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.)

OPENING BRIEF OF PLAINTIFF-APPELLANT NIZAR ZAKKA

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RULE 28(a)(2) STATEMENT

The following is a list of all parties and their counsel in the proceeding:

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A disclosure statement is not required for Mr. Zakka under Rule 26.1.

INTRODUCTION & SUMMARY OF ARGUMENT

Nizar Zakka ("Plaintiff") spent nearly four years imprisoned, interrogated, and tortured in Iran's notorious Evin prison. He traveled to Iran because Palladium International, LLC ("Palladium"), and its senior executive, Edward Abel (collectively, "Defendants"), sent him there as part of the "Women's Alliance for Virtual Exchange" ("WAVE II") program, which was funded by a grant from the U.S. State Department. But what Defendants knew and never told Mr. Zakka was that he faced a uniquely heightened risk of imprisonment in traveling to Iran because the Iranian government considered Palladium an agent of the Arab Gulf States, Iran's adversaries, and thus would likely target Mr. Zakka for his affiliation with Palladium. Compounding their negligence, Defendants also failed to provide Mr. Zakka with *any* of the security precautions that Defendants told the State Department they would implement for the WAVE II program – precautions typical of the international development industry and required by Palladium's internal policies. Defendants thus failed to warn, train, or protect Mr. Zakka for his trip to Iran. Instead, they painted a target on his back by holding him out as the face of the WAVE II program.

When Mr. Zakka was finally released by the Iranian government in June 2019, he sued Palladium and Mr. Abel in D.C. Superior Court for their reckless mismanagement of the WAVE II program and his travel to Iran.

Palladium and Mr. Abel assiduously blamed the State Department. They claimed that Mr. Zakka's travel to Iran was authorized by the State Department and that they were not obligated to provide warnings, trainings, or take any precautions for Mr. Zakka because they were not explicitly required to do so by the State Department. They moved to dismiss Mr. Zakka's suit on the theory that they were entitled to immunity under *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 20 (1940), which holds that a private company cannot be held liable in tort when the U.S. government "authorized and directed" the private company's tortious conduct pursuant to a valid conferral of governmental authority, and they moved to stay discovery until after their motion had been addressed.

After permitting (very) limited discovery, the Superior Court adopted Defendants' argument in full. It held under D.C. Superior Court Rule of Civil Procedure 12(b)(1) that it lacked subject matter jurisdiction to hear the dispute. Stating that "the solution is not always a lawsuit," Joint Appendix 788–89 ("J.A."), the Superior Court dismissed Mr. Zakka's suit with prejudice, denied his motion to compel relevant discovery from Defendants, and rejected his request to take discovery from the State Department on the key issue raised in the motion to dismiss – whether it in fact authorized and directed Defendants' tortious conduct.

In granting Defendants' motion, the Superior Court committed three fundamental legal errors.

1. It applied the wrong standard of review. The *Yearsley* defense is not a jurisdictional immunity from suit analyzed under Rule 12(b)(1). It is an affirmative defense against liability that must be analyzed under Rule 56's summary judgment standard. The court was not permitted to make credibility determinations or resolve disputed issues of fact – both of which it did when it inexplicably discredited the declarations submitted in the litigation by Mr. Zakka and Nadia Alami, the former Palladium employee who was the "the program director with top managerial and operational authority" for the WAVE II program and who reported directly to Mr. Abel. J.A. 674. Proper application of the correct standard of review precludes summary judgment and necessitates reversal.

2. The Superior Court misapplied *Yearsley*. As *Yearsley* itself makes clear, the legal test is whether the U.S. government "authorized *and directed*" Defendants' *tortious conduct*. 309 U.S. at 20 (emphasis added). Rather than ask whether Defendants' full allegations of tortious conduct were authorized and directed by the State Department, the Superior Court ignored part of the question and part of Mr. Zakka's allegations, asking only "whether the State Department authorized plaintiff's travel to Iran in September of 2015." J.A. 297.

This was wrong for two reasons. First, the Superior Court erased part of the legal standard – the "*and directed*" requirement. Second, and compounding its error, the Superior Court applied its erroneous *Yearsley* standard to only *part* of

Mr. Zakka's allegations. The court asked whether the State Department authorized *Mr. Zakka's travel to Iran*. But Mr. Zakka's suit was not about merely whether Defendants sent him to Iran. He alleged that Defendants sent him to Iran without warning him of the risks of traveling there on Palladium's behalf and without taking any meaningful security precautions, including ones the Defendants told the State Department they would take. *Yearsley* requires a court to ask whether the State Department authorized and directed Defendants' *tortious conduct* – not one isolated part of that conduct. Under the correct legal standard, Defendants were not entitled to *Yearsley* immunity because the State Department did not authorize and direct their failure to provide Mr. Zakka with the relevant warnings, training, or precautions.

3. The record was insufficient as a matter of law to sustain the Superior Court's conclusion that Defendants were entitled to *Yearsley* immunity. Two examples of the record confirm this.

The first was a September 8, 2015 email from a State Department representative (Shervin Hadjilou) in which Ms. Hadjilou told Palladium that Mr. Zakka's travel to Iran "*is not required under the terms of the project, but is undertaken at the organization's [Palladium's] and traveler's own risk.*" J.A. 679 (emphasis added). Palladium's decision to send Mr. Zakka to Iran at all was thus not a requirement or directive or even endorsed by the State Department, but was

instead a decision Palladium made in its own discretion and at its "own risk." This exercise of discretion is antithetical to *Yearsley* immunity. "We have held in the domestic context that a contractor might avail itself of the government's derivative immunity only where it acts pursuant to specific directions from the government. . . . [D]erivative immunity does not apply to contractors exercising discretion in working to accomplish broad governmental objectives[.]" *Broidy Cap. Mgmt. LLC v. Muzin*, 12 F.4th 789, 803 (D.C. Cir. 2021) (citation omitted). Defendants could not show that their exercise of discretion in sending Mr. Zakka to Iran entitled them to an immunity predicated on them exercising no discretion in compliance with a specific government directive.

The second example from the record was the "Technical Application" (the bid) that Palladium and Mr. Abel submitted to win the WAVE II award from the State Department. In that bid, Palladium and Mr. Abel made detailed representations about the "Security Standard Operating Procedures" Palladium would employ for the WAVE II program and travel for the program. The State Department approved the application and awarded the WAVE II program grant to Palladium – which then promptly failed to implement any Standard Security Operating Procedures. (Defendants refused to produce any documents on this topic, and the Superior Court denied Plaintiff's motion to compel on the issue, ruling that the topic was not "relevant to my ruling." J.A. 802.) These facts

precluded application of *Yearsley*. A private company that makes certain representations to a federal agency about how it will conduct itself cannot be said to have acted in a manner that is authorized and directed by that agency when it fails to abide by those representations. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 154 (2016), *as revised* (Feb. 9, 2016).

For these reasons and those that follow, the Court should reverse.

STATEMENT OF THE CASE

Plaintiff-Appellant Nizar Zakka filed his Complaint on November 4, 2020. J.A. 7–29. On January 19, 2020, Defendants moved to dismiss Mr. Zakka's suit, asserting seven different grounds for dismissal. J.A. 41. On February 12, 2021, the Superior Court granted Defendants' motion for a protective order, staying discovery pending resolution of the motion to dismiss. J.A. 3.

The Superior Court held the first motion to dismiss hearing on May 10, 2021. J.A. 4. The court ruled that it would resolve Defendants' contention that they were entitled to immunity from suit under *Yearsley*. J.A. 276. The court held Defendants' motion in abeyance pending "limited discovery through June 10, 2021 [for 30 days], on the issue of whether the State Department authorized plaintiff's travel to Iran in September of 2015." J.A. 297. The court also set a schedule for post-limited discovery briefing on the *Yearsley* issue. *Id.*

On June 10, 2021, the parties made document productions to each other. *Id.* A few days later, Plaintiff notified Defendants of deficiencies in their document production. J.A. 310, 388–89. The parties reached impasse on the two deficiencies, and Plaintiff filed a motion to compel on June 24, 2021. J.A. 302.

