that reason, neither shall we.”).

2. The derivative-privilege theory also fails on the merits, which explains why this Court and others have declined to adopt it.

a. The notion that courts have been extending an agency-based “privilege” rather than an immunity proves both too much and too little. It proves too much because, if correct, it would necessarily encompass employees—the paradigmatic agents—but reams of precedent confirm that qualified immunity is an immunity from suit, not a mere privilege. The same is true for contractors. Once again, *Mitchell* and *Filarsky* are Respondents’ undoing.

The theory also proves too little. The cases it cites almost all involve private principals, and the Restatement sections at the heart of their theory concern only torts. Sections 345, 347, and 353 of the Restatement (First) of Agency all appear under “Topic 3. Torts,” within Chapter 11 “Liability of Agent to Third Person.” By their own terms, they are limited to tort liability. See, e.g., Restatement (First) of Agency § 345 (1933) (“An agent is privileged to do what otherwise would constitute a tort”). The same is true of Sections 217 and 343 of the Restatement

(Second) of Agency (1958), which appear in the parallel sections of the Second Restatement. These sections are far too narrow to establish a rule for the sovereign or its agents that explains their immunity for the complete range of claims they might face, including, as here, claims other than torts. Moreover, since 1946, tort claims against the federal government have been governed by statute in the Federal Tort Claims Act. Neither Respondents nor the Solicitor General offer a justification for expanding the tort rules to cover all sources of potential liability or for substituting that novel construct for centuries-old derivative sovereign immunity.

By failing to account for employees and citing only tort principles, Respondents' effort to explain away derivative sovereign immunity as agency law in immunity clothing comes up short.

b. This argument is not new to the Court. The Solicitor General advanced the same theory in *Campbell-Ewald*. See Br. of the U.S. at 27, *Campbell-Ewald*, 2015 WL 5138588 (citing same Restatement comments to argue that immunities are “personal” and “non-delegable” and “*Yearsley* did not confer derivative immunity” but instead a “privilege” for contractors to perform otherwise unlawful acts). Instead of adopting this revisionist theory, the Court reaffirmed that “government contractors obtain certain **immunity**”—not privileges—“in connection with work which they do pursuant to their contractual undertakings with the United States.” 577 U.S. at 166 (emphasis added; quoting *Brady*, 317 U.S. at 583).

This Court is not alone in rejecting the derivative-privilege theory. After reversing its longstanding position supporting derivative sovereign immunity, the government has floated its derivative-privilege theory several times here and in the lower courts. See, e.g., CVSG Br. 20–23, *CACI Premier Tech., Inc. v. Al Shimari*, No. 19-648 (Aug. 26, 2020); Br. of the U.S., *Childs v. San Diego Family Housing LLC*, 2021 WL 1897312, at *14 (9th Cir. 2021). It has failed every time. Even the circuits holding that *Yearsley* confers only a defense as opposed to an immunity from suit do not rely on Respondents’ derivative-privilege theory. E.g., *Pullman Constr. Indus., Inc. v. United States*, 23 F.3d 1166, 1168 (7th Cir. 1994) (denying the government’s sovereign immunity, meaning that contractors have nothing to derive) (cited at Resp. Br. 27). The Court should again reject the unprecedented derivative-privilege theory that the Solicitor General has inexplicably advanced in recent years, despite taking the correct position in *Yearsley* and *Filarsky*.

II. The Denial of Derivative Sovereign Immunity Satisfies the *Cohen* Factors.

Because contractors who satisfy *Yearsley*’s conditions are “immune from suit . . . , it follows that the elements of the *Cohen* collateral order doctrine are satisfied.” *Puerto Rico*, 506 U.S. at 144. An independent analysis of *Cohen*’s three prongs confirms that denials of *Yearsley* immunity are collateral orders.

A. The Denial of Derivative Sovereign Immunity Conclusively Determines the Disputed Question.

An order denying derivative sovereign immunity conclusively determines the “disputed question”—*i.e.*, whether the contractor must stand trial. As the Solicitor General recognizes, Respondents did not contest this element below. U.S. Br. 29 (“[T]he parties here have not joined issue as to the first *Cohen* condition, see Pet. App. 18[.]”); *Empagran*, 542 U.S. at 175 (argument forfeited where not presented below).

