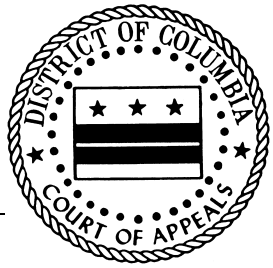
Case No. 21-CV-0690






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.)

# REPLY BRIEF OF PLAINTIFF-APPELLANT NIZAR ZAKKA

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## INTRODUCTION

Palladium International, LLC ("Palladium") and Edward Abel (collectively, "Defendants") sent Plaintiff Nizar Zakka to Iran without taking any safety and security precautions and without warning him that traveling there as an affiliate of Palladium would paint a target on his back for the Iranian government. Opening Brief of Plaintiff-Appellant Nizar Zakka ("Opening Br.") 20–21. Security precautions are standard in the international development industry for travel like this; they are standard inside Palladium, too. J.A. 16–17. Indeed, they are so standard that when Palladium and Mr. Abel pitched the U.S. State Department for the grant money that funded the Palladium project that sent Mr. Zakka to Iran (called "WAVE II"), they told the State Department that Palladium would use certain "Security Standard Operating Procedures" for the project. J.A. 640–41. Yet Palladium never did, and so when Mr. Zakka traveled to Iran at Palladium's direction, he was abducted and tortured for nearly four years by the Iranian government – and interrogated relentlessly about Palladium. Opening Br. 17.

Defendants claim that this Court has no subject matter jurisdiction to hear Mr. Zakka's suit because it is "unequivocal" that "the State Department [a]uthorized Mr. Zakka's [t]ravel and . . . [that] Palladium [c]omplied with [a]ll [g]overnment [d]irectives." Brief for Appellees Palladium International, LLC and Edward Abel ("Palladium Br.") 26, 40. Wrong on all counts.

What is unequivocal is that the State Department told Palladium that Mr. Zakka's trip 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). No official of the U.S. government authorized and directed Palladium's reckless decisions to send Mr. Zakka to Iran without the necessary warnings or industry standard security precautions. Indeed, Palladium's decision to send Mr. Zakka to Iran *at all* was done in its own discretion, at its "own risk," and not at the direction of the U.S. government.

This terminates Palladium and Mr. Abel's affirmative defense under *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 20 (1940), which holds that a private company cannot be held liable when the alleged conduct that gives rise to that liability was not a choice of the company, but rather "authorized and directed" by the U.S. government. The defense is about control. It is meant to protect a private defendant from liability when its tortious conduct is tightly controlled – directed by – the government, and so "derivative 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). Defendants' reckless management of Mr. Zakka's travel to Iran was not directed by the State Department. It involved choices that Palladium made at its own risk and in its own discretion. That ends the inquiry.

Defendants seek a more lenient standard of review or a relaxed application of *Yearsley*'s substantive legal standard. The weight of the case law is firmly against them on these points. Opening Br. 27–46. But even if Defendants were to somehow persuade the Court on these legal issues, Mr. Zakka would still prevail: the bottom line is that Defendants do not cite a single case in which a defendant was entitled to a *Yearsley* defense after the U.S. government advised that defendant that it was proceeding with a course of conduct at its own risk, in its own discretion, and not as a requirement of the government program. This by itself betrays the weakness and novelty of Defendants' contentions in this appeal and the depth of the error in the Superior Court's ruling. That ruling should be reversed.

## ARGUMENT

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

*Yearsley* is a merits defense against liability reviewed under Rule 56's summary judgment standard, not a jurisdictional immunity from suit reviewed under the Rule 12(b)(1) subject matter jurisdiction standard. *See* Opening Br. 27–29. Under the correct standard of review, Defendants cannot prevail.

#### A. *Yearsley* is not sovereign immunity.

The core premise underlying Defendants' argument that they are entitled to a jurisdictional immunity from suit is that "a contractor's immunity under *Yearsley* is derived from the very same sovereign immunity afforded to the U.S. government,

which also is afforded Rule 12(b)(1) review." Palladium Br. 18. The assumption in their argument is that *Yearsley* immunity is not just derived from, but *equal to* the government's sovereign immunity.

