CASE NO. 21-CV-690

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

NIZAR ZAKKA,

Appellant,

v.

PALLADIUM INTERNATIONAL, LLC, and EDWARD ABEL,

Appellees.

On Appeal from D.C. Superior Court Case No. 2020 CA 004591 B
The Honorable Florence Pan presiding

BRIEF FOR APPELLEES PALLADIUM INTERNATIONAL, LLC AND EDWARD ABEL

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LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 28(a)(2)(A-B) and Rule 26.1, Appellees Palladium International, LLC and Edward Abel hereby submit this list of (A) parties and counsel in the proceedings in the Superior Court; (B) parties and counsel in this appeal; and (C) corporate disclosure statement:

(A) Parties and Counsel in Superior Court:

1. Plaintiff – Nizar Zakka
   Counsel – Richard J. Leveridge, Adam H. Farra, Scott Gilbert, and Emily Grim (GILBERT LLP)

2. Defendants – Palladium International, LLC and Edward Abel
   Counsel – Benjamin S. Boyd and Sean Croft (DLA PIPER LLP (US))

(B) Parties, Counsel, and Amici on Appeal:

1. Appellant – Nizar Zakka
   Counsel – Richard J. Leveridge, Adam H. Farra, and Rachel H. Jennings (GILBERT LLP)

2. Appellees – Palladium International, LLC and Edward Abel
   Counsel – Benjamin S. Boyd, Mary E. Gately, Paul D. Schmitt, and Sean Croft (DLA PIPER LLP (US))

3. Amici in Support of Appellees – Professors Danielle Keats Citron, Kate Sablosky Elengold, Jonathan Glater, Andrew Hessick, and David Rubenstein
   Counsel – John Paul Schnapper-Casteras (SCHNAPPER-CASTERAS PLLC)

(C) Corporate Disclosure Statement

Palladium International, LLC (incorporated in Delaware) is not a publicly traded corporation. Its sole member is Palladium Group International LLC (incorporated in Delaware), whose sole member is Palladium Group Holdings Ltd

(a UK corporation). Palladium Group Holdings Ltd's 100% owner is Palladium Group Holdings Pty Ltd (an Australian corporation), whose 100% owner is Palladium Group Management Pty Ltd (an Australian corporation), whose 100% owner is Palladium Holdings Pty Ltd (an Australian corporation), which is the ultimate parent.

Edward Abel is not required to file a corporate disclosure statement under Rule 26.1.

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RULE 28(a)(5) STATEMENT

This Court has jurisdiction over this appeal because it is from a final order or judgment that disposes of all of the parties' claims.

Appellees Palladium International, LLC and Edward Abel hereby submit their Brief in this appeal. For the reasons stated herein, this Court should affirm the Superior Court's September 15, 2021 Order dismissing Appellant Nizar Zakka's Complaint because Appellees are immune from suit under the Supreme Court's *Yearsley* doctrine.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the Superior Court properly held that immunity under *Yearsley v. W.A. Ross. Const. Co.*, which is derived from the government's sovereign immunity, is a jurisdictional question, thus subjecting it to Rule 12(b)(1) review.

2. Whether the Superior Court properly held pursuant to a Rule 12(b)(1) analysis that Appellees were entitled to *Yearsley* immunity, which shields government contractors from suit when the government authorized the contractor's actions and validly confers that authorization.

3. Whether the Superior Court properly dismissed Mr. Zakka's suit in any event, because under the Rule 56 summary judgment standard, there was no dispute of material fact that the State Department authorized Mr. Zakka's travel to Iran, and *Yearsley* immunity therefore applied as a matter of law.

4. Whether the Superior Court, in its proper discretion, rightly denied Mr. Zakka's discovery requests for information that was not relevant to the question of *Yearsley* immunity.

STATEMENT OF THE CASE

I. Nature of the Case

This case arises from Mr. Zakka's tragic imprisonment by the Iranian authorities. Mr. Zakka traveled to Iran in 2015 as a representative of IJMA3, an international development organization, pursuant to a subcontract IJMA3 had with Palladium. Palladium and Mr. Abel sympathize with Mr. Zakka and his horrible plight, and condemn in the most serious terms the Iranian government's abduction and mistreatment of him.

The parties are engaged in the instant dispute not because of any disagreement as to whether Mr. Zakka's imprisonment and mistreatment by the Iranian authorities was wrong. The dispute is instead centered on whether Appellees, authorized and directed by the U.S. State Department to formulate and administer a program that explicitly contemplated Mr. Zakka's travel to Iran, are immune from Mr. Zakka's claims of liability for his imprisonment and mistreatment. The answer is clear: Appellees are immune from Plaintiff's claims of liability because since the Supreme Court's decision in *Yearsley v. W.A. Ross. Const. Co.*, 309 U.S. 18 (1940), U.S. courts have recognized that government contractors acting under the valid authority of the government, and who do not deviate from or violate that authority, are afforded immunity from suit. That is because the government itself typically enjoys immunity from suit in such situations, and it would be inequitable, and would not

serve the government's interests, to subject the contractor, the agent of the government, to a suit from which the government itself is immune.

Appellees fulfilled the *Yearsley* immunity requirements here. The detailed agreements with the State Department governing the programs at issue contained extensive and specific instructions as to how the programs would be administered, including specific instructions to have Mr. Zakka's travel to Iran authorized by the State Department. The State Department expressly authorized Mr. Zakka's travel and provided conditions for same, and it is undisputed that Palladium and Mr. Zakka complied with all those conditions. As the Superior Court rightly recognized, those undisputed facts are sufficient to convey *Yearsley* immunity. Appellees respectfully requests that this Court uphold that ruling.

II. Proceedings in the Superior Court

Mr. Zakka filed his initial Complaint in the Superior Court on November 3, 2020, alleging claims for negligence (failure to warn) and intentional infliction of emotional distress, both arising from his travel to Iran and subsequent imprisonment and torture in that country. J.A. 7-29. Appellees filed a motion to dismiss on January 19, 2021, arguing, *inter alia*, that Palladium had derivative sovereign immunity from Mr. Zakka's claims and that Mr. Zakka had failed to state a claim. J.A. 41-80. Mr. Zakka filed an opposition to the motion on February 19, 2021, and Appellees filed a reply on March 5, 2021. J.A. 3-4.

While briefing on the motion to dismiss was pending, Mr. Zakka served a wide-ranging set of 53 separate requests for production of documents, which would have required Palladium to expend extensive time, effort, and costs to respond. Consequently, Appellees moved for a protective order to stay discovery until a ruling on the motion to dismiss, which could potentially forestall the need for any such discovery. J.A. 3. After full briefing, the Superior Court granted Appellees' motion for a protective order during a conference with the parties on February 12, 2021, and stayed discovery pending a resolution of the motion to dismiss. J.A. 3.

The Superior Court held an oral hearing on Appellees' motion to dismiss on May 10, 2021. J.A. 205-296. During that hearing, the court held the motion to dismiss in abeyance and allowed limited discovery on the issue of whether the State Department authorized Mr. Zakka's travel to Iran in 2015, for the purpose of determining whether *Yearsley* immunity applied. J.A. 297. The court then set a deadline of June 10, 2021, for the aforementioned discovery to be conducted, and established a schedule for supplemental briefing on the merits of *Yearsley* immunity to take into account whatever the discovery process might reveal. *Id.*

Appellees filed their supplemental brief as to the motion to dismiss on June 24, 2021. J.A. 456-470. Mr. Zakka filed his supplemental opposition on July 8, 2021 (J.A. 575-600), and Appellees submitted a reply on July 15, 2021. J.A. 751-765. During this period, Mr. Zakka also moved to compel Appellees to search for

and produce documents (1) regarding the "Security Standard Operating Procedures" that Palladium purportedly told the State Department it would implement for travel to Iran, and (2) post-dating September 15, 2015, about Mr. Zakka's Iran travel, including communications between the State Department and Palladium. J.A. 302-320. Appellees opposed the motion on July 23, 2021. J.A. 441-446.

III. Disposition Below

The Superior Court held a second oral hearing on Appellees' motion to dismiss on *Yearsley* grounds on September 15, 2021. J.A. 766-804. The court stated that it construed Appellees' motion as falling under Rule 12(b)(1) because "it is a claim about the jurisdiction of the Court, and an assertion of immunity has been viewed in that way[.]" J.A. 793 (4-7). As to the merits of *Yearsley* immunity, the court concluded that "as long as the work done by the government contractor was done with the authorization of the government, the approval of the government, and within the scope of the contract . . . they would be entitled to Derivative Sovereign Immunity." J.A. 797 (15-19). Thus, the court noted that for purposes of *Yearsley* immunity, the key factual issue was "whether the travel by Mr. Zakka to Iran was authorized by the State Department, and if it was, I think the plaintiff is entitled to Derivative Sovereign Immunity, and if it was not, Palladium is not." J.A. 769 (5-8).

