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 ERWIN CHEMERINSKY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE[1]

Erwin Chemerinsky is the Dean of the University of California Berkeley School of Law, where he holds the title of Jesse H. Choper Distinguished Professor of Law. He is the author of 14 books, including leading casebooks and treatises about constitutional law, and has authored over 200 law-review articles. Dean Chemerinsky has written about governmental immunities on multiple occasions and has an interest in preventing the unwarranted expansion of such immunities to private actors.

[1] No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity, other than the amicus curiae or his counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus curiae Erwin Chemerinsky writes to explain why there is no basis in common law or modern precedent for expanding sovereign immunity—a narrowly cabined doctrine that does not even extend to individual government officers—to *immunize from suit* the tens of thousands of government contractors that provide an unfathomable range of services and products to the federal government under millions of contracts awarded annually.[2] Unless the Court takes the unprecedented step of expanding sovereign immunity to government contractors, Petitioner cannot demonstrate that an order denying its claim of so-called "derivative sovereign immunity" would "be effectively unreviewable on appeal from a final judgment"[3] and therefore immediately reviewable under the collateral-order doctrine.

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[2] In fiscal year 2024 alone, the federal government awarded $773.68 billion dollars in contracts to 108,899 companies. (This figure includes "de-obligations"—the cancellation or downward adjustment of previously committed government funds or financial obligations.) Archisha Mehan, *Federal Contract Awards Hit $773.68B in FY24, Small Businesses See $4B Increase*, GovSpend.com (Feb. 24, 2025), https://govspend.com/blog/federal-contract-awards-hit-773-68b-in-fy24-small-businesses-see-4b-increase/.

In that same fiscal year, the federal government awarded over 5,357,500 contracts. *Federal Fiscal Year: Strategies for Contractors in FY 2024 and 2025*, FAMR.US, https://www.famr.us/learn/federal-fiscal-year/.

[3] *Will* v. *Hallock*, 546 U.S. 345, 349 (2006).

Properly understood as a defense and not as an immunity from suit, *Yearsley*[4] yields rulings and verdicts that are just as reviewable after final judgment as rulings and verdicts on any other ordinary defense. And, *Yearsley* aside, government contractors also have other defenses at their disposal, including, where applicable, qualified immunity and preemption, making it unnecessary to inundate the intermediate federal courts with a torrent of newly authorized interlocutory appeals.

We pay particular attention to amicus curiae Alexander Volokh's use of a "parity principle" to cobble together excerpts from cases that concededly do *not* authorize immunizing government contractors from suit. Indeed, many of those cases did not even consider a government contractor's claim of immunity from suit—and some denied even an ordinary defense to government officials and contractors alike, proving that "parity" is at best a double-edged sword when wielded in this context.

Part I demonstrates that, under common-law principles, government agents and contractors have been subject to suit since the founding. For the Framers and for early Americans generally, these common-law principles were part of the established jurisprudence and helped to ensure that government officers and agents did not overstep the bounds of their authority—just as those principles presently serve as a critical check on the modern administrative bureaucracy.

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[4] *See Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18 (1940).

Part II reviews this Court's modern *Yearsley* precedents. Those precedents establish that, although federal contractors in certain circumstances ultimately may escape *liability* for conduct that otherwise would be deemed tortious or illegal, no authority exists for the proposition that federal contractors can claim *sovereign immunity from suit*.

For all the reasons stated here and in Respondents' Brief, the Court should affirm the Tenth Circuit's order dismissing the Petitioner's appeal for lack of appellate jurisdiction.

ARGUMENT

I. In the United States, agents and officers of the federal government have been subjected to suit since the founding.

The Constitution provides little direct guidance on the question of sovereign immunity. *See* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1, 4–7 (2017); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201, 1205 (2001). Indeed, some early Americans and decisions of this Court expressed doubts about sovereign immunity's relevance to the United States. In *Langford* v. *United States*, 101 U.S. 341, 342–43 (1879), for example, this Court commented: "It is not easy to see how" the proposition that "the king can do no wrong" "can have any place in our system of government." Indeed, "the entire history of the American Revolution would seem to negate the applicability" of sovereign immunity in the United States. George W. Pugh, *Historical Approach to the Doctrine of Sover-*

eign Immunity, 13 La. L. Rev. 476, 480 (1953). Nevertheless, over time, the English common-law principles of sovereign immunity took root in American courts. *See* Resp. Br. 4–10.