Respondents nevertheless argue that denials of *Yearsley* immunity do not “conclusively resolve the issue” because “in many cases, interlocutory *Yearsley* orders will be able to conclude only that there is a genuine dispute of fact about whether the government directed the challenged conduct.” Resp. Br. 48. But in cases where immunity cannot be determined on uncontested facts, the suit will proceed, meaning the immunity question has been resolved and the defendant must endure suit. *Puerto Rico*, 506 U.S. at 145 (holding that denials of Eleventh Amendment immunity are “conclusive determinations that they have no right not to be sued in federal court”). It is of no moment that the contractor can assert immunity later in the proceedings; the same is true following an initial denial of qualified immunity, which is indisputably a collateral order. *Mitchell*, 472 U.S. at 527 (noting satisfaction of *Cohen*’s first prong).

B. The Denial of Derivative Sovereign Immunity Is Sufficiently Separate from the Merits.

Orders denying *Yearsley* immunity are “conceptually distinct” from the merits of the underlying action and less intertwined than other orders the Court has recognized as collateral orders. See Pet. Br. 34–40. Indeed, a denial of absolute immunity, qualified immunity, and double-jeopardy immunity all entail some consideration of the merits, but the Court has held that each is a collateral order. See *id.* at 34–36; see also *Mitchell*, 472 U.S. at 528–529.

1. Respondents argue that the *Yearsley* conditions and the merits are intertwined based on a false premise that *Yearsley* asks whether the contractor’s actions were “legal.” Resp. Br. 39. Respondents repeatedly insist that *Yearsley* “answers the ultimate merits questions: What did the contractor do, and was it legal?” *Id.* at 45; see also *id.* at 41 (“[W]hether a defendant’s conduct was legal is the ultimate merits question in every case.”); *id.* at 3, 9, 18, 41 (similarly rewriting the *Yearsley* conditions).

That inquiry is foreign to *Yearsley*, which instead asks whether (i) “what was done was within the constitutional power of Congress,” and (ii) the contractor “performed as the Government directed.” *Campbell-Ewald*, 577 U.S. at 167 (quoting *Yearsley*, 309 U.S. at 20–21). Nowhere does *Yearsley* ask whether the contractor’s alleged actions were “legal.” Indeed, the essence of an immunity is that the defendant may have violated the law, but the defendant is not

susceptible to suit. If an “immunity” attached only when a defendant showed that it did not violate the law, the immunity would be unnecessary. See *Cunningham v. Gen. Dynamics Corp.*, 888 F.3d 640, 648 (4th Cir. 2018).

2. Orders finding *Yearsley*’s conditions unmet are no more enmeshed with the merits than other orders the Court has found to satisfy *Cohen*. Evaluating *Yearsley*’s first condition requires only that a court consider whether Congress has the constitutional authority to undertake certain actions. It is strictly legal, based on the allegations in the plaintiff’s complaint, and Respondents offer no reason to think this inquiry would be fact-bound in any *Yearsley* case.

Yearsley’s second condition asks whether the contractor “performed as the Government directed.” *Campbell-Ewald*, 577 U.S. at 167. To be sure, this inquiry might entail some factual overlap with the merits. But the *Mitchell* Court rejected the argument that “any factual overlap between a collateral issue and the merits of the plaintiff’s claim is fatal to a claim of immediate appealability.” 472 U.S. at 529 n.10. The Tenth Circuit’s ruling below is irreconcilable with *Mitchell*, and neither Respondents nor the Solicitor General meaningfully defend it.

This case illustrates how the *Yearsley* inquiry is “conceptually distinct” from the merits. To determine whether GEO is entitled to immunity, a court need only consider “given facts:” Respondents’ allegations, the contract between ICE and GEO, and ICE’s directives. See Pet. Br. 38–39. The district court

considered those facts sufficient; indeed, it not only denied GEO’s motion for summary judgment but affirmatively **granted** summary judgment to Respondents on the immunity issue, belying their argument that the *Yearsley* inquiry can be resolved only by deciding the underlying merits. See Pet. App. 70a–78a. To the extent any necessary facts are not apparent from the complaint, district courts have ample discretion to permit limited discovery on *Yearsley*’s two conditions. See, e.g., *Cunningham*, 888 F.3d at 650 (“[T]he parties participated in 75 days of limited discovery on the applicability of *Yearsley*[.]”). And if a fact determination by the court or jury is required, then the proper course is to deny the defendant’s motion—exactly what occurs in the qualified immunity context. See, e.g., *Sanzone v. Gray*, 884 F.3d 736, 739 (7th Cir. 2018) (noting this standard but reversing because the given facts supported immunity); *Farmer v. Moritsugu*, 163 F.3d 610, 613–614 (D.C. Cir. 1998).

