No. 24-758

# In the Supreme Court of the United States

THE GEO GROUP, INC.,
*Petitioner,*
*v.*
ALEJANDRO MENOCAL, ET AL.,
*Respondents*

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER**


Jonathan D. Urick
Kevin R. Palmer
U.S. CHAMBER LITIGATION CENTER
1615 H St., NW
Washington, DC 20062

Michael R. Huston
*Counsel of Record*
PERKINS COIE LLP
2525 E. Camelback Road
Suite 500
Phoenix, AZ 85016-4227
(202) 434-1630
mhuston@perkinscoie.com

Nicholas S. Crown
PERKINS COIE LLP
700 Thirteenth St., N.W.
Suite 800
Washington, DC 20005-3960

Shae McPhee
PERKINS COIE LLP
1301 Second Avenue
Suite 4200
Seattle, WA 98101-3099

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Pages**

**CASES**

**STATUTES**



**OTHER AUTHORITIES**

U.S. Government Accountability Office, *A Snapshot of Government-Wide Contracting for FY 2021* (Aug. 25, 2022), https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2021-interactive-dashboard ..... 11

U.S. Government Accountability Office, *A Snapshot of Government-Wide Contracting for FY 2023* (June 25, 2024), https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2023-interactive-dashboard ..... 12

U.S. Government Accountability Office, *A Snapshot of Government-Wide Contracting for FY 2024* (June 24, 2025), https://www.gao.gov/blog/snapshot-government-wide-con-tracting-fy-2024-interactive-dashboard ..... 11, 12

## INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The Chamber takes no position on whether derivative sovereign immunity applies on the facts of this case. The Court's decision on whether a denial of such immunity is immediately appealable, however, could have sweeping implications beyond the interests of the parties. Although the question presented targets a matter of appellate jurisdiction under the collateral-order doctrine, the underlying dispute concerns the ability of government contractors to "obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States." *Brady* v. *Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943). As explained below, that longstanding doctrine applies in circumstances where government employees themselves enjoy immunity. Granting derivative immunity thus ensures that contractors are not "left hold-

---

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

ing the bag" and "facing full liability for actions taken in conjunction with government employees who" need not face suit despite engaging in "the same activity." *Filarsky* v. *Delia*, 566 U.S. 377, 391 (2012).

The Chamber is well positioned to aid this Court's understanding of the significance of this case to current and prospective government contractors. Many members of the Chamber contract to provide critical services to the public on the government's behalf. Those essential industries include: architecture; auditing; aviation; cybersecurity; civil, electrical, and software engineering; domestic and national security; healthcare; information technology; manufacturing; military logistics, supplies, and training; and shipbuilding. Like government contractors generally, many of the Chamber's members rely on the protections of derivative immunity both in setting the prices they charge to taxpayers and, more fundamentally, in determining whether to accept government contracts in the first place. If petitioners succeed in making it harder to vindicate the protections of derivative sovereign immunity, then contractors across the board could be forced to raise their prices or decline government contracts altogether—depriving the American people of essential services that private industry is best positioned to provide.

## SUMMARY OF ARGUMENT

**A.** Because this case implicates the degree of protection afforded by the doctrine of derivative sovereign immunity, it has the potential to affect all current and prospective contractors at every level of government.

Derivative sovereign immunity offers government contractors limited but significant protection for acts taken on the government's behalf: so long as the contractor exercises validly conferred authority and hews to the government's express instructions, the contractor enjoys

the same immunity from suit held by the government itself. The doctrine thus ensures that contractors are not left facing potentially ruinous liability for actions taken under the direction of government employees—who would enjoy immunity for the exact same conduct.

Recognizing a government contractor's derivative immunity advances paramount public interests that extend far beyond the parties' dispute here. Like other immunity doctrines, derivative sovereign immunity ensures that the government can perform essential functions. It reduces the risk that contractors will forgo government work, and instead permits governments to leverage the talent and expertise of the private sector while minimizing taxpayer expense. It encourages high-quality work and avoids undue timidity when contractors perform tasks for, or make recommendations to, their public-employee supervisors. And it frees both contractors and public officials from the many disruptions caused by litigation, thus allowing them to focus on their important responsibilities to the public. By contrast, categorically denying derivative immunity to contractors—and thereby exposing them to the asymmetrical risk of expensive litigation and potentially ruinous liability—would likely reduce the government's access to private-sector talent, decrease the quality of government services, and significantly raise costs on taxpayers.