This is wrong. The U.S. Supreme Court made this point explicitly when it rejected another government contractor's attempt to equate sovereign and derivative immunity: "Do federal contractors share the Government's unqualified immunity from liability and litigation? *We hold they do not.*" *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 166 (2016) (emphasis added); *id.* ("Campbell asserts 'derivative sovereign immunity,' . . . but can offer no authority for the notion that private persons performing Government work acquire the Government's embracive immunity."). This is also the position of the United States:

> Federal contractors do not share the Government's unqualified immunity from liability and litigation. . . . [W]hile the federal government generally cannot be sued for a tort, its immunity does not extend to those that acted in its name. . . . "Derivative sovereign immunity" is therefore a misnomer. The defense known by that name is not a derivative form of the government's own immunity, because [the Supreme] Court has stated unambiguously that contractors cannot assert a right to that immunity in U.S. courts.

Brief of the United States as Amicus Curiae, *CACI Premier Tech., Inc., v. Abdulla Al Shimari*, No. 19-648, 2020 WL 5094136, at *9–10 (U.S. Aug. 26, 2020) (cleaned up); Opening Br. 29. Because *Yearsley* is not sovereign immunity, the standards of review for each defense are not (and should not be) the same.

That courts treat other immunities derived from sovereign immunity as a defense to liability rather than a jurisdictional bar to suit is another reason why this Court should not transform *Yearsley* into a jurisdictional immunity from suit. *See* Amicus Br. of Scholars ("Amicus Br.") 9. Government contractor immunity under *Boyle v. United Techs. Corp*., 487 U.S. 500, 512 (1988), for example, also stems from sovereign immunity and directly from *Yearsley* itself, yet *Boyle* is a merits-based defense to claims, not a jurisdictional bar to suit. *See New York ex rel. James v. Pa. Higher Educ. Assistance Agency*, No. 19 Civ. 9155 (ER), 2020 WL 2097640, at *7 (S.D.N.Y. May 1, 2020).

Defendants dismiss *Boyle* as "not apply[ing] here, because the 'government contractor defense' is separate and different from the *Yearsley* immunity doctrine." Palladium Br. 32 n.8. Whether they are separate doctrines or variants on the same doctrine is beside the point: the cases are related and each demarcate the circumstances under which a private company doing business with the government can be protected from liability, and so courts use both cases to inform the appropriate standard of review and substantive legal standard. *See Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 125 n.8 (2d Cir. 2021) (*Boyle* immunity is "related" to the doctrine of "derivative sovereign immunity" and the "decision in *Boyle* drew support from *Yearsley*").

Unrooted in law, Defendants turn to policy. Their assertion that immunity from suit ensures talented candidates are not deterred from government contracting work, Palladium Br. 20–22, is speculative fearmongering. *Boyle* immunity for military contractors is not a jurisdictional immunity from suit, *New York ex rel. James*, 2020 WL 2097640, at *7, yet there has been no brain drain away from the military contracting industry. Moreover, "[a]ny concerns about government contractors being unwilling to do business with the government . . . are mitigated by the potential ability of government contractors to price litigation risks into their contracts." Brief of the United States, *CACI Premier Tech., Inc.*, 2020 WL 5094136, at *13. Finally, the countervailing policy considerations of not slamming the courthouse doors shut on those who are injured by private companies, *see* Amicus Br. 11, outweigh the purported need to gift protection from suit to the multibillion-dollar government contracting industry.

### B. The overwhelming majority of jurisdictions agree that *Yearsley* is a defense to liability, not a jurisdictional question.

Treating *Yearsley* immunity as a merits defense is consistent with how all other courts (but one) treat *Yearsley*. *See* Opening Br. 27–29; Amicus Br. 6. Defendants' arguments to the contrary are spin, not law.

