

GIBSON DUNN



Appellate and Constitutional Law Update

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Supreme Court Holds That Denials Of Contractor “Immunity” Are Not Immediately Appealable

The GEO Group, Inc. v. Menocal, No. 24-758 – Decided February 25, 2026

Today, the Supreme Court unanimously held that federal contractors may not take immediate appeals from pretrial orders rejecting a defense to liability based on compliance with the government’s directives.

“Because Yearsley provides a defense to liability, not an immunity from suit, an order denying its protection can be effectively reviewed after a final judgment. So appellate review of such an order, as of most pretrial rulings, must await completion of the district court’s proceedings.”

JUSTICE KAGAN, WRITING FOR THE COURT

Background:

In *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), the Supreme Court held that government contractors cannot be held liable for acts that they undertake pursuant to validly conferred governmental authority. *Yearsley* gave rise to what many have described as “derivative sovereign immunity.”

GEO Group operates a private detention facility in Aurora, Colorado under contract with U.S. Immigration and Customs Enforcement (ICE). A class of detainees who were detained at GEO's Aurora facility sued GEO in federal court, alleging that GEO's facility-sanitation policy and voluntary-work program violate federal and Colorado law. GEO moved for summary judgment, asserting derivative sovereign immunity based on GEO's claim that ICE authorized its challenged policies. After the district court denied the motion on the theory that ICE neither directed nor required those policies, GEO took an immediate appeal.

The Tenth Circuit dismissed the appeal for lack of jurisdiction. Under 28 U.S.C. § 1291, courts of appeals have jurisdiction over appeals from "final" decisions, which terminate the litigation. Under the collateral-order doctrine, appellate courts can hear appeals from certain, non-case-terminating decisions that (1) conclusively determine the disputed question, (2) resolve an issue completely separate from the merits of the action, and (3) are effectively unreviewable on appeal from a final judgment. The Tenth Circuit held that orders denying derivative sovereign immunity under *Yearsley* are not immediately appealable because they are not completely separate from the merits. Both the *Yearsley* defense and the merits of the case turn on whether the government directed the contractor's challenged actions, so GEO would have to wait until the conclusion of litigation in the district court to appeal.

GEO petitioned for certiorari, noting a circuit split regarding whether government contractors can immediately appeal from denials of derivative sovereign immunity.

Issue:

Is an order denying a government contractor's "derivative sovereign immunity" defense under *Yearsley* immediately appealable under the collateral-order doctrine?

Court's Holding:

No. The *Yearsley* defense is a defense to liability on the merits, not an immunity from suit. Because merits defenses can be effectively reviewed on appeal from a final judgment, the collateral-order doctrine does not permit an immediate appeal.

What It Means:

- Today's decision clarifies that derivative sovereign immunity under *Yearsley* is not, despite its label, a true immunity from suit, but a defense to liability on the merits. The Supreme Court explained that government authorization relieves contractors of *liability* because the *Yearsley* defense turns on the legality of the defendant's conduct. Government authorization does not and cannot delegate the government's immunity from suit to its agents; sovereign immunity belongs to the government alone.
- Because *Yearsley* does not provide an immunity from suit, orders rejecting that defense turn on the legality of the defendant's conduct and therefore are effectively reviewable on appeal from a final judgment, defeating an immediate appeal as of right under the collateral-order doctrine.

- At the same time, the Court went out of its way to note that government contractors could use the appeal-certification process in 28 U.S.C. § 1292(b) to seek immediate appellate review of an otherwise unappealable order denying the *Yearsley* defense.
- Concurring in the judgment, Justice Thomas reiterated his longstanding position that the Court should refuse to allow interlocutory appeals from any new category of pretrial orders absent express congressional authorization.
- Justice Alito also wrote separately. He would have denied a right to an immediate appeal because the *Yearsley* defense does not vindicate sufficiently important constitutional or public-policy interests, not because the defense turns on the legality of the defendant's conduct.

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The Court's opinion is available [here](#).

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice group leaders:

Appellate and Constitutional Law

Thomas H. Dupree Jr.
+1 202.955.8547
tdupree@gibsondunn.com

Allyson N. Ho
+1 214.698.3233
aho@gibsondunn.com

Julian W. Poon
+1 213.229.7758
jpoon@gibsondunn.com

Lucas C. Townsend
+1 202.887.3731
ltownsend@gibsondunn.com

Bradley J. Hamburger
+1 213.229.7658
bhamburger@gibsondunn.com

Brad G. Hubbard
+1 214.698.3326
bhubbard@gibsondunn.com

Related Practice: Government Contracts

Dhananjay S. Manthripragada
T: +1 213.229.7366
dmanthripragada@gibsondunn.com

Lindsay M. Paulin
+1 202.887.3701
lpaulin@gibsondunn.com

This alert was prepared by associates Patrick Fuster and Connor P. Mui.

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