The interests protected by derivative sovereign immunity are hardly abstract. The public relies on contractors' specialized knowledge for indispensable services and goods that government often cannot provide or create by itself. The federal and state governments have contracts worth hundreds of billions of dollars for, among other things, advanced aircraft, aircraft carriers, cybersecurity, courtroom security, healthcare, missile systems, military

logistical support, water-quality monitoring, and weapons training. Recent litigation against contractors highlights the importance of preserving the doctrine's protections. Recent contractor-defendants have included a security firm that performs millions of background checks annually for the federal government; engineering companies tapped for emergency clean-ups following calamitous accidents and terrorist attacks; and logistics companies supporting U.S. military operations. Derivative immunity helps safeguard the public's access to such imperative goods and services.

**B.** This Court should hold that contractors may appeal the denial of derivative immunity under the collateral-order doctrine. Doing so would be consistent with the appellate-procedure rules that apply to other forms of immunity from suit, and it would promote the important public-policy interests inherent in this immunity doctrine.

Under the collateral-order doctrine, certain district court orders are immediately appealable when they resolve important issues that are separable from the rights asserted in the underlying case and that are effectively unreviewable after final judgment. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). This Court has repeatedly recognized that interlocutory review is available when a district court resolves a defendant's claim to immunity from federal suit. For example, orders addressing sovereign immunity (for the President and for Members of Congress), qualified immunity, and double-jeopardy immunity are all immediately appealable. For good reason: Those immunities are more than a mere defense to liability; they exist to immunize litigants against the burdens of trial itself. The important functions of each of those immunities would be severely diminished if the

party claiming immunity was required to wait until final judgment to seek appellate review.

The same principles apply to derivative immunity. Like those other forms of immunity, derivative immunity is not merely a defense to liability. It is the right to be free from the burdens of litigation and trial. And permitting prompt appellate review over the denial of derivative immunity would advance the substantive purposes of that immunity: government contractors cannot function effectively when they are consumed—or even threatened—with crippling litigation merely because they carry out the will of the government.

**C.** The court of appeals erred in concluding that the denial of derivative immunity, unlike orders denying any other type of immunity from federal suit, is not a collateral order under *Cohen*. The Tenth Circuit grounded its decision on a perceived overlap between the immunity and merits inquiries. But this Court has rejected materially identical reasoning in the contexts of Eleventh Amendment immunity and qualified immunity. In fact, this Court has explained that some factual analysis of the plaintiff's claim is necessary to resolve *any* immunity question. *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985). That has never precluded collateral review of the denial of any other kind of immunity. Because the *Cohen* factors are satisfied here, this Court should reverse the judgment of the court of appeals.

## ARGUMENT

### A. Derivative sovereign immunity supports the government's ability to perform its basic functions.

This case could have staggering consequences for the many industries and businesses that provide essential—and extremely specialized—public services across the country under government contract. At stake here is not simply a procedural point of appellate jurisdiction. Rather, this case implicates the availability and degree of litigation protection afforded by derivative sovereign immunity, a critical doctrine on which contractors rely when they agree to share their expertise with the government and provide services on the public's behalf. Diminishing that form of immunity could saddle the federal and state governments with higher prices and reduced services.

#### 1. Derivative sovereign immunity ensures that governments can leverage the talents of the private sector.

This Court has repeatedly recognized that "[g]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States." *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153, 166 (2016) (quoting *Brady*, 317 U.S. at 583). A federal government contractor enjoys derivative sovereign immunity only under specific circumstances: when (1) the contractor's actions were "within the constitutional power of Congress" and (2) the contractor was "executing [the government's] will" at the time. *Brady*, 317 U.S. at 583 (quoting *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 20–21 (1940)); see *Campbell-Ewald*, 577 U.S. at 166 (explaining that "'derivative immunity'" does not "shield[] the contractor from suit" if the contractor "violates both federal law and the Government's explicit instructions"). That well-established doc-

trine builds on the common law, which "did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." *Filarsky*, 566 U.S. at 387.