The same day, Defendants filed their supplemental brief on the *Yearsley* defense. J.A. 456. Plaintiff filed his supplemental brief on July 8, 2021. J.A. 575. Among other arguments, Plaintiff argued that the motion should be denied pending discovery from the State Department on whether it authorized *and directed* Defendants' tortious conduct. J.A. 596.

The Superior Court held its second motion to dismiss hearing on September 15, 2021. J.A. 766. After very brief argument, the court ruled that it was granting Defendants' motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). J.A. 793. The court stated that it would grant Defendants' motion even were it to apply the summary judgment standard of review in Rule 56. *Id.*

Plaintiff requested leave to amend the Complaint to conform the allegations to the court's alteration of the *Yearsley* legal standard; the court denied that request. J.A. 801. The court also denied Plaintiff's motion to compel and request for discovery from the State Department, ruling that the discovery was not relevant. J.A. 802. Mr. Zakka filed his notice of appeal on October 4, 2021. J.A. 805–06. This appeal is from a final order that disposes of all parties' claims.

STATEMENT OF FACTS

Nizar Zakka is a 55-year-old U.S. citizen who lives in Washington, D.C. J.A. 10. Born and raised in Lebanon, Mr. Zakka came to the United States as a teenager and has lived in the U.S. since 1985. J.A. 10. At the time of his abduction, Mr. Zakka was employed as the Secretary-General of "IJMA3," a Lebanon-based non-profit focused on cultivating the use of information and communications technology in the Middle East. J.A. 12, 601. As part of the WAVE II program, Palladium retained IJMA3 via a sub-agreement, and Palladium sent Mr. Zakka to Iran as part of its sub-agreement with IJMA3. J.A. 14, 16, 136.

I. THE ORIGIN OF THE WAVE II PROGRAM.

Beginning in 2012, the State Department and the U.S. Agency for International Development ("USAID") began funding two programs involving the support of women's groups and civil society organizations in Iran: the original WAVE program (known as "WAVE I") and the "CIVIC" program. J.A. 601, 673. Although this case specifically involves the WAVE program, the programs were considered complements of each other, with largely similar participants, goals, and operations. *See* J.A. 603–04. They were referred to as the "Iran program(s)."

Both programs sought to help Iranian civil society organizations, primarily through educating them about the use of information and communications technology. J.A. 603–04. This was done through hosting workshops, conferences,

trainings, and providing grants. J.A. 86, 112. With respect to WAVE, the goal was to support and make sustainable a regional Middle Eastern network of non-profits – called "WAVE" – that would promote information and communications technology use amongst women's groups. J.A. 704.

Until 2014, International Relief & Development ("IRD") operated the WAVE I and CIVIC programs. J.A. 674. The "Chief of Party" for the programs was an IRD employee, Nadia Alami. J.A. 602, 673. As Ms. Alami explained in her declaration submitted in this litigation, "'Chief of Party' is a term of art in the international development and contracting industry, generally meaning the program director with top managerial and operational authority." J.A. 673. Mr. Zakka and his employer, IJMA3, were sub-grantees in the WAVE I and CIVIC programs and reported to IRD. J.A. 602.

In 2014, USAID exited the WAVE I and CIVIC programs, leaving only the State Department. J.A. 602, 674. Separately, in May 2014 IRD lost its ability to receive federal funds, including the WAVE I and CIVIC program funds. J.A. 603, 674. Ms. Alami met with Mr. Abel, who was a senior executive at Palladium. J.A. 603, 674.[2] Mr. Abel hired Ms. Alami "with the understanding that we would be

[2] At the time, Palladium was known as "Futures Group." In early 2015, Futures Group began calling itself "Palladium" as part of a rebrand and business combination. J.A. 673.

able to continue the Iran programs with Palladium" in place of IRD. J.A. 674. They pitched the State Department together on renewing the WAVE I and CIVIC programs with Palladium. *Id.*

II. PALLADIUM SUCCESSFULLY BIDS FOR THE WAVE II PROGRAM.

Palladium submitted a "Technical Application" to the State Department in February 2015, its bid to formally win the "WAVE II" award. J.A. 611, 628, 674–75.[3] Signed by Mr. Abel, J.A. 628, the Technical Application described how Palladium would operate the WAVE II program and identified the sub-grantees ("partners") Palladium would retain and manage for the program, including IJMA3, J.A. 633–34.

The Technical Application also described the "Corporate Security Policies" Palladium would use for the WAVE II program and travel for the program. J.A. 640–41. Palladium boasted that its "security team is led by our Global Security Manager" who "oversees all comprehensive risk and threat assessments for [Palladium] active projects," how the risk assessments "focus on the current security situation in each country, and forecast likely developments in the future," and how Palladium, "[b]ased on current security practices and procedures, . . . has formulated a risk mitigation plan with a number of key operating principles and

[3] "WAVE II" because it was a renewal of the prior WAVE program with IRD.

standard operating procedures" for the WAVE II program. J.A. 640. The Technical Application further stated that "[f]or this project [Palladium] will produce a comprehensive set of Security Standard Operating Procedures that could include" (among other things) "[a] robust crisis management plan including appropriate response options using either an outsourced provider and/or national security forces," "[a] practical evacuation plan for both internal and external options," "[t]he issue and use of the right security equipment," "[t]he correct level of security training and regular briefings for all staff," "[e]ffective transport and movement plans," and "[p]ersonal and accommodation security measures." J.A. 640–41.

In 2015 the State Department approved the Technical Application and designated Palladium as the prime grantee, implementer, or recipient of the WAVE II program. J.A. 674–75, 684. (These terms were used synonymously.)

III. THE STRUCTURE AND OPERATION OF THE WAVE II PROGRAM.

In April 2015, Palladium and the State Department executed the WAVE II Cooperative Agreement. J.A. 684. It incorporated by reference Palladium's Technical Application. *Id.* Ms. Alami became a Palladium employee and the Chief of Party for the WAVE II program. J.A. 674.

As both Ms. Alami and Mr. Zakka explained in their declarations, "[t]he Iran program agreements were not 'government contracts.' They were 'cooperative

agreements' that operated like government grants. The State Department was a donor of funds to Palladium . . . . Palladium was not a 'contractor.' It was the 'prime grantee,' 'implementer,' or 'recipient' of federal funds operating a program that Palladium designed and the State Department approved." *See* J.A. 604, 675–76. The official representing the State Department was not a contracting officer, but a "grants officer." J.A. 684.

Mr. Zakka, who spent his career working in the government contracting industry, explained the importance of these distinctions: "[i]n a typical government contract, the government agency has specific requirements about the contractor's objectives and the methods used to achieve those objectives. This is accomplished under the careful scrutiny of the government agency." J.A. 604. But "[t]he Iran program cooperative agreements were not like that" because "Palladium retained total operational control to develop and implement the methods Iran program staff could use to achieve [their] objectives." J.A. 604–05.

Palladium thus exercised "total discretion and ultimate authority to operate the cooperative agreement's subject program." J.A. 604. The Chief of Party "set the agenda and the Iran program objectives," "decided how Palladium and IJMA3 and other subgrantees would ultimately achieve the goals of the Iran program cooperative agreements (including travel)," exercised "the ability to decide [] who would be program staff (including consultants and IJMA3)," "oversaw the day-to-

day operation of the Iran program," "oversaw the budgeting process and approved expenses," and served as "the contact point with the State Department for the Iran program. IJMA3 and its employees, including [Mr. Zakka], reported to Ms. Alami." J.A. 602. Ms. Alami, in turn, reported directly to Mr. Abel. J.A. 674.

The documents corroborated this. The WAVE II Cooperative Agreement described a limited role for the State Department. It would "concur" with Palladium's "Work Plans" and "Monitoring and Evaluation Plans." J.A. 690. For travel not in an approved Work Plan, the grants officer would provide "prior approval . . . of all travel details (destination, number of participants, number of trips)" and "ensure that all proposed travel is documented accordingly and that sufficient funds exist in the budget for such activities." *Id.* The State Department could not (among other things) "place[] an employee of the Department of State as a supervisor of [Palladium's] employees." J.A. 691.