First, Defendants misconstrue *Campbell-Ewald*, 577 U.S. at 153, as "strongly suggest[ing]" that *Yearsley* immunity is jurisdictional. Palladium Br. 19. It did the opposite. If the holding of *Campbell-Ewald*, 577 U.S. at 166, was to

reject the notion that derivative and sovereign immunity are equivalent, then the case cannot be read to stand for the proposition that private companies enjoy the sovereign's unique jurisdictional protection from suit. While Defendants describe it as not "substantive," Palladium Br. 25, this was the reasoning of the Fifth and Sixth Circuits and many district courts. *See* Opening Br. 28–29; Amicus Br. 8–11.

Second, notwithstanding the snippets Defendants pull from opinions out of their context, Palladium Br. 15, Defendants ultimately concede that the only court that has ever held that *Yearsley* is a Rule 12(b)(1) issue is the Fourth Circuit. Palladium Br. 23. *Moore v. Electric Boat Corp.*, 25 F.4th 30, 36–39 (1st Cir. 2022), held that a defendant could remove a case to federal court because it had a "colorable federal defense" under *Yearsley*; it said nothing about whether *Yearsley* was a Rule 12(b)(1) or Rule 56 issue. *In re U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 68–69 (D.C. Cir. 2019) ("*OPM*"), similarly said nothing about whether *Yearsley* is a Rule 12(b)(1) issue. This leaves only the Fourth Circuit. This Court should not make itself an outlier with the Fourth Circuit. Its reasoning is premised on the same flawed policy arguments that are discussed above, *supra* at 6, and criticized by Amici. *See* Amicus Br. 4–11.[2]

[2] The article Defendants cite (Palladium Br. 21 n.1) claims that the Ninth and Eleventh Circuits have held that *Yearsley* is a jurisdictional bar to suit, but the author is mistaken. Neither court has so held.

### C. Proper application of *Yearsley* as a defense from liability precludes summary judgment.

Under Rule 56, the Superior Court was required to place the burden on Defendants to show that there was no genuine dispute about whether their breach of the standard of care was authorized and directed by the State Department, and to construe the facts in the light most favorable to the plaintiff and draw all reasonable inferences in his favor. It did neither. *See* Opening Br. 30–39.

Defendants double down on the Superior Court's errors, arguing that the court correctly discredited Mr. Zakka's "self-serving declaration," Palladium Br. 44, and asserting that Ms. Alami's declaration, the former Palladium employee who was the WAVE II program director, presents "no new material facts" and instead reflects "her own subjective interpretation of [the] documents." *Id.* at 47–48. Their arguments are meritless.

First, even without the declarations, a bare reading of Ms. Hadjilou's email in the light most favorable to Mr. Zakka is that the travel was taken at Defendants' "own risk" and not as a requirement of the WAVE II program. J.A. 676–79. This raises factual disputes regarding whether the State Department directed Palladium to send Mr. Zakka to Iran or whether it permitted Palladium to do so at Palladium's own risk and in its own discretion. This creates a dispute about whether *Yearsley*'s requirements are met. *See Broidy*, 12 F.4th at 803 ("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."). The Superior Court's contrary ruling that the language was somehow an implicit approval of Palladium's tortious conduct violates the summary judgment standard by construing the record against Mr. Zakka. *See* Opening Br. 31–32.

Second, the Superior Court ignored parts of the record in favor of its own acontextual reading of other parts of the record, viewed in the light least favorable to Mr. Zakka. For example, the Superior Court held that Ms. Hadjilou's email "authorized" Mr. Zakka's trip, but Mr. Zakka and Ms. Alami both explained that the State Department, Palladium (Ms. Alami was a Palladium employee), and Mr. Zakka understood that the email merely authorized the expenditure of federal funds on the trip and provided country clearance – not the trip itself, and not Defendants' tortious failure to provide the relevant warnings and security precautions. *See* Opening Br. 12–14, 32–33, 35. Under Rule 56, Defendants' insistence that the "plain language" of the email demonstrates unequivocal State Department authorization cannot be credited over witness statements otherwise. *See* Opening Br. 34–35.