As applied to state-law actions in particular, derivative sovereign immunity finds ample support in preemption principles. When federal law "authorizes" private parties "to engage in activities that" state law "expressly forbids," federal law prevails. *Barnett Bank of Marion Cnty., N.A.* v. *Nelson*, 517 U.S. 25, 31 (1996); see, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154–159 (1982); see also Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 261 (2000) ("If state law purports … to penalize something that federal law gives people an unqualified right to do, then … the Supremacy Clause requires [courts] to apply the federal rule."). Those preemption concepts likewise apply to actions taken under government contract. As this Court has explained, "it is clear that if th[e] authority to carry out [a] project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Yearsley*, 309 U.S. at 20–21. Similar logic underlies the immunity from suit conferred under *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). See *id.* at 505–507, 512–513.

Immunizing contractors from suit in appropriate cases "protect[s] government's ability to perform its traditional functions." *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992). Indeed, "regardless whether the individual sued … works [for the government] full time or on some other basis," granting immunity from suit protects public interests "of vital importance." *Filarsky*, 566 U.S. at 390; see, *e.g.*, *Boyle*, 487

U.S. at 505–506. This case implicates at least four of those public interests.

*First*, like other forms of immunity from suit, derivative sovereign immunity can "reduce[] the risk that contractors will shy away from government work." *Campbell-Ewald*, 577 U.S. at 167. Immunity doctrines generally "ensur[e] that talented candidates are not deterred from public service." *Filarsky*, 566 U.S. at 389–390. The "government's need to attract talented individuals," moreover, "is not limited to full-time public employees." *Id.* at 390. When the government has "a particular need for specialized knowledge or expertise," it often must "look outside its permanent work force" and "secure the services of private individuals." *Ibid.* Refusing to extend immunity to contractors would produce a fundamentally unfair asymmetry: It would leave contractors "holding the bag" and "facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Id.* at 391. Indeed, if contractors "d[id] not receive the same"—or similar—"immunity enjoyed by their public employee counterparts," then it would be "more likely that the most talented candidates" in private industry "will decline public engagements" altogether. *Id.* at 390. That risk is especially acute because private-sector experts often "have freedom to select other work—work that will not expose them to liability for government actions." *Ibid.*

*Second*, recognizing a contractor's derivative immunity not only from liability, but from suit, helps to "prevent[] the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky*, 566 U.S. at 390. The public has a significant interest "in ensuring performance of government duties free from the distractions that can accompany even

routine lawsuits." *Id.* at 391. That interest "is also implicated when individuals other than permanent government employees discharge these duties," because responding to a lawsuit could cause contractors' "performance of any ongoing government responsibilities [to] suffer." *Ibid.* And the problems would not stop there: The disruptions caused by a lawsuit against government contractors "will also often affect any public employees with whom they work by embroiling those employees in litigation." *Ibid.* Depending on each government employee's "roles in the dispute," certain public officials could be "required to testify" or otherwise participate in the lawsuit. *Ibid.* Such "distraction of officials from their government duties," *Mitchell*, 472 U.S. at 526 (citation omitted), would "substantially undermine an important reason immunity is accorded to public employees in the first place," *Filarsky*, 566 U.S. at 391.

*Third*, for those in the private sector willing to offer their services, immunity from suit "help[s] to avoid 'unwarranted timidity' in performance of public duties." *Filarsky*, 566 U.S. at 389–390 (citation omitted); see *Richardson* v. *McKnight*, 521 U.S. 399, 409 (1997) (describing "unwarranted timidity" as "the most important special government immunity-producing concern"). That is because the mere *threat* of litigation is enough to impede contractors' efforts to serve the public. See *Mitchell*, 472 U.S. at 526. Without immunity from suit, a contractor might carry out the government's instructions with undue caution. Such hesitance would in turn impede the public officials under whose direction the contractor works. If a contractor, for example, sought to limit its litigation exposure by erring on the side of caution in providing services—or in making recommendations—to its government supervisors, then those public officials would either be forced to undertake the contractor's functions them-

selves (which the government employees may or may not have the capacity to do), or they would receive flawed advice (which would reflect the contractors' unduly reticent suggestions).

Without immunity, contractors would have good reasons to hesitate when carrying out government officials' commands. Litigation portends exorbitant costs that continue to increase each year. "[C]osts and compensation in the U.S. tort system amounted to $529 billion in 2022, equivalent to 2.1 percent of U.S. GDP and $4,207 per American household." Nicholas C. Lucas, *The Hidden Costs of Lawsuits Continue to Grow*, U.S. Chamber of Commerce (Nov. 20, 2024).[2] Under current trends, "the costs of lawsuits will continue to skyrocket, with overall tort costs rising to over $900 billion by 2030." *Ibid.* And unlike their government counterparts, contractors can be held liable for punitive damages, which introduces immense pressure to settle unmeritorious suits. See, *e.g.*, Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?*, 58 Ohio St. L.J. 175, 219 (1997). That pressure intensifies if the litigation triggers the SEC rule requiring publicly held companies to identify certain high-stakes litigation in their public disclosures. 17 C.F.R. § 229.103.

