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13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:57 a.m.
16
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19 of the Petitioner.
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24 United States, as amicus curiae, supporting the
25 Respondents.

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1 P R O C E E D I N G S

2 (11:57 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this afternoon in The GEO Group versus
5 Menocal.

6 Mr. Draye.

7 ORAL ARGUMENT OF DOMINIC E. DRAYE

8 ON BEHALF OF THE PETITIONER

9 MR. DRAYE: Mr. Chief Justice, and may
10 it please the Court:

11 The government can act only through
12 agents, either employees or non-employee
13 contractors. And the common law draws no
14 distinction between public servants and private
15 individuals engaged in public service. That
16 makes sense. Contractors following the
17 government's instructions are immune from suit
18 for the same reason government employees are
19 immune. That is, they are doing the
20 sovereign's work.

21 Now, to be sure, their immunity is not
22 the same as the sovereign's. The sovereign is
23 immune from suit unless it has waived its
24 immunity. Its agents are only immune when they
25 satisfy certain conditions. The most familiar

1 example is government employees' qualified
2 immunity. For contractors, the conditions for
3 immunity are most famously articulated in
4 Yearsley; namely, what was done was within the
5 constitutional power of Congress, and the
6 contractor performed in compliance with all
7 federal directions.

8 When those conditions are met, a
9 private party doing the government's work is
10 immune from suit. If, however, a district
11 court concludes as a matter of law that those
12 conditions are unmet, as occurred here, that
13 holding is an appealable collateral order. The
14 Yearsley conditions are dispositive of the
15 contractor's asserted immunity and separate
16 from the underlying merits, and because an
17 immunity from suit is at issue, waiting until
18 the end of trial and taking appeal only then is
19 not an adequate alternative.

20 Orders denying contractors immunity,
21 therefore, fit comfortably within this Court's
22 precedent, permitting immediate appeals of any
23 number of other immunities. The Court should,
24 therefore, reverse the Tenth Circuit's
25 dismissal of this appeal.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Could you cite the --
3 show us the language in Yearsley that indicates
4 that -- this immunity from suit and also the
5 basis for that? I thought Yearsley was just
6 a -- seemed to be -- it's a short opinion, but
7 it seemed to be more about the fact that there
8 was a takings claim that there was -- which had
9 gone to the court of claims and that --
10 certainly, that Yearsley, the construction
11 company, could not effect a taking?

12 MR. DRAVE: So Yearsley itself arises
13 after trial, so the Court doesn't have to
14 engage the ability not to endure a suit.

15 JUSTICE THOMAS: Yeah.

16 MR. DRAVE: But drawing on a common
17 law history that includes The Paquete Habana,
18 Lamar versus Browne, and Murray's Lessee, the
19 Court distills these two conditions, and
20 although it doesn't say immunity -- I'll --
21 I'll concede that -- three years later, in
22 Brady, the Court says, of course, contractors
23 obtain an immunity in connection with the work
24 they perform for the government. And then, in
25 2019, this Court explained in -- in Knick

1 versus Township of Scott that Yearsley was
2 correct to recognize an immunity from suit.

3 And so this is a common law immunity
4 case and the -- the long arc of common law
5 cases where, as the Court described it in
6 Digital Equipment, there is a good pedigree in
7 public law for the asserted immunity.

8 JUSTICE JACKSON: Why isn't Yearsley
9 better understood as a defense than an
10 immunity?

11 MR. DRAYE: Yes. Well, the Court has
12 consistently said that it's an immunity and an
13 immunity from suit. And the rationales that
14 this Court and others have given for it is
15 because of the relationship to the sovereign.
16 So it's not just --

17 JUSTICE JACKSON: But, usually, the
18 sovereign can't delegate or give away their
19 immunity. I thought the immunity really is
20 unique to the sovereign. That's the essence of
21 it.

22 MR. DRAYE: Well --

23 JUSTICE JACKSON: And it can't be sort
24 of handed off to -- to other folks.

25 MR. DRAYE: The sovereign's immunity

1 is unique to the sovereign, the sovereign's
2 unconditional immunity. And that's
3 Campbell-Ewald. That's what the Court held in
4 Campbell-Ewald, rejecting the rather ambitious
5 argument that that contractor was forced to
6 make because they had disobeyed the
7 government's instructions, that that contractor
8 enjoyed the government's "embrasive immunity,"
9 as the Court called it. And the Court rejected
10 that, as I -- as I note, because that's true.
11 Your Honor is absolutely correct. The
12 sovereign doesn't hand off its immunity.

13 But that -- there are other
14 immunities, including qualified immunity, that
15 are available to people who perform the
16 government's work.

17 JUSTICE KAGAN: Mr. Draye, when --
18 when your client claims this Yearsley
19 protection, is your client saying: I satisfied
20 the Yearsley criteria and -- and -- and that
21 shows that I did nothing wrong? Or is your
22 client saying: I satisfied the Yearsley
23 criteria; that means that even though I did
24 something wrong, it was, in fact -- you know, I
25 am, in fact, protected from legal consequences?

1 MR. DRAYE: The latter. So -- so, in
2 fact, immunities are only useful when they
3 protect -- same thing with defenses.

4 JUSTICE KAGAN: See, I -- well, go
5 ahead. Explain to me why it's the latter,
6 because it seems to me that the Yearsley
7 criteria suggests that you're saying the
8 former. In other words, when somebody says,
9 look, I did only what the government authorized
10 by way of a lawful authorization, what I'm
11 really saying is so how could I have done
12 anything wrong.

13 MR. DRAYE: Oh, okay. So consider the
14 Cunningham case from the Fourth Circuit that we
15 cite, which Judge Floyd gives a great
16 exposition of this doctrine. In that case,
17 it's kind of like Campbell-Ewald, except the
18 instruction was essentially violate the TCPA to
19 reach out to people who had not consented to be
20 contacted. That instruction would definitely
21 violate federal law, but the Fourth Circuit,
22 quite appropriately, applied Yearsley to
23 conclude that the contractor was immune from
24 suit because it was following the government's
25 instructions.

1 So that's why I say it falls into the
2 latter category.

3 JUSTICE KAGAN: Well, the -- I'm
4 following the government's instructions and the
5 government's instructions are lawful, so,
6 obviously, everything I did was lawful too.
7 Isn't that the sort of rationale of Yearsley?

8 MR. DRAYE: Ah. No, Your Honor. And
9 this is an important point. My friends on the
10 other side rewrite Yearsley's first condition
11 to say was it lawful. That has never been
12 announced as the first Yearsley condition.

13 And it doesn't make any sense to say
14 that you enjoy an immunity or even a defense or
15 even a derivative privilege or whatever the
16 SG's office has for us. That doesn't make any
17 sense if what you've done complied with the
18 law.

19 The value of an immunity -- and,
20 again, the Cunningham decision to which I -- I
21 commend to the Court's attention does a great
22 job of analyzing this -- it only does any work
23 if -- if the person could have been liable.
24 So -- so the government's instruction may have
25 been violate the TCPA. Consider

1 Campbell-Ewald, but change one of the facts.
2 Suppose they had said -- the Navy had said to
3 the contractor: Carpet-bomb every 18- to
4 24-year-old in America with a text asking if
5 they'd like to join the Navy. In that case,
6 the -- the contractor in Campbell-Ewald
7 wouldn't have had to make the argument that it
8 was entitled to the government's absolute
9 immunity. It would be able to argue that it
10 was following the government's instructions and
11 comes within Yearsley.

