[ORAL ARGUMENT NOT SCHEDULED]

No. 20-5045

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

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiff,

COMMITTEE TO PROTECT JOURNALISTS,

Plaintiff-Appellant,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

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GLOSSARY

ACLU	American Civil Liberties Union
CIA	Central Intelligence Agency
CPJ	Committee to Protect Journalists
DEA	Drug Enforcement Administration
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
NSA	National Security Agency
ODNI	Office of the Director of National Intelligence

INTRODUCTION

This case arises from Freedom of Information Act (FOIA) requests by the Committee to Protect Journalists (CPJ) for records about murdered journalist Jamal Khashoggi from the Office of the Director of National Intelligence, the National Security Agency, the Central Intelligence Agency, and the Federal Bureau of Investigation (the Agencies). CPJ sought records about Khashoggi and Intelligence Community Directive 191, which sets a policy for deciding when to warn individuals about threats of imminent harm.

The district court correctly upheld the Agencies' *Glomar* responses. The Agencies create records pursuant to the Directive only when they receive credible and specific intelligence that an individual may be in imminent danger. As the Agencies' detailed declarations explain, confirming or denying the existence of records here thus would disclose whether or not they have an intelligence interest in, and the intelligence capability to learn about in advance of an attack, Jamal Khashoggi or the people who may have been involved in murdering him. FOIA Exemption 1 shields information that "pertains to" "intelligence" matters, Exec. Order No. 13,526, § 1.1(a)(4), 1.4, 75 Fed. Reg. 707, 707-08 (Dec. 29, 2009); *see* 5 U.S.C. § 552(b)(1), and FOIA Exemption 3 shields "intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1); *see* 5 U.S.C. § 552(b)(3). There can be no serious doubt that a records request premised on discovering intelligence information from intelligence agencies falls under both exemptions.

CPJ agrees (Br. 40) that if the Agencies had denied the existence of records, that response would have revealed intelligence gaps. CPJ nonetheless insists that the Agencies' declarations do not adequately describe why *confirming* the existence of responsive records would implicate intelligence sources and methods, hypothesizing that (for example) employees might have exchanged news articles about Khashoggi. But the Agencies need only provide a "logical or plausible" justification for invoking FOIA exemptions, and their declarations are owed "*substantial weight*." *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (quotations omitted). Their declarations need not anticipate or exclude whatever scenarios CPJ imagines. The Agencies described the consequences and potential national security costs of confirming or denying the existence of responsive records here with as much particularity as public documents allow. That is all that FOIA requires.

CPJ fares no better in arguing that the Agencies waived any *Glomar* response by officially acknowledging the non-existence of responsive records. CPJ rests entirely remarks by the State Department during a press briefing, where the spokesperson said, "although I cannot comment on intelligence matters, I can say definitively the United States had no advanced knowledge of Jamal Khashoggi's disappearance." JA345 (quoting Office of the Spokesperson, U.S. Dep't of State, *Department Press Briefing* (Oct. 10, 2018), https://www.state.gov/briefings/department-press-briefing-october-10-2018/). But the State Department's refusal to "comment on intelligence matters," *ibid.*, does not compel the Agencies to disclose information on intelligence

matters—which CPJ concedes is what it seeks. CPJ Br. 40. Moreover, the State Department is a separate agency with no supervisory authority over the Agencies here; under this Court's longstanding precedent, the State Department's remarks thus could not bind the Agencies to waive FOIA's exemptions in any event.

STATEMENT OF JURISDICTION

CPJ invoked the district court's jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. JA12. The district court granted summary judgment to the Agencies on January 6, 2020. JA339-51. CPJ filed a timely notice of appeal on March 4, 2020. JA353. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Agencies' detailed declarations provide a "logical or plausible" justification for refusing to confirm or deny the existence of records that would tend to disclose whether or not the Agencies have an intelligence interest in, or the intelligence capability to learn about in advance of an attack, Jamal Khashoggi or the people who may have been involved in murdering him.
2. Whether a State Department representative who disclaimed any "comment on intelligence matters" officially acknowledged the non-existence of records on intelligence matters on behalf of the Agencies.

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

1. FOIA disclosure and exemptions

The Freedom of Information Act provides a mechanism by which the public may request access to agency records. 5 U.S.C. § 552(a)(3)(A). The Supreme Court has explained, however, that "public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). Because Congress recognized that "the harms of disclosure may in some cases outweigh its benefits," *August v. FBI*, 328 F.3d 697, 699 (D.C. Cir. 2003), FOIA carves out certain exemptions that protect "legitimate governmental and private interests" that could be damaged by releasing information. *Ibid.* (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)). Courts must afford FOIA's exemptions "meaningful reach and application," *John Doe Agency*, 493 U.S. at 152, to respect Congress's effort to strike a "workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure." *Id.* at 157.

Two exemptions are particularly relevant here: Exemption 1 and Exemption 3. 5 U.S.C. § 552(b)(1), (b)(3).

Under Exemption 1, FOIA's disclosure provisions do not apply to classified matters—that is, matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive order."