*Fourth*, derivative sovereign immunity avoids excessive taxpayer expenses. Absent immunity, the government and the public would most likely share the costs of unnecessary litigation against government contractors, who would be forced to raise prices to account for potential liability and litigation expense. See Jason Malone,

---

[2] https://www.uschamber.com/lawsuits/hidden-costs-lawsuits-grow.

*Derivative Immunity: The Impact of* Campbell-Ewald Co. *v.* Gomez, 50 Creighton L. Rev. 87, 120–121 (2016). By contrast, when government contractors need not factor anticipated litigation fees into their costs, they can offer lower bids and pass their savings to taxpayers. See *Boyle*, 487 U.S. at 510.

**2. Government contractors that benefit from derivative sovereign immunity are indispensable providers of essential goods and services.**

Preserving derivative immunity is particularly important because the federal and state governments have increasingly relied on the private sector for its expertise and efficiency—with good reason. The volume and variety of existing government contracts—and the specialized knowledge required to perform them—make plain the importance of preserving the protection afforded by derivative sovereign immunity. And recent lawsuits against contractors make clear that the Court's decision in this case could affect scores of government services.

a. The U.S. Government Accountability Office (GAO) reported that "[i]n Fiscal Year 2024" alone, "the federal government committed about $755 billion" in new contracts. GAO, *A Snapshot of Government-Wide Contracting for FY 2024* (June 24, 2025) (*FY 2024 Snapshot*).[3] That figure reflects a significant increase from the $637 billion in new contracts awarded just three years earlier. GAO, *A Snapshot of Government-Wide Contracting for FY 2021* (Aug. 25, 2022).[4]

---

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

[4] https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2021-interactive-dashboard.

Those contracts allow the federal government to tap private industry's unique competencies, particularly in highly complex and labor-intensive fields in which it would be inefficient, impractical, or even impossible for government to perform the work itself. See, *e.g.*, *Filarsky*, 566 U.S. at 390 (recognizing that the government often "must look outside its permanent work force" to fulfill a "particular need for specialized knowledge or expertise"). GAO has described how many of the federal government's recent contracts will "provide products and services ranging from cybersecurity software," "consulting services," "[d]rugs and biologicals (medical treatments that can include vaccines, tissue, and other products)," "aircraft carriers," and "fixed wing aircraft." GAO, *FY 2024 Snapshot*; see also, *e.g.*, GAO, *A Snapshot of Government-Wide Contracting for FY 2023* (June 25, 2024) ("These contracts are used to provide products and services ranging from aircraft and software to health care and engineering support.").[5] In its most recent fiscal year, the government entered more than $445.1 million in contracts for private-sector products and services on behalf of the Department of Defense (DoD), in addition to tens of millions of dollars in contracts to benefit the Department of Veterans Affairs, the Department of Energy, the Department of Health and Human Services, the General Services Administration, the Department of Homeland Security, NASA, the Department of State, the Department of Agriculture, and the Department of Justice. GAO, *FY 2024 Snapshot*.

More recently, DoD announced several significant contracts with outside firms to advance the country's military readiness and support the national defense. In

---

[5] https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2023-interactive-dashboard.

March 2025, the Air Force entered a contract for the development and manufacture of "the world's first sixth-generation fighter aircraft." Secretary of the Air Force Public Affairs, *Air Force Awards Contract for Next Generation Air Dominance (NDAG) Platform, F-47* (Mar. 21, 2025).[6] The government lacks the capacity to build those warplanes itself—which is why it described the outside contract as "reflect[ing] the Air Force's commitment to delivering cutting-edge technology to the warfighter while optimizing taxpayer investment." *Ibid.* Weeks ago, DoD similarly announced important contracts for, among other things, "Terminal High Altitude Area Defense (THAAD) Interceptors" for the Missile Defense Agency; the "acquisition, integration, installation, operations, and maintenance" and certain communications systems "in support of U.S. Air Forces Central Command … deployed mission requirements" for the Defense Information Systems Agency; "architect-engineer services" for the Army; as well as "troop housing construction" and "research on advanced manufacturing techniques for avionics sustainment" for the Air Force. DoD, *Contracts for July 28, 2025*.[7] As those agreements make clear, contractors provide critical support for the Armed Forces, which rely on voluntary conscription and cannot spare warfighters for construction, transport, and other tasks historically assigned to soldiers.