12 JUSTICE JACKSON: But it wouldn't get
13 the Yearsley defense, though, because I thought
14 the government would have to have the authority
15 to issue the instructions, and to the extent
16 the instructions violated the law, they
17 wouldn't be authorized.

18 MR. DRAYE: Well, no, the question is,
19 was it within Congress's power to authorize?
20 And Congress --

21 JUSTICE JACKSON: And it's not in
22 Congress's power -- are you saying it is within
23 Congress's power to instruct its contractors to
24 do something unlawful?

25 MR. DRAYE: So the -- the question --

1 I want to be very precise about the language,
2 Your Honor. The question in Yearsley's first
3 prong is whether what was done was within the
4 constitutional power of Congress.

5 JUSTICE JACKSON: Understood.

6 MR. DRAYE: Okay.

7 JUSTICE JACKSON: Does Congress have
8 the constitutional power, Congress, the --
9 to -- to authorize the government to direct its
10 contractors to do something unlawful?

11 MR. DRAYE: That's -- that's a
12 different -- a slightly different but
13 importantly different question, so please
14 indulge me on this. The question is, could
15 Congress have done the thing? So could
16 Congress have carpet-bombed all the 18- to
17 24-year-olds with a text? Definitely yes.

18 It's a constitutional check. In other
19 words, it's an anti-circumvention prong in the
20 first prong of Yearsley. Was what was done,
21 say -- we'll just keep using this example from
22 Campbell-Ewald. What was done, texting
23 everyone in America, was that within the
24 constitutional power of Congress? Absolutely.

25 The question is not does Congress have

1 the ability to do that, to -- to authorize its
2 contractors, for example. It's -- it's was the
3 underlying action within Congress's authority.

4 JUSTICE SOTOMAYOR: I'm sorry, you're
5 skipping a big step. Yearsley was never an
6 immunity case not because it was after trial
7 but because the issue in Yearsley was who was
8 responsible for the taking. And what we said
9 is the agent was not responsible; it was the
10 government. He was acting at the government's
11 direction. The government can take. So sue
12 the government. All right? That's what we
13 said in Yearsley.

14 The fact that we've inartfully called
15 it an immunity, it's really a question of
16 relief from liability. That's all Yearsley was
17 about, was saying you, the agent, is not
18 liable, the principal is liable. So I don't
19 know why the reliance on or even claiming this
20 is an immunity defense.

21 But putting that aside, you're taking
22 a step further. You're taking what the
23 Yearsley Court said it was, is the
24 government -- was what the government did
25 lawful? Congress can pass a law that permits

1 the government to send texts to 16-year-olds,
2 but if it passes a law that says our military,
3 no one can send a text, including our military,
4 then I don't think the -- that the military
5 giving an order to its contractor to do it
6 gives the contractor immunity. It may give it
7 a defense to liability. I'm not sure what that
8 defense was -- would be because Yearsley said
9 you have to be following a lawful government
10 order. But I -- I -- this is circular to me.

11 MR. DRAYE: I'm going to -- I -- I
12 think what Your Honor is asking is what if
13 Congress passed something that was outside of
14 its constitutional authority, like no one shall
15 text anybody. If -- if that was the
16 instruction, say, to a satellite operator that
17 was a government contractor, just jam all the
18 texts, don't let people communicate or speak
19 with each other, there would be a very good
20 argument that that is outside of Congress's
21 authority to authorize because it can't shut
22 down speech. Great.

23 JUSTICE SOTOMAYOR: Then we're back to
24 Yearsley. Can the contractor --

25 MR. DRAYE: Great. So then -- then --

1 JUSTICE SOTOMAYOR: -- who should --
2 who should be responsible for that loss? Then
3 we're -- but that's still a liability question,
4 not an immunity.

5 MR. DRAYE: No, it's not. I mean, so,
6 throughout the history of this -- of this body
7 of law, the Court has consistently emphasized
8 that it's avoidance of suit, that it is an
9 immunity from suit. And that is different, of
10 course, than just avoiding liability.

11 Now the other side cites a number of
12 times where the word "liability" appears in
13 this Court and other courts' decisions. So,
14 for example, the Newman case, which is the New
15 York subway case, and Salliotte are two that we
16 talk about in the papers. They excerpt the
17 word "liability," but liability is avoided by
18 both a defense and an immunity. So that
19 doesn't tell you enough.

20 But, if you look deeper at those
21 cases, you can see -- and I think it's page 28
22 of the reply brief -- you can see why the
23 reasoning is in -- in Newman, for example, the
24 court says, because the contractor stands in
25 the shoes of the government, it has all of the

1 immunities that come with being the
2 government's -- doing the government's work.

3 And, in fact, Yearsley and Brady say
4 that. They cite United States versus Lynott to
5 say the action of the contractor is the action
6 of -- of the government.

7 JUSTICE SOTOMAYOR: Thank you,
8 counsel.

9 MR. DRAYE: So, with -- with that in
10 mind, the -- the operative question then
11 becomes whether you have a collateral order
12 that follows from this -- from this immunity.
13 And, in that regard, the Court's precedent is
14 very helpful. Puerto Rico Aqueduct expressly
15 says that it follows that you have a collateral
16 order when an immunity from suit is at stake.

17 Filarsky and other cases have teased
18 out the purposes, including Mitchell, for which
19 immunities exist.

20 JUSTICE KAVANAUGH: Why -- why is the
21 government on the other side from you then? I
22 mean, that seems like a big --

23 MR. DRAYE: It's a good question.

24 JUSTICE KAVANAUGH: -- a big -- big
25 hurdle. And it's -- and it's been that way.

1 MR. DRAYE: Yes. Well, it's been that
2 way lately. So, as I read the government's
3 papers in this case, it is -- the reason that
4 they're on that side is their legal conclusion
5 about what's at stake, that is, whether it's an
6 immunity or, as they have posited for the last
7 eight years but not before that, whether it is
8 a derivative privilege based on the sort of
9 principal agency concepts.

10 The government to its credit
11 acknowledges that the impact on government
12 operations from exposing its contractors to
13 massive liability would be a significant
14 obstacle -- I think it's page 31 of their
15 brief -- and that -- that Yearsley is
16 critically important, page 3 of their brief.

17 So -- so I think we're -- we're
18 aligned as to part of the point, but I'm aware
19 of the seating chart, and I think the
20 explanation is that they have this rather
21 creative argument based on principal agent
22 concepts, which, in 1939 in Yearsley, they told
23 the Court that it was obvious as a matter of
24 principle that contractors were immune.

25 In Filarsky, they said the same policy

1 considerations apply. And then last week in
2 Hencely, it's page 10 of their amicus brief,
3 they characterized Yearsley as barring suit.
4 So I -- I think it's an -- it's a break from
5 where they've been in the past. And, as a
6 result, you know, Wyeth versus Levine was the
7 same situation where the government had -- had
8 changed positions.

