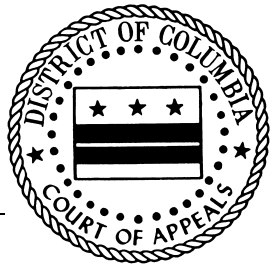
Case No. 21-CV-0690



DISTRICT OF COLUMBIA COURT OF APPEALS

NIZAR ZAKKA,

Plaintiff-Appellant,

v.

PALLADIUM INTERNATIONAL, LLC,
and EDWARD ABEL,

Defendant-Appellees.

On appeal from an order of the
Superior Court of the District of Columbia,
Case No. 2020 CA 004591 B (Pan, J.)

AMICUS BRIEF OF SCHOLARS IN SUPPORT OF PLAINTIFF-APPELLANT NIZAR ZAKKA

John Paul Schnapper-Casteras
(D.C. Bar No. 1009043)
SCHNAPPER-CASTERAS PLLC
1717 K Street, N.W. / Suite 900
Washington, D.C. 20006
(202) 630-3644
jpsc@schnappercasteras.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

CORPORATE DISCLOSURE STATEMENT

A disclosure statement is not required for Danielle Keats Citron, Kate Sablosky Elengold, Jonathan Glater, Andrew Hessick, or David Rubenstein under D.C. Court of Appeals Rule 26.1.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

This brief is filed on behalf of Professors Danielle Keats Citron, Kate Sablosky Elengold, Jonathan Glater, Andrew Hessick, and David Rubenstein ("Amici")[1] pursuant to D.C. Court of Appeals Rule 29. The parties to this appeal do not object to the filing of this brief. *See* D.C. Court of Appeals Rule 29(a)(2) ("Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.").

Amici are law professors with expertise in the federal law of immunity, federal courts, civil procedure, and civil rights, who are concerned about the ways in which the immunity doctrine is utilized to limit jurisdiction to award remedies for unlawful actions that cause harm. They submit this brief to highlight the importance of a thorough factual analysis and consequently of procedural treatment that enables such analysis to determine whether a defendant is entitled to "derivative" immunity pursuant to *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). In light of the history of, purposes of, and risks inherent in applying

[1] Danielle Keats Citron is the Jefferson Scholars Foundation Schenck Distinguished Professor of Law and Caddel and Chapman Professor of Law, University of Virginia School of Law. Kate Sablosky Elengold is an Assistant Professor of Law, University of North Carolina School of Law. Jonathan Glater is a Professor of Law, University of California, Berkeley, School of Law. Andrew Hessick is the Judge John J. Parker Distinguished Professor of Law, University of North Carolina School of Law. David Rubenstein is the James R. Ahrens Chair in Constitutional Law and Professor of Law, Washburn University School of Law.

Yearsley immunity to private companies under contract with the federal government, we urge the Court to apply a standard of review in this case that is in line with both the purpose of the *Yearsley* doctrine and the majority of courts that have considered when and how to apply it. This is an issue of first impression in this Court.

SUMMARY OF THE ARGUMENT

Derivative governmental immunity has been recognized as a critical protection for non-governmental actors who are acting as extensions of the government. But this immunity should be narrowly construed, and recognized by a court only when the facts of the case reveal: (1) a particular relationship between the federal government and the contractor, (2) sufficient control by government officials over the contractors' actions, and (3) compliance by the contractor with the government's directives. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016). As the D.C. Circuit has held, the *Yearsley* defense "applies only when a contractor takes actions that are authorized and directed by the Government of the United States, and performed pursuant to the Act of Congress authorizing the agency's activity." *In re U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 69 (D.C. Cir. 2019) (citations and quotations omitted). This is a high bar: "'staying within the thematic umbrella of the work that the government authorized is not enough to render the contractor's activities the act[s] of the

government.'" *Taylor Energy Co., L.L.C. v. Luttrell*, 3 F.4th 172, 176 (5th Cir. 2021)) (alteration in original) (quoting *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 345 (4th Cir. 2014)); *see also Campbell-Ewald*, 577 U.S. at 156 ("The petitioner's status as a Government contractor does not entitle it to 'derivative sovereign immunity,' *i.e.*, the blanket immunity enjoyed by the sovereign.").