At bottom, Respondents have no answer to the Court’s serial holdings that denials of immunity are collateral orders despite some overlap with the merits. Indeed, the denial of qualified immunity is immediately appealable despite often being coterminous with the merits of a claim under 42 U.S.C. § 1983 or *Bivens*. In such cases, a court must assess what the defendant did and whether it violated a clearly established right. That is no less distinct from the merits than deciding whether a contractor’s actions violated constitutional government directions.

C. The Denial of Derivative Sovereign Immunity Is Effectively Unreviewable on Appeal from Final Judgment.

The Court has consistently held that the denial of immunity from suit is the archetypal order that is “effectively unreviewable” after final judgment because the immunity’s benefit is effectively lost if not vindicated before trial. See Pet. Br. 40–41 (collecting cases). *Yearsley* immunizes obedient contractors from suit. See Part I *supra*. Thus, its denial is effectively unreviewable after final judgment.

Respondents’ primary counterargument hinges on the Grand Straw Man and their novel derivative-privilege theory, Resp. Br. 20–31, which are mistaken for the reasons discussed above.

Respondents’ remaining argument turns on the requirement that collateral orders serve a “value of a high order.” *Will v. Hallock*, 546 U.S. 345, 352 (2006). Respondents contend that “[e]ven if *Yearsley* could be described as a right to avoid trial,” its denial is not “important enough” to warrant immediate appeal because it is not “found in a statute or in the Constitution.” Resp. Br. 32. But neither absolute immunity nor qualified immunity are “found in a statute or in the Constitution,” yet denials of both are collateral orders. See *Mitchell*, 472 U.S. at 526; *Nixon*, 457 U.S. at 742. And the same interests animating *Mitchell* apply to private contractors: “The public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits is also implicated

when individuals other than permanent government employees discharge these duties.” *Filarsky*, 566 U.S. at 391.

While Respondents assert that the government has “consistently” expressed a “lack of concern” for *Yearsley* denials, the Solicitor General disagrees: “Lawsuits that threaten to impose massive liability on contractors thus risk erecting a substantial obstacle to federal governmental objectives.” U.S. Br. 31. The Solicitor General goes on: “those [litigation] costs ultimately are likely to be passed on to the government (and thus the taxpayers) in the form of higher contracting costs.” *Ibid.* Far from evincing a “lack of concern,” the Solicitor General characterizes contractors’ immunity as “unquestionably important.” *Id.* at 21.

Respondents downplay the consequences of their position because, they assert, federal contractors can simply “buy insurance” or “price litigation risks into their contracts.” Resp. Br. 34. But federal law limits a contractor’s ability to do so. For instance, the Anti-Deficiency Act precludes the federal government from indemnifying unknown contract-related costs and liabilities. 31 U.S.C. § 1341(a)(1)(B); see also Amicus Br. for CCSGP at 22–24. Moreover, Federal Acquisition Regulations severely limit a contractor’s ability to price future litigation into a bid. 48 C.F.R. § 31.205–47(b)(2).

Beyond monetary cost, a key concern in *Filarsky* was the effect of litigation on the performance of government work. 566 U.S. at 389–390; see *Richardson*

v. *McKnight*, 521 U.S. 399, 419 (1997) (Scalia, J., dissenting) (noting that contractors are more vulnerable to timidity because lawsuits threaten their profitability). Not only does the threat of litigation drive potential contractors out of the marketplace, but it forces the government to adjust its policies. That occurred recently in a case similar to this one, in which the district court denied derivative sovereign immunity, and ICE suspended its Voluntary Work Program because the cost to GEO was prohibitive. See *Nwauzor v. GEO Grp., Inc.*, 146 F.4th 1280, 1292 (9th Cir. 2025) (Bumatay, J., dissenting from denial of rehearing en banc). The disruption to federal policy caused by increased costs for contractors is more than simply monetary.