9 It's also wrong on the merits. I
10 mean, it proves too much and too little, as we
11 point out in the reply brief, too much in that
12 it --

13 JUSTICE KAVANAUGH: They say also
14 that -- I don't want to interrupt you there,
15 but just so you can fold this in -- they say
16 there are other avenues for you for relief from
17 this issue to be pursued.

18 MR. DRAYE: Yes, and I can fold that
19 in because it proves too much in that employees
20 who get qualified immunity and officers who
21 have their own immunity, absolute immunity,
22 also could avail themselves of 1292. And one
23 of the odd things about the government's
24 position in its brief is that it carves out a
25 new and special rule unique to federal

1 contractors that they have to go through
2 1292(b).

3 Nobody else has to do that involved in
4 the process. So whereas, in our case, you have
5 GEO, for example, running a facility and there
6 are a number of ICE personnel, I think we have
7 to provide 14 offices for ICE, there are two
8 immigration courtrooms at this facility,
9 everybody involved, the ICE officials, the
10 sovereign itself, are all immune and can all
11 take a collateral order appeal, but the
12 contractor, who is just doing what they're
13 told -- at least that's the presumption here
14 under the second prong -- is unable to appeal
15 the denial of its immunity.

16 So it creates a very odd loophole or
17 gap in the -- in -- in the operation of
18 these -- of these programs.

19 JUSTICE JACKSON: Can I just ask you,
20 because it does seem to me that the core of
21 this is how we characterize Yearsley, is it a
22 defense or is it actually conferring immunity.

23 What -- what do we do with the fact
24 that in Yearsley itself, the government had
25 waived sovereign immunity? That's my

1 understanding. And so, to the extent that
2 that's the case, wouldn't we have a very odd
3 scenario in which the contractor would somehow
4 be given immunity, but the government itself
5 wouldn't, even though you say the contractor's
6 immunity is derivative of the government's?

7 MR. DRAYE: This -- this illustrates
8 exactly the way it's supposed to work.

9 JUSTICE JACKSON: Okay.

10 MR. DRAYE: So the sovereign waives
11 its immunity in that case and accepts
12 liability, as it must constitutionally for a
13 taking, by the way.

14 JUSTICE JACKSON: Right.

15 MR. DRAYE: But then you sue the
16 federal government. Our friends on the other
17 side haven't sued the federal government in
18 this case. The whole game here is suing
19 contractors to try and thwart the government's
20 policies.

21 And so, you know, today, you know,
22 today it's a case about immigration detention.
23 Tomorrow it could be Cunningham, in which the
24 contractor was engaged in signing people up for
25 subsidized insurance under the Affordable Care

1 Act.

2 If you name a government policy or
3 program, it will rely on contractors, and I can
4 find you somebody who would like to stymie the
5 implementation of that program.

6 So that is how we get back to the
7 important interests at stake here. But, to
8 Your Honor's question, the government is free
9 to waive its immunity all it wants. The
10 question, however, under the common law and the
11 long common law tradition is that when
12 contractors are performing as directed, that
13 they are immune. And that -- that makes sense.
14 I mean, you should -- you should actually want
15 to focus the litigation on the decisionmaker,
16 which is the government.

17 JUSTICE JACKSON: No, I understand.
18 But -- but -- but you can do that by treating
19 it as a defense. It's just odd to suggest that
20 in a derivative sovereign immunity kind of --
21 that there is derivative sovereign immunity in
22 this kind of circumstance.

23 I mean, the -- yes, to the extent that
24 the contractor is saying we were just following
25 orders, the law provides an opportunity for

1 them to defend themselves as a result of that.
2 And I thought that's really the crux of what
3 Yearsley is getting at. But, as Justice Kagan
4 said, that's a different concept than we should
5 be liable, we are liable, we -- you know -- but
6 we are not going to be held liable because we
7 have immunity.

8 MR. DRAYE: It -- it is a different
9 concept, Justice Jackson, and it's an
10 importantly different concept because qualified
11 immunity could be a defense.

12 JUSTICE JACKSON: No, but it's an
13 important -- it's an odd concept in a world in
14 which the government has assumed liability --

15 MR. DRAYE: So sometimes it has and
16 some --

17 JUSTICE JACKSON: -- in that same
18 scenario.

19 MR. DRAYE: Sorry. Sometimes it has
20 and sometimes it hasn't. In this case, the
21 government has not waived its sovereign
22 immunity as to the administration of these
23 programs, which is why they've sued us.

24 The government runs the exact same
25 policy -- exact same programs at its

1 facilities. It's Section 5.8 of the PBMDs,
2 which is the -- the Voluntary Work Program.
3 Congress appropriates exactly the stipend that
4 GEO pays. It's at Pet. App. 141 and 144, is
5 the disciplinary scale that comes from the
6 government. It applies to their facilities
7 too.

8 So all of this is -- all of these
9 decisions are made by the government, which is
10 why I think Your Honor makes a good point that
11 the suit should be directed against the
12 government.

13 JUSTICE KAVANAUGH: That still gets
14 back to the why is the government -- I guess
15 I'm just stuck on this. You said this is
16 across all sorts of government programs.
17 Obviously, I agree. Why is the government then
18 taking a position that you say will thwart the
19 implementation operations of all this
20 government -- all these government programs?
21 I'm just not seeing that. And because they're
22 on the other side, it casts doubt on your
23 assertion that all these programs are going to
24 be -- obviously, we're going to ask the
25 government this too, but --

1 MR. DRAYE: I was going to suggest
2 that you ask Dr. Joshi that very question.

3 (Laughter.)

4 MR. DRAYE: And -- and -- and it is to
5 some extent better directed to him. All I can
6 say is that, you know, what's driving their
7 brief as far as I read it is this
8 re-conceptualization of the long common law
9 history and the idea that, in fact, what this
10 Court and others have been doing, but never
11 saying it, is applying some sort of derivative
12 privilege born in the pages of the Restatement
13 and urged, by the way, on this Court in
14 Campbell-Ewald, and the Court didn't take the
15 bait; urged on the Ninth Circuit in Childs, the
16 2022 decision; that court didn't take the bait;
17 repeated here in the CVSG brief in CACI from a
18 few years ago.

19 No one has embraced this thing, and
20 it's not new. Well, it's -- it's somewhat new.
21 It's eight years old. But, before that, the
22 government was consistently on -- on the side
23 of its contractors. And, again, beyond that,
24 I -- I just have to leave it to -- to the -- to
25 the government.

1 You know, if the -- if the calculation
2 is about the burden imposed on contractors, the
3 government is also -- doesn't really have a
4 perspective on life as a private litigant.
5 They don't have to hire outside counsel.

6 JUSTICE BARRETT: But couldn't you
7 negotiate for that in your contract with the
8 government, that they cover your litigation
9 expenses?

10 MR. DRAYE: No. I wish we could. So
11 the Antideficiency Act, of course, prevents us
12 from having an open-ended indemnification. FAR
13 31.205 prevents any number of litigation costs
14 from being built in. This is a fixed-price
15 contract, as all of these are.

