How To Prepare If Justices Curb Gov't Contractor Immunity

By **Lisa Himes** (November 17, 2025)

Lisa Himes

On Nov. 10, the U.S. Supreme Court heard oral arguments in GEO Group Inc. v. Menocal, a case that has significant implications for federal government contractors.[1]

The issue before the court is whether an order denying a government contractor's claim of derivative sovereign immunity is immediately appealable under the collateral order doctrine. The court's decision is set to resolve a 5-3 split among the federal appellate courts on this important issue.

Title 28 of the U.S. Code, Section 1291, provides appellate courts with jurisdiction over "final decisions" of district courts.

Under the collateral order doctrine, however, an order that does not terminate the litigation is a final order if it meets certain requirements, including resolving an issue that would be effectively unreviewable on appeal from a final judgment.

Under the doctrine, orders denying claims of absolute immunity and qualified immunity are immediately appealable, even when they do not terminate the litigation.

The justices were active throughout the oral arguments and appeared skeptical of GEO's argument that an interlocutory appeal was warranted based on the collateral order doctrine.

Several justices focused on whether Supreme Court precedent regarding derivative sovereign immunity, particularly the 1940 decision in Yearsley v. W.A. Ross Construction Co., created an immunity from suit, as opposed to a defense to liability that is only reviewable after a final judgment.[2]

If the Supreme Court concludes that derivative sovereign immunity claims are not reviewable under the collateral order doctrine, which appears likely from the oral arguments, the decision will have wide-ranging effects for government contractors supporting the U.S. government at home and abroad.

Background

This case arises out of a 2014 class action filed by Alejandro Menocal and other immigration detainees against GEO, a private company that operates the Aurora Immigration Processing Center in Colorado, under a government contract with U.S. Immigration and Customs Enforcement.

The detainees filed suit in the U.S. District Court for the District of Colorado alleging that GEO's operation of the AIPC involved (1) noncompliance with the Colorado Minimum Wages of Workers Act; (2) violations of the forced labor provision in the Trafficking Victims Protection Act; and (3) unjust enrichment.[3]

GEO moved to dismiss the claims and the district court dismissed the Colorado minimum wage claim.[4]

After the district court certified two classes, the parties moved for summary judgment. GEO asserted that derivative sovereign immunity barred suit. The detainees conversely argued that GEO was not immune from suit.

On Oct. 18, 2022, the district court denied GEO's motion for summary judgment on derivative sovereign immunity grounds and granted the detainees' motion.[5]

GEO then appealed to the U.S. Court of Appeals for the Tenth Circuit, where the detainees moved to dismiss the appeal for lack of a final decision under Section 1291. The Tenth Circuit allowed briefing and argument, and then dismissed the case for lack of jurisdiction.[6]

On Jan. 13, GEO petitioned the Supreme Court to review the case and the court granted certiorari on June 2. Following briefing by the parties and amici, the court held oral arguments.

Oral Argument

During oral arguments, GEO's counsel, Dominic E. Draye of Greenberg Traurig LLP, argued that GEO should not have to wait until after trial for an appeal on derivative sovereign immunity because it is immune from suit.

Counsel for the detainees, Jennifer D. Bennett at Gupta Wessler LLP, however, argued that Yearsley provides for a defense to suit that is only reviewable on appeal after a final judgment is issued.

As Draye responded to questions from the court, Justice Brett Kavanaugh asked why the government is "on the other side" from GEO. Sopan Joshi, assistant to the solicitor general, explained that the government is supporting the detainees because it does not believe that the collateral order doctrine applies in this case.

Joshi noted, however, that if the question before the court was whether GEO could invoke the defense at all, "we might well be on the other side of the lectern." He also emphasized how important derivative sovereign immunity is, stating that the government agrees with GEO that "the defense is critical to our efforts."

Justices Ketanji Brown Jackson, Elena Kagan, Sonia Sotomayor and Amy Coney Barrett appeared to agree with the detainees and the government that derivative sovereign immunity is a defense that is only reviewable after final judgment.

Justice Clarence Thomas inquired about the absence of specific immunity language in Yearsley. Justice Barrett focused on whether litigation expenses, without a collateral order appeal, could be negotiated and priced into the contract between government contractors and the government.

While many of the justices appeared skeptical about the use of the collateral order doctrine in this situation, Justice Samuel Alito focused on the policy issues.

Justice Alito asked Bennett about why contractors acting on the government's behalf are not immune from suit if the government would be immune, and why those considerations would not justify an interlocutory appeal here.

Implications for Government Contractors

The court's decision in GEO could have a significant impact on cases involving government contractors.