Because of this history, the "provenance" of sovereign immunity in the United States is linked closely to the history of English common law. Baude, *Sovereign Immunity*, *supra*, at 4. A similar history has shaped the trajectory of qualified-immunity jurisprudence. *See* William Baude, *Is Qualified Immunity Unlawful?* 106 Cal. L. Rev. 45 (2018). In the relatively recent case of *Filarsky* v. *Delia*, 566 U.S. 377 (2012), for example, the Court "invoked the common-law background" of the history of tort liability for officers as part of its discussion of qualified immunity. *See* Baude, *Is Qualified Immunity Unlawful?*, *supra*, at 53. In this Court's words, "the inquiry begins with the common law." *Filarsky*, 566 U.S. at 384.

Any inquiry into the traditional common-law principles governing immunity provides no support for Petitioner's request to extend immunity to private contractors. At the time of the founding, the relevant English common law included a "wide range of actions against officials," stemming from the time of King Edward I (1275). *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 9 (1963). "[O]ne who had been disseised in the King's name," for example, "could recover his land by bringing action against the officer." *Id.* In other words, at the time of the founding, the Framers would have understood that even the King's agents could be subjected to suit.

Early Americans shared these understandings. It became clear early on that "a suit against an officer [in the United States] was not forbidden simply because it raised a question as to the legality of his action as an agent of government." Jaffe, *supra*, at 20. On the contrary, "government officers have long been held to be suable in their own right, without the government's immunity." Baude, *Sovereign Immunity*, *supra*, at 4.

Lawsuits against government agents were commonplace in the early years of the nation, when officers of the government "were given legal powers and corresponding duties and were directly accountable to the law (rather than their superiors) for discharging them." Nathaniel Donahue, *Officers at Common Law*, 135 Yale L.J. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5415055 at 5. Trespass suits in response to tax enforcement, for example, were particularly common. *Id*. at 31. Officers who worked as surveyors also were held subject to damage suits for digging streets too deep. *See Callender* v. *Marsh*, 18 Mass. (1 Pick.) 418, 435–36 (1823).

With the rise of the administrative state, the role of government officers changed but the principles continued to be applied "throughout the nineteenth century." Baude, *Qualified Immunity*, *supra*, at 57. For example, in 1891, the Supreme Judicial Court of Massachusetts held that an order issued by government commissioners could not immunize local officials from liability for the mistaken killing of a horse. *Miller* v. *Horton*, 26 N.E. 100, 103 (Mass. 1891) (Holmes, J.).

Holding government officers personally liable was viewed as a useful tool for ensuring that they did not act without authority. *See* David E. Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. Colo. L. Rev. 1, 17–18 (1972). In the English context, a scholar noted that "ministers are not the Crown," and it poses no threat to the Crown to hold public offers liable for actions that exceed their authority. Harold J. Laski, *The Responsibility of the State in England*, 32 Harv. L. Rev. 447, 450 (1919). In Laski's words, "When the King's ministers find their way into the courts it is still a personal responsibility which they bear. Statutory exceptions apart, no such action need cause a moment's qualms to the grim guardians of the royal treasury; the courts' decision does not involve a raid upon the exchequer." *Id.* Further, "[n]o one can doubt the value of this rule, for it constitutes the fundamental safeguard against the evils of bureaucracy." *Id*. at 458.

The Court should be cautious about extending the immunity of the state to actors who are not otherwise publicly accountable. Early Americans shared this view, and it remains a concern for many Americans today, as bureaucratic responsibilities are increasingly outsourced to private actors like Petitioner.