Third, whether Palladium was expected to be taking security precautions based on Defendants' representations about the Corporate Security Policies and Security Standard Operating Procedures raises a genuine dispute about whether Palladium violated the State Department's understanding of whether and how

Defendants would manage safety and security on the WAVE II program, which would vitiate any purported State Department approval. *See* Opening Br. 36–39.

Defendants argue that the Security Standard Operating Procedures were "potential" but "not required." Palladium Br. 35. In the light most favorable to Mr. Zakka, the issue is disputed – and as a matter of fact, Defendants are flat wrong. The Technical Application states that "[f]or this project Futures Group *will* produce a comprehensive set of Security Standard Operating Procedures that *could* include" any of the 13 precautions listed in the document, and that "[b]ased on *current* security practices and procedures, [Palladium] *has formulated* a risk mitigation plan," J.A. 640–41 (emphasis added); Opening Br. 36–38 (emphasis added). Defendants told the State Department that they *would* or *already had* produced the Security Standard Operating Procedures and a risk mitigation plan for the program. Had Defendants not done any of this – a fact unknown due to the Superior Court's denial of requests for discovery – that would have been a probative fact showing that Defendants violated their contractual requirements, or at the very least misled the State Department about the security and risk mitigation protocols Palladium was undertaking. This would preclude summary judgment under the logic of *Campbell-Ewald*, 577 U.S. at 673–74. *See* Opening Br. 36–40.

Defendants claim that the Technical Application was not incorporated into the WAVE II Cooperative Agreement. Palladium Br. 35. The face of the

agreement says the opposite. J.A. 84. Defendants say that some of the application materials were attached, but not all of them. Palladium Br. 35. This is false. There were no application materials "attached" to the WAVE II Cooperative Agreement; they were "incorporated herein by reference." *See* J.A. 84–108. Defendants' assertions that the Technical Application "was entirely superseded by the Work Plan," Palladium Br. 36 n.10, and that the State Department did not rely on the Technical Application representations, *id.* at 49, have zero factual basis and are inconsistent with Ms. Alami's statement that Palladium was trying to win the business by presenting itself to the State Department "as a top-tier international development and consulting firm that had the experience, technical expertise, and resources to operate the Iran program." J.A. 674.

Fourth, Defendants' assertion that Mr. Zakka's declaration can be discounted as conclusory on a Rule 56 motion is wrong. Defendants cite *Arrington v. United States*, 473 F.3d 329, 343 (D.C. Cir. 2006) (Palladium Br. 47), but neglect to mention that they are citing only to Judge Brown's partial dissent and not the majority opinion of the court, which *reversed* summary judgment in a case involving a police beating when the primary record evidence supporting the plaintiff's version of events was his own sworn testimony. *Id.* at 339–40.

In any event, Mr. Zakka's factual descriptions are distinguishable from *New 3145 Deauville, L.L.C. v. First American Title Insurance Co.*, 881 A.2d 624, 628–

29 (D.C. 2005), where the affiant did not have personal knowledge or give specific facts underlying a broad assertion that a property's past due water bill was inaccurate, and *Carranza v. Fraas*, 820 F. Supp. 2d 118, 124–25 (D.D.C. 2011), where the declarant baldly lied about whether a settlement offer was made in a malpractice suit against her lawyer in the face of documents indicating there was no such offer. Conversely, Mr. Zakka and Ms. Alami have both attested to their knowledge of events and conversations they were personally involved in, corroborated by documents. *See Smith v. Wells Fargo Bank*, 991 A.2d 20, 31 (D.C. 2010) (reversible error to strike plaintiff's own declaration at summary judgment when it was based on personal knowledge); Opening Br. 11–15; 32–35.

