ORAL ARGUMENT NOT YET SCHEDULED

THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20-5045

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiff,

COMMITTEE TO PROTECT JOURNALISTS,

Plaintiff-Appellant,

-against-

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants-Appellees,

UNITED STATES DEPARTMENT OF STATE,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, No. 1:18-cv-02709-TNM

BRIEF OF AMICI CURIAE HUMAN RIGHTS WATCH, AND OTHER NON-GOVERNMENTAL ORGANIZATIONS AND INTERNATIONAL HUMAN RIGHTS EXPERTS IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amici certify as follows:

A. Parties and amici curiae

Except for the following amici, all parties, intervenors, and amici appearing before the District Court and in this Court are listed in Appellant's brief: Human Rights Watch, Freedom Initiative, Global Witness, International Crisis Group, International Foundation for the Protection of Human Rights Defenders d/b/a Front Line Defenders, National Security Archive, Robert F. Kennedy Human Rights, and individual amici Morton H. Halperin, Frank LaRue, and David Kaye.

B. Rulings under review

References to the rulings at issue appear in Appellant's brief.

C. Related cases

This case has not previously been before this Court on appeal, and counsel for amici are not aware of any related case pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, amici state that they are non-profit organizations. None of the amici have any parent corporation, and no publicly held corporation owns 10% or more stock in any of amici.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Circuit Rule 29(b), amici certify they have obtained consent to file this brief from both parties.

Pursuant to D.C. Circuit Rule 29(d), amici certify that this brief is necessary to offer the unique perspective of non-governmental organizations working internationally and international law specialists on the fundamental violation of both domestic law and international principles by the U.S. government's refusal to admit or deny whether it possesses any documents concerning the U.S. Intelligence Community's ("IC") advance knowledge of a plot to kidnap or kill Jamal Khashoggi, and whether the IC fulfilled its duty to warn him of the danger he faced. Amici are aware of another amicus brief on behalf of media organizations that addresses issues of particular concern to the press. Amici are unaware of any other amicus brief being filed on behalf of a collective of non-profit human rights and international advocacy organizations and individuals working in these spaces, all of whom share a unique interest in the proper discharge of U.S. obligations under international law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

GLOSSARY ix

IDENTITY OF THE AMICI CURIAE AND THEIR INTEREST IN THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. ACCEPTING THE GOVERNMENT'S *GLOMAR* RESPONSES WOULD SERIOUSLY UNDERMINE THE DUTY TO WARN 8

A. The Proper Discharge Of The Duty To Warn Is A Matter Of Substantial Public Interest 9

B. Accepting A *Glomar* Response On The Record Here Would Frustrate Oversight Of The Duty To Warn And Undermine Incentives To Satisfy That Duty 15

II. THE *GLOMAR* RESPONSES CONTRAVENE DISCLOSURE OBLIGATIONS IMPOSED BY CONGRESS 20

III. THE *GLOMAR* RESPONSES ARE INCONSISTENT WITH INTERNATIONAL LAW AND THE PRACTICES OF DEMOCRACIES AROUND THE WORLD 23

CONCLUSION 33

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) 34

TABLE OF AUTHORITIES

Page(s)

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GLOSSARY

African Union	AU
Committee to Protect Journalists	CPJ
Freedom of Information Act	FOIA
United Nations Human Rights Committee	HRC, or UN HRC
Human Rights Watch	HRW
International Covenant on Civil and Political Rights	ICCPR
U.S. Intelligence Community	IC
National Security Administration	NSA
Organization for Security and Cooperation in Europe	OSCE
Organization of American States	OAS
Right to information	RTI
Special Rapporteur(s)	SR(s)

IDENTITY OF AMICI CURIAE AND THEIR INTEREST IN THE CASE[1]

Amici include seven non-profit public interest organizations working in human rights and international advocacy that have particular interest in the proper discharge of the government's duty to warn when it has credible and specific information of an impending threat of serious, intentional harm to a particular individual—the issue that motivated the Freedom of Information Act ("FOIA") request at issue. Amici organizations have investigators and observers in countries around the world who often find themselves at great personal risk due to the nature of their work. These organizations are:

Human Rights Watch ("HRW"), is a non-governmental organization established in 1978 and headquartered in New York whose mission is to expose publicly and report on violations of fundamental human rights, end abuses, and provide victims a voice. HRW operates around the world, issuing public reports on violations of international human rights in over 100 countries, and advocating for their cessation and remedy. It does this by researching human rights conditions on the ground, directly with eyewitnesses and partner organizations, activists, and victims, in often-perilous circumstances. These circumstances entail risks such as

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici state that no counsel for a party authored this brief in whole or in part, and no party or entity other than amici and their counsel made a monetary contribution intended to fund the preparation of this brief.

armed conflict, threats and reality of murder, torture, kidnapping, detention and other forms of abuse. It enlists support from the public and international community to act on its findings, and make its work possible and secure.

Freedom Initiative, is a leading independent human rights organization based out of Washington D.C., with a focus on political prisoners in the Arab world. Its mission is to advocate for political prisoners and the issues they represent through advocacy, public relations and legal action. Its vision is an Arab region without political prisoners.

Global Witness, is an international non-profit organization working to end environmental and human rights abuses driven by the exploitation of natural resources and corruption in the global political and economic system. As part of those worldwide efforts, Global Witness regularly investigates and exposes the hidden links between demand for natural resources, corruption, armed conflict, and environmental destruction.

International Crisis Group, is a nonprofit organization working to prevent wars and shape policies to build a more peaceful world. Crisis Group employs over 100 people in field offices around the world and engages directly with a range of conflict actors to seek, share, and publish information and reports to encourage intelligent action for peace.