II. This Court's precedents reject the notion of extending governmental immunity to private parties.

This Court repeatedly has rejected attempts to judicially expand the reach of sovereign immunity to

government contractors and agents. "[T]he petitioner's status as a Government contractor does not entitle it to 'derivative sovereign immunity,' *i.e.*, the blanket immunity enjoyed by the sovereign." *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153, 156 (2016).

Several of this Court's decisions drive the point home. In *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922), a case involving the actions of the Fleet Corporation "representing the United States of America," this Court rejected the notion that a private corporation—even one wholly owned by a government—"share[d] the immunity of the sovereign from suit." *Id.* at 566, 568; *see also id.* at 565. Instead, the Court emphasized that the immunity of the United States does not extend to its agents or those who act "in [the government's] name." *Id.* at 567–68. Two decades later, this Court reached a similar conclusion in *Brady* v. *Roosevelt Steamship Co.*, 317 U.S. 575, 583 (1943), holding that a contractor could not obtain "[i]mmunity from suit" "by reason of a contract between [it] and the [federal government]." The Court also commented that only Congress could grant government contractors such immunity. *Id.* at 579–80.

As this Court recognized in *Yearsley*, the government can lawfully authorize a contractor to take actions that the government itself could lawfully take. But this is not the same thing as a delegation of sovereign immunity. *Yearsley* is "rooted in traditional principal-agent concepts." Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 Stan. L.

Rev. 969, 991 (2021); *see also* Pet. Br. 16–17. The contractor in such circumstances is insulated from liability, not because it shares the government's immunity from suit but because the contractor has provided a justifiable *defense* for its conduct. *See Yearsley*, 309 U.S. at 21. Contractors also may assert a preemption defense. *See Boyle* v. *United Techs. Corps.*, 487 U.S. 500, 512 (1988). But once again, unlike the sovereign-immunity doctrine, that defense does not bar the suit entirely.

The fact that some courts have loosely used the term "immunity" to describe what is now known as the *Yearsley* defense does not change the analysis or the underlying common-law principles. It is true that some courts have "use[d] 'immunity' language interchangeably with 'privilege' in the context of an agent's individual liability for tortious interference." Restatement (Third) of Agency § 7.01 cmt. e (Am. Law Inst. 2006). But this linguistic confusion does not convert an agent's "privilege" to lawfully engage in acts that might not otherwise be legally permissible into an "immunity" from suit. They are legally and analytically distinct concepts.

This Court's qualified-immunity jurisprudence likewise provides no support for extending governmental immunity to private parties in this case. In some instances, contractors might assert qualified immunity for reasonable mistakes of law. *See Filarsky*, 566 U.S. at 389–92. But *Filarsky* offers no support for the idea that government contractors are shielded *from suit* under "derivative sovereign immunity." To our knowledge, no precedent supports extending qualified immunity to corporations, as Petitioner urges here.

Professor Alexander Volokh's "Parity Principle" fails to fill this precedential gap. The principle, as he articulates it—"that the private party doing work at the government's behest is the government's agent" and therefore should be treated "equally to more formally governmental actors"—contains the seeds of its own failure because, as we have shown, individual "formally governmental actors" do *not* share in the government's sovereign immunity, and never have. The Parity Principle serves only as a means to identify phrases in the case law that sound good but fail to establish the principle that government contractors—*unlike* "more formally governmental actors"—may partake of the government's sovereign immunity.

Ironically, the "parity" language forming the basis of Professor Volokh's argument could just as easily support an argument for the legal status quo; for if existing common-law doctrine *already* incorporates the parity principle, there's no need for dramatic legal change to ensure that government contractors are treated fairly by the courts.

In any event, such policy arguments are more appropriately directed to Congress. They do not provide this Court with a doctrinal basis for the unprecedented judicial expansion of immunity that Petitioner seeks here. On the contrary, established common-law principles and a long line of cases tracing back to the founding of the United States and beyond support the opposite conclusion.

CONCLUSION

For the reasons stated above, the Court should affirm the Tenth Circuit's order dismissing the Petitioners' appeal for lack of appellate jurisdiction.

Respectfully submitted,

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