With regard to the record before it, the court made several findings of fact:

- The WAVE agreement, WAVE proposal, and the work plan all contemplated travel to Iran by IJMA3, and that Palladium would not travel to Iran. J.A. 774 (9-14).
- Palladium sent an email to the State Department on August 31, 2015, requesting approval for Mr. Zakka to travel to Iran from September 15-18, 2015. J.A. 798 (4-16). Palladium also sent a follow-up email to the State Department on September 2, 2015. J.A. 798 (17-20). These emails were sent "in order to comply with the WAVE 2 agreement" which "required that all travel be approved by the State Department[.]" J.A. 798 (21-24).
- The State Department authorized Mr. Zakka's Iran travel via email on September 8, 2015, stating that "travel authorization is granted with the understanding that [Mr. Zakka and others traveling to Iran] will be traveling with documents issued by their respective governments, none of which are US. Please note that this travel authorization is issued for Palladium in accordance with the provisions of the award" of the contract. J.A. 799 (3-14). *See also* J.A. 774 (9-24); 783 (23)–784 (1); 785 (4-7).
- The email said that "the authorization does not exceed the travel warnings for the destination country from the State Department," and that "[t]his travel is not required under the terms of the project but is undertaken at the organization's and traveler's own risk." J.A. 799 (15-20).

- Thus, the court held, "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." J.A. 799 (23) – 800 (4).

Based on that record, the court held that Mr. Zakka's "travel plans, including the lack of security or specified security arrangements were authorized by the State Department," and therefore Palladium was entitled to *Yearsley* immunity. J.A. 800 (11-15). Consequently, the court dismissed the case under Rule 12(b)(1).

The court added that even if the motion were viewed as a summary judgment motion, it "would not find that the sort of self-serving declaration of Mr. Zakka would be sufficient to create a material issue of fact to contradict the very plain language in a binding contract and a legally significant email which was required under the contract for authorization." J.A. 800 (18-24). The court emphasized that the interpretation offered by the declaration was "just not at all plausible." J.A. 786 (1-7); *see also* J.A. 787 (7-15); J.A. 793 (4-19).

At the conclusion of the September 15, 2021, hearing, the court denied Mr. Zakka's motion to compel because it was irrelevant to the issues at hand, J.A. 802 (1-10), and also denied Mr. Zakka's request to take additional discovery from the

State Department, because its authorization of Mr. Zakka's travel was already very clear from the September 8, 2015 email. J.A. 802 (11-20).

Mr. Zakka filed a Notice of Appeal on October 4, 2021. J.A. 805-812.

STATEMENT OF FACTS

A. The Parties

Appellee Palladium International, LLC ("Palladium") is a leading implementer of international development programs and has worked in over 90 countries to spark lasting social and economic development. Palladium works with governments across the world, including the United States government, to make transformational change possible. Palladium was formerly known as Futures Group International, LLC. J.A. 81. Before the change of name on July 29, 2015, the contracts pertinent to this case were signed by Futures Group International, LLC. *Id.* Palladium is therefore a party to each of the contracts relevant to this case.

Appellee Edward Abel is the former Managing Partner, Americas for Palladium, Group Global, LLC, an affiliated company of Palladium International, LLC. J.A. 81. In that role, he was responsible for Palladium's Americas business, including developing and implementing a cohesive business growth strategy, hiring and retaining top talent, and developing and nurturing client relationships. *Id.* He was also responsible for forming and executing contracts to further Palladium's business goals, including the contracts at issue in this litigation. *Id.*

Both at the time the relevant agreements were signed and his abduction and imprisonment, and continuing through the filing of this lawsuit, Mr. Zakka, the Appellant, was the Secretary General of IJMA3: The Arab ICT Organization ("IJMA3"). J.A. 12, 137, 174. IJMA3 is a non-profit corporation that encourages the development of information and communications technology ("ICT") infrastructure around the world, including in several Middle Eastern and North African countries. J.A. 12. Mr. Zakka alleges that he was wrongfully imprisoned and subjected to physical and psychological torture for nearly four years in Iran. J.A. 7. At the time of his abduction and wrongful imprisonment, Mr. Zakka was working in Iran for IJMA3 pursuant to a sub-agreement with Palladium. J.A. 135-171.

B. Palladium's Cooperative Agreements with the State Department

Palladium had two cooperative agreements with the State Department to carry out U.S. foreign policy work in Iran. The first cooperative agreement, dated April 24, 2015, involved the Women's Alliance for Virtual Exchange, a program operated under State Department Agreement S-NEAAC-15-CA-1037, and was known as "WAVE II." J.A. 83-108. The second cooperative agreement, dated April 29, 2015, involved the Small Grants Program to Support Independent Citizens in Iran, a program operated under State Department Agreement S-NEAAC-15-CA-1038, and was known as "CIVIC." J.A. 109-134. As expressly stated by their terms, the WAVE II and CIVIC Agreements are authorized by the Foreign Assistance Act

(FAA), 22 U.S.C. § 2151 *et seq*. J.A. 84, 110. The FAA is designed to promote "the foreign policy, security, and general welfare of the United States by assisting peoples of the world in their efforts toward economic and social development and internal and external security, and for other purposes." 22 U.S.C.§ 2151 *et seq*.

The purpose of these programs was "to promote the use of information and communications technology in Iran to enable economic and civic society development, particularly among women's groups." J.A. 794 (18-20). The WAVE II Agreement was designed "to engage Iranian women's CSOs [Civil Society Organizations] in using information and communications technologies (ICT) as a tool to develop their organizations, build alliances with international and regional organizations and have their voices heard." J.A. 104. The CIVIC Agreement was meant to "strengthen the capacity of Iranian civil society organizations (CSO) and enable them to create, improve and sustain the dialogue with the local and national government to address citizen and community needs." J.A. 130.

Both cooperative agreements specifically mention IJMA3 and contemplate its involvement with the relevant programs. The CIVIC Agreement identifies IJMA3 as a "regional organization that has been a key implementer of projects in Iran." J.A. 130. The cooperative agreements also establish that IJMA3 would be the organization that will "interface with CSOs within Iran." J.A. 128; J.A. 104.

The Agreements set forth achievements, budgets, workplan and reporting requirements, and various other rules governing Palladium's and its subcontractors' conduct. *See generally* J.A. 86-105, 112-131. Overall, the State Department's involvement in Palladium's and IJMA3's conduct under the cooperative agreements was "substantial." J.A. 90, 116. This included concurrence by the State Department with all "Work Plans, and Monitoring and Evaluation Plans," "prior approval by the Grants Officer of all travel details (destination, number of participants, number of trips)," "[a]pproval of key personnel" and "concurrence on the location of any activities to be held in a third country." J.A. 90, 116.

Importantly, both agreements state that "[d]ue to security concerns relating to international travel in Iran, [Palladium] staff will not travel in country. All travel to Iran will be undertaken by regional partner staff." J.A. 100, 127. Both agreements specifically contemplate that IJMA3 personnel would travel to Iran. J.A. 104, 128.

In his Brief, Mr. Zakka focuses on the Security Standard Operating Procedures mentioned by Palladium in its Technical Application for the Wave II Agreement. Br. at 10-11. That list of procedures was not "promised" as Mr. Zakka claims; instead, they were only procedures that Palladium indicated it "could include" with no requirement that it do so. J.A. 489-490. Neither cooperative agreement contains any requirements for security procedures or security briefings for travel to Iran by regional partner staff. Nor does either cooperative agreement

provide any obligation or duty for Palladium to assess risks associated with travel to Iran or provide any security for IJMA3 personnel on their trips to Iran.

C. Palladium's Sub-Agreements with IJMA3

Palladium and IJMA3 entered into two sub-agreements (the "WAVE II Sub-agreement" and the "CIVIC Sub-agreement") to perform work under the WAVE II and CIVIC cooperative agreements. J.A. 135-171, 172-204. IJMA3 had significant experience in this area; through Mr. Zakka, it had played a key role in earlier efforts to provide ICT assistance to independent citizens and women in Iran, and Mr. Zakka had traveled to Iran on many occasions to carry out that work. J.A. 14, 130.

Mr. Zakka signed the WAVE II and CIVIC Sub-agreements on behalf of IJMA3 as the Secretary General of IJMA3. J.A. 137, 174. Mr. Zakka is also listed as one of the IJMA3 staff authorized to work on the program. J.A. 144, 179-180.

D. The State Department's Authorization of Mr. Zakka's Travel

The State Department was informed of Mr. Zakka's proposed travel on several occasions and specifically authorized Mr. Zakka's September 15-18, 2015, trip to Iran as part of the WAVE II program. First, Palladium submitted its proposal for the WAVE II award to the State Department on February 27, 2015. The proposal indicated that the "President of IJMA3" (*i.e.*, Mr. Zakka) would take multiple trips to Iran. J.A. 491. This document also refers to a "BC in-person meeting" on September 15, 2015, which is labeled as an IJMA3 initiative. J.A. 499. And the

Cost Application further stated that "[d]ue to security concerns relating to international travel in Iran, no [Palladium] staff will travel in country. All travel to Iran will be undertaken by regional partner staff." J.A. 516.