## II. THE SUPERIOR COURT MISAPPLIED THE LEGAL STANDARD UNDER *YEARSLEY*.

*Yearsley* "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." *OPM*, 928 F.3d at 68–69 (citations and quotations omitted); Opening Br. 39–40. Here, the actions that Defendants took – sending Mr. Zakka to Iran without warning him about the risks of traveling there as a Palladium affiliate and without taking any security precautions for the trip – were not authorized and directed by the U.S. government, and Defendants are therefore not immune from liability. Opening Br. 41–46. Defendants make several arguments in response. Not one is persuasive.

First, Defendants cite *Campbell-Ewald* for the proposition that a contractor loses *Yearsley* protection only when it violates federal law and the government's explicit instructions or a provision of a contract. Palladium Br. 30–31; *id.* at 34–35. But the Court was not articulating a new standard in *Campbell-Ewald*, 577 U.S. at 166–68. It was merely stating that in that case a violation of a federal statute and a deviation from the government's understanding were sufficient (but not necessary) to preclude *Yearsley* immunity. *See Adkisson v. Jacobs Eng'g Grp., Inc.*, 527 F. Supp. 3d 961, 978 (E.D. Tenn. 2021) (rejecting defendant contractor's argument that *Campbell-Ewald* announced a "new, heightened standard" for *Yearsley* immunity).

Similarly, Defendants' claim that *OPM* (Palladium Br. 37) held that a contractor loses *Yearsley* protection only when it violates its contract is based on a selective reading: the D.C. Circuit held that the contractor "is not entitled to derivative sovereign immunity because it has not shown that its alleged security faults were directed by the government, and it is alleged to have violated the Privacy Act standards incorporated into its contract with OPM." 928 F.3d at 53. The point of *OPM* is that its framing was tailored to the plaintiffs' allegations – whether the government directed the alleged negligent acts – and not framed at Defendants' higher level of generality. That the contractor was also alleged to

have violated the Privacy Act blocked *Yearsley* immunity, but that was not an allegation necessary to defeating *Yearsley*. *See OPM*, 928 F.3d at 69.

Moreover, a breach of the standard of care by negligently performing under the contract independently supports denial of *Yearsley* immunity – without requiring an express violation of the contract – because it is a violation of law. *See In re Fort Totten Metrorail Cases Arising Out of Events of June 22, 2009*, 895 F. Supp. 2d 48, 74 (D.D.C. 2012) (no *Yearsley* immunity for contractor who negligently performed safety and compatibility testing because "derivative sovereign immunity is not available to contractors who act negligently in performing their obligations under the contract"); *Rhoads Indus., Inc. v. Shoreline Found., Inc.*, Nos. 15-921 & 17-266, 2022 WL 742486, at *14 n.23 (E.D. Pa. Mar. 10, 2022) (suggesting that a negligence suit is akin to a claim that the contractor exceeded its contractual authority because a violation of state tort law is presumably not part of the operative contract). Insofar as Defendants argue that the State Department required them to send Mr. Zakka to Iran, their negligent execution of that directive constitutes a breach of the standard of care and of any purported directive and thus precludes a *Yearsley* defense.[3]

[3] Defendants assert that Mr. Zakka has not "offered any evidence" that the relevant "warnings were warranted or even based in fact," and they note that Mr. Zakka had traveled to Iran before. Palladium Br. 36. This case is still at the pleading stage, so Mr. Zakka is not required to present "evidence" to prove his claims. In any

Second, Defendants dismiss all of Plaintiffs' cases as adopting a "no discretion" Ninth Circuit-only gloss on *Yearsley* "at odds" with Supreme Court case law and which D.C. courts have never adopted. Palladium Br. 32. But *Yearsley* and *Campbell-Ewald* each turned on the amount of discretion the contractor enjoyed, Opening Br. 38–39, 44 n.5, and the D.C. Circuit has adopted the Ninth Circuit's articulation of the *Yearsley* standard. The court reaffirmed in *Broidy* that "derivative immunity does not apply to contractors exercising discretion in working to accomplish broad governmental objectives," *Broidy*, 12 F.4th at 803, and it cited Ninth Circuit case law for that proposition. *Id.* (citing *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 732 (9th Cir. 2015)). Applying *Yearsley* in the case of a municipality, another D.C. Superior Court judge also framed the inquiry around the lack of discretion: "Derivative discretionary function immunity applies where (1) the federal government, acting with discretionary function immunity, mandated reasonably precise specifications or directives; and (2) the non-federal actor merely implemented those