16 JUSTICE BARRETT: Well, couldn't you
17 fix that into the price of the contract?

18 MR. DRAYE: No, because the FARs
19 exclude -- it's a very fair question. The FARs
20 exclude these litigation expenses. And if we
21 were to put them in as sort of, like, overhead
22 or something, that would be a false claim and
23 would expose us to suit under the False Claims
24 Act. So there again, although it is a real
25 problem for -- for GEO and other contract --

1 JUSTICE KAGAN: I -- I just want to
2 make sure I understand what you're saying.
3 You're saying you cannot price in litigation
4 risk?

5 MR. DRAYE: Correct. We cannot price
6 in at least not all litigation risk. It may be
7 possible in some contracts, Your Honor, but, as
8 a general proposition, again, it's FAR Part --
9 the Federal Acquisition Regulations Part 31.205
10 that greatly restricts our ability to -- to
11 price that in.

12 And, as a result, you know, the
13 government and GEO cite the Nwauzor case in the
14 Ninth Circuit, where the State of Washington
15 sought to impose its minimum wage law on GEO's
16 operation of the Voluntary Work Program. The
17 Ninth Circuit said that was A-okay. A cert
18 petition coming. But the -- the government in
19 the meantime suspended, as Judge Bumatay noted
20 in his dissent from denial, suspended the
21 operation of the Voluntary Work Program at that
22 facility. The point here is that it's not
23 strictly monetary, Justice Barrett.

24 This also goes to the operation of
25 policy. That is a policy -- the ICE

1 determination that having a Voluntary Work
2 Program that reduces idleness and encourages,
3 you know, cooperation and -- and reduces
4 disciplinary incidents is a good penological
5 policy, has been suspended at that facility
6 exclusively because of the crushing liability
7 that's coming for the contractors.

8 JUSTICE BARRETT: But, counsel, it
9 seems to me like all the arguments you're
10 making, I can see why you want them, and
11 they -- there's a lot of functional reasons why
12 it might make sense, advance government
13 interests, et cetera. But should they be
14 directed to Congress? Because, at the end of
15 the day, we're not -- we're not being asked to
16 decide whether you should have a defense to
17 liability. We're asking whether this is within
18 the collateral order doctrine essentially --

19 MR. DRAYE: Yes.

20 JUSTICE BARRETT: -- whether 1291 lets
21 you have an immediate appeal. And so Congress
22 could give you that.

23 MR. DRAYE: Yes, they could. Congress
24 could have given employees an immediate appeal,
25 the president an immediate appeal. So I -- I

1 take Your Honor's point. It is certainly
2 possible. But, again, this goes to -- this
3 is -- this is analogous to the 1292 argument
4 that -- that the government puts forward. It
5 would be new ground and a new contractor-
6 specific rule to say that some people who do
7 the government's work and some people who are
8 immune have to go through an additional step of
9 obtaining statutory authorization.

10 JUSTICE SOTOMAYOR: But we have
11 certain statutory limits, and one of them is
12 the finality rule. So you're asking us to make
13 a judge-made immunity, which is an odd fit
14 because sometimes the government has immunity
15 or not. You don't care if the government has
16 immunity. You're saying we have immunity. So
17 we're creating a new sort of immunity, a
18 judge-made exception to finality after we've
19 said -- which should be sparingly used, and a
20 judge-made exception to Congress's legislation
21 over immigration and government contracting.

22 So you're asking us as judges to make
23 three immunities, three new principles.

24 MR. DRAYE: Not at all, Your Honor.
25 The Court has already made the immunity in

1 question. It -- it stretches back to the cases
2 that Yearsley cited, which, you know, Yearsley
3 is 1940. Those three stretch --

4 JUSTICE SOTOMAYOR: Release -- we've
5 always said the sovereign can't contract away
6 its immunity.

7 MR. DRAYE: And -- and -- and,
8 respectfully, that is --

9 JUSTICE SOTOMAYOR: So it's either
10 immunity or it's either a defense to liability.

11 MR. DRAYE: Not at all. So that is
12 what we call the grand strawman. No one is
13 asking for the government's embrasive immunity.
14 Employees enjoy qualified immunity. That's not
15 the government giving away its immunity.

16 JUSTICE JACKSON: But qualified
17 immunity is different, isn't it, in kind? I
18 mean, qualified immunity has different purposes
19 than this.

20 MR. DRAYE: Not at all. So Filarsky
21 answers that question. Filarsky says expressly
22 that this serves -- that immunity for
23 contractors serves the identical purposes, that
24 is to say, not dissuading good people from
25 serving in government, avoiding timidity in the

1 exercise of discretion, and --

2 JUSTICE JACKSON: But it's not about
3 individual officers in being shielded from
4 undue interference with the performance of
5 their duties in the way that qualified immunity
6 works. I mean, you're just asking for a
7 blanket no liability for contractors who are
8 following the government's instructions that --
9 qualified immunity is almost the opposite.
10 It's like, when you do something wrong, you are
11 immunized if it's not clear to you that that
12 principle exists in the law and that you were
13 doing something wrong.

14 This is the opposite of that, I think.

15 MR. DRAYE: No. I -- I wish we got
16 qualified immunity. Qualified immunity is much
17 easier to satisfy because the question is, did
18 you do something illegal? Was it clearly
19 illegal?

20 Those conditions are more forgiving
21 than the ones that Yearsley gives to
22 contractors. And believe me, I would love to
23 have fit this within qualified immunity.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 Justice Alito?

4 Justice Sotomayor?

5 Justice Kagan, anything further?

6 Justice Barrett?

7 Justice Jackson?

8 Thank you, counsel.

9 MR. DRAYE: Thank you.

10 CHIEF JUSTICE ROBERTS: Ms. Bennett.

11 ORAL ARGUMENT OF JENNIFER D. BENNETT

12 ON BEHALF OF THE RESPONDENTS

13 MS. BENNETT: Mr. Chief Justice, and
14 may it please the Court:

15 To justify an expansion of the
16 collateral order doctrine, GEO has to run the
17 table. It must demonstrate that as we just
18 heard, Yearsley is the rare defense that
19 provides a right to avoid litigation entirely;
20 that, two, immediate appeal serves a public
21 interest so important that it overrides the
22 final judgment rule; and, three, as a category,
23 Yearsley orders are completely separate from
24 the merits.

25 GEO fails on all three, each of which

1 is an independent basis to affirm. First, on
2 the right to avoid trial, below and in its
3 opening brief GEO claimed that contractors that
4 satisfy Yearsley's requirements share the
5 sovereign's immunity. It has now disavowed
6 that claim. I think that's correct.

7 But that means that all GEO is left
8 with is the claim that Yearsley is qualified
9 immunity for contractors. But qualified
10 immunity is qualified immunity from
11 contractors. What Filarsky shows is that where
12 history and policy support immunity from suit,
13 those who work for the government get qualified
14 immunity, which means GEO's argument boils down
15 to the claim that Yearsley is an immunity from
16 suit for contractors who can't show that
17 history and policy warrant immunity. That
18 doesn't make sense as a matter of common sense.
19 It's also not what Yearsley says or what the
20 history of the defense that Yearsley recognizes
21 shows.