The State Department accepted Palladium's proposal by issuing the WAVE II Agreement. The CIVIC Agreement specifically identified IJMA3 as a "regional organization that has been a key implementer of projects in Iran." J.A. 130. Both agreements specifically state that "[d]ue to security concerns relating to international travel in Iran, [Palladium] staff will not travel in country. All travel to Iran will be undertaken by regional partner staff." J.A. 100, 127. Thus, both agreements specifically contemplate that IJMA3 personnel would travel to Iran. They do not set forth the need for briefings or security measures that Plaintiff claims were required.

In accordance with the WAVE II Agreement, Palladium submitted a WAVE II Work Plan (the "WAVE II Work Plan") to the State Department on May 29, 2015. J.A. 522-572. The WAVE II Work Plan refers to the "BC in-person meeting" on September 15, 2015, and a "WAVE Sustainability Event in Iran" to take place from September 8-10. J.A. 568. The Work Plan further states that IJMA3, a regional implementing partner, will lead and coordinate regional workshops and meetings. J.A. 553. The State Department approved the Work Plan on June 1, 2015. J.A. 574.

Most importantly, on August 31, 2015, Palladium sent an email to the State Department that explicitly requested approval for Zakka to travel to Iran from

September 15-18 for the WAVE sustainability event as envisioned by the WAVE II proposal, Award, and Work Plan. J.A. 473-474. The request for authorization specifies the individuals who would travel to Iran (Mr. Zakka, others from IJMA3 and others from different partner organizations). *Id.* The email also lays out the dates of travel, the WAVE II agenda for the sustainability event, and additional meetings and workshops that are planned. *Id.* On September 2, 2015, having not yet received an answer, Palladium followed up, stating that "We look forward to *your approval* so that we can proceed with [the] event." J.A. 473 (emphasis added).

The State Department expressly approved Mr. Zakka's travel to Iran on September 8, 2015. J.A. 472. On that day, a State Department representative emailed Palladium to grant authorization for Mr. Zakka's travel, stating that:

> I am re-sending this approval, as it appears the one Abraham sent on Friday did not come through. Also, just to clarify the event is actually October 15-18.
>
> Regarding the travel request referenced in the email below, **travel 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. US government travel warnings can be found at http://www.state.gov/travel/.
>
> This travel is not required under the terms of the project, but is undertaken at the organization's and traveler's own risk.

J.A. 472 (emphasis added). The State Department then followed up by indicating: "Just to clarify, the dates are actually September 15-18th as you noted, thanks!" *Id*. Pursuant to this approval, issued in accordance with the provisions of the WAVE II Agreement, Mr. Zakka traveled to Iran in September 2015.

SUMMARY OF ARGUMENT

The Superior Court properly ruled that Palladium and Mr. Abel were immune from suit under *Yearsley*, and this Court should affirm that ruling.

First, the Superior Court rightly recognized that the question of *Yearsley* immunity is an issue of subject matter jurisdiction and is properly analyzed under Rule 12(b)(1), which enables the trial court to evaluate the evidence and make factual and legal determinations. The Superior Court's decision to apply Rule 12(b)(1) is well-supported by Supreme Court case law, as well as authority from the Fourth, First, and D.C. Circuits, all of which have held that *Yearsley* provides immunity from suit (and is therefore not simply an affirmative defense for resolution at the summary judgment stage or at trial).

Second, applying the *Yearsley* standard, the Superior Court properly held pursuant to 12(b)(1) that immunity for Palladium and Mr. Abel was warranted. The Superior Court rightly rejected Mr. Zakka's narrow view of the *Yearsley* standard (which would eliminate any discretion on the part of the contractor and would permit a plaintiff to rely on invented requirements that were not part of the contract) and

held that *Yearsley* simply requires that the government authorize the contractor's actions, that the contractor's actions not deviate from or violate that authorization, and that the authorization was validly conveyed. *Yearsley* immunity in this case is warranted under that standard, because as the Superior Court found, the State Department was informed as to the nature of Mr. Zakka's travel and expressly authorized it, and because Palladium complied with all directives from the State Department, contractual or otherwise.

Third, even under a Rule 56 summary judgment standard, the Superior Court's dismissal of the suit was proper because there was no dispute of material fact related to the authorization of Mr. Zakka's travel to Iran and Appellees were entitled to *Yearsley* immunity as a matter of law. Mr. Zakka failed to identify a dispute of material fact regarding the State Department's authorization of Mr. Zakka's travel or Palladium's compliance with all State Department directives. The affidavits introduced by Mr. Zakka and his reliance on security procedures which were optional under the agreements were insufficient to create any dispute of material fact relevant to the *Yearsley* analysis.

Finally, the Superior Court did not abuse its discretion in denying Mr. Zakka's requests for additional discovery regarding the optional security procedures, Palladium's communications with the State Department after Mr. Zakka's abduction, and additional communications from the State Department as to whether

the State Department authorized Palladium's actions. The Superior Court rightly noted that the information sought by these requests was irrelevant, given the unequivocal evidence that the State Department had communicated authorization to Palladium and that the security procedures were not required by the contract.

For all of these reasons, and as discussed further below, the Superior Court's September 15, 2021, judgment should be affirmed.

ARGUMENT

I. Standard of Review

"Whether the trial court applied the proper legal standard is a question of law subject to *de novo* review." *Fraternal Ord. of Police, Metro. Police Dep't Lab. Comm. v. D.C.*, 52 A.3d 822, 827 (D.C. 2012) (citation omitted).

Should the Court hold that the Superior Court properly applied Rule 12(b)(1) to its *Yearsley* immunity ruling, "[t]he issue of subject matter jurisdiction is a question of law that this court reviews *de novo.*" *Second Episcopal Dist. Afr. Methodist Episcopal Church v. Prioleau*, 49 A.3d 812, 815 (D.C. 2012). However, when a factual inquiry is necessary for the court to determine whether it has subject matter jurisdiction, as was the case here, this Court reviews those factual findings for clear error. *Monteilh v. AFSCME, AFL-CIO*, 982 A.2d 301, 302 (D.C. 2009).

If a summary judgment standard applies, review of a grant of summary judgment is *de novo*. *Zere v. Dist. of Columbia*, 209 A.3d 94, 98 (D.C. 2019).

This Court reviews the Superior Court's discovery rulings for abuse of discretion. *Daniels v. Potomac Elec. Power Co.*, 100 A.3d 139, 145 (D.C. 2014) (citing *Futrell v. Dep't of Lab. Fed. Credit Union,* 816 A.2d 793, 809 (D.C. 2003).

II. *Yearsley* Immunity Is a Jurisdictional Question.

The Superior Court properly held that *Yearsley* immunity is a jurisdictional question subject to Rule 12(b)(1) analysis. J.A. 793 (4-9). Mr. Zakka disagrees with that decision and cites a few cases suggesting that immunity under *Yearsley* is an affirmative defense, not a jurisdictional issue. Br. at 28-29. Both Mr. Zakka and the authority he relies upon are mistaken, because 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. The Supreme Court (and other courts) have made clear that *Yearsley* bestows contractors immunity from *suit* if certain conditions are met, and is not a mere affirmative defense against liability.

In *Yearsley*, the plaintiffs sued a contractor that built dikes in the Missouri River pursuant to a contract with the United States, but in the process had caused the washing away of part of the plaintiff's land. *Yearsley*, 309 U.S. at 18-19. The Court held there was no liability as to the contractor because the work was authorized and directed by government officers, and was performed pursuant to an Act of Congress, which validly conferred its authority to carry out the project. 309 U.S. at 20. The *Yearsley* Court did not squarely address the issue of whether the immunity afforded

to the contractor was jurisdictional in nature or was an affirmative defense. However, the Court clearly linked that immunity to the kind afforded to the sovereign (which ***is*** jurisdictional in nature), holding that the contractor was immune from liability because of its contractual relationship with the government and because it had satisfied the aforementioned conditions. Those conditions (*i.e.*, whether the work was authorized and directed by the government and performed pursuant to an Act of Congress) were similar to those required for government immunity. To wit, the Court noted that "[w]here an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred." *Id.* at 21.

The Supreme Court has not since addressed on the merits the issue of whether *Yearsley* immunity is a jurisdictional question. But it did strongly suggest that such immunity is jurisdictional in *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016). In that case, the plaintiff brought a putative class action against an advertiser, alleging that it violated a federal statute prohibiting vendors from sending unsolicited text messages to consumers' cell phones. The advertiser argued, *inter alia*, that *Yearsley* immunity was warranted because it had sent the text messages pursuant to a contract with the Navy. The Court held that the advertiser was not entitled to *Yearsley* immunity, because there was nothing in the record to suggest

that the advertiser had complied with the Navy's instructions under the contract. 577 U.S. at 169. The Court explained that "[w]hen a contractor violates both federal law and the Government's explicit instructions, as here alleged, no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation." *Id.* at 166. In other words, had the contractor complied with those instructions, it ***would have been entitled*** to derivative immunity akin to what is afforded the sovereign. And with regard to sovereign immunity, the Court made clear that it provided immunity from ***suit*** (*i.e.*, the lawsuit as a whole) rather than a mere affirmative defense to be litigated at trial. *See id.* (presenting question as whether advertiser's "status as a federal contractor renders it immune from suit for violating the TCPA by sending text messages to unconsenting recipients.").