International Foundation for the Protection of Human Rights Defenders d/b/a Front Line Defenders, is a charitable non-profit organization headquartered in Dublin, Ireland, that works for the protection and security of human rights defenders at risk around the world through the provision of resources, training in physical and digital security, advocacy and visibility to and for human rights defenders.

National Security Archive, National Security Archive, is a non-profit organization founded in 1985 by journalists and scholars to check rising government secrecy. It serves as an investigative journalism center, research institute on international affairs, library and archive of declassified U.S. documents ("the world's largest nongovernmental collection," according to the *Los Angeles Times*), leading non-profit user of the U.S. Freedom of Information Act, public interest law firm defending and expanding public access to government information, and indexer and publisher of formerly secret information.

Robert F. Kennedy Human Rights, is a nonpartisan, not-for-profit international human rights organization founded in 1968 to realize Robert Kennedy's vision of a more just and peaceful world. We partner with frontline advocates in the United States and around the world to carry on Robert Kennedy's unfinished work of social justice.

Amici also include several leading international human rights experts. Along with the aforementioned organizations, the individual amici have a vital interest in promoting compliance with international principles concerning the types of national security information that democratic governments must make available to their citizens for democracy to function.

Morton H. Halperin, is an executive advisor to the Open Society Foundations. Prior to his current role providing strategic guidance on U.S. and international issues, Halperin served in three presidential administrations. Among his many senior roles, he was director of the Policy Planning Staff at the Department of State (1998–2001), special assistant to the president and senior director for democracy at the National Security Council (1994-96), a consultant to the secretary of defense (1993), senior staff member of the National Security Council staff (1969), and deputy assistant secretary of defense for International Security Affairs (1966-69). Halperin was a principal drafter of the Global Principles on National Security and the Right to Information, known as the "Tshwane Principles" and continues to speak on the Principles in countries around the world.

David Kaye, is a clinical professor of law at the University of California, Irvine, and the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. He is the author of *Speech*

Police: The Global Struggle to Govern the Internet (2019), and has also written for international and American law journals and numerous media outlets. He began his legal career with the U.S. State Department's Office of the Legal Adviser, is a member of the Council on Foreign Relations, and is a former member of the Executive Council of the American Society of International Law.

Frank LaRue, was appointed the UN Special Rapporteur on the Right to Freedom of Opinion and Expression by the UN Human Rights Council in 2008 and held the mandate for two terms until 2014. Mr. La Rue is the founder of the Center for Legal Action for Human Rights and the former Executive Director of Robert F. Kennedy Human Rights Europe. He served as Presidential Commissioner for Human Rights in Guatemala (2004–08), and as Human Rights Adviser to the Minister of Foreign Affairs. He has lectured extensively about freedom of expression and information, including teaching at the American University Washington College of Law.

***

Together, these amici have substantial expertise with the issues presented in this appeal and can assist the Court in understanding how a *Glomar* response, on the facts here, is inconsistent not only with the operation and objective of FOIA, but also with international principles concerning the disclosure obligations relating to national security information.

SUMMARY OF ARGUMENT

Nearly two years ago, journalist and U.S. resident Jamal Khashoggi was lured to the Saudi Arabian embassy in Istanbul, ambushed, suffocated, and dismembered by agents of the Saudi government. In the aftermath of his murder, many raised questions about what the United States government knew of the Saudis' plans, and whether it had discharged the duty to warn set out in Intelligence Community ("IC") Directive 191. That Directive requires all IC elements, when feasible, to notify persons of serious and credible threats of harm against them.

In response, the U.S. State Department flatly and unambiguously denied that "the United States" had any "advance knowledge" of the threat to Mr. Khashoggi.[2] When asked, the State Department also redacted and released relevant documents. Notwithstanding these public disclosures, other elements within the IC refused even to confirm or deny whether they possess documents relating to knowledge of a plot against Mr. Khashoggi and their duty to warn him of it.[3] Their "neither

[2] Brief for Plaintiff-Appellant CPJ ("CPJ Br.") at 14-15 (quoting Office of the Spokesperson, Department Press Briefing, U.S. Dep't of State (Oct. 10, 2018), https://bit.ly/2B4AtlO).

[3] After the State Department disclosed documents, it was voluntarily dismissed from the litigation. CPJ Br. at 4. The remaining defendants, and appellees in this appeal, are the Central Intelligence Agency ("CIA"), the Federal Bureau of Investigation ("FBI"), the National Security Agency ("NSA"), and the Office of the Director of National Intelligence ("ODNI"). *Id.* at 20.

confirm nor deny" responses raise questions of significant public concern, violate disclosure obligations imposed by Congress when it enacted FOIA, and contravene international principles concerning the disclosure of national security information. Amici submit this brief to underscore the important, adverse implications of the District Court ruling for international non-governmental organizations and human rights advocates, and to underscore how the ruling below places the United States outside a global consensus on the scope of citizens' access to national security information. Specifically, this brief explains that:

1. Amici organizations face significant threats of violence as they do their work in many parts of the world. Allowing *Glomar* responses on the sparse declarations provided here would seriously undermine the duty to warn imposed through Directive 191, which was put in place to ameliorate those risks. Accepting appellees' conclusory allegations of harm in the face of the widely known facts would sustain a form-over-substance application of the *Glomar* exception that essentially permits agencies within the IC to unilaterally "opt out" of their obligation to disclose information about whether and how they are fulfilling their obligations under Directive 191. This short-circuits the independent judicial review and other transparency obligations imposed by FOIA and undermines incentives for the proper discharge of the duty to warn.

2. Appellees' *Glomar* responses defy the national security disclosure obligations imposed by Congress when it enacted FOIA and when it later amended FOIA to ensure meaningful, *de novo* judicial review of agency refusals to disclose national security information.