5 U.S.C. § 552(b)(1). Executive Order 13,526 currently governs classification of national security information. *See* 75 Fed. Reg. 707 (Dec. 29, 2009). Courts afford "*substantial weight*" to "agency assertions of potential harm" that justify withholding information under Exemption 1. *Wolf v. CIA*, 473 F.3d 370, 374-76 (D.C. Cir. 2007).

Under Exemption 3, FOIA does not apply to matters that are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Three statutes are relevant here. The National Security Act of 1947, as amended, provides that the Director of National Intelligence "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). Section 6 of the National Security Agency Act of 1959 provides that "nothing in * * * any other law * * * shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof." 50 U.S.C. § 3605(a). Finally, 18 U.S.C. § 798 prohibits the unauthorized disclosure of classified information "concerning the communication intelligence activities of the United States" or "obtained by the processes of communication intelligence from the communications of any foreign government." *Id.* § 798(a)(3)-(4). All these statutes exempt covered matters from disclosure under Exemption 3. *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011) (National Security Act of 1947); *Larson v. Dep't of State*, 565 F.3d 857, 868-69 (D.C. Cir. 2009) (National Security Agency Act of 1959 and 18 U.S.C. § 798). Courts afford "even greater deference" to agency declarations invoking Exemption 3. *Wolf*, 473 F.3d at 377; *Sims*, 471 U.S. at 168-69.

2. *Glomar* responses

Generally, when an agency receives a FOIA request, it must conduct a reasonable search for responsive agency records, acknowledge the existence or non-existence of any responsive records found in the search, produce the non-exempt portions of any responsive records, and provide an explanation of why any responsive records were withheld under applicable FOIA exemptions. *See ACLU v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013). In certain circumstances, however, as this Court has recognized, confirming or denying whether the agency has any responsive records may itself reveal information that is protected from public disclosure under an applicable FOIA exemption. In those circumstances, an agency may properly refuse to confirm or deny whether it has any records responsive to the FOIA request. Neither confirming nor denying the existence of responsive records is generally referred to as a *Glomar* response, after a seminal case in which the CIA declined to acknowledge whether or not it had records about a ship called the *Glomar Explorer*. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). In reviewing a *Glomar* response, "courts apply the general exemption review standards established in non-*Glomar* cases." *ACLU v. CIA*, 710 F.3d at 426 (quotations omitted).

3. Official acknowledgments

Courts have also developed a line of cases holding that "when an agency has officially acknowledged," through "prior disclosure," information that is "otherwise exempt" from disclosure under FOIA, "the agency has waived its right to claim an

exemption with respect to that information." *ACLU v. CIA*, 710 F.3d at 426. This Court applies a "strict" test to assess whether information has been officially disclosed by the defendant agency. *Moore v. CIA*, 666 F.3d 1330, 1333 (D.C. Cir. 2011) (quotation omitted). "To be officially disclosed: (1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure." *Ibid.* (quotations omitted). This Court "insist[s] on exactitude" when comparing "the *specific* information sought by the plaintiff" and the alleged official disclosure, to protect "the Government's vital interest in information relating to national security and foreign affairs." *Wolf*, 473 F.3d at 378 (quotations omitted). Plaintiffs must also demonstrate that the defendant agency itself officially acknowledged the existence of the responsive records. *See Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999). Courts "do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought." *Ibid.*

B. Factual Background and Prior Proceedings

1. Intelligence Community Directive 191

Intelligence Community Directive 191 was issued by the Director of National Intelligence and applies to the Agencies here. It sets out "a consistent, coordinated approach" for how the Agencies "will provide warning regarding threats to specific individuals or groups of intentional killing, serious bodily injury, and kidnapping."

Intelligence Community Directive (ICD)-191, § B.1 (July 21, 2015). This approach is a matter of "policy": the Directive explicitly "is not intended to, and does not create any right or benefit, substantive or procedural, enforceable at law or in equity." *Id.* § B.2.

Under the Directive, an intelligence agency that "collects or acquires credible and specific information indicating an impending threat of intentional killing, serious bodily injury, or kidnapping directed at a person * * * shall have a duty to warn the intended victim or those responsible for protecting the intended victim, as appropriate." ICD-191, § E. Each agency establishes its own internal procedures for implementing this policy, *id.* § F.1., which must "include a provision whereby the duty to warn may be waived" and also "include all justifications" for waiver that are "appropriate." *Id.* § F.3. "[A]ppropriate justifications that should be included" in an agency's procedures are, for example, that "[a]ny attempt to warn the intended victim would unduly endanger U.S. government personnel, sources, methods, intelligence operations, or defense operations," *id.* § F.3.d., or "the personnel, sources, methods, intelligence operations, or defense operations" of foreign governments "with whom the U.S. has formal agreements or liaison relationships." *Id.* § F.3.e.

The Directive provides that agencies "shall document and maintain records" on specific so-called "duty to warn actions," including "[t]he method, means, and substance of any warning given" and "[j]ustifications not to warn an intended victim based on waiver criteria." ICD-191, § F.13.a.c. If disputes arise about "a determination to warn an intended victim or waive the duty to warn requirement, or

regarding the method for communicating the threat information to the intended victim," the issue may be elevated to agency heads for resolution, with the help and oversight of the Director of National Intelligence. *Id.* §§ G, H.