On top of its existing contracts, the federal government forecasts that it will need to enter thousands of new

---

[6] https://www.af.mil/News/Article-Display/Article/4131345/air-force-awards-contract-for-next-generation-air-dominance-ngad-platform-f-47/.

[7] https://www.defense.gov/News/Contracts/Contract/Article/4257577/.

agreements for key goods and services. See U.S. General Services Administration, *Acquisition Gateway Forecast Tool*.[8] The government plans to continue partnering with private industries for services such as auditing; cloud storage and data security; civil engineering and dam-preservation; courthouse security; electrical engineering; information-technology support; medical second-opinions and examinations; military-operations and logistics; software engineering; water-quality monitoring; and weapons training (for conventional, electronic, and information warfare)—to name only a few. *Ibid.* The federal agencies currently seeking such private-sector support include the Department of Defense, the Department of the Interior, the Department of Labor, the Department of Veterans Affairs, the General Services Administration, and the Nuclear Regulatory Commission.

The federal government is hardly unique in leveraging the talents of private industry to benefit its citizens. The State of Florida currently has contracts worth more than $499 billion. See Florida Department of Financial Services, Florida Accountability Contracting System, *Contract Amount by Agency* (July 25, 2025).[9] More than $295 billion of that total supports the Florida Agency for Health Care Administration, another $18 billion supports the Florida Department of Health, and some $33 billion benefits the State's Department of Children and Families. *Ibid.* The State of Texas awarded over $40 billion in new contracts in its fiscal year 2024 and reports more than 48,000 active contracts worth $251 billion benefiting 159 state agencies. See Legislative Budget Board, *Texas*

---

[8] https://perma.cc/KEF2-UXYS.

[9] https://facts.fldfs.com/Charts/Top5AmountByAgency.aspx.

*State Contracts* (July 25, 2024).[10] And California expended more than $57 billion on government contracts in its most recent fiscal year alone. California Department of General Services, *Statewide Procurement Data Dashboards, Department Spend* (July 1, 2025).[11]

b. Recent lawsuits against government contractors—and appellate decisions concerning derivative-sovereign immunity—shed even further light on the breadth of potential industries and contractors that may be affected by this Court's decision here.

Perhaps recognizing that government employees typically enjoy immunity for materially identical conduct, special-interest groups have increasingly sought to impede disfavored government policies by directing lawsuits against government *contractors*. Plaintiffs have brought suit against military-recruitment contractors, *Campbell-Ewald*, 577 U.S. at 166, detention-facility contractors, *Washington* v. *GEO Grp., Inc.*, 283 F. Supp. 3d 967, 972–973, 976 (W.D. Wash. 2017); *Novoa* v. *GEO Grp., Inc.*, No. 17-cv-02514, 2018 WL 4057814, at *3 (C.D. Cal. Aug. 22, 2018) (same), and student-loan servicers, *Chae* v. *SLM Corp.*, 593 F.3d 936, 944–950 (9th Cir. 2010). In each instance, government employees likely would have enjoyed immunity for the same challenged conduct.

Federal appellate opinions addressing derivative immunity underscore the stakes here. Consider *In re U.S. Office of Personnel Management Data Security Breach Litigation*, 928 F.3d 42 (D.C. Cir. 2019). That case involved claims arising from a data breach suffered by "a private investigation and security firm" on which the

---

[10] https://contracts.lbb.texas.gov/.

[11] https://perma.cc/3MZE-WLCY.

Office of Personnel Management had "relied … to conduct the lion's share of the agency's background and security clearance investigation fieldwork." *Id.* at 50. No doubt OPM had sought assistance from a private entity because background investigations require "collect[ing] a tremendous amount of sensitive personal information from current and prospective federal workers" across "more than two million background checks and security clearance investigations a year." *Ibid.* Although the court of appeals denied immunity on case-specific grounds—because it concluded that the plaintiff had plausibly alleged that the contractor "ran afoul of both OPM's explicit instructions and federal law standards," *id.* at 69—that litigation makes clear the potential impact of limiting derivative sovereign immunity. Data security is a continuing concern, and the prospect of facing suit and liability could deter the private sector from offering its irreplaceable knowledge in an area of critical need, or to charge taxpayers a premium for such extremely technical services.