To date, three U.S. Courts of Appeals have held or strongly suggested that *Yearsley* immunity is jurisdictional. In *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326 (4th Cir. 2014), the Fourth Circuit classified *Yearsley* under derivative sovereign immunity, holding that "under *Yearsley,* a government contractor is *not subject to suit* if (1) the government authorized the contractor's actions and (2) the government 'validly conferred' that authorization, meaning it acted within its constitutional power." 744 F.3d at 342 (quoting *Yearsley*, 309 U.S. at 20-21) (emphasis added).

The reason for affording private contractors immunity *from suit* in these circumstances is obvious. As the Fourth Circuit explained in *KBR*, "*Yearsley*

recognizes that private employees can perform the same functions as government employees" and that, from a policy perspective, "[b]y rendering government contractors immune from suit when they act within the scope of their validly conferred authority, the *Yearsley* rule combats the 'unwarranted timidity' that can arise if employees fear that their actions will result in lawsuits." *Id.* at 344 (citing *Filarsky v. Delia*, 566 U.S. 377, 389 (2012). Further, "affording immunity to government contractors 'ensur[es] that talented candidates are not deterred from public service' by minimizing the likelihood that their government work will expose their employer to litigation[]" and "'prevent[s] the harmful distractions from carrying out the work of government that can often accompany damages suits.'" *Id.* (citing *Filarsky*, 566 U.S. at 377). The unavoidable conclusion to be drawn from *KBR* is that, to fulfill its purpose, *Yearsley* immunity must shield the contractor from suit *entirely*, and therefore must be decided at the outset as a jurisdictional question.[1]

The rationale for qualifying *Yearsley* immunity as a jurisdictional question is further underscored by the burden already faced by Palladium in this lawsuit. The time and expense incurred to conduct discovery and brief the issues in the underlying

[1] For a thorough analysis of this issue, *see* V. Eatherton, Is Derivative Sovereign Immunity Jurisdictional; An Analysis and Resolution of the Circuit Split, 47 PUB. CONT. L.J. 605 (2018). Eatherton addresses the Court of Appeals decisions on the issue and concludes that "[f]or both legal and policy reasons," courts should recognize that "*Yearsley* immunity is a jurisdictional bar raised by contractors as a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction." *Id.* at 620-21.

lawsuit were not insubstantial. If unlimited discovery were to be allowed prior to a decision on the immunity issue, many government contractors could not afford the costs of defense and would be forced to resolve liability claims before Yearsley immunity could be addressed. There are a significant number of contractors in the Washington metropolitan area who perform contractual functions for the government every day, all of whom would face significant exposure before immunity could be decided.

Building on its decision in *KBR*, the Fourth Circuit squarely addressed the jurisdictional issue in *Cunningham v. Gen. Dynamics Info. Tech., Inc.,* 888 F.3d 640 (4th Cir. 2018). In that case, the court affirmed the district court's Rule 12(b)(1) dismissal of a consumer's suit against a contractor arising from contact center operations support provided to the Centers for Medicare and Medicaid Services. The Fourth Circuit ruled that *Yearsley* immunity applied, and expressly held that *Yearsley* "operates as a jurisdictional bar to suit[.]" 888 F.3d at 650. The court explained that its holding was the logical extension of classifying *Yearsley* as derivative sovereign immunity, stating that "'[i]f the basis for dismissing a *Yearsley* claim is *sovereign immunity*, then a *Yearsley* defense would be jurisdictional' because 'sovereign immunity deprives federal courts of jurisdiction to hear claims, and a court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction.'" *Id.* at 649 (quoting *Ackerson v. Bean*

Dredging LLC, 589 F.3d 196, 207 (5th Cir. 2009)) (emphasis in *Cunningham* opinion). Thus, the court held, the district court properly applied Rule 12(b)(1) in evaluating whether *Yearsley* immunity was warranted. *Id.* at 650-51.

Additionally, while having not yet ruled on whether *Yearsley* is jurisdictional in nature, the D.C. Circuit noted in *In re U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42 (D.C. Cir. 2019) ("*OPM*"), that *Yearsley* immunity renders government contractors immune from suit, unless the contractor "violates both federal law and the government's explicit instructions" – whereby it then "loses the shield of derivative immunity and *is subject to suit* by those adversely affected by the contractor's violations." 928 F.3d at 69 (emphasis added).

More recently, the First Circuit has also suggested that *Yearsley* operates as a jurisdictional bar. In *Moore v. Elec. Boat Corp.*, 25 F.4th 30 (1st Cir. 2022), a former Navy serviceman sued a federal contractor that built the submarine he served on for injuries allegedly caused by exposure to asbestos-containing products. In arguing that the suit, which was originally filed in state court, satisfied the standards for removal to federal court, the contractor presented several arguments as to colorable federal defenses, including *Yearsley* immunity. 25 F.4th at 37. The court held that the defendant's *Yearsley* argument satisfied the removal standard and, relying on the Fourth Circuit's rulings in *Cunningham* and *KBR*, noted that "[u]nder *Yearsley*, 'a government contractor *is not subject to suit* if (1) the government authorized the

contractor's actions and (2) the government "validly conferred" that authorization, meaning it acted within its constitutional power.'" *Id.* (citing *Cunningham*, 888 F.3d at 643 and *In re KBR*, 744 F.3d at 342) (emphasis added).

Mr. Zakka conveniently omits the rulings of the First and D.C. Circuits, and instead solely attacks the Fourth Circuit's *Yearsley* jurisprudence, wrongly framing it as a "sole outlier." Br. at 28. He points to decisions from the Fifth and Sixth Circuits, as well as a small handful of cases from district courts, and claims that "[t]he 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.'"[2] *Id.* (quoting *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015)). This argument is flawed for several reasons.

First, neither the Fifth nor the Sixth Circuits have provided any in-depth analysis as to why they deem *Yearsley* to be a non-jurisdictional issue. The Fifth Circuit first considered the question in *Ackerson v. Bean Dredging LLC*, 589 F.3d 196 (5th Cir. 2009), holding that *Yearsley* "does not deny the court of subject-matter

[2] Mr. Zakka also cites to the government's Statement of Interest in *Clover v. Camp Pendleton & Quantico Hous. LLC*, 525 F. Supp. 3d 1140 (S.D. Cal. 2021) for its argument that "[d]erivative sovereign immunity to litigation does not exist." Br. at 29 (citing J.A. 716). Needless to say, positions taken in a brief are not binding on this Court, nor is a legal position taken by one presidential administration indicative of consistency by the government regarding that issue over time.

jurisdiction" on the sole basis that "*Yearsley* does not discuss sovereign immunity or otherwise address the court's power to hear the case."[3] 589 F.3d at 207-208. But the mere fact that *Yearsley* did not "discuss" sovereign immunity does not undermine the nature and origin of the immunity it conferred; as discussed above, the *Yearsley* court couched its decision within the contours of the contractor's contractual relationship with the government, which enjoys sovereign immunity from suit in certain cases. Further, the Supreme Court's more recent decision in *Campbell-Ewald* firmly classified *Yearsley* as derivative sovereign immunity. *See supra* at 19.

The Sixth Circuit's treatment of the jurisdictional question is similarly bereft of any significant analysis. In *Adkisson*, the court held that *Yearsley* immunity was not jurisdictional for the same reason as the Fifth Circuit – *i.e.*, because the *Yearsley* court did not "discuss" sovereign immunity. *Adkisson*, 790 F.3d at 647. On that basis, the court theorized, again without any substantive analysis, that "*Yearsley* immunity is, in our opinion, 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." *Id.* (citing *Filarsky*). But this reading ignores that *Yearsley* immunity derives from the sovereign's *own* immunity, while qualified

[3] The Fifth Circuit case Mr. Zakka cites on this issue, *Kuwait Pearls Catering Co. v. Kellogg Brown & Root Servs., Inc.*, 853 F.3d 173 (5th Cir. 2017), merely refers to *Ackerson* without providing any further substantive discussion on *Yearsley*, because the district court had not addressed the parties' *Yearsley* arguments. 853 F.3d at 185.

immunity is a wholly different doctrine that shields *government officers* from liability in certain circumstances. And *Adkisson* did not address the significant policy concerns that militate in favor of immunizing contractors from suit when they are acting under lawful authorization from the government, as discussed above.[4]

In short, Mr. Zakka provides no compelling reason to deviate from the principle that sovereign immunity, and by extension, derivative sovereign immunity under *Yearsley*, are jurisdictional in nature. Consequently, this Court should evaluate *Yearsley* immunity under Rule 12(b)(1) standards, as the Superior Court did.

III. The Record Demonstrates that the State Department Authorized Mr. Zakka's Travel and that Palladium Complied with All Government Directives, Which Is All that *Yearsley* Immunity Requires.