If the Supreme Court determines that a denial of derivative sovereign immunity is not subject to a collateral order appeal — which the court appeared to signal through the oral arguments — federal contractors may decide not to compete for critical support contracts where the costs of potential tort litigation are simply too high.

During oral argument, the government agreed with GEO and its supporting amici about the potential costs of contractor liability from such suits, and the resulting increased costs to the government for services.

Similarly, in its amicus brief, the government acknowledged that tort lawsuits can impose significant liability on government contractors and create "a substantial obstacle to federal governmental objectives."[7]

The government also acknowledged that significant litigation costs likely would result in higher contracting costs that would be passed on to the government and taxpayers. It also noted that such suits could impose substantial discovery burdens on the government.[8]

Given the very real possibility that the court will determine that the collateral order doctrine does not apply in these situations, contractors need to be prepared to potentially engage in third-party tort litigation through discovery and trial. In so doing, government contractors should look to incorporate the additional risk and higher litigation costs into their contracts.

Particularly with cost-type contracts, contactors can pass certain costs, including insurance and defense costs, onto the government under the third-party liability clause, Federal Acquisition Regulation 52.228-7.

Another approach for government contractors comes from the 2010 appeals court decision in Martin v. Halliburton, which the government discussed in its amicus brief.[9]

In Martin, the U.S. Court of Appeals for the Fifth Circuit issued an initial decision denying the defendants' interlocutory appeal, following the district court's denial of the defendants' motion to dismiss for lack of jurisdiction, which included an assertion of derivative sovereign immunity.[10]

In response to a motion for rehearing and a rehearing en banc, however, the court issued an amended decision that remains instructive today.

The Fifth Circuit's amended decision in Martin explained that district courts should look to freely certify orders denying dispositive motions for interlocutory appeal under Title 28 of the U.S. Code, Section 1292(b), "where the law is unsettled but, after refinement on appeal, might warrant dismissing plaintiffs' claims."[11]

Indeed, while rejecting the collateral order appeal in the GEO Group case, the government remarked in its amicus brief that "interlocutory appeal of orders denying a Yearsley defense may well be warranted under" Title 28 of the U.S. Code, Section 1292(b).[12]

Justice Kavanaugh appeared to focus on this alternative during the oral arguments, specifically noting that the government said there were other avenues for relief that could be pursued.

Yet another possibility is rulemaking. During oral arguments, Justice Barrett stated the question is "whether this is within the collateral order doctrine" and "Congress could give you that." Contractors could pursue a legislative approach to ensure such cases would be statutorily entitled to an interlocutory appeal.

While it remains unclear how the court will rule, government contractors should prepare to build litigation costs into their contracts, and look to other avenues for potential interlocutory appeals.

Lisa Norrett Himes is of counsel at Rogers Joseph O'Donnell PC.

Disclosure: The author represented the defendants in Martin v. Halliburton.

[1] GEO Group Inc. v. Menocal et al., No. 24-758, cert. granted (U.S. June 2, 2025).

[2] Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940).

[3] Colorado Minimum Wages of Workers Act, Colo. Rev. Stat. § 8-6-101, et seq. Trafficking Victims Protection Act, 18 U.S.C. §§ 1589, 1595.

[4] Menocal v. GEO Grp. Inc., 113 F. Supp. 3d 1125, 1135 (D. Colo. 2015).

[5] Menocal v. GEO Grp. Inc., 635 F. Supp. 3d 1151 (D. Colo. 2022).

[6] Menocal v. GEO Grp. Inc., No. 22-1409, 2024 WL 4544184 (10th Cir. Oct. 22, 2024).

[7] Br. for the United States as Amicus Curiae at 31, GEO Grp. Inc. v. Menocal, No. 24-758 (U.S. June 2, 2025). Cf. Nwauzor v. GEO Group Inc., 146 F.4th 1280, 1289 (9th Cir. 2025) (Bumatay, J., dissenting from the denial of rehearing en banc).

[8] Id. Cf. Al Shimari v. CACI Premier Technology Inc., 775 Fed. Appx. 758 (4th Cir. 2019), cert. denied, 141 S. Ct. 2850 (2021).

[9] Martin v. Halliburton, 618 F.3d 476 (5th Cir. 2010). Br. for the United States as Amicus Curiae at 32, GEO Grp. Inc. v. Menocal, No. 24-758 (U.S. June 2, 2025).

[10] Martin v. Halliburton, 601 F.3d 381 (5th Cir. 2010).

[11] Martin v. Halliburton, 618 F.3d 476, 488 (5th Cir. 2010).

[12] Br. for the United States as Amicus Curiae at 32, GEO Grp. Inc. v. Menocal, No. 24-758 (U.S. June 2, 2025).