The Sixth Circuit's decision in *Adkisson* v. *Jacobs Engineering Group, Inc.*, 790 F.3d 641 (2015), raises similar concerns. The plaintiffs in *Adkisson* brought tort claims against an engineering firm that had contracted with the Tennessee Valley Authority to provide "project planning, management, and oversight to assist in the overall recovery and remediation" from a catastrophic coal-ash spill that had left "5.4 million cubic yards of coal-ash sludge" covering "over 300 acres of adjacent land." *Id.* at 644. Similarly, the private defendants in *Ackerson* v. *Bean Dredging LLC*, 589 F.3d 196 (5th Cir. 2009), were civil-engineering companies that had agreed to help the U.S. Army Corps of Engineers dredge portions of the Mississippi River. *Id.* at 202–203. And *In re World Trade Center Disaster Site Litigation*, 521 F.3d 169 (2d Cir. 2008), involved private companies that had contracted to "do

much of the work" required during the enormous clean-up response to the 9/11 terrorist attacks. *Id.* at 173–174. A ruling by this Court diminishing the degree of protection afforded by contractors' derivative immunity could hamper essential efforts like those shouldered by the contractors in *Adkisson*, *Ackerson*, and *World Trade Center*.

The cases that have been percolating in the courts of appeals also make plain that the government's national defense contracts could be affected by the outcome in this case. The defendants in *McMahon* v. *Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), had contracted with the Department of Defense to "furnish 'all fixed-wing aircraft, personnel, equipment, tools, material, maintenance, and supervision necessary to perform'" for the U.S. military certain "'passenger, cargo, or passenger and cargo air transportation services' between various locations in Afghanistan, Uzbekistan, and Pakistan." *Id.* at 1336. The defendant companies in *Martin* v. *Halliburton*, 618 F.3d 476 (5th Cir. 2010), were "governmental contractors providing logistical support to the United States military in Iraq." *Id.* at 478–479. And the defendants in the tort suit at issue in *Childs* v. *San Diego Family Housing LLC*, 22 F.4th 1092 (9th Cir. 2022), were a "public-private venture created by statute" that owned military housing at Naval Amphibious Base Coronado, and a private company that had agreed "to provide property management services" on base. *Id.* at 1094.

* * *

As those examples show, this case implicates contracts across various levels of government and spanning specialized industries of all kinds. A decision undercutting the protections of derivative sovereign immunity could have significant consequences extending far beyond the parties currently before this Court.

**B. Permitting government contractors to take interlocutory appeals from orders denying derivative immunity similarly serves crucial public interests.**

1. As just explained, derivative immunity plays an essential role in ensuring that litigation does not deter contractors from partnering with the government, impede their performance, or subject them to ruinous liability (and the public to higher prices). Although government contractors perform work that is vital to the government, their "immunity in connection with work which they do pursuant to their contractual undertaking with the United States," *Brady*, 317 U.S. at 583—unlike the government's "embracive" immunity from suit—"is not absolute," *Campbell-Ewald*, 577 U.S. at 166. For that reason, government contractors are subject to litigation risks that do not apply to the government. It is thus important for this Court to be particularly careful to ensure that contractors are not subjected to *unwarranted* litigation—that is, lawsuits challenging conduct that was within Congress's lawful authority and directed by government officials. Permitting timely appellate review of erroneous orders forcing a contractor to face trial will advance that important public purpose. See *ibid.*

By contrast, requiring a denial of derivative immunity to await a final-judgment appeal would defeat the substantive policy aims served by derivative immunity. It is the specter of expensive and burdensome litigation itself that undermines government's ability to leverage private-sector talent. See pp. 7–11, *supra*. Ending legally unsupportable litigation sooner rather than later preserves valuable resources, provides stability, and allows contractors to set expectations. "According to a 2010 survey of attorneys conducted by the Federal Judicial Center, summary judgment motion practice increases the costs of litigation by between twenty-two and twenty-four percent." Victor

Marrero, *The Cost of Rules, the Rule of Costs*, 37 Cardozo L. Rev. 1599, 1665 (2016). Those "motions typically consume from four to six months for the litigants to prepare and file the various rounds of papers," on top of expensive discovery. *Ibid.* In turn, typically "the courts spend from five to nine months to hold a hearing and issue a decision." *Ibid.* Determining a government contractor's immunity before summary judgment thus serves to limit litigation costs and encourage the private sector to share its expertise by undertaking public contracts.