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event, a Palladium document dated a few months before Mr. Zakka's trip to Iran states that Palladium was "aware that IJMA3 is being watched more closely due to increased activity in Iran," J.A. 8–9, and there were facts in the Complaint that indicated that the reason for this was because of Palladium's close ties to the Arab Gulf States, J.A. 15, 21–22. That Mr. Zakka's prior trips to Iran were on behalf of a different company (a non-profit called "IRD") that did not create the same risks to his safety and security as his relationship with Palladium strengthens his allegations.

specifications or directives in taking the actions that allegedly caused harm to the plaintiff." *Barkley v. Dist. of Columbia Water and Sewer Authority*, No. 2013 CA 003811 B, 2016 WL 184433, at *6 (D.C. Super. Jan. 13, 2016).

The cases Defendants cite confirm that contractor discretion is anathema to *Yearsley* immunity. *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466–67 (4th Cir. 2000), held that a private security contractor was not liable for engaging in gender discrimination for refusing to promote a qualified woman employee to a Saudi princess' security detail (because she was a woman) when that precise conduct was explicitly directed by a Saudi military officer and the contractor had no discretion to do otherwise. In *Taylor Energy Company, L.L.C. v. Luttrell*, 3 F.4th 172, 173 (5th Cir. 2021), a specific Coast Guard officer was by federal statute required to "*direct* all federal, state, or private actions to remove the discharge" after an oil spill. (Emphasis added.) But in Mr. Zakka's case the WAVE II Cooperative Agreement *prohibited* the State Department from placing an employee of the State Department as a supervisor of Palladium's employees. Opening Br. 13.

Third, Defendants argue that the State Department's involvement in Palladium's operations was "substantial," which makes this case more akin to *Yearsley*. Palladium Br. 33. Not so. Even the undisputed facts make clear that Palladium exerted significant discretion over the means and methods of Mr. Zakka's travel to Iran, which precise security protocols would be taken, all

supervisory roles for the program, and whether to travel at all. J.A. Opening Br. 31–33, 36–39. This is not close to the complete absence of discretion the contractor enjoyed in *Yearsley*, *see* Opening Br. 44 n.5, or in any other case that has granted *Yearsley* immunity. *See Rhoads*, 2022 WL 742486, at *15 (no *Yearsley* immunity when the "Defendants may have had at least some discretion concerning the means and methods of performing the contracted work").

Fourth, Defendants argue that Palladium did not violate any government directives. Palladium Br. 42. The Superior Court rejected Mr. Zakka's efforts to obtain discovery about the specific State Department directives related to the Security Standard Operating Procedures and security protocols for the WAVE II program, even though Defendants alone possess this evidence. *See* Opening Br. 46–47; Amicus Br. 6. Defendants thus have no factual basis for this assertion, and they cannot rest their argument on evidence they refused to enter into the record.[4]

## III. DEFENDANTS FAILED TO CARRY THEIR BURDEN TO SHOW THAT THEY WERE ENTITLED TO THE *YEARSLEY* DEFENSE.

Even under Rule 12(b)(1) and Defendants' relaxed *Yearsley* standard, Defendants' failure to develop a legally sufficient record on an issue in which they

[4] Defendants counter that the motion to compel was properly denied under an abuse of discretion standard, Palladium Br. 50, but Mr. Zakka's argument is that the Superior Court's ruling that the documents sought in the motion to compel were not relevant was predicated on its relaxation of the *Yearsley* standard, which is a legal error. *See* Opening Br. 46–47.

had the burden precludes a *Yearsley* defense. The ultimate question of whether *Yearsley* immunity applies is reviewed *de novo*. *OPM*, 928 F.3d at 68.