2. The FOIA requests

On November 20, 2018, CPJ submitted FOIA requests to the Office of the Director of National Intelligence, the National Security Agency, the Central Intelligence Agency, and the Federal Bureau of Investigation.[1] The requests sought records about whether the Agencies knew in advance of a threat to Jamal Khashoggi. CPJ sought:

> (1) All procedures or guidance for determining whether to warn, or for delivering a warning to, an intended victim or those responsible for protecting the intended victim, pursuant to Directive 191;
>
> (2) All records concerning the duty to warn under Directive 191 as it relates to Jamal Khashoggi, including any records relating to duty to warn actions taken with respect to him; [and]
>
> (3) All records concerning any "issue arising among [the Agencies]" regarding a determination to warn Jamal Khashoggi or waive the duty to warn requirement, or regarding the method of communicating threat information to him. *See* Directive 191, § G.1.

JA13-14 (reproducing the FOIA requests).[2]

---

[1] CPJ's requests took the form of a cover letter that attached FOIA requests submitted by another organization, the Knight First Amendment Institute at Columbia University. JA13. Both also submitted identical requests to the State Department. *Ibid.* After all the recipient agencies responded, the Knight First Amendment Institute abandoned the litigation, and CPJ voluntarily dismissed the State Department as a defendant. *See* JA342 (recounting this history).

[2] The Agencies' disclosures of records in the first category are not at issue.

CPJ requested a fourth category of documents only from the Office of the Director of National Intelligence:

> (4) All records relating to any dispute referred to the [O]DNI regarding a determination to warn Jamal Khashoggi or waive the duty to warn requirement, or regarding the method for communicating threat information to him. *See* Directive 191, § G.2.

Ibid.; *see also* JA75-79 (FOIA request to ODNI).

3. The State Department's press briefing

Shortly before CPJ submitted its FOIA requests, a State Department spokesperson offered the following responses to press questions at a public briefing:

> QUESTION: Let's start with the whole situation in Turkey with Mr. Khashoggi and the Saudis. We've all seen, I think – at least most of us have seen the White House statement about the calls that went out, which you're more than welcome to repeat if you want, but I want to ask you about a specific line in one report about this that said that the U.S. had intelligence, overheard or intercepted communications, suggesting that there was a threat to Mr. Khashoggi should he go. Is that correct?
>
> [RESPONSE:] * * * As to your specific question regarding intelligence, I would say that although I cannot comment on intelligence matters, I can say definitively the United States had no advanced knowledge of Jamal Khashoggi's disappearance.
>
> QUESTION: Well, okay, that's a bit different than – I mean, did you have any advance knowledge that there might be some kind of threat to him should he go into the consulate in Istanbul?
>
> [RESPONSE:] We had no advanced knowledge.
>
> QUESTION: Okay. If you had had – based on that report that you did have knowledge, there was a lot of talk about how the administration, if it did have such information, would have been required to have warned him – Mr. Khashoggi – about that. * * *.

> [RESPONSE:] What I would say is we've seen the report; and although I can't go into intelligence matters, I can definitively say that we had no knowledge in advance of Mr. Khashoggi's disappearance.

Office of the Spokesperson, U.S. Dep't of State, *Department Press Briefing* (Oct. 10, 2018), https://www.state.gov/briefings/department-press-briefing-october-10-2018/.

4. The Agencies' *Glomar* responses

On January 17, 2019, before the Agencies responded substantively to the FOIA requests, CPJ sued in district court to compel the Agencies to release records.[3] The parties negotiated a production schedule and, as relevant here, the Agencies issued *Glomar* responses to CPJ's requests for the second, third, and fourth categories of documents, and declined pursuant to FOIA Exemptions 1 and 3 to confirm or deny the existence of responsive records.

The Agencies submitted detailed declarations justifying their *Glomar* responses. For example, in describing why confirming the existence of "duty to warn" records here could alert adversaries to the Agencies' intelligence activities, ODNI explained that if an individual surveilled by one of the Agencies had discussed harming Khashoggi while employing "a particular method of communication" "during a specific period of time," then a disclosure that responsive records exist could allow the surveillance target to infer the manner by which the Agencies gathered

[3] CPJ joined the suit through an amendment to the Knight First Amendment Institute's complaint, which was filed on November 20, 2018. *Compare* Compl., ECF No. 1, Dkt. No. 18-2709 (D.D.C.), *with* First Am. Compl., ECF No. 16.

information. JA70. The other agencies articulated similar concerns. The CIA explained that disclosing the existence of responsive records could reveal "targets of intelligence collection at a given point in time" and "sources, capabilities, resources, and/or relationships with domestic or foreign entities." JA125. NSA explained that disclosing the existence of responsive records would "tend to reveal information relating to NSA's SIGINT [Signals Intelligence] collections activities, sources, and methods." JA92. And the FBI explained that confirming or denying the existence of records about a duty to warn here would implicate "prerequisite intelligence related to the threat to Mr. Khashoggi in the time period directly preceding his death," which could, in turn, reveal the FBI's "specific intelligence interests and collection capabilities." JA159.