3. The *Glomar* responses contravene international principles that ensure citizens in a democracy have the national security information required for meaningful self-rule. These principles reflect an international consensus about the public's right to certain national security information and provide persuasive authority on the appropriate limits on appellees' right to refuse to admit or deny the existence of such information.

Amici respectfully urge the Court to reverse and remand the judgment of the District Court.

ARGUMENT

I. ACCEPTING THE GOVERNMENT'S *GLOMAR* RESPONSES WOULD SERIOUSLY UNDERMINE THE DUTY TO WARN

The merits of this appeal cannot be divorced from the compelling public interest both in understanding how the duty to warn is implemented and in preserving FOIA as an effective tool for promoting democratic oversight and incentivizing agencies to follow the rule of law. The judicially-created *Glomar* response, if allowed to be so loosely applied, would permit an agency essentially to exempt itself from the obligations imposed by statute whenever the agency

withholds information. These importantly include the opportunity for *in camera* judicial review of withheld materials and a *de novo* judicial determination of the propriety of the withholding. Given its extra-statutory foundation, *Glomar* responses should be permitted only in the narrowest of circumstances and cannot properly be justified on the record here. *See* CPJ Br. at 18, 24-26.

A. The Proper Discharge Of The Duty To Warn Is A Matter Of Substantial Public Interest

The existence of a globally-recognized duty to warn flows from the right to life. This right is guaranteed under customary international law and under Article 6 of the International Covenant on Civil and Political Rights ("ICCPR"), which the United States ratified almost 30 years ago.[4] The right to life applies to "all individuals within [the] territory [of a state] and subject to its jurisdiction . . . without distinction of any kind." ICCPR Art. 2(1); *see also* UN Human Rights Council, *Annex to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Investigation into the Unlawful Death of Mr. Jamal*

[4] *See* ICCPR, Dec. 16, 1966, S. Exec. Doc. E., 95-2, 999 U.N.T.S. 171, Art. 6(1), https://bit.ly/3eWQLLv ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."); *Status of Ratification*, UN Office of Human Rights, https://bit.ly/3eCmYHC (noting year of ratification); UN Human Rights Council, *Investigation of, Accountability for and Prevention of Intentional State Killings of Human Rights Defenders, Journalists and Prominent Dissidents* ("Oct. 4, 2019 UN Special Rapporteur Report"), ¶ 26, UN Doc. A/HRC/41/36 (Oct. 4, 2019), https://bit.ly/3f1JZEt.

Khashoggi ("Callamard Special Rapporteur Report"), ¶¶ 193-196, UN Doc. A/HRC/41/CRP.1 (June 19, 2019), https://bit.ly/3hv9mjC.[5] According to the United Nations' Human Rights Committee ("HRC"), part and parcel of respect for the right to life is "a due diligence obligation" to avert threats to life before they occur.[6] As the Committee has explained:

> States parties are . . . under a due diligence obligation to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the State.

UN Human Rights Comm., *General Comment No. 36 (2018)*, ¶ 37, UN Doc. CCPR/C/GC/36 (Oct. 30, 2018), https://bit.ly/2ZnwrON; *see also* October 4, 2019 UN Special Rapporteur Report ¶¶ 31-40.[7]

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[5] Dr. Agnes Callamard was appointed UN Special Rapporteur ("SR") to the Human Rights Council, to investigate the circumstances of Mr. Khashoggi's death. An SR is an independent expert reporting to the Human Rights Council pursuant to a specific mandate of the Council.

[6] The HRC is the UN body established to oversee the interpretation and implementation of the ICCPR and to monitor compliance with it. The Committee's interpretations are "ascribe[d] great weight" by the International Court of Justice. *See, e.g.*, Ahmadou Sadio Diallo (Republic of Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. Rep. 639, ¶ 66 (Nov. 30, 2010).

[7] *See also* Marko Milanovic, *The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life*, 20 Human Rights L. Rev. 1 (2020) ("the substantive positive obligation to ensure, secure or protect the right to life even against threats to the life of an individual from third parties, be that from a private person or some other states . . . is the essence of . . . [the] requirement [in Article 6(1) of the ICCPR] that the right to life be 'protected by law'").

The United States has long recognized the moral imperative of a duty to warn, which reportedly has informed U.S. policy for decades. *See* Steven Aftergood, *Intelligence Agencies Have a "Duty to Warn" Endangered Persons,* Federation of American Scientists (Aug. 24, 2015), https://bit.ly/38Qmgp0 (noting 1995 warning conveyed by the CIA to a Christian missionary in Iraq targeted for death by Iranian Revolutionary Guards). This duty was formalized as an express obligation of the IC in July 2015 through Directive 191, and a UN Special Rapporteur ("SR") has identified the Directive as imposing precisely the kind of "due diligence obligation" required by respect for the right to life.[8]

In essence, the Directive requires all IC elements to notify both "U.S. persons" and "non-U.S. persons" of serious and credible threats of harm to them. *See* Intelligence Community Directive 191, Office of the Dir. of Nat'l Intel. (Jul. 21, 2015), https://bit.ly/38UtuZ3 ("Directive 191"). It provides:

> An IC element that collects or acquires credible and specific information indicating an impending threat of intentional killing, serious bodily injury, or kidnapping directed at a person or group of people (hereafter referred to as intended victim) shall have a duty to warn the intended victim or those responsible for protecting the intended victim, as appropriate. . . . The term intended victim includes both U.S. persons, as defined in EO 12333, Section 3.5(k), and non-U.S. persons.