According to the allegations, Nizar Zakka ("Plaintiff" or "Mr. Zakka") is a Washington, D.C. resident who was imprisoned and tortured by the Government of Iran after Defendant-Appellees Palladium International, LLC ("Palladium") and senior executive Edward Abel (collectively, "Defendants") sent him to Iran both without first disclosing to him the specific risks he faced while traveling there as a result of his relationship with Palladium, and also without taking necessary security precautions to prevent his abduction. The Superior Court dismissed Mr. Zakka's claims for negligence and intentional infliction of emotional distress. It ruled that Defendants are entitled to governmental derivative immunity from suit pursuant to *Yearsley* because Palladium's funding for the program that involved sending Mr. Zakka to Iran was awarded by the U.S. Department of State. Of considerable concern to us, the Superior Court decided this in resolving a Rule 12(b)(1) motion to dismiss, after making several findings of fact and weighing the evidence.

On appeal, Mr. Zakka seeks reversal, and asks this Court to rule on several issues, including one critical issue of first impression in this Court: whether the Superior Court erred in treating *Yearsley* as a jurisdictional bar to suit under Rule 12(b)(1), rather than as an affirmative defense on the merits under a Rule 56 motion.

Amici submit that derivative immunity must be regarded as an affirmative defense. Treating *Yearsley* as a jurisdictional bar is inconsistent with the factual analysis that is required under the doctrine. It is unsurprising, therefore, that of those courts that have addressed the issue, the majority treat *Yearsley* as an affirmative defense on the merits, not a jurisdictional bar. This Court should join those courts in holding that *Yearsley* immunity is an affirmative defense to liability, an outcome consistent with how *Yearsley* itself and its progeny analyze whether to grant derivative immunity.

Dismissing a case for lack of subject matter jurisdiction – as the Superior Court here did – is tantamount to shielding a defendant from litigation in its entirety, regardless of the precise nature of the relationship between the government and the contractor, regardless of the extent to which a federal contractor deviated from the terms of its agreement, and regardless of the degree of discretion the contractor may have enjoyed in choosing to engage in harmful conduct. Treating derivative immunity as a jurisdictional bar is inconsistent with

the purpose of *Yearsley*, as interpreted by the U.S. Supreme Court and other courts. *See Campbell-Ewald*, 577 U.S. at 166 ("When a contractor violates both federal law and the Government's explicit instructions, as here alleged, no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation.").

ARGUMENT

I. TREATING YEARSLEY IMMUNITY AS A JURISDICTIONAL BAR IS INCONSISTENT WITH THE HISTORY, PURPOSE, AND APPLICATION OF THE DOCTRINE.

Although *Yearsley* analysis does not require finding a strict principal-agent relationship between government and contractor (*Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204 (5th Cir. 2009)), the necessary analysis is rooted in principals of agency law. This requires a thorough factual analysis, determining factors such as "the relationship between the government and the contractor[ ] and [ ] the nature and extent of the government's role in specifying the manner in which the contractor must perform." Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 Stan. L. Rev. 969, 989 (2021). Those are inherently fact-intensive questions. For example, in *Campbell-Ewald*, the Supreme Court had to determine whether the record showed that the contractor complied with the Navy's instructions with respect to developing and executing a multimedia recruiting campaign; the Court found that the record failed to substantiate that the contractor

followed government instructions. *Campbell-Ewald*, 577 U.S. at 168. *See also Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (recognizing immunity for a military contractor sued for products liability under state law "when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States").

Further, the contractor controls the information that would provide the answers to the factual questions. Thus, without sufficient opportunity for discovery and fact-investigation, the plaintiff is at a significant and unfair disadvantage in attempting to rebut an immunity claim under *Yearsley*. Therefore, the history and purpose of the *Yearsley* doctrine, with its invocation of agency analysis, point to a merits-based analysis.

II. THE DISTRICT OF COLUMBIA SHOULD JOIN THE MAJORITY OF JURISDICTIONS THAT HOLD THAT *YEARSLEY* IMMUNITY IS NOT A JURISDICTIONAL BAR TO SUIT, BUT RATHER AN AFFIRMATIVE DEFENSE TO LIABILITY.