2. The same principles that animate the derivative-immunity doctrine underlie the collateral-order doctrine and demonstrate why a denial of immunity should be immediately appealable.

The collateral-order doctrine permits a party to take an interlocutory appeal from an order that does not terminate the action but nevertheless "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. This Court has generally looked to three factors in deciding whether to allow an appeal: The order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 468 (1978) (citing *Cohen*, 337 U.S. at 546).

If a district court rejects a litigant's claim to an established right not to stand trial, "it follows that the elements of the *Cohen* collateral order doctrine are satisfied." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). Indeed, since *Cohen*, this

Court has consistently applied the collateral-order doctrine to permit appeals of orders involving the denial of immunity from trial. Orders denying motions to dismiss on the grounds of absolute immunity are immediately appealable. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742–743 (1982) (absolute immunity of the President from civil damages liability); *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979) (absolute immunity under the Speech and Debate Clause). So are orders denying a State's Eleventh Amendment immunity, *Puerto Rico Aqueduct*, 506 U.S. at 144–145, orders denying an official's qualified immunity, *Mitchell*, 472 U.S. at 530, and orders denying a criminal defendant's immunity right under the Double Jeopardy Clause, *Abney* v. *United States*, 431 U.S. 651, 660 (1977). Because immunity from federal suit is never given lightly to any litigant, including government contractors, *see Brady*, 317 U.S. at 581, preserving such immunity is "too important to be denied review," *Cohen*, 337 U.S. at 546.

This Court has recognized that allowing a prompt appeal from a district court's denial of immunity vindicates the interests served by immunity doctrines. Without an interlocutory appeal, the benefits of immunity from suit would be "effectively lost." *Mitchell*, 472 U.S. 526. And permitting immediate review helps "to avoid subjecting government officials either to the costs of trial or to the burdens of broad-reaching discovery," which "can be peculiarly disruptive of effective government." *Ibid.* (cleaned up). Thus, the "application of the collateral order doctrine" in the immunity context is "justified in part" by the concern that the immune defendant "not be unduly burdened by litigation." *Puerto Rico Aqueduct*, 506 U.S. at 146; see *Helstoski*, 442 U.S. at 508 (explaining that the availability of immediate appeal is necessary for a Mem-

ber of Congress "to avoid exposure to being questioned for acts done in either House" (cleaned up)).[12]

Those principles apply with similar force in the context of government contractors' derivative immunity. Indeed, this Court has held that contractors, much like government employees, are entitled to *qualified* immunity from suit. *Filarsky*, 566 U.S. at 393–394. It would be particularly anomalous if public employees enjoy sovereign immunity for their conduct while government contractors performing public functions under federal employees' express direction are burdened with litigation and trial. This Court should reaffirm that, where a government contractor does the bidding of the government and for that reason claims the shield of the government's

---

[12] In recognizing a defendant's right to take an immediate appeal from an order denying immunity from suit, this Court has generally relied on the collateral-order doctrine. See, *e.g.*, *Mitchell*, 472 U.S. at 526. But recent scholarship suggests that orders denying immunity historically were viewed as "final decisions" appealable under 28 U.S.C. § 1291, particularly because the right not to stand trial would be irretrievably (and finally) lost after such a decision. See Adam Reed Moore, *A Textualist Defense of a New Collateral Order Doctrine*, 99 Notre Dame L. Rev. Reflection 1, 8–9, 28–37 (2023). Indeed, the Judiciary Act of 1789 originally conferred on federal circuit courts mandatory appellate jurisdiction over certain "final *decrees* and judgments" of district courts. § 22, 1 Stat. 73, 84 (emphasis added). And when Congress amended the operative text to "final decisions" in 1891, this Court already had a long tradition of permitting appeals from "decision[s]" that were not themselves *judgments*, but were nonetheless "final in [their] nature" and "distinct from the general subject of litigation." *Williams* v. *Morgan*, 111 U.S. 684, 699 (1884) (collecting cases); see *Bronson* v. *La Crosse & M.R. Co.*, 67 U.S. (2 Black) 524, 531 (1862) (similar).

immunity, that contractor may seek immediate appellate review from a court's denial of that immunity.