The Work Plan similarly described how Palladium would assume "overall management of the cooperative agreement including ensuring project deliverables, partner oversight [meaning oversight of IJMA3], [monitoring and evaluation], technical expertise, and sustainability," and that IJMA3 would "lead[] all in-country coordination, which includes managing the WAVE [online] portal and social media, overseeing the WAVE Board of Directors, establishing the WAVE office in Lebanon, and hosting some regional activities related to the WAVE

Business Plan." J.A. 554. Palladium's Monitoring and Evaluation Plan described how Palladium would report on progress in the WAVE II program, including its monitoring of IJMA3 personnel. J.A. 530.

IV. PALLADIUM SENDS MR. ZAKKA TO IRAN IN SEPTEMBER 2015.

Travel to Iran for the WAVE II program was not a requirement of the program or of the State Department. J.A. 675 (N. Alami: "Travel to Iran by Iran program staff was not a requirement of the Iran program."); J.A. 607–08 (same). Palladium made the ultimate decision about whether, when, and for what purpose WAVE II staff would travel to Iran (or anywhere). J.A. 608–09. The State Department did not authorize and direct travel to Iran for the WAVE II program. J.A. 675. Instead, its role was to ensure (1) that Palladium's proposed travel complied with U.S. government country clearance policy, and (2) that Palladium did not misspend federal funds. J.A. 675, 608–09.

Country clearance is a generally applicable U.S. government policy that prohibits U.S. government employees, contractors, and grantees from traveling to places – including Iran – for official or private purposes without prior government authorization. J.A. 609–10. *See*, *e.g.,* 48 C.F.R. § 752.7027 (regulation providing that all USAID service contracts involving performance overseas must include this clause: "The contractor will obtain written notification from the contracting officer of Cooperating Country clearance of any employee sent outside the United States

to perform duties under this contract."). It is not a policy or requirement specific to the WAVE II program. J.A. 610.

The State Department did not authorize and direct that any travel actually take place; rather, it provided country clearance and approved expenditures for travel. J.A. 608–09, 675–76. The WAVE II Cooperative Agreement confirmed this. J.A. 609; *supra* at 13. So did Palladium's Technical Application. J.A. 491 ("Travel for project staff will adhere to DOS country clearance procedures and other visits will be coordinated closely with DOS; this includes for example the IJMA3 President's travel to Iran (four times during the project) to oversee Innovation Fund grants and other third country meetings.").

In this context, Ms. Alami wrote as Chief of Party on August 31, 2015 to two State Department representatives – Shervin Hadjilou and Eric Novotny – requesting funding approval and country clearance for a team from IJMA3 (including Mr. Zakka) and three other organizations to travel to Iran for a conference on women in sustainable development for the WAVE II program. J.A. 675, 679–80. Ms. Alami's request did not discuss security or risk-related precautions for the program. J.A. 679–80.

On September 8, 2015, Ms. Hadjilou wrote back:

> [T]ravel authorization is granted for the individuals below with the understanding that they will be traveling with documents issued by their respective governments, and none of which are US. Please note that this travel authorization is issued for Palladium in accordance

> with the provisions of award. Authorization by US government personnel for travel does not supersede travel warnings issued by the USG for the destination country. . . . *This travel is not required under the terms of the project, but is undertaken at the organization's [Palladium's] and traveler's own risk.*

J.A. 678–79 (emphasis added). Palladium proceeded with the travel.

V. MR. ZAKKA IS ABDUCTED AND TORTURED FOR HIS AFFILIATION WITH PALLADIUM.

Mr. Zakka was initially slated to travel to Jordan for a conference for WAVE II, but due to some visa issues for some of the other participants, Ms. Alami decided that Mr. Zakka would travel to Tehran to attend a different conference for WAVE II. J.A. 607–08. On September 18, 2015, as he was leaving Iran and on his way to the airport, Mr. Zakka's taxi was surrounded by two unmarked vehicles. J.A. 18. Several unidentified men jumped out of the vehicles, pulled Mr. Zakka from his taxi, blindfolded him, and placed him in one of the cars. *Id.* Mr. Zakka was brought to a location in Tehran that he later learned was Evin prison. *Id.* His arrest, detention, imprisonment, and interrogations were conducted by the Iranian Revolutionary Guard Corps (the "IRGC"). *Id.*

Mr. Zakka was imprisoned for nearly four years. J.A. 23. He was beaten, starved, isolated from his family, and relentlessly interrogated. J.A. 18–21. At one point, he was beaten so badly that he permanently lost hearing in one of his ears. J.A. 20. His captors alternated between extended periods of solitary confinement and stuffing him with 20 other prisoners in a five-by-five-meter cell infested with

cockroaches. *Id.* They would tell him they were going to hang him, walk him to a noose, and then abruptly cancel his execution. *Id.* Mr. Zakka's mother died while he was in prison, 48 hours after making a video begging the Iranian government to free her son. *Id.* Palladium sent no condolence note. *Id.*

A recurring theme of Mr. Zakka's interrogations was Palladium. His captors constantly asked about Palladium, its relationship with the Arab Gulf States, whether he was trying to subvert the Iranian government for them, and whether Palladium's WAVE II and CIVIC programs were a means for the Arab Gulf States to meddle in Iran's internal affairs. J.A. 19. They asked for the names of Palladium officials, and asked about their personal histories and spouses. *Id.* Mr. Zakka's captors would place him in solitary confinement for months, only to bring him out and ask him again to report on Palladium. J.A. 20.

A year into his imprisonment, Mr. Zakka and his lawyers were told that he was charged with spying, "corrupting the Earth," reporting to the director at Palladium, and cooperating with enemy governments. *Id.* He was convicted and sentenced to 10 years in prison and ordered to pay a $4.2 million fine. *Id.* At his trial, the prosecutors introduced as "evidence" internal Palladium documents that Mr. Zakka had never seen before; years later, after he was released and he returned to the United States, he learned that Palladium's databases had been hacked by the Iranian government around the time of his abduction. J.A. 607.

VI. PALLADIUM DISAVOWS MR. ZAKKA IN A SCRAMBLE TO PROTECT ITS BUSINESS WITH THE ARAB GULF STATES.

Palladium was alerted to Mr. Zakka's abduction in September 2015 by a mysterious, anonymous phone call to Ms. Alami. J.A. 21. Ms. Alami told Mr. Abel, who was the head of Palladium's U.S. business unit, the Washington, D.C. managing partner, and the senior executive credited with bringing the Iran program business into Palladium. *Id.*

Mr. Abel then forbade Palladium employees from discussing Mr. Zakka's abduction. *Id.* Under Mr. Abel's orders, Palladium refused to lobby for Mr. Zakka's release, or even to clarify that he was merely an independent contractor and not a Palladium employee. *Id.* Palladium refused to pay for any of Mr. Zakka's imprisonment-related expenses, refused to find him a lawyer or pay for his legal expenses, and refused to lobby the U.S. government to help with Mr. Zakka's release. J.A. 22. Instead, Palladium pressured IJMA3's other employees to sign a document purporting to release Palladium from any further obligation to IJMA3 or its employees; they refused. J.A. 21.

Mr. Abel stated that this secrecy was because he needed to protect Palladium's business *with the Arab Gulf States*. J.A. 22. In Mr. Abel's view, disclosure of Palladium's involvement in the WAVE II or CIVIC programs would jeopardize its lucrative government contracting business with the Arab Gulf States, whose antagonistic relationship with Iran made them (in Palladium's view) likely

to terminate their business with Palladium if its role in those programs was discovered. J.A. 9, 10, 15, 22. If the Arab Gulf States learned of Palladium's involvement in the Iran program, Mr. Abel feared they would terminate their business with Palladium out of anger that Palladium was working on a program that would be perceived as trying to improve Iran's relations with the West, and out of fear that Iran's hardline elements (like the IRGC) would retaliate against the Arab Gulf States for their perceived meddling in Iran's internal affairs via a purported proxy (Palladium). J.A. 15, 22.

Yet even after Mr. Zakka was abducted, Palladium *continued* the WAVE II and CIVIC programs, operating them by remote control from Washington, D.C. Mr. Zakka's interrogators even confronted him with this information. J.A. 22. Palladium finally wound the programs down by the end of 2016. J.A. 22–23.