As the declarations also described—and CPJ itself urges—denying the existence of responsive records would reveal a "blind spot in the U.S. Government's intelligence acquisition." JA124-25; *accord* CPJ Br. 40 (arguing that for the Agencies "to admit that they have no responsive documents would be to admit a serious failure of intelligence, in that the [Agencies] did not detect a grave threat to a prominent U.S.-based Saudi dissident"). The Agencies explained that this is because "confirming the non-existence of classified records identifies an area in which [the Agencies] may lack interest in particular individuals, entities, or subjects, or an inability to obtain information on the individuals or entities of interest, and potentially confirms the success of any evasive techniques," JA69-70, and reveals "intelligence collection

priorities." JA92. These concerns are not abstract: as the FBI explained, "[i]nformation about the gaps in the [Agencies'] intelligence interests and collection capabilities is of great interest to the U.S. Government's adversaries, who can use such information to, for example, exploit tactics they have used in successfully avoiding detection." JA159; *see, e.g.*, JA125-26 (affirming this concern).

The Agencies' declarations also explained that protecting intelligence sources and methods requires the Agencies to respond consistently to all similar FOIA requests. For example, if the Agencies were inconsistent in invoking *Glomar* in response to requests about the application of the Directive to specific individuals—perhaps denying outright the existence of records in some cases, but asserting *Glomar* in others—adversaries would infer that a *Glomar* response was effectively an admission that pertinent records exist. As the FBI explained, terrorist groups and foreign spies have the capability to "gather information from myriad sources, analyze it, and deduce means and methods from disparate details." JA158. For this reason, "even seemingly innocuous, indirect references" to intelligence gathering "could have significant adverse effects when juxtaposed with other publicly-available data." *Ibid.* The other Agencies articulated similar concerns. *See* JA70-71, 93-94, 125-26.

Finally, the Agencies' declarations explained that protecting intelligence activities, sources, and methods through the *Glomar* responses here is critical to national security. JA71 (reviewing the complaint and affirming ODNI's "assessment regarding the harm to national security that would result if ODNI confirmed the

existence of non-existence of records" here); *see also* JA94 (same); JA126-27 (same); JA159 (same). Failing to safeguard such information could allow adversaries to adopt "countermeasures to nullify the effectiveness" of intelligence-gathering methods and sources. JA70-71; *see also* JA159 (same), JA86 (same), JA124-25 (same). Degraded intelligence capabilities could affect a diverse range of sensitive national security matters—including military operations, "threat warnings and readiness," "arms proliferation," "terrorism," and international drug trafficking. JA86-87. Unauthorized disclosure of sensitive information could also hurt relationships with foreign countries and make American personnel overseas targets for "terrorists and foreign intelligence services." JA115. The Agencies' ability to warn individuals of imminent threats also depends on protecting intelligence sources and methods, and thereby preserving opportunities to learn about threats in the first instance. *See, e.g.*, JA157 (explaining that intelligence sources and methods generate information that the Agencies need "to carry out their missions").

5. The district court proceedings

The district court granted summary judgment to the Agencies, reasoning that that the declarations justified the Agencies' *Glomar* responses, and that they had not waived *Glomar* responses through any prior official acknowledgment. JA339-51.

The district court examined each of the Agencies' declarations and determined that they provided "ample support" for their *Glomar* responses. JA349-51. Applying this Court's longstanding precedent, the district court ruled that the Agencies'

assessments of "the untoward consequences that could ensue" by confirming or denying the existence of responsive records here were entitled to "substantial weight." JA350 (quotations omitted). The court declined to "undercut" this deference, JA351, by second-guessing the Agencies' "persuasive[] show[ing]" about "just how much is at stake to protect national security" in this case. JA349. "[T]he law compels and reason dictates" that "the surest way to preserve the means and methods of intelligence collection against tomorrow's threats is to preserve them today." JA351.

The district court also rejected CPJ's assertion that the State Department's remarks constituted an "official acknowledgment" about responsive records that waived the Agencies' ability to issue *Glomar* responses. JA345-49. The court explained that "there is a substantial difference between the State Department's general press statement" and "confirmation (or denial) that the [Agencies] had (or did not have) 'credible and specific information indicating an impending threat' to Khashoggi that would trigger the duty to warn." JA348 (quoting ICD-191, § ¶ E.1.). "Indeed," the court noted, "the State spokesperson qualified his statement to protect these same intelligence interests." *Ibid.*

Moreover, the district court explained, this Court's cases make clear that statements "made by someone other than the agency from which the information is being sought" do not constitute an "official" disclosure of the requested information. JA345-46 (quotations omitted). The district court observed that in *Frugone v. CIA*, 169 F.3d 772 (D.C. Cir. 1999), this Court rejected claims that the CIA had officially

disclosed an individual's status as a CIA employee because the Office of Personnel Management had informed the individual that his benefits records were "maintained by the CIA." *Id.* at 773; JA345-46. So too here, the district court reasoned, the State Department is "no more able to speak about intelligence matters on behalf of the entire United States Government, than OPM could speak for the CIA. Less so, arguably, given that OPM has some supervisory duties over executive agencies," while the State Department does not supervise the Agencies here. JA346 (quotations omitted). As for CPJ's reliance on the fact that the State Department and the Agencies are all part of the Intelligence Community, this argument "is just a reformulation of the claim that one executive agency can speak for another one." JA347.