The Superior Court rightly held that Mr. Zakka's suit against Appellees cannot withstand Rule 12(b)(1) scrutiny. In conducting a jurisdictional inquiry

[4] Mr. Zakka's reliance on non-binding district court cases fails. First, *Harris v. Kellogg, Brown & Root Servs., Inc.*, No. 08-563, 2016 WL 4720058, at *1 (W.D. Pa. Sept. 9, 2016), simply relied on the flawed rulings in *Ackerson* and *Adkisson*, finding them "persuasive" without explaining why. Second, *Spurlin v. Air & Liquid Sys. Corp.*, -- F.Supp.3d --, No. 19-cv-02049-AJB-AHG, 2021 WL 4924829, at *2 n.3 (S.D. Cal. Oct. 21, 2021), rejected the Fourth Circuit's jurisprudence because it "did not elaborate on its conclusion that *Yearsley* immunity is jurisdictional." But the court only cited the Fourth Circuit's earlier decision in *Butters v. Vance Int'l, Inc.*, 225 F.3d 462 (4th Cir. 2000), and ignored the extensive justification provided in *KBR* and *Cunningham*. *See supra* at 20-23. Finally, in *New York ex rel. James v. Pennsylvania Higher Educ. Assistance Agency*, No. 19 Civ. 9155 (ER), 2020 WL 2097640, at *7 (S.D.N.Y. May 1, 2020), the court rested its *Yearsley* finding on speculation as to what the Second Circuit's position *might* be. But to date, the Second Circuit has not weighed in on whether *Yearsley* immunity is jurisdictional.

under Rule 12(b)(1), the trial court "'may extend beyond the facts pled in the complaint' to encompass evidence submitted by the parties without thereby converting the motion into one for summary judgment." *Vining v. Exec. Bd. of D.C. Health Benefit Exch. Auth.*, 174 A.3d 272, 281 (D.C. 2017) (citing *UMC Dev., LLC v. District of Columbia*, 120 A.3d 37, 43 (D.C. 2015)). When a defendant makes a factual attack on the plaintiff's complaint under Rule 12(b)(1), the trial court is permitted to "resolve factual disputes concerning whether subject-matter jurisdiction exists." *UMC Dev., LLC v. D.C.*, 120 A.3d 37, 43 (D.C. 2015) (citing *Matthews v. Automated Bus. Sys. & Servs., Inc.,* 558 A.2d 1175, 1179 (D.C. 1989)). Further, when a factual attack on subject matter jurisdiction is undertaken, "the plaintiff bears the burden of proof without the benefit of any presumption that the allegations of the complaint are true."[5] *Vining*, 174 A.3d at 281. *See also Pardue v. Ctr. City*

[5] Mr. Zakka claims that "whether Rule 56 or Rule 12(b)(1) applies, a defendant claiming sovereign immunity in a motion to dismiss bears the burden of proving they qualify for it." Br. at 47 (citing *Broidy Cap. Mgmt., LLC v. Muzin*, 12 F.4th 789, 796 (D.C. Cir. 2021); *Minch v. District of Columbia*, 952 A.2d 929, 936–37 (D.C. 2008)) (internal quotation marks omitted). *Minch* does not discuss immunity in the Rule 12(b)(1) context. And *Broidy* did not even mention *Yearsley* immunity; it addressed immunity derived from a foreign sovereign. The two cases *Broidy* relied on for its discussion of the burden also involved foreign immunity, not *Yearsley* immunity. *See Broidy*, 12 F.4th at 796 (citing *Lewis v. Mutond*, 918 F.3d 142, 145 (D.C. Cir. 2019) (foreign official immunity), and *Ivanenko v. Yanukovich*, 995 F.3d 232, 236 (D.C. Cir. 2021) (Foreign Sovereign Immunities Act)). Additionally, in the context of derivative sovereign immunity under the FTCA's discretionary function exception, at least one court has held that the plaintiff has the burden to establish that immunity did not apply. See *Federico v. Lincoln Mil. Hous., LLC*, No. 2:12cv80, 2013 WL 5409910, at *4 (E.D. Va. Sept. 25, 2013).

Consortium Sch. of Archdiocese of Washington, Inc., 875 A.2d 669, 675 (D.C. 2005) ("whereas a court in deciding an issue on summary judgment must construe the facts in the light most favorable to the plaintiff and draw all reasonable inferences in her favor . . . matters are different when . . . the defendant has made a 'factual' attack on the court's subject matter jurisdiction supported by materials outside the face of the complaint.") (internal citations omitted).

The Superior Court conducted the factual analysis required by Rule 12(b)(1). There was sufficient evidence in the record to conclude that (1) the State Department explicitly authorized Mr. Zakka's travel and Palladium did not exceed the conveyed authority, and (2) the agreements themselves and the related communications show that the State Department had substantial involvement in the manner in which the contracts were executed. These factual findings were not clearly erroneous. And the Superior Court rightly concluded that Mr. Zakka's other arguments regarding *Yearsley* immunity were simply not relevant to the issue at hand.

A. The Superior Court Properly Applied the *Yearsley* Test.

As a preliminary matter, Mr. Zakka argues that the Superior Court improperly applied the *Yearsley* test, in that it purportedly failed to (1) recognize that *Yearsley* does not permit any discretion on the part of the contractor, and (2) "ask whether Defendants' tortious conduct was authorized and directed by the State Department." Br. at 43. These attempts to radically narrow the *Yearsley* doctrine fail.

1. *Yearsley* Simply Requires that the Government Authorize the Contractor's Actions and that Those Actions Not Deviate from the Government's Instructions.

First, Mr. Zakka argues that when *any* discretion by the contractor is implicated, then *Yearsley* cannot apply, because "discretion is incompatible with *Yearsley* immunity."[6] Br. at 42. Under Mr. Zakka's reading, the moment that a contractor takes any action that is not specifically spelled out in the relevant contract or communications from the government, the contractor loses its *Yearsley* immunity. That narrow reading is flatly inconsistent with Supreme Court precedent and would render *Yearsley* immunity virtually nonexistent.

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[6] Mr. Zakka employs semantic spin to argue that because the relevant agreements were called "cooperative agreements" (as opposed to "government contracts"), it means that those agreements were more flexible and gave Palladium further discretion to do what it wanted. Br. at 48. But whether the WAVE II Agreement was called a "contract" or a "cooperative agreement" and whether Palladium was called a "grantee" or a "contractor" is immaterial to derivative immunity, which requires only authorization and conduct compliant with that authorization. *See Ackerson,* 589 F.3d at 205-6 ("*Yearsley* does use the word 'agent' but also uses 'contractor' and 'representative'"). And a cooperative agreement like the WAVE II Agreement is in fact a contract insofar as both parties received a benefit and a burden. *United States v. President & Fellows of Harvard Coll.,* 323 F. Supp. 2d 151, 164 (D. Mass. 2004); *see also Henke v. U.S. Dep't of Com.,* 83 F.3d 1445 (D.C. Cir. 1996) (National Science Foundation grant agreement included essential elements of a contract and was thus a contract). The Superior Court agreed with Palladium on this point. *See* J.A. 792 (15-24) ("I don't think it matters whether you call it a grant or a contract, or a traditional contract. I think it is an agreement or a contract between Palladium and the State Department that authorizes Palladium to conduct certain business that the State Department endorses and wants to have happen. . . . It's a contract that's an agreement. It's signed by both parties. Each side has obligations to the other.").

Yearsley immunity derives from "the government's unquestioned need to delegate governmental functions[,]" and the recognition that "[i]mposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work." *Butters*, 225 F.3d at 466 (quoting *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996)). All *Yearsley* requires is that (1) the government authorized the contractor's actions and the contractor complied with any government directives, and (2) the government "validly conferred" that authorization (*i.e.*, it acted within its constitutional power). *Yearsley*, 309 U.S. at 20–21. In other words, for *Yearsley* immunity to be withheld from a contractor acting upon valid authority, the agent must be found to have exceeded or deviated from the authority validly conferred by the government.[7] *Id.*

That principle is clear from the Supreme Court's discussion of *Yearsley* in *Campbell-Ewald.* There, the Court held that "[w]hen a contractor violates *both federal law and the Government's explicit instructions* . . . no 'derivative immunity'

[7] Mr. Zakka misunderstands Palladium's *Yearsley* argument in that he states that Palladium claims immunity under the Federal Tort Claims Act ("FTCA"). *See* Br. at 48-49. Palladium has never made such an argument. Instead, it argued below that *the State Department* was immune as to its discretionary actions under the FTCA. *See* Defs. Motion to Dismiss (Jan. 19, 2021) at 10-11. That is significant because for the contractor to be immune under *Yearsley*, the government must also enjoy immunity for its actions. *See, e.g.*, *OPM*, 928 F.3d at 68 ("Because the improper conduct alleged would have violated the Privacy Act if committed by OPM itself and because KeyPoint's challenged misconduct was not directed by OPM, there is no sovereign immunity for KeyPoint to derive.").

shields the contractor from suit by persons adversely affected by the violation." 577 U.S. at 166-68 (emphasis added). Indeed, the Court specified that the "[c]ritical [issue] in *Yearsley* was . . . the contractor's performance in compliance with all federal directions." *Id.* at 167 n.7. As it explained, a "contractor who *simply performs as directed* by the Government may be shielded from liability for injuries caused by its conduct." *Id.* at 155 (emphasis added). *See also Taylor Energy Co., L.L.C. v. Luttrell*, 3 F.4th 172, 176 (5th Cir. 2021) (rejecting plaintiff's argument that *Yearsley* did not apply because the contractor designed various components of the technology contracted for by the government, and holding that "the appropriate inquiry is whether [the contractor] adhered to the Government's instructions as described in the contract documents."); *Butters*, 225 F.3d at 466 (recognizing derivative immunity for contractors who perform a discretionary function within the scope of a government contract).