**C. The court of appeals erred in dismissing this appeal.**

1. The Tenth Circuit's decision below is inconsistent with this Court's application of the *Cohen* doctrine in immunity cases. As just described, the Court has repeatedly held that orders denying immunity from federal suit warrant collateral review under *Cohen*. And *Yearsley* and other decisions make clear that contractors who provide public services are immune from suit in federal court. *Brady*, 317 U.S. at 583 (citing *Yearsley*, 309 U.S. at 20–21); see *Campbell-Ewald*, 577 U.S. at 166. It therefore follows that orders denying derivative immunity trigger immediate review under the collateral-order doctrine. Without prompt appellate review, the defendant would be subjected to the very burdens of litigation (and trial) against which the immunity is supposed to protect.

2. The court of appeals dismissed petitioner's appeal by reasoning that an order denying a contractor's assertion of immunity under *Yearsley* "cannot be reviewed completely separate from the merits" of the complaint's allegations. Pet. App. 3a. The court stated that "both the inquiries regarding *Yearsley* protection and the merits of [respondents'] claims would relate to whether the government specifically directed the contractors' actions and whether, in practice, they deviated from the government's directions." *Id.* at 26a. The court also took the view that "the actual facts," whether "as pleaded" or "established by the evidence at the summary-judgment phase," would have a "significant role" in the immunity analysis. *Ibid.*

The court of appeals' reasoning is irreconcilable with this Court's precedents. Under the collateral-order doctrine, the question whether a defendant is "entitle[d] not to be forced to litigate" is "conceptually distinct from the

merits of the plaintiff's claim that his rights have been violated." *Mitchell*, 472 U.S. at 527–528. Equally misguided was the lower court's focus on the "actual facts." Pet. App. 26a. At least some consideration of factual allegations is necessary in *any* immunity appeal. For example, when considering "a double jeopardy claim, the court must compare the facts alleged in the second indictment with those in the first to determine whether the prosecutions are for the same offense." *Mitchell*, 472 U.S. at 528. When "evaluating a claim of immunity under the Speech and Debate Clause, a court must analyze the plaintiff's complaint to determine whether the plaintiff seeks to hold a Congressman liable for protected legislative actions." *Ibid.* (citing *Abney*, 431 U.S. at 660; *Helstoski*, 442 U.S. at 508; *Nixon*, 457 U.S. at 742–743). And in the Eleventh Amendment context, this Court has rejected the view that "the determination of a State or state agency's claim to Eleventh Amendment immunity is bound up with factual complexities whose resolution requires trial and cases in which it is not." *Puerto Rico Aqueduct*, 506 U.S. at 147 (cleaned up). But in analyzing a claim to immunity, the reviewing court "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." *Mitchell*, 472 U.S. at 528. Rather, a court need only assume the complaint's version of events and determine the immunity question on that basis. See *ibid.*

The logic of *Mitchell*, *Puerto Rico Aqueduct*, *Helstoski*, *Nixon*, and *Abney* applies with equal force here. As noted above, for purposes of derivative sovereign immunity the salient questions are: (1) whether "what was done was within the constitutional power of Congress" and (2) whether the contractor "performed as the Government directed." *Campbell-Ewald*, 577 U.S. at 167. Neither answer turns on the correctness of a plaintiff's factual

allegations. The decision below therefore erred by focusing on the "actual facts."

Finally, there can be no doubt that the other *Cohen* factors are also satisfied here. Immunity from suit is unreviewable on appeal because the right to be free of trial is lost by the time of final review. See, *e.g.*, *Abney*, 431 U.S. at 660; *Helstoski*, 442 U.S. at 508. And a trial court's denial of immunity from suit conclusively determines the immunity question. See *ibid.* This Court should hold that an order denying derivative immunity is immediately appealable under the collateral-order doctrine, and remand for appellate review of the trial court's order.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Jonathan D. Urick
Kevin R. Palmer
U.S. CHAMBER LITIGATION CENTER
1615 H St., NW
Washington, DC 20062

Michael R. Huston
*Counsel of Record*
PERKINS COIE LLP
2525 E. Camelback Road
Suite 500
Phoenix, AZ 85016-4227
(202) 434-1630
mhuston@perkinscoie.com

Nicholas S. Crown
PERKINS COIE LLP
700 Thirteenth St., N.W.
Suite 800
Washington, DC 20005-3960

Shae McPhee
PERKINS COIE LLP
1301 Second Avenue
Suite 4200
Seattle, WA 98101-3099

August 7, 2025