At bottom, Respondents fail to rebut the combined force of *Mitchell* and *Filarsky*. This case asks whether a contractor claiming derivative immunity, as in *Filarsky*, has the same right to immediate appeal that government employees have when they are doing the government’s work, as in *Mitchell*. Respondents give no reason that a different rule should apply when the same interests are at stake.

D. Respondents’ Parade of Horribles Is Unfounded.

The collateral-order doctrine governs “a narrow class of decisions that do not terminate the litigation, but are sufficiently important and collateral to the merits that they should nonetheless be treated as final.” *Will*, 546 U.S. at 347 (quotation omitted). Respondents hypothesize that treating denials of

contractors' immunity like those denying employees' immunity will result in a flood of fact-intensive appeals. Resp. Br. 4, 18. Speculation is unnecessary, however, when data from the circuits that permit collateral-order appeals show barely a trickle of cases.

As noted in the Petition for Certiorari, three circuits permit immediate appeal of orders denying a contractor's claim to immunity. Pet. 12–14. In the Second and Eleventh Circuits, not a single case has arisen since they allowed collateral-order review in 2008 and 2007, respectively. In the Sixth Circuit, a grand total of two cases have presented the issue. *Riggs v. UCOR, LLC*, 2024 WL 3634471 (Aug. 2, 2024, 6th Cir. 2024); *Adkisson v. Jacobs Eng'g Grp., Inc.*, 36 F.4th 686, 690 (6th Cir. 2022). That works out to roughly seven cases per circuit per century. The floodgates are secure.

The same pattern followed this Court's holding in *Filarsky*. Since that decision 13 years ago, the circuit courts have heard only 11 collateral-order appeals of orders denying individual contractors' immunity under *Filarsky*. That number includes circuits like the Tenth Circuit that do not allow immediate appeal of orders denying corporate contractors' immunity under *Yearsley*. *E.g.*, *Crowson v. Wash. Cnty.*, 983 F.3d 1166 (10th Cir. 2020).

There is simply no basis for the suggestion that treating *Yearsley* like other immunities will overwhelm the courts or create an intolerable exception to the final judgment rule. If anything, the availability of collateral-order review should discourage

frivolous suits like this one that seek only to hamstring contractors' performance of the government's work.

Additionally, there is no reason to fear that these cases will be fact-intensive. To the contrary, a defendant's entitlement to immunity turns on "given facts." *Johnson*, 515 U.S. at 311; see Part II.B.2 *supra*. If the defendant cannot establish an entitlement to immunity based on "the facts alleged," *Mitchell*, 472 U.S. at 528 n.9, then the motion should be denied. Once again, this case is illustrative: the district court considered only the allegations in the complaint, GEO's contract with ICE, and the incorporated regulations. On the basis of those given facts, the court denied GEO's motion for summary judgment and granted Respondents' motion. The court's error was strictly legal in following the Ninth Circuit's rule in *Cabalce v. Thomas E. Blanchard & Assocs.*, 797 F.3d 720 (9th Cir. 2015), and GEO asked the Tenth Circuit to join the three other circuits that have rejected that narrow test. Pet. Br. 9. Far from fact-intensive, determining the legal standard is, by definition, "purely legal." *Mitchell*, 472 U.S. at 530.

Finally, Respondents suggest (again, for the first time) that the Court must use 28 U.S.C. § 2072(c) to promulgate rules for collateral-order review. Resp. Br. 13. The statute, of course, says no such thing. To the contrary, it provides that the Court "may" declare certain rulings final for purposes of 28 U.S.C. § 1291. That permissive language does not require the Court to replace its collateral-order jurisprudence with

rules. If anything, it confirms Congress's understanding that the final-judgment rule in Section 1291 does not mean "final" and ratifies the Court's "practical" construction of Section 1291. *Cohen*, 337 U.S. at 546. That practicality favors immediate appeal for contractors whom the common law has never distinguished them from their government counterparts. *Filarsky*, 566 U.S. at 387.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted.

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