22 Second, on effective unreviewability,
23 GEO argues that immediate appeal of all
24 Yearsley orders, whether they apply to
25 detention contractors or tree trimmers, is

1 necessary to avoid burdening the government.

2 But the government itself disagrees, and this

3 Court held as much in Will.

4 And, finally, on separateness from the

5 merits, unlike qualified immunity, Yearsley

6 cannot be granted without answering

7 fact-intensive questions. What did the

8 contractor do? What did the government direct?

9 And what caused the plaintiff's injuries? So,

10 ordinarily, Yearsley orders merely decide

11 whether there's a sufficient factual dispute to

12 send to the jury, precisely what this Court in

13 Johnson held cannot be immediately appealed.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: If we agree with you,

16 what approach should we take in disposing of

17 this?

18 MS. BENNETT: So I think the most

19 straightforward approach is -- is to hold --

20 you know, GEO's entire argument rests on this

21 contention that Yearsley is a right to avoid

22 trial. I think it's clearly not if you look at

23 Yearsley itself and if you look at the history.

24 I think the most straightforward approach is to

25 do that.

1 But I think second would be to rule on
2 the effective unreviewability prong. The sole
3 interest that GEO is claiming here that
4 supports a right to immediate appeal is the
5 interest in avoiding the burdens of litigation
6 to the government. That's precisely the
7 interest that this Court held in Will versus
8 Hallock isn't enough.

9 And that case, you'll recall that's
10 the case about the Federal Torts Claims Act's
11 judgment bar. In that case, the defendants
12 were government employees and it was a statute
13 that said no action can be brought at all. So
14 you have a statutory immunity from suit with a
15 government employee defendant, and this Court
16 held that the burdens of litigation are not
17 enough.

18 So I'll take each of those. So,
19 first, to start with the questions on the right
20 to avoid suit that this Court was discussing
21 with GEO's counsel, as I take it, they have
22 essentially two arguments. One is this loose
23 language argument. There's some language that
24 we could interpret in cases that weren't
25 dealing with this issue that suggests it's an

1 immunity from suit.

2 I'll note that none of those cases
3 and, in fact, none of the briefs that GEO cites
4 actually says that except with one exception,
5 which is the footnote in Knick. If you read
6 the next sentence in the footnote in Knick,
7 what it says is the Tucker Act provides a
8 complete remedy, so it excludes liability.

9 So, like Brady, Knick also says --
10 makes clear what it means by immunity from
11 suit. And, again, the Court wasn't dealing
12 with that issue. And if this Court -- you
13 know, as this Court said in Digital Equipment,
14 virtually every right that can be enforced on a
15 motion to dismiss can be loosely called and, in
16 fact, I'll tell you has loosely been called an
17 immunity from suit.

18 If you look at statute of limitations,
19 if you look at personal jurisdiction, if you
20 look at Monell, which held that a local
21 government may not be sued for an injury
22 inflicted solely by its employees and agents,
23 so that's the language, "may not be sued."

24 Still in Swint, this Court held that
25 government entities don't have a right to avoid

1 trial under Monell. So, over and over again,
2 this Court has used this kind of loose
3 language, but what the Court focuses on is,
4 what is the core of the actual right? Is this
5 actually a right to avoid trial?

6 And if you look at the cases that
7 Yearsley cites and that discuss this government
8 authority defense over and over again, when the
9 Court is actually examining this defense, it
10 says it's not a right to avoid trial.

11 JUSTICE JACKSON: What about
12 Campbell-Ewald?

13 MS. BENNETT: So Campbell-Ewald, I
14 think, didn't answer this question. It didn't
15 need to. It was after final judgment.

16 The -- the contractor there said
17 there's this thing called derivative sovereign
18 immunity, which I'll note Campbell-Ewald puts
19 in scare quotes throughout the opinion.
20 There's this thing called derivative sovereign
21 immunity and we get it. And what
22 Campbell-Ewald said is, well, there's nothing
23 to support your claim that there is this thing
24 called derivative sovereign immunity, and in
25 any event, everybody agrees that whatever it

1 is, it would have these two requirements.

2 And it said, at this stage, we can't
3 determine that those -- both of those
4 requirements are met. And so I don't know that
5 this Court -- this Court didn't actually have
6 to decide the right-to-avoid-trial versus
7 immunity-from-suit issue.

8 When it did look at that issue, so,
9 for example, Hopkins versus Clemson, what it
10 says, and this is -- this is a quote, "Agents
11 acting for the state, though not exempt from
12 suit, could successfully defend by exhibiting
13 the lawful authority under which they acted."

14 Murray's Lessee distinguishes the
15 immunity from suit for the United States.
16 Murray's Lessee, though no suit can be brought
17 against the United States, it says a suit may
18 be brought against a marshal to determine --
19 to -- to provide its lawful authority.

20 Brady, again, says in broadening the
21 government's use of contractors, so Brady
22 considered essentially this argument, which was
23 the government is using contractors all the
24 time now. Shouldn't they be treated like
25 employees of the government?

1 And what Brady says is, in broadening
2 the use of contractors, "immunity from suit is
3 not favored." And what Brady says is it would
4 require not only a grant from Congress but a
5 grant in unambiguous terms.

6 And there are numerous other cases.
7 United States versus California says the same
8 thing. So then I think --

9 JUSTICE ALITO: Well, GEO is doing
10 exactly what government officials can do and
11 generally have done running facilities like
12 this, so imagine you had brought these claims
13 against ICE and specific ICE officials.

14 ICE and the officials could raise
15 sovereign immunity, they could raise qualified
16 immunity and Westfall Act immunity, and if the
17 district court denied any of those, then they
18 could get an interlocutory appeal.

19 So why shouldn't the rule be the same
20 for GEO? Don't the considerations that justify
21 interlocutory appeal when the suit is against a
22 government official also justify an
23 interlocutory appeal here?

24 MS. BENNETT: I think it depends on
25 the basis for the suit and particularly in the

1 basis for the defense. So the reason that an
2 ICE employee -- and I'll note this Court has
3 never held that qualified immunity is a defense
4 to forced labor claims, statutory forced labor
5 claims. But I'll bracket that.

6 Assume -- assume that ICE employees
7 could get qualified immunity or could assert
8 it. The reason they can do that is what this
9 Court has said is that the history and the
10 policies support an immunity from suit.

11 And so what -- and so, if the history
12 and policy support an immunity from suit, then
13 you'll get qualified immunity. And what
14 Filarsky --

15 JUSTICE ALITO: All right. Well, how
16 about the policy? Why isn't the policy the
17 same -- policy considerations the same here?

18 MS. BENNETT: Sure. So what -- what
19 Filarsky and what Mitchell say are the policy
20 considerations that specifically justify the
21 immunity from suit is the consideration of
22 wanting government employees to show initiative
23 in the face of unclear law.

24 That is why you would get qualified
25 immunity. That is not why you get Yearsley.

1 Yearsley, in fact, is precisely the opposite of
2 that. Yearsley only applies when you're doing
3 exactly what the government directed. And it
4 doesn't matter whether it's clearly established
5 or not. Yearsley isn't about saying,
6 contractors, we want to you go out and take
7 bold action regardless of whether you know it's
8 lawful, regardless of whether you've been
9 directed by the government.