This case requires the District of Columbia to clarify the proper treatment of derivative immunity within this jurisdiction under the *Yearsley* doctrine. This Court should adopt the rule that the *Yearsley* doctrine provides an affirmative defense to liability rather than a bar to suit that deprives courts of subject matter

jurisdiction. This rule conforms with the majority treatment of derivative immunity in U.S. courts, and is most consistent with *Yearsley* itself and treatment of other immunity doctrines.

The majority of courts to consider *Yearsley* immunity have treated the immunity as an affirmative defense to liability, and expressly rejected that it is a jurisdictional question. The Fifth Circuit recently directed that "*Yearsley* immunity is an affirmative defense," and accordingly placed the burden on the defendant to "demonstrate[] that there were no material factual disputes about whether the Coast Guard authorized and directed [its] work." *Taylor Energy Co.*, 3 F.4th at 175. The Sixth Circuit has also held that "*Yearsley* is not jurisdictional in nature." *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015) (rejecting consideration of the *Yearsley* doctrine under Rule 12(b)(1)); *see also New York ex rel. James v. Pennsylvania Higher Educ. Assistance Agency*, No. 19 Civ. 9155 (ER), 2020 WL 2097640, at *6 (S.D.N.Y. May 1, 2020) (stating that the Second Circuit likely follows the Fifth and Sixth Circuits' view that *Yearsley* is not a jurisdictional bar to suit).[2] Simply stated, "concluding *Yearsley* is applicable does not deny the court of subject-matter jurisdiction." *Ackerson*, 589 F.3d at 208.

[2] *See also, e.g.*, *Spurlin v. Air & Liquid Sys. Corp.*, No. 19-CV-02049-AJB-AHG, 2021 WL 4924829, at *3 (S.D. Cal. Oct. 21, 2021) (holding that "*Yearsley* immunity does not implicate the Court's subject matter jurisdiction, but rather, is an affirmative defense for which [defendants] bear the burden of proving"); *Harris*

The Fourth Circuit disagrees and treats *Yearsley* immunity as a jurisdictional bar to suit altogether. *See In re KBR*, 744 F.3d at 342 (stating that when the *Yearsley* doctrine applies, "a government contractor is not subject to suit"). The Fourth Circuit analogizes *Yearsley* immunity to the absolute immunity of the sovereign, which deprives federal courts of jurisdiction to hear claims. *See Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 650–51 (4th Cir. 2018) (affirming the application of *Yearsley* immunity and dismissal of a case under Rule 12(b)(1)). This Court should decline to adopt this minority approach, as it is inconsistent with *Yearsley* itself and the application of other government immunities.

The language in *Yearsley* indicates that the Supreme Court treats the immunity as a defense to liability rather than as a jurisdictional bar to suit. As the Fifth Circuit recently reiterated, the contractor in *Yearsley* "*defended itself* on the grounds that its work was authorized and directed by the Government of the United States," and "[t]he Court agreed and held that where 'it is clear that [ ] 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

---

v. Kellogg, Brown & Root Servs., Inc., No. 08-563, 2016 WL 4720058, at *1 (W.D. Pa. Sept. 9, 2016) (describing *Yearsley* as a "affirmative defense" that is "not 'jurisdictional,' and cannot be raised under Rule 12(b)(1)").

for executing [the government's] will.'" *Taylor Energy Co.*, 3 F.4th at 175 (emphases added) (alteration in original) (quoting *Yearsley*, 309 U.S. at 20–21). The Supreme Court evaluated whether the contractor had a valid *defense to liability* – an entirely distinct inquiry from whether the defendant could be haled into court in the first place. *See also Ackerson*, 589 F.3d at 207 ("[T]he Court's opinion in *Yearsley* itself countenances against its application to deprive the federal courts of jurisdiction.").

Treating *Yearsley* as a jurisdictional bar to suit would also be contrary to the application of the similar immunity of military contractors, which is often treated as a form of derivative sovereign immunity. Military contractor immunity operates as a merits defense to liability. In *Boyle*, 487 U.S. at 514, the primary case extending government immunity to military contractors, the Supreme Court analyzed whether a reasonable jury could find "that the Government contractor defense was inapplicable." *Id.* at 514 ("The critical language in the Court of Appeals' opinion was that '[b]ecause Sikorsky has satisfied the requirements of the military contractor defense, it can incur no liability for . . . the allegedly defective design of the escape hatch.'" (alteration in original) (citation omitted)). If the court lacked subject matter jurisdiction, it would have been obligated to dismiss the case, and there would have been no question for the jury. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the