[8] *See* Oct. 4, 2019 UN Special Rapporteur Report ¶¶ 56-59; *see also* Milanovic, *The Murder of Jamal Khashoggi*, 20 Human Rights L. Rev. 1 ("US domestic policy already expressly acknowledges the existence of a duty to warn, demonstrating that there is nothing inherently impractical in such an obligation [as a matter of international law].").

Directive 191 ¶ E.

Directive 191 also contains qualifications. For example, the duty to warn "may be waived" where the intended victim is "already aware of the specific threat," an attempt to warn the intended victim "would unduly endanger U.S. government personnel, sources, methods, intelligence operations, or defense operations," or "[t]here is no reasonable way to warn the intended victim." *Id.* ¶¶ F.3.a, d, f.[9] The Directive further provides that where none of these circumstances is present, "[i]ssues concerning whether threat information meets the duty to warn threshold should be resolved in favor of informing the intended victim." *Id.* ¶¶ F.4.

There is a vital public interest in the robust and consistent enforcement of Directive 191. A failure to vigorously enforce Directive 191 imperils both the work of human rights groups and other NGOs working internationally, like *amici*, and the safety of political dissidents like Mr. Khashoggi. The amici are well acquainted with these risks. HRW, for instance, operates in the most dangerous corners of the

[9] The duty to warn may also be waived where the intended victim is at risk only as a result of "participation in an insurgency, insurrection, or other armed conflict," the intended victim "is a terrorist, a direct supporter of terrorists, an assassin, a drug trafficker, or involved in violent crimes," or any attempt to warn "would unduly endanger the personnel, sources, methods, intelligence operations, or defense operations" of a foreign government that provided the information. Directive 191 ¶¶ F.3.b, c, e.

world, investigating and documenting human rights abuses through experts, journalists, and others on the ground. This work necessarily puts HRW personnel in the crosshairs of the perpetrators of abuse, whether they be gangs, militia groups, or governments—as was the case for Mr. Khashoggi. Likewise, Global Witness, which works to end environmental and human rights abuses driven by the exploitation of natural resources and corruption in the global political and economic system, regularly engages in investigations around the world. This work can expose Global Witness' staff, partners, and sources to great risks. Global Witness' own reports underscore the deadly threats that frontline environmental activists in many places face.

Many of the amici are positioned similarly to HRW and Global Witness. Those that do not employ full-time personnel in high-risk countries nevertheless work closely with and depend on local partners whose risk exposure may increase due to the partnership.[10]

[10] The danger to frontline human rights workers is widely recognized. In 2019 alone, over 300 human rights defenders across 31 countries were targeted and killed according to one international analysis. *See, e.g.*, Global Analysis 2019, Front Line Defenders, Jan. 11, 2020, https://bit.ly/3hB6kKH; *see also Enemies of the State?*, Global Witness, July 30, 2019, https://bit.ly/30If6j5 (finding more than three people were murdered each week in 2018, in connection with activism around land and the environment).

Non-enforcement of the duty to warn undermines the safety of political dissidents and activists as well. Repressive regimes across the world—in Egypt, the United Arab Emirates, Tajikistan, Vietnam, Venezuela, China and elsewhere—continue to target dissidents and their relatives, often within their own borders and sometimes beyond them.[11] Even Saudi Arabia, it appears, has remained undeterred in its efforts to silence critics.

In May 2019—only seven months after Mr. Khashoggi's assassination—it came to light that the CIA and foreign security services had alerted three Saudi activists living abroad that they and their families were under potential threat from the Saudi government. Josh Meyer, *The CIA Sent Warnings to at Least 3 Khashoggi Associates About New Threats From Saudi Arabia*, Time (May 9, 2019), https://bit.ly/3eAURJd. The activists, living in Norway, Canada, and the United States, were working on human rights projects with Mr. Khashoggi at the time of his killing and had since become even more vocal critics of the Saudi regime. *Id.* The activists were instructed to secure their electronic devices, avoid

[11] *See e.g.*, *Egypt: Families Of Dissidents Targeted*, HRW (Nov. 19, 2019), https://bit.ly/30fKqFH; *UAE: Unrelenting Harassment of Dissidents' Families*, HRW (Dec. 22, 2019), https://bit.ly/2B4D4MC; *Enforced Disappearance As A Tool Of Political Repression In Venezuela*, Robert F. Kennedy Human Rights (2020), https://bit.ly/2WTwj88; *Tajikistan: Intensified Pressure on Dissidents' Families*, HRW (July 9, 2020), https://bit.ly/2Zxhaes; *Vietnam: Crackdown on Peaceful Dissent Intensifies*, HRW (June 19, 2020), https://bit.ly/3fBftlO. *See generally* World Report 2020, HRW (2020), https://bit.ly/2OvZKbM.

travel to countries where Saudi Arabia has particular influence, and to move family members out of one country, Malaysia. *Id.*

This is precisely how the duty to warn should work. When followed, Directive 191 makes human rights workers less vulnerable to threats and makes it more difficult for authoritarian regimes to target critics and dissidents. The stakes are, quite literally, life or death.

B. Accepting A *Glomar* Response On The Record Here Would Frustrate Oversight Of The Duty to Warn And Undermine Incentives To Satisfy That Duty

The circumstances of Jamal Khashoggi's killing immediately raised questions about the IC's compliance with the duty to warn and continue to highlight the need for public oversight and understanding of how Directive 191 is being implemented. Upholding the *Glomar* responses on the record of this case, however, would render that oversight and understanding all but impossible—keeping the public in the dark about whether and under what circumstances its government satisfies its duty to warn. The lack of oversight, in turn, undermines incentives to rigorously satisfy the duty to warn.