Mr. Zakka cites three cases for the proposition that *Yearsley* is only implicated when the contractor "had no discretion[.]" Br. at 42-43. Two of the three cases he relies upon, *Cabalce v. Thomas E. Blanchard & Assocs., Inc.,* 797 F.3d 720, 732 (9th Cir. 2015), and *Clover v. Camp Pendleton & Quantico Hous. LLC*, 525 F. Supp. 3d 1140, 1143 (S.D. Cal. 2021) are from the Ninth Circuit and the Southern District of California (which is bound to follow Ninth Circuit precedent). Setting aside the fact that, as discussed further below, the government provided numerous detailed

and specific directives to Palladium (which in turn followed them), the Ninth Circuit's guidance on this issue is at odds with both *Yearsley* and *Campbell-Ewald*, neither of which say anything about a "zero discretion" requirement. As for *Broidy*, which Mr. Zakka claims stands for the same zero-discretion interpretation of *Yearsley* (Br. at 43), that case simply stated that "derivative immunity does not apply to contractors exercising discretion in working to accomplish *broad governmental objectives*[.]" 12 F.4th at 803 (emphasis added). It does not require that every single action taken by a contractor be pursuant to a government directive.[8]

In fact, D.C. courts have never adopted the Ninth Circuit's "no discretion" standard. For example, in *OPM*, the D.C. Circuit mentioned no such requirement. Instead, it focused on whether the contractor complied "with all federal directions pertaining to its relevant conduct, including the regulatory and contractual obligation to meet the [relevant statute's] standards in its contract operations." 928 F.3d at 70. The same is true of *In re Fort Totten Metrorail Cases Arising Out of Events of June 22, 2009*, 895 F. Supp. 2d 48, 74 (D.D.C. 2012), where the court focused on whether the contractor was following the government's directions and whether it had exceeded its authority under the contract.

[8] While there are cases that include a "precise specifications" requirement in the context of procurement contracts, such as *Boyle v. United Techs. Corp.,* 487 U.S. 500, 512 (1988), that line of cases does not apply here, because the "government contractor defense" is separate and differerent from the *Yearsley* immunity doctrine.

In any event, and as previously discussed, the State Department's involvement in the conduct of Palladium and IJMA3 under the cooperative agreements was "substantial." *See supra* at 11. This included mandatory concurrence by the State Department with all "Work Plans, and Monitoring and Evaluation Plans," "prior approval by the Grants Officer of all travel details (destination, number of participants, number of trips)," "[a]pproval of key personnel," and "concurrence on the location of any activities to be held in a third country." J.A. 55. And in its email confirming authorization for Mr. Zakka's travel, the State Department provided additional conditions and requirements, which Palladium followed. J.A. 472.

These stringent requirements are far more detailed than those at issue in Mr. Zakka's cited cases. In *Cabalce*, the contractors tasked with disposing of government-seized fireworks were not entitled to immunity because they "designed the destruction plan *without government control or supervision*." *Cabalce*, 797 F.3d at 732 (emphasis added). Similarly, in *Clover*, the court held that *Yearsley* did not apply because the contractors, who were responsible for maintaining military housing, failed to maintain plumbing. Although the contractors "were following a general plan approved by the Navy in how they maintained the housing, they were given discretion in responding to most service requests[]" and "were responding to the situation in the manner they thought best." *Clover*, 525 F. Supp. 3d at 1143 (citations omitted). No such level of wide-ranging discretion was possible or

permitted here, as Palladium was required to provide detailed travel plans for State Department approval, which had been preceded by a precise plan for that same travel under the WAVE II Agreement. Finally, the D.C. Circuit's decision in *OPM* is completely inapposite regarding this issue. There, the court denied the contractor derivative sovereign immunity because, *inter alia*, the plaintiffs plausibly alleged a statutory violation of the Privacy Act. *OPM*, 928 F.3d at 61–62. Plaintiff has made no allegation here of a statutory violation. For all these reasons, Mr. Zakka's "no discretion" interpretation of *Yearsley* immunity should be rejected.

2. Mr. Zakka Cannot Rewrite the Agreements for *Yearsley* Purposes to Include Nonexistent Requirements for Warnings and Security Procedures.

Mr. Zakka next argues that the Superior Court did not consider the proper conduct (namely, Palladium's purported "tortious" failure to act) or determine whether the State Department authorized and directed that failure. Br. at 43-46. Incredibly, he claims that his suit "is not about whether Palladium sent him to Iran" – even though it undeniably is. Br. at 43. Instead, he points to the allegations in the Complaint 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." Br. at 43 (citing J.A. 16-18). No such duties were imposed on Palladium by the Agreements, or by anything else for that matter.

First, neither the agreements between the State Department and Palladium, nor those between Palladium and IJMA3, set forth any of the security requirements that Mr. Zakka cites as the basis for liability. *See* Br. at 49. Nowhere in the State Department's September 8, 2015 approval email, the WAVE II Work Plan, the Wave II Award, or even in the WAVE II proposal documents do such conditions appear. Consequently, Mr. Zakka is forced to rely on *potential* security measures (the Security Standard Operation Procedures) mentioned in Palladium's WAVE II *application*. But these measures were not required by the Agreements. All that Palladium said about the *potential* security measures listed in the Technical Application was that it "could" adopt them. J.A. 489-490. In other words, those procedures **could** be included – or they could not be included. In fact, the procedures were not carried forward to the WAVE II Agreement.[9]

Further, the possible Security Standard Operating Procedures contained in the Technical Application were not incorporated into the WAVE II Agreement, as Mr. Zakka claims. The WAVE II Agreement states: "The recipient agrees to execute the

[9] Nor can Mr. Zakka rely on the vague assertion that these security measures were "typical of the international development industry and required by Palladium's internal policies." Br. at 1. There are no concrete allegations or evidence as to what the "industry standard" is regarding (1) security measures in these circumstances, Palladium's "internal policies" to which Mr. Zakka alludes.

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." J.A. 84 (emphasis added). The WAVE II Agreement attaches *some* of the application materials – but not all of them, leaving off the list of security measures cited by Mr. Zakka.[10] None of the Agreements incorporate the security measures by reference.

Mr. Zakka also argues that Palladium failed to warn him 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." Br. at 1. Once again, none of the Agreements – either with the State Department or IJMA3 – required such warnings, nor has Mr. Zakka ever offered any evidence for his conclusory statement that such warnings were warranted or even based in fact. And that does not even account for the fact that Mr. Zakka was an experienced traveler to the region – including to Iran – and was well aware of the dangers of traveling there. *See supra* at 12.

[10] The Technical Application was entirely superseded by the Work Plan, which the WAVE II Agreement incorporates by specific reference. J.A. 86. The Work Plan covers the same topics as the Technical Application, but narrows, refines, and revises them. Tellingly, the Application listed a set of "assumptions," some of which match those in the Work Plan and some of which were removed, including the reference to "Standard Security Operating Procedures." J.A. 503, 534-535.

Moreover, Mr. Zakka's creative reimagining of *Yearsley* is not in accord with Supreme Court precedent as he claims. The Supreme Court said nothing in *Yearsley* about "tailor[ing]" the relevant inquiry "to the plaintiff's allegations." Br. at 44. Nor was it referring to *Yearsley* immunity in *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) when it stated in a footnote 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." 534 U.S. at 74 n.6 (cited by Appellant, Br. at 44). That footnote did not mention *Yearsley* immunity and instead referred to *Boyle v. United Techs. Corp.,* 487 U.S. 500 (1988), which required conformity by the contractor to the government's "reasonably precise specifications" in a contract – a distinct theory from *Yearsley* immunity. *See* 487 U.S. at 501. No such "precise specifications" are required by *Yearsley*.