SUMMARY OF ARGUMENT

The district court correctly upheld the Agencies' *Glomar* responses.

A. The Agencies invoked Exemption 1 to protect classified information from unauthorized disclosure, 5 U.S.C. § 552(b)(1); *see* Exec. Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009), and their supporting declarations are entitled to "*substantial weight*." *Wolf v. CIA*, 473 F.3d 370, 374-76 (D.C. Cir. 2007). The Agencies' *Glomar* responses here safeguard a currently and properly classified fact—"namely, whether the duty to warn was implicated in connection with Jamal Khashoggi." JA124. As the declarations explain, the duty to warn is implicated as to a particular person only when one of the Agencies has relevant intelligence information in advance of a threat to that individual. ICD-191, § E; *see, e.g.*, JA69-70, 92, 124-25, 157, 159. Thus,

acknowledging the existence of records concerning the duty to warn, as it relates to a particular person, would necessarily confirm the existence of intelligence information about the individual at a particular time, thus tending to reveal the Agencies' intelligence interests, sources, and methods. *See, e.g.*, JA69-70, 92-93, 124-25, 159. Conversely, denying that records exist could expose a lack of such intelligence information, tending to reveal, for example, either a lack of intelligence interest in particular individuals or collection gaps against certain targets. *See, e.g.*, JA69-70, 92, 124-26, 159. As the Agencies explained, either disclosure risks harming national security. *See, e.g.*, JA70-71, 86-87, 115, 124-25, 157, 159. "Mindful that courts have little expertise in" intelligence matters, the district court correctly reasoned that it was "in no position to dismiss" such "facially reasonable concerns." *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999); *see* JA349-51.

The Agencies' *Glomar* responses are also independently justified under Exemption 3. 5 U.S.C. § 552(b)(3). As the Agencies' declarations explain, confirming or denying the existence of responsive records would necessarily implicate sources and methods of intelligence gathering, which are protected from unauthorized disclosure by the National Security Act of 1947, 50 U.S.C. § 3024(i)(1). *See* JA72, 95-98, 126, 161. Because confirming or denying the existence of responsive records would also necessarily implicate NSA's functions and activities, including its communications intelligence activities, NSA's *Glomar* response is also independently justified by the National Security Agency Act of 1959 and 18 U.S.C. § 798, which

criminalizes knowingly and willfully disclosing classified communications intelligence information to an unauthorized person. JA95-98.

CPJ does not dispute that its records request implicates intelligence matters, and CPJ concedes that denying the existence of responsive records would reveal intelligence information. CPJ Br. 40 (arguing that for the Agencies "to admit that they have no responsive documents would be to admit a serious failure of intelligence, in that the [Agencies] did not detect a grave threat to a prominent U.S.-based Saudi dissident"). CPJ instead urges (Br. 35-57) that the Agencies' declarations do not adequately describe why *confirming* the existence of responsive records would tend to reveal intelligence matters, and suggests (based purely on CPJ's own speculation) that it would not. But *Glomar* responses are justified so long as the agency's reasons for invoking an exemption "appear[] logical or plausible," *Wolf*, 473 F.3d at 374-75 (quotations omitted); this deferential standard does not require agencies to anticipate and exclude a FOIA requester's conjecture. Further, in national security cases, "more detailed information itself may compromise intelligence methods and sources." *Military Audit Project v. Casey*, 656 F.2d 724, 751 (D.C. Cir. 1981). The Agencies' declarations here describe the consequences and potential national security costs of confirming or denying the existence of responsive records with as much particularity as public documents allow, and in at least as much detail as the agency declarations supporting other *Glomar* responses that this Court has previously upheld. *See, e.g.*,

Freedom Watch, Inc. v. NSA, 783 F.3d 1340 (D.C. Cir. 2015); *Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007). There is no basis for a different outcome here.

B. CPJ further argues (Br. 27-35) the Agencies should be compelled to disclose the existence or non-existence of records based on State Department press remarks expressly declining to "comment on intelligence matters." *See supra* pp. 10-11. As the district court rightly recognized, that argument does not come close to clearing the "high hurdle" that this Court has imposed for plaintiffs who assert that an agency's official acknowledgement forces it to reveal otherwise-protected information. *Public Citizen v. Dep't of State*, 11 F.3d 198, 203 (D.C. Cir. 1993); *see* JA345-49.