As noted, the circumstances of Mr. Khashoggi's killing raise important questions about the IC's compliance with Directive 191. Within days of the assassination, the State Department stated—publicly, repeatedly, and "definitively"—that the United States had no "advance knowledge" of the

imminent threat to Mr. Khashoggi's life. CPJ Br. at 14-15. Despite this denial, credible news reports—uncontradicted by any IC element—revealed that U.S. intelligence agencies had intercepted Saudi communications discussing plans to target Mr. Khashoggi, and that such information had "been disseminated throughout the U.S. government and was contained in reports that are routinely available to people working on U.S. policy toward Saudi Arabia or related issues." *Id.* at 15-16 (citing reports in *The New York Times* and *The Washington Post*).[12] The United States reportedly failed to convey any such information to Mr. Khashoggi.

A response to CPJ's records request would help explain why this is so—illuminating how the IC understands the duty to warn and what the IC elements do to faithfully discharge that duty. Upholding the *Glomar* responses short-circuits the judicial review process contemplated by FOIA and cuts off this inquiry before it even begins.

[12] *See also* John R. Schindler, *NSA: White House Knew Jamal Khashoggi Was In Danger. Why Didn't They Protect Him?*, Observer (Oct. 10, 2018), https://bit.ly/2OzwC3b (reporting, based on a source within the NSA, that "[a]t least a day before Khashoggi appeared at the Saudi consulate in Istanbul . . . the agency had Top Secret information that Riyadh was planning something nefarious," and that "this threat warning was communicated to the White House through official intelligence channels").

As CPJ notes, there are several possible explanations for the apparent failure to warn Mr. Khashoggi. It is conceivable that the cause was simple negligence. CPJ Br. at 40-41. But Mr. Khashoggi's case was not a one-off. In 2017, for instance, a *New York Times* reporter based in Egypt narrowly escaped arrest by local authorities and fled the country after receiving a warning from a confidential source within the U.S. Government. A.G. Sulzberger, *The Growing Threat to Journalism Around the World*, N.Y. Times (Sept. 23, 2019), https://nyti.ms/3gZjZee. The source spoke without authorization from the U.S. administration. According to the source, the government "intended to sit on the information and let the arrest be carried out." *Id.*

During the Obama administration—before the duty to warn was formalized in Directive 191—it came to light through a FOIA response that the FBI was aware of a plot to assassinate Occupy Wall Street protesters, but again did nothing to inform them of the threat. Brett Wilkins, *FBI knew of assassination plot against Occupy but gave no warning*, Digital Journal (Dec. 31, 2012), https://bit.ly/30gnV3A.[13] These episodes raise legitimate questions about how

[13] *See also* Tim Cushing, *James Clapper Says Intelligence Community Has 'Duty To Warn' Endangered People . . . Sort Of*, Techdirt (Aug. 26, 2015), https://bit.ly/3j1ZDTl.

duty-to-warn decisions are made and reinforce the need for greater transparency and accountability.

It is also conceivable (and not mutually exclusive) that IC elements are working from an erroneous or unduly narrow interpretation of their obligations under Directive 191. For instance, one former senior intelligence official told *The Washington Post* that knowledge of a plan to merely "[c]aptur[e]" Khashoggi, without necessarily inflicting violence, would not have given rise to a duty to warn. Shane Harris, *Crown prince sought to lure Khashoggi back to Saudi Arabia and detain him, U.S. intercepts show*, Wash. Post (Oct. 10, 2018), https://wapo.st/2CzQUal. This again underscores the need for greater transparency, as this interpretation contradicts the language of the Directive itself, which treats "kidnapping"—the "intentional taking of an individual or group through force or the threat of force"—as an independent trigger for the duty. Directive 191 ¶¶ D.4, E.1; *see* Ryan Goodman, *Did the U.S. Fail Its "Duty to Warn" Jamal Khashoggi? How U.S. Directive 191 Applies to Kidnapping Threats*, Just Security (Oct. 10, 2018), https://bit.ly/2WkOhjE ("Kidnapping alone, without any anticipated serious bodily harm, triggers the Directive's duty to warn. A plan to lure and render Khashoggi against his will (i.e., forcibly transfer him) to Saudi Arabia looks like a case of kidnapping.").

Alternatively, the intelligence agencies may have recognized their obligation to warn Mr. Khashoggi, but decide to "waive[]" that duty based on one of the "justifications" in the Directive. Directive 191 ¶ F.3. The *Glomar* responses, however, prevent the public from learning how broadly or narrowly agencies construe these justifications. As UN Special Rapporteur Callamard stated in her report, "the circumstances under which [U.S.] intelligence agencies determine that the duty to warn should not be pursued" are "[o]f particular concern," but how the IC actually implements the duty to warn "may only be inferred from . . . anecdotes." Callamard Special Rapporteur Report ¶ 352. Put simply, the *Glomar* responses thwart the public's ability to meaningfully oversee, and hold accountable, the agencies charged with implementing a critical governmental duty flowing directly from treaty obligations accepted by the U.S. and its allies.

To be sure, FOIA does not require—and amici do not seek—disclosure of information that could credibly harm national security or reveal intelligence sources and methods. But as CPJ has shown, merely confirming or denying the existence of records responsive to the FOIA requests here would do neither. *See* CPJ Br. at 45. But if records exist, that disclosure alone provides the potential of meaningful judicial review and creates incentives for the duty to be properly discharged.

And if no records exist, saying so could not plausibly endanger national security. Indeed, the State Department has already said just that. *See* CPJ Br. at 14-15; J.A. 333. Whether the State Department's representations constitute a technical waiver of the right of any other IC element to assert a *Glomar* response, it certainly must "shift the factual groundwork upon which [the] court assesses the merits of such a response." *Florez v. CIA*, 829 F.3d 178, 186 (2d Cir. 2016).