After Mr. Zakka's abduction, Mr. Abel and Ms. Alami met with State Department representatives, including Ms. Hadjilou. J.A. 676. Ms. Alami testified in her declaration that "[a]t those meetings, Ms. Hadjilou repeatedly cited her email, emphasizing that Palladium had undertaken the travel at its own risk." *Id.*

VII. MR. ZAKKA'S RELEASE AND SUIT AGAINST PALLADIUM AND MR. ABEL.

Mr. Zakka was released in June 2019. J.A. 23. In November 2020, he sued Palladium and Mr. Abel for negligence and intentional infliction of emotional distress in D.C. Superior Court. *See* J.A. 7.

Mr. Zakka's suit focused on two sets of allegations. First, Defendants failed to warn Mr. Zakka that his affiliation with Palladium constituted a particularly heightened risk as he traveled to Iran. J.A. 16–17. Palladium knew (or should have known) of this risk, but it said nothing and instead sent Mr. Zakka into harm's way. Palladium's contemporaneous knowledge of this risk is reflected in part in its communications with the State Department: it told the State Department in May 2015 that "[Palladium] will keep a low profile while keeping a close eye on program implementation and oversight . . . working behind the scenes to make this program a success," J.A. 559, and that it would make IJMA3 the face of the WAVE II and CIVIC programs even though "[Palladium] is aware that IJMA3 is being watched more closely due to increased activity in Iran[.]" J.A. 8–9. Defendants never told Mr. Zakka why Palladium needed to keep a low profile, why IJMA3 needed to be the face of the Iran program, or that IJMA3 was being "watched more closely" or why. J.A. 16. Nor did Defendants disclose that they operated the program "behind the scenes" to protect Palladium's business with the Arab Gulf States. *See id.*

Second, Defendants sent Mr. Zakka to Iran without taking any meaningful security precautions like training, a security detail, a driver, or other risk mitigation efforts. *See id.* This violated the representations Palladium and Mr. Abel made to the State Department to win the WAVE II Cooperative Agreement about

Palladium's extensive security and risk assessment protocols, including that Palladium had created "Security Standard Operating Procedures" for the WAVE II program. *See* J.A. 640–41. Palladium failed to employ any of those procedures for Mr. Zakka's travel to Iran. J.A. 611–12. This failure also violated international development industry standard practices and procedures for contractors working abroad. J.A. 17. It even violated Palladium's own internal policies. In November 2015 there was another incident with a Palladium employee killed in Mali, and in response Mr. Abel publicly stated that Palladium "has a 'very, very rigorous' security policy and does safety assessments of hotels where its employees stay; the company trains employees to handle emergencies.'" *Id.* Yet Palladium had no purported security policy for the WAVE II program, it conducted no safety assessment of the location where Mr. Zakka was staying and abducted, and it provided no training on how to handle emergencies. J.A. 17–18, 612.

A. Defendants move to dismiss Mr. Zakka's suit.

On January 19, 2021, Defendants moved to dismiss Mr. Zakka's suit on several grounds. J.A. 41. Their lead argument was that because the State Department enjoys sovereign immunity for its performance of "discretionary function[s]" under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a), Palladium and Mr. Abel necessarily enjoy derivative sovereign immunity under *Yearsley*, 309 U.S. at 20–21, and application of that derivative immunity is proper

because "Palladium's actions were authorized by the U.S. Government and . . . the government 'validly conferred' that authorization." J.A. 60–62. A discretionary function is a "policy judgment" that involves a federal agency's balancing considerations of "social, economic, and political policy." *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 538, 536–37 (1988) (citations omitted).

B. The Superior Court's initial ruling.

On May 10, 2021, the court held the first motion to dismiss hearing. After surveying each of Defendants' arguments, the court settled on Defendants' *Yearsley* contention. The court ruled that "if you adhere to the terms of your contract with the government and the work that you've done was within the scope o[f] your contract with the government, then, as a contractor, you would be entitled to derivative sovereign immunity. So I view these cases [about *Yearsley*] as being supportive of [Defendants'] position that if the very narrow issue in discovery bears out [Defendants'] position that this particular trip was authorized by the Grants Officer as the contract directs, then derivative sovereign immunity would apply." J.A. 280.

Plaintiff objected that the law requires that the State Department authorize *and direct the tortious conduct* – Defendants' failure to warn Mr. Zakka and take security-related precautions for him – not just authorize the trip itself. J.A. 260–61. The court disagreed, characterizing the inquiry as "not realistic." J.A. 261.

The court then ordered "limited discovery through June 10, 2021, on the issue of whether the State Department *authorized* plaintiff's travel to Iran in September of 2015[.]" J.A. 297 (emphasis added). The court held the motion to dismiss in abeyance pending limited discovery and supplemental briefing. *Id.*

C. Limited discovery and Mr. Zakka's motion to compel.

In response to Plaintiff's discovery requests, Defendants produced 69 documents that were largely duplicates of each other and only a few of which involved correspondence between Palladium and the State Department. J.A. 454–55. Plaintiff then sought additional discovery from Defendants, requesting that Defendants (1) search for and produce documents about the Security Standard Operating Procedures that Palladium and Mr. Abel told the State Department they would create for the WAVE II program, J.A. 307, and (2) search for and produce documents about the State Department's communications with Palladium after Mr. Zakka was abducted, J.A. 308.

Defendants flatly refused to search for documents about the first topic. They argued that the Security Standard Operating Procedures "were not referenced in" Ms. Hadjilou's September 8, 2015 email about the trip, and that this topic therefore "goes beyond the Court's limited discovery." J.A. 444. With respect to the second topic, Mr. Zakka sought documents about the State Department's meetings and correspondence with Palladium about Mr. Zakka's abduction that were referred to

in Ms. Alami's declaration as evidence that the travel was not directed by the State Department. J.A. 308–09. Defendants refused to produce any documents on this request, claiming that it extended discovery beyond the bounds of the Superior Court's order. J.A. 444. Mr. Zakka moved to compel the discovery. J.A. 302.

D. The Superior Court grants the motion to dismiss.

The parties submitted supplemental briefing on the *Yearsley* issue after unduly limited discovery. Citing the Technical Application, the WAVE II Cooperative Agreement, the WAVE II Work Plan, the WAVE II Monitoring and Evaluation Plan, and Ms. Hadjilou's September 8, 2015 email, Defendants argued that "[t]he State Department plainly authorized Mr. Zakka's travel to Iran in September 2015," J.A. 466, and thus that they were "immune from Plaintiff's claims that they should have provided additional security measures or warnings to Mr. Zakka" because the State Department never told them to do so. J.A. 466–67.

Mr. Zakka made several arguments in response, including about the standard of review, about the operative legal standard under *Yearsley*, about whether Defendants misled the State Department regarding the imposition of Security Standard Operating Procedures, and about whether discovery from the State Department was necessary to resolve the *Yearsley* defense. *See* J.A. 586, 593–96.

On September 15, 2021, the court held its second motions hearing. The court reiterated that it was not reconsidering its prior ruling on how it was framing

the *Yearsley* standard, and that "we're down to . . . the factual issue of whether the travel by Mr. Zakka to Iran was authorized by the State Department, and if it was, I think the [Defendants are] entitled to [d]erivative [s]overeign [i]mmunity, and if it was not, Palladium is not. To me it's a narrow issue." J.A. 769.

The court stated that it read the WAVE II Cooperative Agreement, the Technical Application, and the Work Plan as showing that "all of them contemplate travel to Iran by IJMA3." J.A. 774. The court read Ms. Hadjilou's e-mail to mean that the State Department was saying "'[w]e're going to authorize this travel and we're not requiring anything in addition. Instead, this is kind of at your own risk.'" J.A. 776. In the court's view, Ms. Hadjilou's September 8, 2015 email should be "interpret[ed] . . . to be authorizing the travel, and including the failure to specify what security arrangements would be made." J.A. 799–800. The court held that "based on the record that's before this Court, his travel plans, including the lack of security or specified security arrangements were authorized by the State Department, and therefore . . . Palladium is entitled to invoke [d]erivative [s]overeign [i]mmunity." J.A. 800.