Under this Court's long-established precedent, CPJ bears the burden to show that the State Department made public the "specific" information that CPJ requested. *See, e.g.*, *Wolf*, 473 F.3d at 378. It defies logic to characterize the State Department's repeated refusal to comment on "intelligence matters" as disclosing anything about the specific information protected by the Agencies' *Glomar* responses: the existence or non-existence of intelligence information, in advance of the attack on Jamal Khashoggi, about a potential threat to his life or the people who may have been involved in his murder. Rather than engage this point, CPJ elides it.

In any event, the State Department cannot waive *Glomar* responses on behalf of the Agencies. This Court has repeatedly insisted that it will "not deem 'official' a disclosure made by someone other than the agency from which the information is being sought." *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999); *Mobley v. CIA*, 806

F.3d 568, 583 (D.C. Cir. 2015). Only when statements are made by the authorized representative of an entity with plenary supervisory authority over an agency will this Court deem the statements attributable to that agency. *See, e.g.*, *Marino v. DEA*, 685 F.3d 1076, 1082 (D.C. Cir. 2012); *ACLU v. CIA*, 710 F.3d 422, 428-32 & n.7 (D.C. Cir. 2013). CPJ does not dispute that the State Department is a separate agency with no supervisory authority over the Agencies. For each of these independent reasons, the State Department did not override the applicable FOIA exemptions and compel the disclosure of classified and statutorily-protected national security information.

STANDARD OF REVIEW

This Court reviews *de novo* the Agencies' invocation of FOIA Exemptions 1 and 3, "accord[ing] *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record." *Wolf v. CIA*, 473 F.3d 370, 374-76 (D.C. Cir. 2007). It also reviews *de novo* whether official acknowledgments defeat otherwise-applicable FOIA exemptions. *ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013).

ARGUMENT

THE DISTRICT COURT CORRECTLY UPHELD THE AGENCIES' *GLOMAR* RESPONSES UNDER FOIA EXEMPTIONS 1 AND 3

The district court correctly concluded that the Agencies' detailed declarations "persuasively show just how much is at stake to protect national security" in this case, and thus "ampl[y]" justify their *Glomar* responses. JA349-51. The court also properly declined to require disclosure of protected intelligence information on the basis of a

"general press statement" by a different and co-equal agency that expressly disclaimed any comment on intelligence matters. JA348. The judgment should be affirmed.

A. The Agencies' Declarations Amply Satisfy the Deferential Standard for Invoking Exemptions 1 and 3.

The district court properly granted summary judgment to the Agencies. *Glomar* responses are justified so long as the agency's reasons for invoking an exemption "appear[] logical or plausible." *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (quotations omitted). Courts "must accord *substantial weight*" to an agency's rationale for refusing to confirm or deny the existence of responsive records. *ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013) (quotations omitted). This deferential standard reflects the "magnitude of the national security interests and potential risks at stake" when agencies are asked to disclose sensitive national security information. *Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) (quotations omitted). Such risks are best addressed by national security professionals who are positioned to see "the whole picture" and "weigh the variety of complex and subtle factors" that militate against disclosure. *CIA v. Sims*, 471 U.S. 159, 179-80 (1985). Particularly measured against this deferential standard, the Agencies provided "ample support" for their *Glomar* responses. JA351.

1. The Agencies' *Glomar* responses are justified under Exemption 1 because the existence or non-existence of responsive records is a currently and properly classified fact.

The Agencies properly invoked Exemption 1 and issued *Glomar* responses to safeguard a currently and properly classified fact—"namely, whether the duty to warn was implicated in connection with Jamal Khashoggi." JA124. As their declarations explain, this fact "pertains to" intelligence activities, sources, or methods; confirming or denying the existence of responsive records would reveal it; and its unauthorized disclosure could damage national security. Exec. Order No. 13,526, § 1.1(a)(4), 1.4(c), 75 Fed. Reg. at 707-08; JA66-71, 90-94, 123-26, 156-60.

a. i. FOIA Exemption 1 shields information that is classified "under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1). Executive Order 13,526 specifies that information "pertain[ing] to * * * intelligence activities (including covert action), intelligence sources, or methods, or cryptology," Exec. Order No. 13,526, § 1.4(c), 75 Fed. Reg. at 708, is properly classified where "unauthorized disclosure of the information reasonably could be expected to result in damage to national security." *Id.* § 1.1(a)(4), 75 Fed. Reg. at 707. The Order also authorizes an agency to "refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified." *Id.* § 3.6(a), 75 Fed. Reg. at 719.

Here, the existence or non-existence of responsive records "pertains to" "intelligence activities (including covert action), intelligence sources or methods." Exec. Order No. 13,526, § 1.4(c), 75 Fed. Reg. at 708. As explained above, Intelligence Community Directive 191 establishes a policy for how the Agencies will provide warning of threats of intentional killing, serious bodily injury, and kidnapping to specific individuals. The Directive provides that an agency shall have "a duty to warn the intended victim" only if the agency "collects or acquires credible and specific information indicating" such "an impending threat." ICD-191, § E. The Directive further requires that each of the Agencies also must "document and maintain records" on various specified "duty to warn actions," including "[t]he method, means, and substance of any warning given," "[s]enior officer reviews of threat information and determinations," and "[j]ustifications not to warn an intended victim based on waiver criteria identified in this Directive." ICD-191, § F.13.