### A. Under Rule 12(b)(1), it is Defendants' burden to establish a *Yearsley* defense.

While a plaintiff generally bears the burden of establishing jurisdiction, "a defendant claiming [derivative] sovereign immunity in a motion to dismiss 'bears the burden of proving' they qualify for it." *Broidy*, 12 F.4th at 796 (citation omitted); Opening Br. 47–48.

It is immaterial that *Broidy* involved derivative immunity for a foreign sovereign (*see* Palladium Br. 27 n.5) where its analysis of the burden established in *Yearsley* is universal. 12 F.4th at 803; *Afanasieva v. Washington Metro. Area Transit Auth.*, No. 21-1881 (RDM), 2022 WL 621398, at *2 (D.D.C. Mar. 3, 2022) (applying *Broidy*'s holding on burden placement in a case involving WMATA, which is obviously not a foreign sovereign). Defendants similarly discount *Minch v. District of Columbia*, 952 A.2d 929, 936–37 (D.C. 2008), but the point of that case was that the substantive legal burden of establishing that the official function in question merits absolute immunity rests on the defendant official. By extension, a private entity seeking to establish an analogous immunity must shoulder the burden, even under Rule 12(b)(1). The lone case Defendants cite on this point, *Federico v. Lincoln Military Housing, LLC*, No. 12-80, 2013 WL 5409910, at *4

n.2 (E.D. Va. Sept. 25, 2013), assumed that the plaintiff held the burden without deciding the issue because the plaintiff prevailed.

### B. Palladium's discretion with respect to Mr. Zakka's travel precludes a *Yearsley* defense as a matter of law.

Defendants claim that the record showed that the travel was authorized, but the same email from Ms. Hadjilou "authorizing" the travel told Palladium that it was proceeding with the travel at its own risk, and Ms. Hadjilou repeatedly reminded Palladium and Mr. Abel of this after Mr. Zakka was abducted. J.A. 676–79. Thus, Palladium decided whether Mr. Zakka should travel at all, not the State Department. *See* J.A. 678–79. 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") further corroborates the amount of discretion Palladium enjoyed and corresponding lack of control the State Department had. *See* J.A. 604–05, 675–76, 704. Defendants claim this is all "semantic spin," but both Mr. Zakka and Ms. Alami made this point in their declarations (with citations to documents), and Mr. Zakka described from personal experience the practical differences in how these types of agreements operate in the government contracting industry. *See* Opening Br. 11–12; J.A. 605, 611–12, 675–79. Under these circumstances, Defendants are not entitled to *Yearsley* immunity.

Separately, the Federal Tort Claims Act's discretionary function exception cannot be the basis for *Yearsley* immunity in this case. The discretionary function

exception protects a federal agency from tort suits when its decisions were "grounded in social, economic, and political policy," *Begay v. United States*, 768 F.2d 1059, 1064 (9th Cir. 1985), but here the State Department made no such decisions – rather, *Palladium* made the decisions based on its self-interest, and decisions made by a contractor are not protected. *See* Opening Br. 48–49.

### C. Defendants' failure to adhere to their representations to the State Department regarding the use of Security Standard Operating Procedures precludes a *Yearsley* defense as a matter of law.

As discussed above, *supra* at 9–11, Defendants conducted a bait-and-switch: they boasted about Palladium's Corporate Security Policies and Security Standard Operating Procedures to win the WAVE II program award, J.A. 640; Opening Br. 36–40, but then failed to implement any of the security and safety-related procedures outlined in the Technical Application, J.A. 611–12. Under these circumstances, Defendants cannot be entitled to *Yearsley* immunity as a matter of law. *See Campbell-Ewald*, 577 U.S. at 168–69; Opening Br. 36–39, 49.

## CONCLUSION

The Superior Court's rulings dismissing Mr. Zakka's suit and denying him discovery should be reversed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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# 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/ Richard J. Leveridge*
Signature

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