Plaintiff noted to the court that the declarations from Mr. Zakka and Ms. Alami rebut this inference – that rather than authorizing the travel without security precautions, the State Department affirmatively refused to authorize and direct the travel and intentionally left the risk for that decision with Palladium. J.A. 773–74,

777–79. The court responded by saying that it would not "credit statements in a declaration that contradict hard evidence," J.A. 785–86, and that "I believe there is case law to this effect – I've seen it – but . . . you can't create a material issue of fact with sort of a self-serving statement that is completely not supported by anything else. I think that exists because I think I've relied on it in other cases." J.A. 787. The court did not explain how Ms. Alami's declaration was "self-serving." Ms. Alami swore to the truth in her declaration and stated that no one had provided her with compensation for it. J.A. 676.

Granting the motion to dismiss, the court stated that it was a Rule 12(b)(1) issue. J.A. 793. In the alternative, it ruled that even under the Rule 56 standard, it would hold that there was no genuine dispute of material fact because Mr. Zakka and Ms. Alami's declarations were not credible ("self-serving") and thus could not create a genuine dispute of material fact – "and I don't have that case law at my fingertips, but I'm pretty confident it's out there because I've applied it in other cases." *Id.*

The court stated that its dismissal was with prejudice. J.A. 801. The court summarily rejected Plaintiff's request to amend the Complaint to reflect the court's alteration of the *Yearsley* legal standard. J.A. 801. Plaintiff's counsel reminded the court of its motion to compel additional discovery, and its request that the court deny Defendants' motion for lack of a sufficient record and need for additional

discovery from the State Department. *Id.* The court summarily denied the motion and request for additional discovery. J.A. 802. This appeal followed. J.A. 805.

STATEMENT OF THE ISSUES

There are three issues presented:

1. Whether the Superior Court erred in applying Rule 12(b)(1) rather than Rule 56 to Defendants' *Yearsley* affirmative defense.

2. Whether the Superior Court erred in its application of *Yearsley* when it failed to analyze whether Defendants' tortious conduct was authorized and directed by the State Department, and instead focused on whether Defendants' decision to send Mr. Zakka to Iran was merely authorized by the State Department.

3. Whether the Superior Court erred in holding that the record was legally sufficient for it to conclude that Defendants sustained their burden in showing that they were entitled to a *Yearsley* defense.

ARGUMENT

I. THE SUPERIOR COURT APPLIED THE WRONG STANDARD OF REVIEW.

The Superior Court erred when it applied D.C. Superior Court Rule of Civil Procedure 12(b)(1), the rule governing motions to dismiss for lack of subject matter jurisdiction, rather than Rule 56, the rule governing motions for summary judgment. J.A. 57, 793. The court's alternative holding that it would have granted Defendants' motion had it applied Rule 56 was erroneous because even that holding was predicated on credibility determinations prohibited by Rule 56. "Whether the trial court applied the proper legal standard is a question of law subject to de novo review." *In re T.H.*, 898 A.2d 908, 911 (D.C. 2006).

A. The *Yearsley* defense is not jurisdictional.

Yearsley is an affirmative defense that must be analyzed at summary judgment under Rule 56, not a jurisdictional immunity under Rule 12(b)(1). The majority of courts to have considered the issue have held that "*Yearsley* is not jurisdictional in nature," but rather "closer in nature to qualified immunity for private individuals under government contract, which is an issue to be reviewed on the merits rather than for jurisdiction." *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015).

The Fourth Circuit is the sole outlier that applies Rule 12(b)(1) to the *Yearsley* defense. *New York ex rel. James*, 2020 WL 2097640, at *6 (observing the Fourth Circuit split with other courts and stating that Second Circuit law likely follows the Fifth and Sixth Circuits). This Court should not follow the Fourth Circuit's holding. It is inconsistent with Supreme Court case law and splits with the majority of courts to have considered the issue[4] and the position of the United

[4] *Kuwait Pearls Catering Co. v. Kellogg Brown & Root Servs., Inc.*, 853 F.3d 173, 185 (5th Cir. 2017) (holding that *Yearsley* does not strip a court of jurisdiction); *Spurlin v. Air & Liquid Sys. Corp.*, -- F. Supp. 3d. --, 2021 WL 4924829, at *3 (S.D. Cal. Oct. 21, 2021) ("[T]he Court disagrees with Defendants and finds that their claim to *Yearsley* immunity does not implicate the Court's subject matter jurisdiction, but rather, is an affirmative defense for which they bear the burden of proving."); *Harris v. Kellogg, Brown & Root Servs., Inc.*, 2016 WL 4720058, at *1 (W.D. Pa. Sept. 9, 2016) ("[T]the Court finds persuasive cases holding that the defense of qualified immunity under *Yearsley* is not 'jurisdictional,' and cannot be raised under Rule 12(b)(1). . . . [C]onsistent with Third Circuit precedent, qualified

States. The Supreme Court has made clear that federal contractors do *not* "share the Government's unqualified immunity from liability and litigation." *Campbell-Ewald*, 577 U.S. at 166. Neither *Yearsley* nor any of its progeny described it as a jurisdictional immunity. *Yearsley* discusses the defense as "exclud[ing] liability" for government contractors in a specific set of circumstances, *Yearsley*, 309 U.S. at 22, and a defense that excludes liability is not an immunity that deprives a court of its power to hear a dispute. The United States' position is similarly that "[d]erivative sovereign immunity to litigation does not exist. Rather, Defendants at best could argue they are entitled to a privilege shielding them from liability under the factual circumstances of this case." J.A. 716. For these reasons, *Yearsley* is not a Rule 12(b)(1) issue.

B. Proper application of the correct standard of review precluded summary judgment.

D.C. Superior Court Rule of Civil Procedure 12(d) provides that "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to

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immunity must be treated as an affirmative defense challenging the merits of the claim and such defense must be brought by litigants under Rule 12(b)(6), 12(c) or 56, if matters outside the pleadings are considered."); *New York ex rel. James v. Pennsylvania Higher Educ. Assistance Agency*, 2020 WL 2097640, at *7 (S.D.N.Y. May 1, 2020) ("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*, . . . as a defense on the merits, rather than a jurisdictional bar. . . . The Court, therefore, finds that *Yearsley* immunity is a merits, as opposed to a jurisdictional, question.").

and not excluded by the court, the motion *must* be treated as one for summary judgment under Rule 56." (Emphasis added.) The rule is mandatory. *See Gross v. District of Columbia*, 734 A.2d 1077, 1080 (D.C. 1999). In improperly construing Defendants' motion as one for lack of subject matter jurisdiction, the Superior Court violated Rule 12(d): it considered matters outside the pleadings but refused to convert Defendants' motion to dismiss into one for summary judgment. The court's decision expressly relied on the WAVE II Technical Application, the WAVE II Cooperative Agreement, the WAVE II Work Plan, and the September 2015 email from Ms. Hadjilou to Palladium. *See* J.A. 795, 798–800, 802. These materials were submitted by Defendants and were not incorporated into Mr. Zakka's Complaint. The Superior Court's failure to convert Defendants' motion to dismiss into one for summary judgment was reversible error. *See Kitt v. Pathmakers, Inc.*, 672 A.2d 76, 79 (D.C. 1996) (reversing trial court for granting defendants' Rule 12(b)(6) motion to dismiss because it considered a video referred to but not incorporated in plaintiff's complaint).

Under Rule 56, the court was required to review the record in the light most favorable to the non-movant (Mr. Zakka) and draw all reasonable inferences in his favor, it was precluded from resolving issues of fact and making credibility determinations, and it was required to place the burden on the movant (Palladium and Mr. Abel) to establish that there was no genuine dispute of material fact. *See*

D.C. Super. Ct. R. Civ. P. 56(a); *Radbod v. Moghim*, -- A.3d --, 2022 WL 480733, at *3 (D.C. Feb. 17, 2022). The Superior Court's ruling violated each component of the Rule 56 standard of review.