To accept a *Glomar* response on the current record would convert the legal standard from one of "deference . . . to acquiescence." *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998). More to the point, it would allow agencies to exempt themselves from meaningful oversight of their compliance with the duty-to-warn obligation and undermine tier incentives to faithfully execute the duty.

II. THE *GLOMAR* RESPONSES CONTRAVENE DISCLOSURE OBLIGATIONS IMPOSED BY CONGRESS

Appellees' *Glomar* responses are inconsistent with both the disclosure obligations imposed by the FOIA statute and with international legal principles, and the practices of democracies around the world. The District Court order places the United States outside the globally-recognized scope of national security information citizens have a right to receive from their governments.

As CPJ makes clear, a *Glomar* response cannot properly be sustained on the facts of this case. CPJ Br. at 8-11. In the wake of Mr. Khashoggi's death, the State Department announced "definitively" that *the United States* lacked prior

knowledge of the assassination plot. *See* Office of the Spokesperson, Department Press Briefing, U.S. Dep't of State (Oct. 10, 2018), https://bit.ly/3jExh1G; *see also* CPJ Br. at 13-14. The State Department's official acknowledgement renders the *Glomar* responses by fellow IC agencies untenable under the directive.

Moreover, the use of the *Glomar* response should be narrowly cabined given its lack of a clear statutory basis. Both the language and legislative history of FOIA make abundantly clear that courts are to exercise *de novo review* of national security objections and to conduct *in camera* review of classified records when agency declarations, as here, are vague, conclusory or otherwise insufficient. *See, e.g.*, 5 U.S.C. § 552(a)(4)(B).

In 1974, following the Watergate scandal and public disillusionment over the government's handling of Vietnam and other matters of international relations, Congress expanded FOIA to ensure greater transparency and accountability. One significant change empowered courts to ensure that withheld documents are properly classified through *in camera* inspection and *de novo* review. *See* S. 1142, 93rd Cong. at 111-12 (1973).

This change was a direct response to the Supreme Court's ruling in *EPA v. Mink*, 410 U.S. 73 (1973), that an agency could justify a decision to withhold documents on national security grounds simply by providing an affidavit that the materials sought were classified. The *Mink* Court reasoned that FOIA did not

empower judges to question executive classifications and therefore did not authorize *in camera* review of classified material. The 1974 amendments expressly overruled that holding. They provided judges express authority to review classified documents *in camera* and to determine through a *de novo* assessment whether documents were properly classified so that the national security exemption properly applied.[14]

Congress felt strongly about the importance of judicial review of information the intelligence agencies refuse to disclose on national security grounds. In a letter to the conference committee considering the 1974 amendments, President Ford objected that the changes under consideration could allow judges to disclose military or intelligence secrets through *in camera* review. *See* Ltr. From President Gerald Ford to Sen. Edward M. Kennedy (Aug. 20, 1974), National Security Archive, https://bit.ly/3eUF6N9. When the amendments passed nonetheless, President Ford vetoed them, reiterating his objection that in camera review would not adequately protect national security interests. *See* Ltr. from President Gerald Ford to U.S. House of Representatives (Oct. 17, 1974), National

[14] *See* House Comm. On Gov't Operations, Subcomm. On Gov't Info. And Individual Rights & Senate Comm. On The Judiciary, Subcomm. On Admin. Practice And Procedure, 94th Cong., Freedom Of Information Act And Amendments Of 1974 (P.L. 93-502), Source Book: Legislative History, Texts, And Other Documents 109 at 110-11(J. Comm. Print 1975).

Security Archive, https://bit.ly/2OO3YLQ. In November 1974, Congress overrode that veto. In so doing, Congress made plain the independent role it was assigning to the courts to ensure that the national security agencies did not improperly conceal their activities from the public. *Glomar* responses fundamentally undercut this assigned role, preventing judicial inspection of classification decisions by refusing to either confirm or deny if documents even exist. *Glomar* responses necessarily must be accepted in only very limited circumstances, which do not apply here. *See* CPJ at 35-47.

Appellees, no less than any other federal agencies, are bound by the requirements of FOIA. Deferring to their talismanic incantations of "national security," as did the District Court, inappropriately permits appellees to sidestep scrutiny of their activities and undermines accountability.

III. THE *GLOMAR* RESPONSES ARE INCONSISTENT WITH INTERNATIONAL LAW AND THE PRACTICES OF DEMOCRACIES AROUND THE WORLD

The *Glomar* responses are not only improper under FOIA; if accepted, they would place the United States at odds with an international consensus concerning the showing governments must make to justify the withholding of national security information from their citizens. In 1966, when FOIA was first enacted, the United States became only the third country in the world with a law establishing a right to information ("RTI") held by public authorities. Toby Mendel, *The Fiftieth*

Anniversary of the Freedom of Information Act: How it Measures up Against International Standards and Other Laws, 21 Comm. L. & Pol'y 465, 465 (2016) (hereinafter, "Mendel"). Today, 129 countries have enacted RTI laws, guaranteeing RTI to more than 90% of the world's population. *See Historical data on country RTI Rating Scores*, Global Right to Information Rating, https://bit.ly/2B539es.

RTI is guaranteed by Article 19 of the ICCPR, ratified by the United States in 1992 with no reservations relevant to RTI. *See* https://bit.ly/2OR6Urq. Amici do not contend that the ICCPR gives rise to a justiciable right to access the information at issue; rather, we invoke the ICCPR and other sources and statements of international law as further guidance on how the FOIA should be applied to align with the U.S. Government's international commitments, and with the practices of our closest allies and other democracies around the world.