Mr. Zakka's remaining cases also fail to support his narrow view of *Yearsley* immunity. *See* Br. at 45-46. First, he cites the D.C. Circuit's ruling in *OPM* for the supposed principle that *Yearsley* immunity was unwarranted because the negligence of the contractor (KeyPoint) "created the vulnerabilities that led to the OPM data breach when its purported security failures were not 'directed by the government.'" Br. at 45 (citing *OPM*, 928 F.3d at 53). This conveniently omits the entire basis for the D.C. Circuit's ruling: namely, that the contract with OPM specifically "obligated KeyPoint to meet the same standards for protecting personal information that the

Privacy Act imposes directly on OPM." 928 F.3d at 68. KeyPoint's violation of these "regulatory and contractual obligations" led directly to the data breach at issue. *Id.*at 69. Given these plain violations, KeyPoint could not (and did not) even argue that its conduct was authorized and directed by the government. *Id.* at 70. Here, as already discussed, Palladium violated no regulatory or contractual obligations.

Mr. Zakka also distorts the Fourth Circuit's decision in *KBR* as supposedly holding that "there has to be a close fit between the government's directive and the contractor's tortious action[.]" Br. at 45. The Fourth Circuit said no such thing. To be sure, the court noted that "staying within the thematic umbrella of the work that the government authorized is not enough to render the contractor's activities" as "act[s] of the government." *KBR*, 744 F.3d at 345. But that observation was made in a larger context: the court explained how "the contractor must adhere to the government's instructions to enjoy derivative sovereign immunity" – and therefore simply "staying within the thematic umbrella of the work that the government authorized" was not enough to bestow immunity if the contractor was not in compliance with the government's directives in the first instance. *Id.* The court then reversed the district court's finding of sovereign immunity because "the record does not contain enough evidence to determine whether KBR acted in conformity with [the contract], its appended task orders, and any laws and regulations that the contract incorporates." *Id.* Here, in contrast, the record is abundantly clear that

Palladium acted in conformity with the Agreements and all relevant laws.[11] Mr. Zakka has presented no evidence to the contrary.

In short, there is no reason to limit *Yearsley* in the manner that Mr. Zakka suggests. For a defendant to receive the benefit of *Yearsley* immunity, the government must validly authorize the contractor's action, and the contractor must comply with all government directions in the course of performing the contract. As discussed below, Palladium did exactly that.

B. The Superior Court Rightly Held that the State Department Authorized Mr. Zakka's Travel.

As the Superior Court noted in its factual findings, the Agreements contemplated travel to Iran and the State Department plainly authorized Mr. Zakka's travel to Iran in a series of communications with Palladium, culminating in the September 8, 2015 email from Ms. Hadjilou as discussed above. *See supra* at 14-15. Those findings were not clearly erroneous and are borne out by the evidence. First, documents produced by Palladium demonstrate that the State Department was informed of the proposed travel on several occasions. The State Department

[11] Mr. Zakka's remaining case, *Spurlin*, is inapposite because it applies the Ninth Circuit's radically narrow "no discretion" standard to *Yearsley* immunity. *See supra* at 31-32. In any event, *Spurlin* is distinguishable, because there was evidence that the contractor had a duty to warn, in that "the Navy authorized manufacturers to include health and safety warnings in the equipment manuals and relied heavily on Defendants to identify hazards associated with their products." No. 19-cv-02049-AJB-AHG, 2021 WL 4924829, at *4. No such evidence has been presented by Mr. Zakka in this case.

authorized Mr. Zakka's travel to Iran based on Palladium's detailed request on August 31, 2015 setting forth who would travel there (Mr. Zakka *et al.*), the dates they would travel, the agenda of the WAVE II sustainability event they would attend, and additional meetings and workshops that were planned. J.A. 472-474.

Second, the Superior Court found that, as a factual matter, the State Department's authorization of Mr. Zakka's travel was unequivocal. On September 8, 2015, a State Department representative emailed Palladium to grant authorization for Mr. Zakka's travel, stating that:

> I am re-sending this approval, as it appears the one Abraham sent on Friday did not come through. . . . Regarding the travel request referenced in the email below, **travel 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.

J.A. 472 (emphasis added). The State Department then followed up to "clarify, the dates are actually September 15-18th as you noted, thanks!" *Id.* Given the clear language of these emails, the court's factual finding was not clearly erroneous.

Mr. Zakka's treatment of the email that plainly states "travel authorization is granted" is to deny its plain meaning. He argues that despite the State Department's express statements, it did *not* in fact authorize Mr. Zakka's travel, and (incredibly) that "[n]o document in the record stated that the State Department authorized and directed the travel to Iran for the WAVE II program." Br. at 35. Rather, he claims,

through the September 8, 2015, email, the State Department merely "approved the expenditure of funds for the travel and provided country clearance" while confirming that Mr. Zakka's travel was not required. Br. at 31. As an initial matter, this argument fails to the extent that it implies that the State Department's statement that travel was not required thereby transformed that travel into a discretionary act by Palladium, thus rendering *Yearsley* immunity inapplicable. But the "no discretion" view of *Yearsley* is incorrect as explained above. *See supra* at 31-32. In any event, the entire purpose of the program envisioned travel by IJMA3 to Iran; without it, the program's goals could hardly have been realized.

Further, in attempting to erase the obvious meaning of the September 8th authorization email, Mr. Zakka relies on his self-serving affidavit and the affidavit of former Palladium employee Nadia Alami. Br. at 32-33. These affidavits are discussed further in Section IV with respect to Mr. Zakka's Rule 56 arguments. Regarding the Rule 12(b)(1) analysis, the Superior Court was certainly capable of weighing the affidavits against the plain and undeniable language of the September 8th email (as well as the language in the Agreements contemplating that IJMA3 would travel to Iran), and properly concluded that the affidavits lacked merit. *See Phoenix Consulting Inc. v. Republic of Angola,* 216 F.3d 36, 40 (D.C. Cir. 2000) (when evaluating a Rule 12(b)(1) jurisdictional motion to dismiss, a court may consider information extrinsic to the complaint and weigh conflicting evidence).

In short, nothing can change the bare facts: Palladium expressly requested that the State Department authorize Mr. Zakka's travel, and the State Department responded unequivocally that "travel authorization is granted." The Superior Court was right to accept the plain and literal meaning of those words.

C. Palladium Complied with All Government Directives.

The documents produced by Palladium also make clear that it did not deviate from or exceed the State Department's authorization for the travel to Iran, and that Palladium's actions conformed with the government's instructions. Mr. Zakka's trips to Iran were expressly contemplated by Palladium, the State Department and his employer, IJMA3 in all four agreements. The agreements between the State Department and Palladium state that "[d]ue to security concerns relating to international travel in Iran, [Palladium] staff will not travel in country. All travel to Iran will be undertaken by regional partner staff." J.A. 100, 127. More importantly, the September 8th authorization email provides conditions for the travel: travelers must not travel under U.S. passports and the travel must be conducted "in accordance with the provisions of award" *(i.e.,* the WAVE II Agreement). J.A. 472.

Mr. Zakka does not claim that any of these travel conditions were violated. That is because Palladium – and Mr. Zakka – fulfilled them all. The travel was undertaken by the persons authorized to travel, under non-U.S. passports, and according to the WAVE II Agreement's provisions. J.A. 472. Given that Mr. Zakka

has not argued that the State Department's authority was invalidly conferred, the Superior Court's ruling that (1) the State Department authorized Mr. Zakka's travel and (2) Palladium did not exceed the authority conveyed to it, was sufficient to render Palladium immune under *Yearsley*. *See Taylor Energy Co.*, 3 F.4th at 176 (affirming summary judgment under *Yearsley* because "there are no genuine factual disputes about [the contractor's] adherence to the Government's directives.").

That conclusion is underscored by taking a step back and looking at this case in the context of the facts of *Yearsley*. Indeed, *Yearsley* and this case match up in all fundamental respects. First, in *Yearsley*, Congress authorized the government to improve navigation on the Missouri River, just as here Congress authorized the State Department to provide foreign assistance and the State Department determined that it would provide that assistance to women in Iran. Second, in *Yearsley*, the government entered into a contract with the contractor to build dikes on Missouri River to improve navigation, just as here the State Department entered into a cooperative agreement with Palladium to provide assistance to women in Iran. Third, in *Yearsley*, the government authorized the contractor to build dikes, and the contractor did so; here, the State Department authorized Mr. Zakka to travel to Iran to attend the sustainability event, Palladium sent Mr. Zakka to Iran, and Mr. Zakka attended the event. In short, Palladium's actions are well within the metes and bounds of *Yearsley* immunity.

IV. In Any Event, Mr. Zakka Did Not Establish a Dispute of Material Fact Sufficient to Survive Summary Judgment.

As the Superior Court rightly held, its decision would be the same even if the Rule 56 summary judgment standards applied. J.A. 800. That is because there is no genuine dispute of material fact relevant to the *Yearsley* inquiry. As already noted, the undisputed facts establish that (a) the State Department validly conferred authority for the execution of the WAVE II program to Palladium, (b) the State Department thereafter authorized Mr. Zakka's travel to Iran, and (c) Palladium never exceeded or deviated from the State Department's authorization. *See supra* at 10, 12-15. None of the allegations or innuendo presented by Mr. Zakka can refute that.