1. Ms. Hadjilou's September 8, 2015 email.

A blatant example of this was the court's interpretation of Ms. Hadjilou's September 8, 2015 email, in which Ms. Hadjilou approved the expenditure of funds for the travel and provided country clearance while confirming to Palladium that Mr. Zakka's travel to Iran "is not required under the terms of the project, but is undertaken at the organization's and traveler's own risk." J.A. 679. Construed in the light most favorable to Mr. Zakka, this statement showed that it was ultimately *Palladium's* decision to proceed with Mr. Zakka's travel to Iran, that the decision to proceed with the travel was made in Palladium's discretion and not a directive of or otherwise attributable to the State Department, and that the State Department did not authorize and direct Palladium's decision to send Mr. Zakka to Iran without the alleged warnings and security precautions. This precluded summary judgment because "derivative sovereign immunity, as discussed in *Yearsley*, is limited to cases in which a contractor 'had no discretion in the design process and completely followed government specifications.'" *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 732 (9th Cir. 2015) (citation omitted).

The Superior Court adopted a very different interpretation:

> I interpret this email to be authorizing the travel, and including the failure to specify what security arrangements would be made, because underlying the language that is used here is an awareness of danger in traveling to the destination country, because there's a reference to State Department warnings. And there is this specific statement that the travel is taken at the organization's, the traveler's own risk. And so this travel[] was authorized, and the failure to specify additional security was authorized by the State Department, in my view, based on this email.

J.A. 799–800.

The Superior Court's interpretation of the email was an implausible stretch that construed the record in the light least favorable to Mr. Zakka. The court read in between the lines ("underlying the language that is used here") to draw a conclusion that was not on the face of the document, contradicted by other parts of the record, and inconsistent with a common sense understanding of the concept of proceeding at one's own risk. Not even Defendants suggested this interpretation of the email. *See* J.A. 467.

The only witnesses who submitted declarations in the litigation contradicted the Superior Court's interpretation of the email. Mr. Zakka stated in his declaration that "the State Department did not 'authorize or direct' travel to Iran," but rather "(a) authorized Palladium to spend Iran program funds for travel (to anywhere, including Iran), and (b) provided 'country clearance.'" J.A. 608–09. The declaration of Palladium's Chief of Party, Ms. Alami, corroborated this. J.A. 675 ("Travel to Iran by Iran program staff was not a requirement of the Iran

program. Any travel for the Iran program was subject to State Department approval to ensure (a) that government funds were not misspent on extravagant travel, and (b) that Palladium complied with country clearance procedures."). Ms. Alami described how Ms. Hadjilou made clear in contemporaneous conversations that "the travel to Iran was ultimately the implementer's [Palladium's] choice and that Palladium would be undertaking the travel at its own risk[.]" *Id.* Ms. Alami further described how in meetings with State Department officials after Mr. Zakka was abducted that Ms. Hadjilou "repeatedly cited her email" to Palladium officials, "emphasizing that Palladium had undertaken the travel at its own risk." J.A. 676. These factual statements from percipient witnesses contradicted the Superior Court's inference that Ms. Hadjilou's statement that the travel was at Palladium's own risk meant that the State Department authorized and directed the travel and Palladium's decision to send Mr. Zakka without the alleged warnings and security precautions.

In the face of these declarations, the Superior Court declared that the summary judgment standard of review empowered it to discredit them. J.A. 786–87 ("I just can't credit statements in a declaration that contradict hard evidence . . . . I believe there is case law to this effect – I've seen it – but . . . you can't create a material issue of fact with sort of a self-serving statement that is completely not

supported by anything else. I think that exists because I think I've relied on it in other cases."); J.A. 800.

This was a flat misstatement of the law. At summary judgment, trial courts cannot discredit testimony or declarations merely because they are inconsistent with the record or with a trial court's inferences about the record. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."); *Tolu v. Ayodeji*, 945 A.2d 596, 604 (D.C. 2008) (reversing summary judgment when trial court failed to properly credit plaintiff's declaration and deposition testimony that contained facts showing defendants had duty of care).

In very rare circumstances, courts have discredited a witness' declaration or testimony at summary judgment when that witness is the plaintiff, the plaintiff is relying nearly exclusively on his own testimony or statements, *and* the plaintiff's statements are so *internally* "contradictory and incomplete" as to be deemed insufficient to create a genuine dispute of material fact. *E.g.*, *Rojas v. Roman Cath. Diocese of Rochester*, 660 F.3d 98, 103–04 (2d Cir. 2011) (affirming summary judgment when district court wrote a "detailed, 52-page opinion" cataloguing the inconsistencies and contradictions in plaintiff's testimony and her

changing story). That standard was not even close to met here. Mr. Zakka's declaration was not an isolated part of the record; it was corroborated by Ms. Alami's declaration. The Superior Court did not even try to explain how Mr. Zakka's declaration was internally contradictory or incomplete.

Nor was the Superior Court even correct that the declarations contradicted "hard evidence." The only thing the declarations contradicted was *the Superior Court's inferences* about the record, not the record itself. No document in the record stated that the State Department authorized and directed the travel to Iran for the WAVE II program. The WAVE II Technical Application, Cooperative Agreement, and Work Plan each *contemplated* travel to Iran, but discussing travel to Iran and directing it are two different things – and both Mr. Zakka and Ms. Alami explained how travel to Iran for the WAVE II program was never a requirement of the program or the State Department. *See* J.A. 607; J.A. 675–76 (N. Alami: "Travel to Iran by Iran program staff was not a requirement of the Iran program. . . . Ms. Hadjilou approved the expenditure for Mr. Zakka's travel and provided country clearance. She highlighted that the travel was not required under the terms of the Iran program and undertaken at the implementer's risk.").

The court's decision to discredit Ms. Alami's declaration was a particularly stark error. Her declaration represented uncontradicted, truthful statements by a former Palladium employee who had substantial knowledge about the WAVE II

program, communicated directly with the State Department, and was a percipient witness. The Superior Court's decision not to credit either her or Mr. Zakka's declarations as "self-serving" (or to blithely ignore them) was an impermissible credibility determination that violated the summary judgment standard of review. *See In re Est. of Walker*, 890 A.2d 216, 224–25 (D.C. 2006) (reversing grant of summary judgment when court improperly resolved disputes requiring credibility determinations); *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (reversing grant of qualified immunity because of court's "failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party") (citation omitted).

2. Palladium and Mr. Abel's representations about Palladium's Corporate Security Policies and Security Standard Operating Procedures.

In the light most favorable to Mr. Zakka, the record showed that there was a genuine dispute about whether Palladium and Mr. Abel violated their representations to the State Department about how Palladium would manage safety and security for the WAVE II program. J.A. 640–41; *supra* at 10–11. To secure the WAVE II program grant, Defendants made detailed representations in the WAVE II Technical Application (their bid) about the Security Standard Operating Procedures that Palladium would employ for the program, boasting to the State Department about Palladium's sophisticated "Corporate Security Policies," how it

had "formulated a risk mitigation plan with a number of key operating principles and standard operating procedures" "based on current security practices and procedures," and how "[f]or this project [Palladium] will produce a comprehensive set of Security Standard Operating Procedures that could include" the following:

- A structured and effective security management system.
- A reliable and relevant security information service for all including the use of regular reports, spot reports and an SMS-based real time security incident warning system.
- A communication plan including unambiguous chains of management and lines of communication. This plan would include the use of vehicle and personal tracking options and the satellite communications if appropriate.
- A robust crisis management plan including appropriate response options using either an outsourced provider and/or national security forces.
- A practical evacuation plan for both internal and external options.
- A medical plan which will include in-country (during project staff travel) clinical care and emergency medical evacuation plans using an outsourced provider.
- The issue and use of the right security equipment.
- The correct level of security training and regular briefings for all staff.
- Effective transport and movement plans.
- Security of information plans.
- Personal and accommodation security measures.
- Natural disasters preparedness and procedures (if necessary).
- A project Occupational Health and Safety Plan.

J.A. 641. These precautions overlapped considerably with the ones that Mr. Zakka alleged Defendants were reckless in not using for his travel to Iran. *E.g.*, J.A. 17. Yet Defendants did not employ any of them. J.A. 611–12.