The UN HRC is charged with issuing authoritative interpretations of the obligations imposed by the ICCPR. In 2011, the HRC adopted a General Comment declaring that Article 19 of the ICCPR guarantees a right of access to information held by all public authorities, without exception, which is subject only to such restrictions that are "provided by law," that advance a legitimate governmental

interest and that "conform to the strict tests of necessity and proportionality."[15] While national security is indeed recognized as a legitimate governmental interest, the HRC cautioned that it is not compatible with Article 19 "to suppress or withhold from the public information of legitimate public interest that does not harm national security."[16] In failing to apply a strict test of necessity and proportionality, or indeed any such test, the lower court's ruling clearly runs afoul of the United States' treaty obligations.

There are three main regional systems that address human rights – the Organization of American States (OAS, of which the US is a member), the Council of Europe (comprised of the 27 members states of the European Union, plus Russia and another 19 countries), and the African Union (AU, comprised of all 55 African countries). The treaties of each of these regional systems recognize a right of access to information held by public authorities and impose similar requirements

[15] UN Human Rights Committee, *General Comment No. 34 on Article 19* ("General Comment No. 34"), ¶¶ 7, 18, 22, UN Doc. CCPR/C/GC/34 (Sept. 12, 2011), https://bit.ly/2WQCdXv. The SRs on freedom of expression of the UN, the ACHPR, and the OAS, and the Representative on Freedom of the Media of the OSCE have also repeatedly affirmed that freedom of expression includes the right to information held by public bodies. *See, e.g.*, Joint Declaration on Freedom of Expression (May 4, 2015), https://bit.ly/3jxYdQC.

[16] General Comment No. 34 ¶ 30.

for restricting that right.[17] The organs of the intergovernmental organizations responsible for interpreting the obligations imposed by these provisions – the courts and human rights commissions – have done so in language similar to, but often more detailed than, that of the General Comment on Article 19.[18] Of particular relevance are the Model Laws on RTI of the AU and the OAS, and the Convention on Access to Official Documents of the Council of Europe.[19]

Recognizing the challenges that courts face in evaluating claims by governments of the need for national security secrecy, 22 international and regional NGOs and academic institutions set out to develop principles that would synthesize the rapidly growing number of relevant statements of international law, authoritative interpretations, and national best practices. After two years of

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[17] American Convention on Human Rights, 1969, Art. 13(1). European Convention on Human Rights, 1950, Art. 10(1). African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, Art. 9.

[18] *See, e.g.*, Inter-American Court on Human Rights, *Claude Reyes v. Chile*, 19 Sept. 2006, ¶ 77. European Court of Human Rights (Grand Chamber) *Gillberg v. Sweden*, 3 April 2012, ¶ 82.

[19] Council of Europe, Convention on Access to Official Documents, Treaty Series No. 205, adopted Nov. 27, 2008, https://bit.ly/2OUZ5ke; Model Inter-American Law on Access to Information, adopted by the Organization of American States 8 June 2010, AG/Res. 2607 (XL-O/10) ("Model Inter-American Law"), https://bit.ly/32MMNTn; Model Law on Access to Information for Africa, adopted by the African Commission on Human and Peoples' Rights at 12, https://bit.ly/3eWgwvv (member states are obliged to make efforts "to ensure that in the process of adopting or reviewing national legislation on access to information, the principles and objectives of the Model Law are observed to the utmost").

consultations held around the world with more than 500 security professionals, government officials, judges, law professors and other experts, in June 2013, the authors issued the Global Principles on National Security and the Right to Information (called the "Tshwane Principles," after the province in South Africa where they were finalized). *See Global Principles on National Security and the Right to Information*, Introduction, https://bit.ly/32CpSdb.

The Principles have been endorsed by both of the relevant SRs of the UN – on freedom of expression and counterterrorism measures – as well as the freedom of expression SRs of the OAS and AU, and the Special Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe ("OSCE"). The Principles have been cited by the European Union Parliament, various bodies of the UN, OAS, and Council of Europe, academics, NGOs, and multi-stakeholder initiatives such as the Open Government Partnership.[20]

The Tshwane Principles recognize "that states can have a legitimate interest in withholding certain information, including on grounds of national security," and in securing "effective intelligence sharing among states, as called for by UN

[20] *See also, e.g.*, European Parliament Resolution of 12 March 2014 (2013/2188(INI)) ¶¶ 77, 89, https://bit.ly/2CBhekg; UN Special Rapporteur on Freedom of Expression, *Promotion and protection of the right to freedom of opinion and expression*, ¶ 44, UN Doc. A/70/361 (Sept. 8, 2015) ("the principles and their detailed explanatory discussions deserve widespread study and implementation), https://bit.ly/2B0GLmq.

Security Council Resolution 1373." *Id*., preambular ¶¶ 2 and 10. Indeed, Principle 9 lists in considerable detail the categories of information that states legitimately may withhold from the public on national security grounds.

However, the Principles also affirm the imperative that people must have some access to information that relates to national security "to be able to monitor the conduct of their government and to participate fully in a democratic society." *Id.*, preambular ¶ 3. A government's "over-invocation of national security concerns" to justify nondisclosure, and undue deference to such claims by the courts, risk "undermin[ing] the main institutional safeguards against government abuse: independence of the courts, the rule of law, legislative oversight, media freedom, and open government." *Id.* Moreover, public disclosure of certain national security information will do more to promote than impede the protection of legitimate national security interests. *Id.*, Intro.

The fifty Tshwane Principles address a range of issues, including the categories of national security information that are of especially high public interest and thus presumptively should be disclosed, the proper classification and declassification of information, the handling of requests for information, judicial review, and treatment of "public interest disclosures." Upholding *Glomar* responses on the paper-thin declarations of the appellees would be inconsistent with several core Tshwane Principles.

Principle 3 sets the basic standard for limits on disclosure of national security information:

> No restriction on the right to information on national security grounds may be imposed unless the government can demonstrate that: (1) the restriction (a) is prescribed by law and (b) is necessary in a democratic society (c) to protect a legitimate national security interest; and (2) the law provides for adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts.