court must dismiss the action."). *See also Hercules, Inc. v. United States*, 516 U.S. 417, 421‑22 (1996) (describing the "Government contractor defense" in *Boyle* as "shield[ing] contractors from tort liability"); *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1948 n.5 (2021) (Sotomayor, J., concurring in part) (same); *New York ex rel. James*, 2020 WL 2097640, at *7 ("Moreover, the Second Circuit has treated the contractor defense outlined in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1998), which also traces its origins to *Yearsley*, 487 U.S. 500 (1998), as a defense on the merits, rather than a jurisdictional bar.").

The Superior Court here, however, treated the *Yearsley* defense as a jurisdictional bar to suit, and granted Defendants' motion to dismiss Mr. Zakka's claims with prejudice pursuant to Rule 12(b)(1). *See* J.A. 793. The court made its determination by making credibility judgments and weighing very limited discovery. Even the Fourth Circuit, which treats *Yearsley* immunity as a jurisdictional bar, undertakes extensive discovery before providing full immunity from suit to a defendant. *See In re KBR*, 744 F.3d at 345 (vacating the district court's decision and remanding for further fact finding after concluding the record did not contain enough evidence to determine whether the contractor was entitled to derivative sovereign immunity). This would be consistent with the Supreme Court's instruction in *Campbell-Ewald* that "[a]t the pretrial stage of litigation, we construe the record in a light favorable to the party seeking to avoid summary

disposition." *Campbell-Ewald*, 577 U.S. at 168. The Superior Court's errors should be corrected.

When government-derived immunities for private companies expand, those injured by private company misconduct lose avenues for redress. *See* Elengold & Glater, *supra*, at 1038. And by assessing the immunity question at the motion-to-dismiss stage, courts limit the amount of information available to rebut the defense, limiting the plaintiff's access to justice. *See* Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign in Commerce*, 73 Stan. L. Rev. 1101, 1128 n.115 (2021) (proposing a new framework for assessing whether derivative sovereign immunity should apply to certain actions). Here, the version of *Yearsley* adopted by the Superior Court constitutes a transmutation of *Yearsley* into a jurisdictional shield to litigation that, if embraced by this Court, will shut the courthouse doors not just to Mr. Zakka, but to all other parties injured by misconduct, negligence, and fraud committed by federal contractors. The Court should reject this expanded version of *Yearsley* protection.

CONCLUSION

Amici therefore respectfully join Mr. Zakka in requesting this Court's reversal of the Superior Court's order dismissing his suit on jurisdictional grounds.

/s /*John Paul Schnapper-Casteras*
John Paul Schnapper-Casteras
(D.C. Bar No. 1009043)
SCHNAPPER-CASTERAS PLLC
1717 K Street, N.W. / Suite 900
Washington, D.C. 20006
(202) 630-3644
jpsc@schnappercasteras.com

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ John Paul Schnapper-Casteras
Signature

21-cv-0690
Case Number(s)

John Paul Schnapper-Casteras
Name

03/11/2022
Date

jpsc@schnappercasteras.com
Email Address

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on counsel of record listed below via the Court's electronic filing system on March 11, 2022:

Benjamin S. Boyd
Mary E. Gately
Paul D. Schmitt
Sean Croft
DLA PIPER
500 Eighth Street, NW
Washington, DC 20004
Benjamin.Boyd@DLAPiper.com
Mary.gately@us.dlapiper.com
Paul.schmitt@us.dlapiper.com
Sean.Croft@DLAPiper.com

Richard J. Leveridge
Adam H. Farra
Rachel H. Jennings
GILBERT LLP
700 Pennsylvania Avenue, S.E.
Suite 400
Washington, D.C. 20003
(202) 772-2301
LeveridgeR@GilbertLegal.com
FarraA@GilbertLegal.com
JenningsR@GilbertLegal.com

/s/ *John Paul Schnapper-Casteras*
John Paul Schnapper-Casteras
(D.C. Bar No. 1009043)
SCHNAPPER-CASTERAS PLLC
1717 K Street, N.W. / Suite 900
Washington, D.C. 20006
(202) 630-3644
jpsc@schnappercasteras.com