The Superior Court summarily rejected any arguments about these representations. It stated that "representations that the [D]efendants made to the State Department about security-related precautions Palladium would implement" were not "relevant to my ruling," and that Ms. Hadjilou's "email is very clear and the agreements between Palladium and the State Department were very clear." J.A. 802. It denied Mr. Zakka's motion to compel for the same reason. *Id.*

This violated the summary judgment standard of review. In the light most favorable to Mr. Zakka, Defendants represented to the State Department that they would use Security Standard Operating Procedures for the WAVE II program (including Mr. Zakka's travel for the program), the State Department made the WAVE II award to Palladium in light of those representations, and Defendants then violated those representations by failing to implement any of the Security Standard Operating Procedures. Neither the WAVE II Cooperative Agreement, the Work Plan, or Ms. Hadjilou's email explained Defendants' failure to employ the Security Standard Operating Procedures. Indeed, the cover page of the WAVE II Cooperative Agreement referenced the Technical Application and incorporated it by reference: "[t]he recipient [Palladium] agrees to execute the work in accordance with the Notice of Award, *the approved application incorporated herein by reference or as attached*, and the applicable rules checked below and any subsequent revisions [citing 2 C.F.R. § 200]." J.A. 684.

The record was thus sufficient to preclude summary judgment. In *Campbell-Ewald Co. v. Gomez*, 577 U.S. at 168, the defendant government contractor operating a text message-based recruitment campaign for the Navy "encouraged the Navy to use only an opt-in list in order to meet national and local law requirements," but then failed to abide by that recommendation and sent text messages to potential recruits regardless of whether they opted in to receiving text

messages. The Supreme Court held that the contractor was *not* entitled to a *Yearsley* defense at summary judgment because the evidence showed that the contractor failed to abide by its own representations to the Navy and that the Navy relied on those representations. *Id.*

This case is like *Campbell-Ewald*. Like the contractor there, Palladium and Mr. Abel boasted to the State Department about the depth and sophistication of Palladium's security and risk management program, and specifically represented that Palladium would design and implement Security Standard Operating Procedures for the WAVE II program and travel for the program. J.A. 611–12, 640–41. The State Department awarded the WAVE II program to Palladium based on these representations. J.A. 684. Palladium subsequently failed to implement any Security Standard Operating Procedures, J.A. 611–12, and Mr. Zakka was abducted and imprisoned while traveling for the WAVE II program as a result. Under the Rule 56 standard, the Superior Court's decision to ignore these facts constitutes reversible error.

II. THE SUPERIOR COURT APPLIED THE WRONG LEGAL STANDARD UNDER *YEARSLEY*.

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)

(emphasis added) (citations and quotations omitted) ("*OPM*"). Even where a contractor acts pursuant to a specific government directive, "derivative sovereign immunity is not available to contractors who act negligently in performing their obligations under the contract." *In re Fort Totten Metrorail Cases Arising Out of Events of June 22, 2009*, 895 F. Supp. 2d 48, 74 (D.D.C. 2012).

Straightforward application of these principles precludes *Yearsley* immunity. The record showed that Defendants' failure to warn Mr. Zakka of the risks of traveling to Iran on Palladium's behalf, train him, or take any precautions for his travel was not authorized *and directed by* the State Department. Insofar as Defendants claimed that they were complying with a government directive (they were not), the record showed that Defendants' performance of their purported obligations was so negligent as to preclude application of *Yearsley*.

The Superior Court discarded this case law and fashioned its own test. Instead of asking whether the entirety of Defendants' *tortious conduct* was authorized *and directed* by the State Department, the court asked only "whether the State Department authorized [Mr. Zakka's] travel to Iran in September of 2015." J.A. 297. This was wrong for two reasons. The standard of review is de novo. *See T.H.*, 898 A.2d at 911; *OPM*, 928 F.3d at 68.

A. The Superior Court omitted part of the *Yearsley* legal standard.

First, the Superior Court erased the "and directed" language out of the *Yearsley* test. The "authorized and directed" standard reflects the U.S. Supreme Court's desire to maintain the balance that *Yearsley* struck: that federal contractors do not "share the Government's unqualified immunity from liability and litigation," but they can be free from liability when they "simply performed as the Government directed." *Campbell-Ewald*, 577 U.S. at 166–67.

Other cases demonstrate the importance of the requirement that the government direct the defendant's conduct. *Clover v. Camp Pendleton & Quantico Hous. LLC*, 525 F. Supp. 3d 1140, 1143 (S.D. Cal. 2021), for example, held that defendant private property managers of U.S. military housing were not entitled to *Yearsley* immunity when the plaintiff residents alleged that the property managers had negligently maintained the housing in their service requests, causing mold. The defendants argued that they were immune under *Yearsley* because they "were following a general plan approved by the Navy in how they maintained the housing" and thus were "entitled to immunity if they acted under validly-conferred authority and their actions were authorized by contract and consistent with the contract." *Id.*

The court rejected this argument: "derivative immunity is available only when contractors are carrying out government instructions, without exercising any

discretion of their own – that is, where their actions are not merely permitted but directed by the government. To the extent claims arise from their own discretionary activity, they are not immune." *Id.* The court held that plaintiffs' allegations that the defendant property managers negligently maintained the property that caused mold to grow meant *Yearsley* was inapplicable – because "[e]ven though Defendants' maintenance of the property was authorized by the government and the government provided some guidance, it clearly was not *directed by* the government." *Id.* (emphasis added).

The Superior Court adopted the very argument the *Clover* court rejected. While the State Department permitted Palladium to expend program funds for Mr. Zakka's travel to Iran and provided country clearance, the State Department (1) left the ultimate decision of whether Mr. Zakka would travel up to Palladium, (2) cautioned Palladium that it was proceeding at its own risk, and (3) left to Palladium's discretion how it would send Mr. Zakka to Iran – including what warnings and security precautions Palladium would provide him. Under these facts, Palladium and Mr. Abel are not entitled to *Yearsley* immunity.

The absence of government *direction* invites private actor discretion, and discretion is incompatible with *Yearsley* immunity. The Ninth Circuit in *Cabalce*, 797 F.3d at 732, held that "derivative sovereign immunity, as discussed in *Yearsley*, is limited to cases in which a contractor 'had no discretion in the design

process and completely followed government specifications.'" (Citation omitted.) The D.C. Circuit has held the same. *Broidy*, 12 F.4th at 803. As a matter of law, Defendants thus cannot be entitled to an immunity that is built upon their following directives of the federal government when there were no directives for them to follow, and when the Defendants' decision-making regarding the travel to Iran was done in their own discretion and at their own risk. *See Boyle*, 487 U.S. at 525 (Brennan, J., dissenting) ("*Yearsley* . . . has never been read to immunize the discretionary acts of those who perform service contracts for the Government."). Defendants never even argued that the State Department authorized *and directed* Mr. Zakka's travel to Iran or Palladium's security protocol and warnings for that travel. Accordingly, the Superior Court's ruling was error.

B. The Superior Court failed to ask whether Defendants' tortious conduct was authorized and directed by the State Department.

Yearsley applies only when the government authorized and directed the defendant's *tortious conduct*, but the Superior Court changed the inquiry to whether the State Department authorized *the travel to Iran*. This was wrong. Mr. Zakka's suit is not about whether Palladium sent him to Iran. His suit alleges that Palladium sent him to Iran (1) without warning him of the heightened risks to him of traveling to Iran on Palladium's behalf, and (2) without taking the security precautions that were necessitated by Palladium's written assurances to the State Department, Palladium's internal policies, and industry practice. J.A. 16–18.