Id., Principle 3. This Principle is anchored in fundamental principles of international human rights law.[21] A restriction is "necessary in a democratic society" if, among other things, disclosure poses "a real and identifiable risk of significant harm to a legitimate national security interest" that "outweigh[s] the overall public interest in disclosure." *Id.*[22]

[21] Principle 3(b)(i), (ii), and (iii); *see also* ICCPR Art. 19(3); General Comment No. 34 ¶¶ 22, 34; European Court of Human Rights, *Sunday Times v. United Kingdom*, ECtHR, 26 April 1979, ¶ 49; UN Human Rights Committee, *LJM de G v. Netherlands*, October 1995, App. No. 578/1994; Inter-American Court of Human Rights, *Claude Reyes v. Chile*, IACtHR, 9 September 2006, ¶¶ 89-91.

[22] *See also* Model Inter-American Law, sec. 41(b)(2) (public authorities may deny access on national security ground only when allowing access would "create a clear, probable and specific risk of substantial harm"); Africa Model Law, sec. 30 (a public authority may refuse to disclose information on national security grounds only where to do so would cause "substantial prejudice to the security or defense of the state" as narrowly defined by statute).

A *Glomar* response on the facts here would run afoul of this principle, as appellees have neither put forth a "real and identifiable risk of significant harm to a legitimate national security interest" nor shown that any such risk outweighs the public interest in disclosure. The notion that merely acknowledging the existence or non-existence of responsive records would undermine national security or disclose intelligence sources and methods strains credulity. To say that responsive records exist—*i.e.*, that the agency possesses records relating to the duty to warn Mr. Khashoggi—does not reveal that the United States had any actionable intelligence about threats to him, much less the substance of that intelligence or where it came from. *See, e.g.* CPJ Br. at 52-53 (noting the possibility that "information about threats to Mr. Khashoggi's life could have come into the CIA as a tip or direct report").

Principles 4 and 19 separately speak to the nature of the burden that should be placed upon a public authority seeking to withhold information on national security grounds. Under Principle 4, the public authority does not discharge its burden by "simply . . . assert[ing] that there is a risk of harm;" it must "provide specific, substantive reasons to support its assertions."[23] Tshwane Principle 4.

[23] For relevant case-law, see, e.g., *Right to Know v. Minister of Police*, South Africa, South Gauteng High Court, 3 Dec 2014 ¶ 36 (under South Africa's RTI law, the party that refuses to grant access to information on the ground of national security "must adduce evidence that … disclosure could reasonably be expected to endanger anyone, or was likely to prejudice or impair any security measure of a

Principle 19, in turn, addresses specifically a public authority's duty to confirm or deny the existence of responsive records. To the extent a state allows, "in extraordinary circumstances," a public authority to decline to acknowledge the existence or non-existence of particular information, the authority must show that responding otherwise "would pose a risk of harm to a distinct information category designated in a national law or regulation as requiring such exceptional treatment." Tshwane Principle 19.

Appellees' *Glomar* responses clearly violate both Principles 4 and 19. The declarations on which the District Court relied lack the "specific, substantive reasons to support [the] assertions" of dire harm to national security or intelligence sources and methods, particularly given the State Department's repeated, public, and "definitive[]" representations that the United States lacked any "advance knowledge" of Mr. Khashoggi's disappearance. *See* CPJ Br. at 14-15. This is not an "extraordinary circumstance[]" that warrants the invocation of a *Glomar* response.

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building or a person, or … disclosure 'could reasonably be expected to cause prejudice' to the state's security."), https://bit.ly/2WU2155; *Zoya Dimitrova vs. the President of Bulgaria*, Supreme Administrative Court, Fifth Division, Case No. 4596/2005 SAC, 3 Jan 2006 (President's Chief of Staff must disclose report by National Security Services where the refusal letter lacked evidence as to why the requested information was secret, and the trial court had not made an independent determination about the secret classification. Any possible harm from disclosure could be eliminated by granting partial access to the requested information.), https://bit.ly/2WU7sRz.

Finally, Principle 5 provides that no public authority, including "intelligence agencies," can be "exempted from disclosure requirements," and that an authority may not withhold information on national security grounds "simply on the basis that it was generated by, or shared with, a foreign state or inter-governmental body, or a particular public authority or unit within an authority." Tshwane Principle 5.[24] The effect of upholding *Glomar* responses without the specific factual showing of grave harm would effectively allow appellees to "exempt[] [themselves] from disclosure requirements," in violation of Principle 19. On the facts presented, no proper basis exists for a refusal to acknowledge the existence or non-existence of records. As CPJ observed, to do so does not itself disclose information that can be expected to damage national security or reveal sources or methods. CPJ Br. at 49-51.

While this Court is not bound by the Tshwane Principles, the U.S. government does have a treaty obligation to comply with the ICCPR. The IC agencies, in rendering *Glomar* responses, and the lower court, violated Article 19 of that treaty by failing to apply a proportionality test. They also disregarded the "strict test of necessity and proportionality" set forth in the UN's authoritative General Comment and the Tshwane Principles. Ruling for appellees would put the

[24] *See* Model Inter-American Law, secs. 1(e), 2, 3, 41(b); Model Law for Africa, secs. 1 (definition of a public body), 2(a), 3(a), 31.

United States out of step with global standards and with the international recognition of RTI that this country first helped to foster. *See* Mendel, *The Fifieth Anniversary of FOIA*, 21 Comm. L. & Pol'y at 490.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand the judgment of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because it contains 6,482 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ David A. Schulz
David A. Schulz

Dated: July 28, 2020