In his discussion of *Yearsley* immunity, Mr. Zakka argues that the motion to dismiss should have been properly construed as implicating Rule 12(b)(6) – not Rule 12(b)(1) – and therefore the Superior Court erred by "refus[ing] to convert Defendants' motion to dismiss into one for summary judgment." Br. at 29-30. To be clear, the court did not "refuse" to convert the motion; it properly construed it as a motion under Rule 12(b)(1) and applied the relevant standard. But even notwithstanding that decision, the court still took into account the Rule 56 summary judgment standards in dismissing the suit. *See* J.A. 800 (18-24) ("[E]ven to the extent that this were viewed as a summary judgement motion, I would not find that the sort of self-serving declaration of Mr. Zakka would be sufficient to create a material issue of fact to contradict the very plain language in a binding contract and

a legally significant email which was required under the contract for authorization."); J.A. 793 (10-17) ("I actually don't think that whether we call this a motion for summary judgment or a 12(b)(1) motion should be dispositive in this instance, because to the extent that there is evidence in the record and then there are some declarations that say, 'The evidence in the record is not what it says,' I don't think that that can create a material issue of fact that could defeat summary judgment[.]"). Mr. Zakka's attempt to manufacture legal error where none exists is baseless.

Regarding the merits of the Superior Court's Rule 56 analysis, Mr. Zakka makes two main arguments: (1) the court misread the September 8, 2015, email authorizing Mr. Zakka's travel in light of the affidavits presented by Mr. Zakka and Ms. Alami, and (2) there was a dispute of material fact as to whether Palladium violated its purported representations to the State Department. Both arguments fail.

A. There Is No Dispute of Material Fact Regarding the State Department's September 8, 2015 Email, Which Authorized Mr. Zakka's Travel.

As already discussed, the September 8, 2015 email clearly authorized Mr. Zakka's travel, and Mr. Zakka cannot circumvent that fact by insisting that the plain language of the email does not mean what it says. *See supra* at 40-42. Mr. Zakka nevertheless attempts to do so by first claiming that because the State Department indicated that the travel was not required, that demonstrates that it did not authorize

the travel and that it was Palladium that exercised the discretion to do so, thus invalidating *Yearsley* immunity. Br. at 31. But this argument relies on the flawed premise that unless the State Department directed *every single aspect* of Mr. Zakka's travel, *Yearsley* does not apply because Palladium's actions were discretionary. That premise fails for the reasons set forth above. *See supra* at 31-32.

Mr. Zakka also takes issue with the Superior Court's decision not to credit his and Ms. Alami's declarations, which, he argues, create a dispute of material fact as to what the September 8, 2015 email *actually* means, and thus preclude summary judgment. Br. at 32-33. To be clear, the court declined to credit these declarations because they were contradicted by undisputable evidence in the record – including the State Department communication indicating that "travel authorization is granted[.]" J.A. 472. Nevertheless, Mr. Zakka insists that the court should have credited the declarations and declined to resolve the dispute of fact because "[a]t 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."[12] Br. at 34. Mr. Zakka is wrong.

[12] Mr. Zakka cites *Tolu v. Ayodeji*, 945 A.2d 596 (D.C. 2008) as reversing summary judgment when the trial court "failed to properly credit plaintiff's declaration and deposition testimony[.]" Br. at 34. This Court did not rely on statements from declarations for that ruling, but rather deposition excerpts and the photographs filed with the opposition to the motion for summary judgment. 945 A.2d at 602.

Mr. Zakka's conclusory statements in his declaration that the State Department's email did not mean what it said are insufficient to establish a genuine issue of material fact. *Steele v. Salb*, 93 A.3d 1277, 1281 (D.C. 2014) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)); *see also New 3145 Deauville, L.L.C. v. First Am. Title Ins. Co.*, 881 A.2d 624 (D.C. 2005) (conclusory statements in a property manager's summary judgment affidavit that water and sewer authority's water meter readings for a property were inaccurate were insufficient to create a genuine issue of material fact). Further, courts look skeptically on parties' self-serving affidavits in the summary judgment context, especially when they are undermined by other evidence. *See, e.g.*, *Arrington v. United States*, 473 F.3d 329, 343 (D.C. Cir. 2006); *Carranza v. Fraas*, 820 F. Supp. 2d 118 (D.D.C. 2011). Given that courts have done so in the past, a finding that a declaration is self-serving is not a "credibility determination" unfit for summary judgment purposes, as Mr. Zakka claims. *See* Br. at 36. Consequently, the Superior Court was well within its authority to reject the statements in Mr. Zakka's declaration under Rule 56 analysis.

Next, perhaps recognizing that his own declaration is of limited value in the summary judgment context, Mr. Zakka relies heavily on Ms. Alami's declaration and argues that the court's decision not to credit it was "a particularly stark error." Br. at 35. But the statements in Ms. Alami's declaration upon which he relies present no new material facts, *i.e.*, no facts that have a "direct and uncontestable bearing on

the outcome of the case." *Hill v. White*, 589 A.2d 918, 921 n.9 (D.C. 1991). For example, Ms. Alami's claim that at meetings between Palladium and the State Department, "Ms. Hadjilou 'repeatedly cited her [September 8, 2015] email' . . . 'emphasizing that Palladium had undertaken the travel at its own risk'" (Br. at 33) is not material because it simply restates what was in the email. Her other assertions regarding the "meaning" of the Agreements and related materials are simply her own subjective interpretation of those documents, which the court already had before it.[13] Regardless of Mr. Zakka's and Ms. Alami's attempts to frame it otherwise, there is no dispute that the State Department authorized Mr. Zakka's travel.

B. There Is No Dispute of Material Fact that the Security Procedures Invoked by Mr. Zakka Were Not Part of the Agreements.

Contrary to Mr. Zakka's argument, there is no genuine dispute of fact as to how "Palladium and Mr. Abel violated their representations to the State Department about how Palladium would manage safety and security for the WAVE II program." Br. at 36. None of the so-called "detailed representations" (which included general measures such as "a structured and effective security management system" and "the issue and use of the right security equipment") were guaranteed by Palladium or

[13] Mr. Zakka relies on Ms. Alami's declaration because it supposedly "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." Br. at 33. As previously discussed, however, no duty to provide such warnings or briefings existed in the contract. *See supra* at 12.

incorporated into the Agreements. J.A. 641; *supra* at 35-36. Palladium only represented that such measures "could" be included – not that they actually "would" be included, as Mr. Zakka now baldly claims. Br. at 38. There is simply no evidence – and thus no dispute of material fact – that these were ever part of the Agreement or that Palladium had any obligation to provide them to Mr. Zakka.

Mr. Zakka's comparison of this case to *Campbell-Ewald* is unavailing. In that case, there was actual evidence that the Navy relied on the contractor's representations that the list of persons to receive text messages had all opted in (and thus the messages complied with the relevant law). Specifically, the Court pointed to the fact that a "Navy representative noted the importance of ensuring that the message recipient list be 'kosher' (*i.e.,* that all recipients had consented to receiving messages like the recruiting text), and made clear that the Navy relied on Campbell's representation that the list was in compliance." *Campbell-Ewald*, 577 U.S. at 168. No such evidence regarding the State Department's purported "reliance" on the potential security measures (which were not even promised in any event) was presented here – only Mr. Zakka's distorted reading of the relevant documents.

In summary, the Superior Court rightly found there was no dispute of material fact that the State Department authorized Mr. Zakka's travel and that Palladium did not violate the State Department's directives. This Court can affirm the Superior Court's ruling that Appellees are immune under *Yearsley* on those grounds as well.

V. Mr. Zakka Was Afforded All the Discovery He Needed to Address Whether the State Department Authorized His Travel.

Finally, the Superior Court rightly denied Mr. Zakka's motion to compel discovery from Palladium regarding (1) the security procedures mentioned in the Wave II Technical Application, and (2) Palladium's communications with the State Department after Mr. Zakka's abduction. The court also properly denied Mr. Zakka's request for discovery from the State Department as to (as Mr. Zakka describes it) "whether it authorized and directed Palladium's tortious conduct." Br. at 46-47. Regarding the security procedures, as already discussed, these were non-binding, not incorporated into the WAVE II Agreement governing the State Department's authorization of Mr. Zakka' s travel, and not referenced in Mr. Zakka's travel authorization. They are irrelevant to whether Mr. Zakka's travel was authorized in the first instance. As for the post-abduction communications, Palladium performed such a search and found nothing. J.A. 442. Such after-the-fact communications could lend no insight into the issue of authorization anyway, given the unequivocal language of the September 8, 2015 email. The proposed discovery as to the State Department was unwarranted for the same reasons. The Superior Court did not abuse its discretion by denying all of these requests.

CONCLUSION

For the reasons discussed herein, the Superior Court's September 15, 2021 Order dismissing the Complaint should be affirmed.

Respectfully submitted,

Dated: April 18, 2022

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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
   - 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/ Benjamin S. Boyd
Signature

21-CV-690
Case Number(s)

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April 2022, I caused to be served a true copy of the foregoing Brief on counsel of record listed below via the Court's electronic filing system and electronic mail:

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