The U.S. Supreme Court has always discussed *Yearsley* as an inquiry that must be tailored to the plaintiff's allegations, correspondingly warning against broadening *Yearsley* into the immunity enjoyed by government officials. *Yearsley* itself held that a private contractor was not liable for causing erosion that washed away part of the plaintiffs' land after the contractor built dikes in the Missouri River and used boats and paddles to intentionally cause the erosion – because those actions were completed by the contractor according to the specifications and directions of the Secretary of War and the U.S. Chief of Engineers.[5] *Yearsley*, 309 U.S. at 19–21. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001), reiterated that "[w]here the government has directed a contractor *to do the very thing that is the subject of the claim*, we have recognized this as a special circumstance where the contractor may assert a defense[.]" (Emphasis added.) *Campbell-Ewald Co. v. Gomez*, 577 U.S. at 166, rejected the defendant contractor's sweeping characterization of *Yearsley*: "Do federal contractors share

[5] The government's intricate involvement in the planning of the erosion is described in detail in the United States' amicus brief in *Yearsley*. *See* Brief for the United States as Amicus Curiae, *Yearsley v. W.A. Ross Const. Co.*, No. 156, 1939 WL 48388, at *6 (U.S. Dec. 1939) ("Dykes 602.7, 602.7A, 601.9, and 601.9A were constructed by respondent, beginning in 1934, as envisaged by the project and the contracts (R. 95, 98-108). The construction work was in accordance with detailed specifications in the contracts with the Government, and was done under the direct and constant supervision and direction of Government inspectors (R. 98-108, 117-123, 125-127, 138-144).").

the Government's unqualified immunity from liability and litigation? We hold they do not." *Id.*[6]

Other courts have followed this case law faithfully. The D.C. Circuit has held that a private contractor alleged to have negligently maintained its security system was not entitled to immunity against plaintiffs' suit that its negligence created the vulnerabilities that led to the OPM data breach when its purported security failures were not "directed by the government." *OPM*, 928 F.3d at 53 ("KeyPoint is not entitled to derivative sovereign immunity because it has not shown that its alleged security faults were directed by the government[.]"). The Fourth Circuit in *In re KBR, Inc. Burn Pit Litigation*, 744 F.3d 326, 326 (4th Cir. 2014), similarly reversed the district court's holding that the contractor was entitled to immunity and instead held that there has to be a close fit between the government's directive and the contractor's tortious action: "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.'" (Citation

[6] In the context of immunity for military contractors, the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. at 503, held that "[l]iability for design defects in military equipment cannot be imposed [on a private manufacturer], pursuant to state law, when (1) the United States approved *reasonably precise specifications*; (2) the equipment conformed to those specifications; and (3) the [private] 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." *Id.* at 512 (emphasis added).

omitted.) *See also Spurlin*, -- F. Supp. 3d --, 2021 WL 4924829, at *4 (no *Yearsley* defense for private company that failed to warn plaintiff of asbestos exposure risks when "there is no evidence that the failure to warn about asbestos was expressly authorized and directed by the United States").

These cases demonstrate how a court must frame the *Yearsley* inquiry: precisely, so that the question the court answers is whether the defendant's specific tortious conduct as alleged by the plaintiff was authorized and directed by a federal agency. But the Superior Court erroneously eschewed this approach. There was no record evidence that showed that the State Department authorized and directed Defendants' failure to take security precautions for Mr. Zakka's travel to Iran or their failure to warn him of the risks of traveling to Iran for Palladium. The closest the record came to that issue was Ms. Hadjilou's September 8, 2015 email. J.A. 678–80. But as discussed above, neither that document nor any other showed that the State Department authorized and directed Defendants' tortious conduct – and instead showed the opposite. *See supra* at 31–36.

C. The Superior Court's legal errors infected its rulings denying Mr. Zakka's motion to compel and his request for discovery from the State Department.

In his motion to compel and supplemental briefing, Mr. Zakka sought discovery (1) about whether Palladium violated its representations to the State Department regarding implementation of the Security Standard Operating

Procedures, J.A. 302, (2) about Palladium's communications with and about the State Department after Mr. Zakka was abducted – particularly given Ms. Alami's description of those meetings, J.A. 302, 676, and (3) from the State Department about whether it authorized and directed Palladium's tortious conduct. J.A. 596–98. Other *Yearsley* cases involve this type and scale of discovery. *See Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 645 (4th Cir. 2018) ("Discovery lasted 75 days and included six subpoenas, four *Touhy* requests, numerous document requests, six depositions of GDIT and CMS employees, and supplemental briefing on the issue."). The Superior Court's summary denials of these requests were premised on its incorrect view that Defendants were entitled to *Yearsley* immunity if "the State Department authorized plaintiff's travel to Iran in September of 2015." J.A 297. The effect was to compound the court's legal error. Because the court misstated and misapplied the law, its rulings on these discovery issues predicated on its incorrect legal standard must also be reversed.

III. DEFENDANTS FAILED TO SUSTAIN THEIR BURDEN UNDER *YEARSLEY*.

Regardless of whether Rule 56 or Rule 12(b)(1) applied, "a defendant claiming sovereign immunity in a motion to dismiss 'bears the burden of proving' they qualify for it." *Broidy*, 12 F.4th at 796 (citations omitted); *Minch v. District of Columbia*, 952 A.2d 929, 936–37 (D.C. 2008) (it is the sovereign defendant's burden to establish absolute immunity). Defendants failed to meet their burden on

this record. Courts "review the applicability of derivative sovereign immunity de novo." *See OPM*, 928 F.3d at 68.

A. Because Palladium exercised its discretion in sending Mr. Zakka to Iran, Defendants cannot be entitled to *Yearsley* immunity.

The level of discretion Palladium enjoyed with respect to the WAVE II program and Mr. Zakka's travel to Iran is incompatible with *Yearsley* immunity. *See supra* at 12–13, 31–32, 42–43; *Cabalce*, 797 F.3d at 732; *Broidy*, 12 F.4th at 803. It was undisputed that the WAVE II program was governed by a Cooperative Agreement (not a "government contract") in which Palladium was the "prime grantee" (not a "contractor"). *See* J.A. 704, 675–76, 604–05. It was also undisputed that Palladium's discretion in the WAVE II program extended to making decisions about who, when, and how WAVE II program staff would travel to Iran, subject to the State Department's approval to expend program funds on such travel and compliance with country clearance requirements. *See* J.A. 605, 611–12, 675–79. In this context, the State Department's confirmation that Palladium was undertaking the travel to Iran in its own discretion and at its own risk precluded application of *Yearsley* as a matter of law.

Defendants' contention that their exercise of discretion nonetheless entitled them to derived immunity under the FTCA's "discretionary function exception" was incorrect because discretion is incompatible with *Yearsley* immunity. *See supra* at 21–22, 41–43. Moreover, the FTCA immunizes discretionary functions

performed by "a federal agency or an employee of the Government," 28 U.S.C. § 2680(a), and Defendants are neither: "[t]he FTCA explicitly excludes independent contractors from its scope." *KBR*, 744 F.3d at 41. Nor did Defendants show that their negligence constituted a discretionary function. *See Leone v. United States*, 690 F. Supp. 1182, 1183 (E.D.N.Y. 1988) (discretionary function exception did not apply when government employees negligently conducted medical examination of pilot who crashed plane). Congress intentionally excluded contractors from the FTCA's protections. Defendants cannot use their contorted interpretation of *Yearsley* to backdoor their way into the FTCA despite Congress' clear intent.

B. Because Defendants violated their representations to the State Department about how they would manage security and safety on the WAVE II program, they cannot be entitled to *Yearsley* immunity as a matter of law.

As described above, Defendants secured the WAVE II program award after making certain detailed representations to the State Department about Palladium's "Corporate Security Policies" and Security Standard Operating Procedures. J.A. 640; *supra* at 36–40. The record showed that Defendants violated these representations by failing to implement any of the security and safety-related procedures outlined in the Technical Application, J.A. 611–12, and they did not carry their burden to establish a record that showed they employed any of these measures. *See supra* at 36–40. Defendants thus cannot be entitled to *Yearsley* immunity as a matter of law. *See Campbell-Ewald*, 577 U.S. at 168–69.

CONCLUSION

For the reasons stated above, the judgment of the Superior Court should be reversed. Its ruling granting Defendants' motion to dismiss and denying Mr. Zakka's motion to compel should be reversed.

Respectfully submitted,

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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
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   - 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;
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     (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/ Richard J. Leveridge
Signature

21-CV-0690
Case Number(s)

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on March 4, 2022 on counsel of record listed below via the Court's electronic filing system:

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