10 And so the -- the --

11 JUSTICE ALITO: But it's not really --
12 the -- the justification for qualified immunity
13 is not just that you want government officials
14 to be able to take bold action. It's that you
15 don't want them to be -- to have to bear the
16 burdens of litigation, which can be quite
17 substantial, when it may well be that they
18 didn't do -- and they didn't -- they didn't do
19 anything that was unjustified based on what
20 they knew.

21 So why doesn't that apply just as well
22 here?

23 MS. BENNETT: So --

24 JUSTICE ALITO: Those policy
25 considerations, why don't they apply just as

1 well here?

2 MS. BENNETT: Sure. So I want to -- I
3 want to distinguish between the policy
4 considerations that underlie a potential
5 defense like qualified immunity. Those
6 considerations go to the existence of the
7 defense.

8 What Mitchell said is the key to
9 qualified immunity that justifies an immediate
10 appeal is this need to show initiative. And
11 that's just not at issue in Yearsley.

12 And we know that not all government
13 defenses are immediately appealable. Not
14 everything that's going to put a litigation
15 burden on somebody who works with the
16 government is immediately appealable.

17 We know that from Will versus Hallock,
18 the FTCA judgment bar claim. We know that from
19 Swint, which held that Monell claims, when a
20 local government is trying -- when a plaintiff
21 is trying to hold a local government liable for
22 just the acts of its employees when they
23 haven't satisfied Monell, Swint says no
24 immediate appeal. And that is the government
25 itself.

1 McDonald reaffirms an old Supreme
2 Court case about immunity from prosecution for
3 people who have testified on behalf of the
4 government. The public authority defense in
5 the criminal context, which this Court
6 mentioned in the Trump case, that also --
7 that -- that's a defense for people who work
8 with the government. And this Court said it's
9 not an immunity from suit. It's a defense and
10 it's not immediately appealable.

11 And so, when we're talking about just
12 the general cost to the government, what we're
13 talking about is something that this Court over
14 and over again has said does not justify an
15 immediate appeal. You need something special.

16 And I'm happy to talk more about that,
17 but I also want to flag that everything we're
18 talking about now is policy and, you know,
19 the -- the -- and policy based on empirical
20 questions, how much is this going to cost the
21 government, if anything? What is -- what is
22 the impact going to be?

23 We have the government here telling us
24 that the impact doesn't justify an immediate
25 appeal, but if this Court thinks that those

1 kinds of considerations might do so, then the
2 proper avenue for considering them is
3 rulemaking, where you can get expertise from
4 the bench and from the bar to explain, you
5 know, these empirical questions, to discuss the
6 policy considerations, because, you know, here,
7 you have a case at a --

8 JUSTICE ALITO: Well, I mean, policy
9 is a dirty word, but isn't something similar to
10 policy what is going on in Mitchell and in the
11 other cases where we have said there's a right
12 not to be -- there's a right not to trial
13 unless a certain requirement is met?

14 MS. BENNETT: I absolutely agree with
15 that, Your Honor. And Mitchell was before
16 Congress passed a statute enabling the court to
17 create new categories of interlocutory orders
18 through rulemaking and interpret the final
19 decision rule through rulemaking.

20 And what this Court has said in Swint,
21 what it said in Mohawk, what it said very
22 recently in Microsoft, is that now is the -- is
23 the proper venue for -- for answering this kind
24 of question. Unless we previously said that
25 something is a collateral order, if we're going

1 back and forth about empirical questions and
2 policy questions, rulemaking is the proper
3 venue for doing that.

4 And then I'd like to just briefly
5 address the idea, the -- the completely
6 separate from the merits prong. You know,
7 again, what this Court held in Mitchell is that
8 the thing that makes qualified immunity
9 collateral is that it -- this clearly
10 established law question. And that question is
11 a pure question of law. And we know from
12 Johnson that where you don't have that pure
13 question of law, where you have a question that
14 is, is there a sufficient dispute of fact to
15 send to the jury, you don't get an immediate
16 appeal.

17 And the way -- and -- and I think
18 GEO's argument on this point, as I understand
19 it, is Mitchell held that anytime you can
20 answer any questions on given facts, that's
21 sufficient. But that can't be the case. That
22 would mean any order on a motion to dismiss,
23 any order on a motion for summary judgment,
24 the -- the issue in Johnson itself would have
25 been immediately appealable. And we know

1 that's not correct.

2 What -- what makes qualified immunity
3 different is the question -- you -- you have to
4 look at given facts to figure out what right is
5 the plaintiff saying is violated here, but the
6 fundamental question is interpreting circuit
7 and Supreme Court precedent to figure out
8 whether a legal right was established at a
9 particular time. That's the ordinary thing
10 appellate courts do every day.

11 Here, there is no equivalent on which
12 Yearsley can be granted to this just interpret
13 appellate and Supreme Court precedent.
14 Yearsley -- to get the Yearsley defense, a
15 contractor always has to satisfy the second
16 prong, which is was the conduct that caused the
17 plaintiff's injury directed by the government?
18 And that is always a factual question that's
19 record-intensive.

20 The question is look at the facts
21 underlying what the contractor did and what
22 caused the plaintiff's injury and then compare
23 them with a second universe of facts, which is
24 what the government directed, which I'll note
25 is not just in the contract often but is in

1 handbooks, it can be in e-mails, it can be
2 verbal, there can be deposition testimony --
3 JUSTICE JACKSON: Why does that
4 question have to be answered in the context of
5 Yearsley? In other words, your friend on the
6 other side suggested that the Yearsley defense
7 is just -- or at least one prong of it is not
8 really about whether this conduct is actually
9 lawful or whether or not, you know, this --
10 this comports with the law but just whether
11 Congress had the constitutional ability to
12 authorize it.

13 MS. BENNETT: Sure. So I -- I'll
14 answer that question, but just to flag GEO's
15 argument on that, whether it's right or not, is
16 just to the first prong. And so you'll still
17 always have the second prong, which is what --
18 did the government direct the conduct that
19 caused the plaintiff's injury?

20 So, in order to get Yearsley --

21 JUSTICE JACKSON: Which is fact-bound,
22 you say? Yeah.

23 MS. BENNETT: -- you always have to
24 answer this fact-bound question that's often
25 going to be intertwined with the merits.

1 But, to answer your question directly,
2 the reason Yearsley says was this within
3 Congress's authority is because Yearsley
4 involved a statute. The work that was being
5 done by the contractor in Yearsley was directed
6 by statute by Congress. And so, to determine
7 whether the government had authority to direct
8 the contractor to do that, you're looking at
9 Congress's authority.

10 I am aware of no case that suggests
11 that a contracting officer in an agency
12 somewhere could authorize a contractor to
13 violate federal law and that would be validly
14 conferred authority. And I think, you know,
15 the -- the cases, I think, show otherwise. You
16 know, Yearsley itself, the reason it looks at
17 whether the government provided a remedy for
18 the taking was to determine whether the
19 authority was validly conferred.