The Directive is not triggered—and thus, no "duty to warn actions" are taken, much less documented with records—unless one of the Agencies "collects or acquires credible and specific information indicating an impending threat" of a qualifying harm directed at a particular person. ICD-191, § E. Because the duty to warn process under the Directive is activated, at a minimum, only when one of the Agencies has such intelligence information, *ibid.*, confirming that records exist about the duty to warn under the Directive, as it relates to a particular person, would necessarily acknowledge the existence of intelligence information relating to the particular person at a

particular time. Conversely, acknowledging that no responsive records exist could reveal a lack of such intelligence information, tending to expose, for example, either a lack of intelligence interest in particular individuals or collection gaps against certain targets. *Accord* CPJ Br. 40 (arguing that for the Agencies "to admit that they have no responsive documents would be to admit a serious failure of intelligence, in that the [Agencies] did not detect a grave threat to a prominent U.S.-based Saudi dissident"). Either way, Exemption 1 protects the information from disclosure under FOIA.

ii. The district court correctly ruled that the Agencies' declarations provide "ample support" (JA351) for issuing the *Glomar* responses here. As described below, each agency's detailed declaration discusses why CPJ's records request implicates classified information that "pertains to" intelligence activities, sources, or methods; describes why confirming or denying the existence of responsive records would reveal this information; confirms the need for consistency in invoking *Glomar* in response to requests about the application of the Directive to specific individuals; and explains that unauthorized disclosure could damage national security. *See* Exec. Order 13,526, § 1.1(a)(4), 1.4(c), 75 Fed. Reg. at 707-08.

ODNI Response. In support of its *Glomar* response, the Office of the Director of National Intelligence submitted a 13-page declaration by the Director of its Information Management Division, who is an original classification authority. JA61-73 (Gaviria Decl.). The Division Director explained, "to the extent possible on the public record," JA62, that confirming or denying the existence of the records CPJ

sought "would reveal a classified fact and intelligence sources or methods information" by exposing the Agencies' "intelligence interest in a particular individual or entity," whether the Agencies are "conducting particular intelligence activities," and whether the Agencies use "particular intelligence sources or methods." JA67. This is because the records CPJ sought "would only exist" if the Agencies had information acquired through "surveillance efforts targeted at particular individuals or entities that were discussing Mr. Khashoggi during a specific period of time." JA69-70. Revealing such "very specific information" could lead a surveillance target to infer "that they were being surveilled during a specific period of time" and the method "us[ed] to surveil them." *Ibid.* By contrast, denying the existence of responsive records "would indicate that ODNI had no intelligence interest" in particular persons or entities, and that the Agencies "had no associated intelligence activities." JA71. "Either confirmation would reveal sensitive information about intelligence activities, priorities, sources, and methods," *ibid.*, and enable "adversaries to accumulate information and draw conclusions regarding intelligence sources and methods" by comparing ODNI's responses to FOIA requests over time. JA70-71 (additionally confirming the need for consistency in invoking *Glomar*). For all these reasons, the Division Director determined that confirming or denying the existence of responsive records here would "reasonably be expected to result in at least serious damage to national security." JA68-69.

NSA Response. In support of its *Glomar* response, the National Security Agency submitted an 16-page declaration by a 35-year veteran of NSA who was at the time its Deputy Chief and also its Acting Chief (and who is now Chief) of Policy, Information, Performance, and Exports, as well as an original classification authority. JA84-99 (Kiyosaki Decl.). The Deputy Chief explained that confirming the existence of responsive records "would, at minimum, indicate that NSA" or other Agencies "had collected or acquired intelligence related to a threat to Mr. Khashoggi," "threatening or undermining the future effectiveness or viability of these sources and methods." JA92. "[E]ven disclosure of the existence of a particular intercepted communication" may "reveal intelligence collection techniques applied around the world," the Deputy Chief warned, JA87-88, imperiling the collection of intelligence that "is often unobtainable by other means." JA86-87. "Conversely, denying the existence of responsive records would tend to indicate a lack or dearth of underlying intelligence information" that "could reveal gaps in [intelligence] capabilities, [or] the success of evasive tactics taken by adversaries." JA92. Either response, especially when aggregated over multiple cases, "would disclose NSA's priorities and capabilities, and could inform our adversaries of the degree to which NSA is able to exploit particular communications." JA93-94 (additionally confirming the need for consistency in invoking *Glomar*). That would undermine an information-collection infrastructure that "has taken years to develop at a cost of billions of dollars and significant human effort." JA86. For all these reasons, the Deputy Chief determined

that confirming or denying the existence of responsive records here would reveal classified information and "could reasonably be expected to cause exceptionally grave damage to national security." JA92-93 (quotations omitted).