20 And -- and just to -- to address the
21 idea of agency principles where this comes
22 from, you know, I -- I take GEO's argument to
23 be, well, these cases don't use the word
24 "privilege." That's true. Most of them don't.
25 But the Restatement says privilege. What it's

1 saying is a validly conferred authority.
2 That's a -- that's just the Restatement's word
3 for -- for that kind of authority, whether the
4 principal had the lawful authority to do
5 something that would otherwise violate the law
6 and had the authority to confer that.

7 And you can see that throughout this
8 Court's cases, starting with Yearsley. You
9 know, Yearsley itself couches its rule in terms
10 of agency. And there's no dispute that the
11 principles it applies are longstanding agency
12 principles. In fact, GEO's opening brief says
13 Yearsley reflects settled agency principles.
14 That's page 16 to 17.

15 And this is most clear, I think, in
16 Larson, where this Court summarizes its
17 jurisprudence on this. And I'll just read you
18 a little bit of Larson. It says, "The
19 principle that an agent is liable for his own
20 torts is an ancient one. It applies even to
21 government actors." And then it says, "if the
22 actions of a government officer do not conflict
23 with the terms of his valid statutory
24 authority, then they are the actions of" -- "of
25 the government if they would be the actions of

1 a private principal."

2 So Larson is saying, you know, when
3 a -- when an agent takes -- a government agent
4 takes an action, what you look to is
5 traditional agency law, principal/agent, to
6 figure out whether that's the act of the
7 government. And then it also says, even if the
8 action is the act of the government, the
9 government agent is still liable if his action
10 is such that a liability would be imposed by
11 the general law of torts. In other words,
12 we're looking at the general principles of
13 torts, which include agency, of course, to
14 figure out when is the government agent liable.

15 That's what this Court said in Larson.
16 And that principle, that ordinary principle
17 from the Restatement, from Larson, from
18 Yearsley, from Brady, that ordinary principle
19 is, if the principal has authority and validly
20 delegates it, the agent is not liable for
21 complying with directions.

22 And because it comes from agency,
23 that's one way you know that it's an ordinary
24 defense. You know, this Court in Will versus
25 Hallock said this judgment bar, it's not

1 exactly one-to-one with ordinary preclusion
2 principles, but that's basically where it comes
3 from. And we know preclusion is a -- is -- you
4 know, we -- we're not going to give an
5 immediate appeal to something like preclusion.

6 The same is true here. We don't
7 ordinarily give an immediate appeal on -- on
8 the defense that my principal told me I could
9 do this, and there's no reason to do so in this
10 context.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas?

14 Justice Alito?

15 Justice Sotomayor?

16 Justice Kavanaugh?

17 Thank you, counsel.

18 MS. BENNETT: Thank you.

19 CHIEF JUSTICE ROBERTS: Mr. Joshi.

20 ORAL ARGUMENT OF SOPAN JOSHI

21 FOR THE UNITED STATES, AS AMICUS CURIAE,

22 SUPPORTING THE RESPONDENTS

23 MR. JOSHI: Thank you, Mr. Chief

24 Justice, and may it please the Court:

25 It sounds like the Court has a pretty

1 good handle on the issues, so why don't I just
2 start by addressing why are we on this side of
3 the lectern instead of the other.

4 (Laughter.)

5 MR. JOSHI: You know, the -- the
6 bottom line is that we just look at Yearsley,
7 and everything I think we said in our brief
8 there, we said a suit can't be maintained.
9 We're talking about liability, we look at
10 Yearsley. We do think it's a rule about
11 liability and a defense to liability.

12 And then we're just trying to be
13 faithful agents of this Court's collateral
14 order jurisprudence, which suggests that when
15 you have a standard defense to liability, even
16 if it's important, even if it would mean that
17 you have to suffer through a trial that, had
18 the motion to dismiss been granted, you
19 wouldn't have had to suffer through, that is
20 still not the kind of order that is immediately
21 appealable as a final decision under Section
22 1291.

23 And to be clear, we agree with
24 Petitioner that the defense is critical to our
25 efforts. And a lot of what Petitioner says in

1 its briefs and a lot of what its amici say
2 about the costs of liability and what that can
3 do to the amount the government has to pay for
4 services, we agree with that completely. We do
5 think this is a really important defense. And
6 if the defense were up here, we might well be
7 on the other side of the lectern.

8 But the only question here, as Justice
9 Barrett indicated, was just the collateral
10 order question, and, there, we think the right
11 answer under this Court's case law is that it
12 is just like a denial of any other motion to
13 dismiss on the merits. It's not immediately
14 appealable. You have to wait until final
15 judgment.

16 JUSTICE KAGAN: You should never
17 over -- oh, I'm sorry.

18 JUSTICE THOMAS: No, no, it's --

19 JUSTICE KAGAN: No, please.

20 JUSTICE THOMAS: I was simply going to
21 ask the question I asked earlier. What's your
22 preferred method of disposing of this?

23 MR. JOSHI: We think the -- the right
24 way to dispose of it is largely what my friend
25 said for Respondents, which is that because

1 Yearsley reflects a defense to liability and
2 not an immunity from even standing the burdens
3 of trial, that it doesn't satisfy the -- the
4 third Cohen condition if you want to look at it
5 doctrinally like that, and that's the most
6 straightforward way to proceed.

7 JUSTICE KAGAN: I -- I was just going
8 to ask, you know, we -- we know that this is a
9 defense from liability as opposed to a true
10 immunity because why?

11 MR. JOSHI: Because we view Yearsley
12 through the principal/agency concepts in which
13 we do think it's a privilege that's being
14 delegated, but we really think, if you look at
15 the substance of what's being delegated, it
16 means that the contractor acts lawfully when it
17 obeys lawfully delegated instructions from the
18 government.

19 And we agree with Respondents and what
20 my friend said earlier, which is that the -- an
21 agency doesn't have -- like, a federal agency
22 doesn't have authority to violate a federal
23 statute, for example. That -- that's just not
24 something an agency is allowed to do. So I
25 don't think Petitioner is correct to say that

1 the first condition of Yearsley is just whether
2 it's within Congress's constitutional power.
3 Of course, Congress could pass a different
4 statute, but it hasn't. It has passed a
5 certain statute, and an agency is not free to
6 violate it.

7 And I don't think the agency is free
8 to effectually violate the statute by simply
9 contracting a private party to do it for the
10 agency. That doesn't really make much sense.

11 So we think where Yearsley applies --
12 well, sorry, we think the first condition of
13 Yearsley is really about lawfulness, is it --
14 can the government -- could the government
15 lawfully do it, and then, second, did the
16 government lawfully delegate that privilege to
17 the agent?

18 And that's why we think there's really
19 no gap between successfully showing entitlement
20 to the Yearsley defense and having acted
21 lawfully. We think those Venn diagrams are
22 just circles on top of each other.

23 JUSTICE BARRETT: Mr. Joshi, is it
24 true that a contractor can't price in
25 litigation risk or seek indemnification for

1 litigation expenses?

2 MR. JOSHI: Yeah, we don't think
3 that's quite true for a number of reasons.
4 Number one, we do think they can -- to the
5 extent they have litigation costs in the
6 background, they have their own in-house
7 counsel, things like that, those do go into
8 sort of overhead costs, and I think most
9 contractors with all of their overheads will,
10 to a certain degree, price that into their bids
11 into the contract, and that's generally
12 considered okay.

13 Also considered okay under the FAR is
14 insurance against litigation costs. Those can
15 be a line item in -- in, say, a cost-plus
16 contract. That -- that could be validly put
17 into a bid and the government could validly pay
18 it.

19 As far as indemnity goes, OLC has long
20 taken the position that indemnity clauses are
21 acceptable as long as, number one, they are
22 capped and, number two, they are conditioned
23 expressly in the contract as being contingent
24 on there being appropriated funds available at
25 the time the payment is due. So, as long as

1 those conditions are satisfied in the contract,
2 even indemnity is okay.

3 Now I know that --

4 JUSTICE KAVANAUGH: On your first
5 point --

6 MR. JOSHI: -- Petitioner in the reply
7 briefs --

8 JUSTICE KAVANAUGH: -- you mention --
9 your friend on the other side mentioned the
10 False Claims Act. That's not a concern?

11 MR. JOSHI: I'm not entirely sure why
12 it would be a False Claims Act violation --
13 violation to say, in a contract, here are our
14 overhead costs and, government, you can accept
15 our bid or not. Maybe -- maybe --

16 JUSTICE KAVANAUGH: Okay. Well, I'm
17 sure that'll be used in the future, that
18 representation.

19 (Laughter.)

20 MR. JOSHI: Well, I -- I just -- I --
21 I'm just not sure what Mr. Draye is referring
22 to, to be -- to be honest. You know, in -- in
23 my own discussions with my -- my client
24 agencies, I've been told that these kinds of
25 overhead costs typically are just reflective

1 of -- of background costs. And so, presumably,
2 GEO might be competing with CoreCivic, might be
3 competing with others. And, presumably, if
4 there were large litigation costs as a result
5 of not having an interlocutory -- or I
6 shouldn't use the word interlocutory -- but not
7 having an immediate collateral order appeal,
8 that would be the delta presumably. I guess
9 that would just be priced into -- into the
10 contract.

11 We don't see a hesitance on the part
12 of either Petitioner or CoreCivic or -- or
13 other private contractors in bidding on
14 contracts in circuits, including the Ninth,
15 which is a pretty large circuit, that don't
16 find this to be a collateral order subject to
17 immediate appeal.

18 As we note, to the extent you're
19 thinking, well, maybe it is an immunity from
20 suit, then you would have to answer the
21 question from Will against Hallock, is this
22 important enough to warrant an immediate
23 appeal? Is this more like in Digital
24 Equipment, in Lauro Lines, in Heike? You know,
25 in other cases, you would have to ask, you

1 know, is this right being under-enforced, was
2 the word Mohawk used? Are district courts
3 getting it wrong a lot? We don't see evidence
4 of that either.

5 All the cases that Petitioner cites
6 on -- on its side of the split have ultimately
7 heard the interlocutory appeal and then ruled
8 against the defendant there. So we just don't
9 see it empirically as a large problem.

10 JUSTICE SOTOMAYOR: It seems
11 intuitively to me, and I'll stop here, so -- I
12 won't have any questions on the round-robin,
13 but, intuitively, the simple answer was the
14 second answer counsel gave, your co-counsel
15 gave, which was this is a category or cases
16 that are factually interwound often. What
17 was -- was the question -- what order did the
18 government give or not give? So isn't that an
19 easy out?

20 MR. JOSHI: I -- I would love to say
21 yes, and my only hesitance is that I really do
22 think that the case to a large degree depends
23 on whether you view Yearsley as an immunity
24 from standing the burdens of trial, an immunity
25 from suit because, if it is, then I have to

1 admit notwithstanding the Court's, like,
2 literal text in -- in Coopers & Lybrand and all
3 the other cases, the fact is sovereign
4 immunity, absolute immunity, and to a certain
5 degree qualified immunity all involve issues
6 intertwined with the merits, and, nevertheless,
7 they're deemed collateral orders.

8 JUSTICE SOTOMAYOR: All right. Thank
9 you, counsel.

10 MR. JOSHI: So --

11 CHIEF JUSTICE ROBERTS: Anyone?
12 Anything further?

13 Thank you, counsel.

14 Rebuttal, Mr. Draye?

15 REBUTTAL ARGUMENT OF DOMINIC E. DRAYE

16 ON BEHALF OF THE PETITIONER

17 MR. DRAYE: Thank you. A few quick
18 points on rebuttal.

19 I'd actually like to pick up where
20 Justice Sotomayor just left off on the fact
21 intensity red-herring. Yearsley is exactly
22 like qualified immunity. As Johnson explains,
23 if there's a fact question, then you don't
24 qualify for the immunity.

25 That's exactly the same thing here.

1 So it's contract interpretation. In this very
2 case, the district court not only denied our
3 motion for summary judgment but granted the
4 other side's on Yearsley, whether it be a
5 defense or an immunity. So, clearly, there are
6 no open fact questions in this case. You
7 consider the facts given in the complaint, the
8 relevant contract, and governing regulations.
9 No need for a -- for a fact-intensive inquiry.

10 As for the claims about history and
11 function, here again, this isn't loose
12 language. The Court doesn't just say immunity
13 in passing. It talks about since Lamar versus
14 Brown, it explains that its --- that
15 contractors are not liable to suit.

16 It is -- it is clear from the Court's
17 reasoning -- and Professor Volokh does a great
18 job explaining this in his amicus brief -- that
19 this has always been an immunity from suit
20 precisely because you're doing the government's
21 work. And all the way through three circuits,
22 the Third, Fourth, and Fifth have all said that
23 since 2018 in cases that we cite in the papers.

24 As to the -- the idea about other
25 workarounds, like including things in the

1 contract, please note that Dr. Joshi mentions
2 only in-house counsel and insurance. Those
3 might be eligible under the FARs, but all the
4 other stuff isn't. And we're not just talking
5 about in-house counsel. I don't work in-house
6 at GEO.

7 Additionally, there are lots of small
8 contractors and specialists who work as
9 contractors for the federal government who
10 can't contract this in but who will have -- and
11 this gets to my last point -- the initiative
12 problem of whether or not they should continue
13 to work for the federal government or do other
14 better things with their time.

15 That's why, at the end of the day,
16 what the SG and Respondents ask the Court to do
17 is to carve out a special rule, an exclusion
18 for contractors. But, based on history and
19 function, contractors fit neatly within this
20 Court's collateral order jurisprudence.

21 The initiative point is a good
22 example. There are many ways in which a
23 contractor can act, as Campbell-Ewald said, "in
24 compliance with all federal directions."

25 Think of the Taylor Energy case

1 devising a solution for an oil spill.
2 Contractors need to exercise their discretion
3 without timidity and without considering
4 lawsuits as well. So the -- the factors --
5 the -- excuse me, the functional analysis
6 applies just as strongly, and Filarsky takes
7 care of this point, as the history does.

8 So, with that, the only alternative
9 from the other side, again, is a carveout
10 that's idiosyncratic to contractors. There's
11 just no reason to deny the immediate appeal to
12 contractors that's available to the government
13 that they serve or the government employees
14 with whom they work side by side.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 The case is submitted.

19 (Whereupon, at 12:54 p.m., the case
20 was submitted.)

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