CIA Response. In support of its *Glomar* response, the Central Intelligence Agency submitted a 22-page declaration by the Information Review Officer of its Litigation Review Office, who is an original classification authority with 20 years of experience in the field. JA107-28 (Shiner Decl.). The Officer explained that confirming the existence of records here "would tend to reveal, at a minimum, targets of intelligence collection at a given point in time and could also reveal sources, capabilities, resources, and/or relationships with domestic or foreign entities." JA124-25. "Conversely," the Officer observed, "disclosing that the Agency had no records on the subject would tend to reveal a blind spot in the U.S. Government's intelligence acquisition." *Ibid.* Either response "would be of great interest to adversaries—who could attempt to hinder or circumvent intelligence collection efforts and exploit blind spots." *Ibid.* Such adversaries include "[t]errorist organizations, foreign intelligence services, and other hostile groups," who "continually gather details regarding the CIA's specific intelligence capabilities, authorities, and interests" and "attempt to use this information to their advantage." JA125 (additionally confirming the need for consistency in invoking *Glomar*). For all these reasons, the Officer determined that confirming the existence or non-existence of responsive records here would reveal classified information and cause "serious damage to national security." JA127.

FBI Response. In support of its *Glomar* response, the Federal Bureau of Investigation submitted a 13-page declaration by the Section Chief of the Record/Information Dissemination Section of the FBI's Information Management Division, who is an original classification authority who has held the Section Chief position for 18 years. JA150-62 (Hardy Decl.). The Section Chief explained that confirming the existence of records "would indicate that the FBI had in fact collected or acquired * * * intelligence related to the threat to Mr. Khashoggi in the time period directly preceding his death," which would endanger "specific intelligence interests and collection capabilities," JA159, by tending "to confirm or refute the FBI's acquisition and reliance on a particular intelligence activity, source, or method." JA158. "Conversely," denying the existence of responsive records would reveal "gaps" that are "of great interest to the U.S. Government's adversaries, who can use such information to, for example, exploit tactics they have used in successfully avoiding detection." *Ibid.* "Once the fact of an intelligence activity, method, or source's use or non-use in a certain situation or against a certain target is discovered," the Section Chief warned, "its continued successful use is seriously jeopardized." JA157-58. This concern is not hypothetical: the FBI "know[s] that terrorist organizations and other hostile or Foreign Intelligence groups have the capacity and ability to gather information from myriad sources, analyze it, and deduce means and methods" of intelligence collection. JA158 (additionally confirming the need for consistency in invoking *Glomar*). "Thus, even seemingly innocuous, indirect references

to an intelligence activity, source, or method could have significant adverse effects." *Ibid.* For all these reasons, the Section Chief determined that confirming or denying the existence of responsive records here would reveal classified information and thereby "pose at least a serious risk to the national security." JA158.

iii. The Agencies' declarations satisfy the government's modest burden under the deferential "logical or plausible" standard. *Wolf*, 473 F.3d at 374-75 (quotations omitted). Indeed, this Court has upheld *Glomar* responses based on declarations that are less detailed than the Agencies' here, and it has deferred to agency judgments about national security concerns like the ones that the Agencies here have described.

For example, in *Freedom Watch, Inc. v. NSA*, 783 F.3d 1340 (D.C. Cir. 2015), this Court upheld the Department of Defense's *Glomar* response to an organization seeking records on leaked information about cyberattacks on Iranian nuclear facilities. The agency's declaration explained that "[a]cknowledging the existence or non-existence of records * * * could reveal whether the United States, and specifically [the Department of Defense], conducts or has conducted cyber-attacks against Iran," and that such a disclosure would threaten national security because it could "provid[e] insight into [the Department's] military and intelligence capabilities and interests." *Id.* at 1345 (quotations omitted). Affording that judgment "substantial weight," this Court ruled that the declaration "easily resolve[d]" the challenge to the agency's *Glomar* response, *id.* at 1344-45, because the agency had "explain[ed] the justifications for nondisclosure with reasonably specific detail." *Ibid.* (quotations omitted).

Similarly, in *Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007), this Court upheld the CIA's *Glomar* response to a writer seeking records about an assassinated foreign political candidate. The agency's declaration explained that, for example, confirming the existence of responsive records could signal to adversaries the kinds of individuals "in which the CIA is interested and upon which it focuses its methods and resources," which could help adversaries resist its intelligence efforts. *Id.* at 376 (quotations omitted). This Court concluded that the declaration "both logically and plausibly suffice[d]" to justify the CIA's *Glomar* response. *Ibid.* "It is plausible that either confirming or denying an Agency interest in a foreign national reasonably could damage sources and methods by revealing CIA priorities," this Court explained, offering adversaries "a starting point for applying countermeasures" and "wasting Agency resources." *Id.* at 376-77. "[E]ach individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information." *Id.* at 377 (quotations omitted).

The Agencies' declarations here are at least as detailed as the declarations in *Freedom Watch* and *Wolf*. Each declaration explains why CPJ's request implicates a currently and properly classified fact—whether the duty to warn was implicated in connection with Jamal Khashoggi. *Supra* pp. 11-14, 25-29. Each declaration also explains why confirming or denying the existence of responsive records would reveal this fact, *supra* pp. 11-13, 25-29; at least as to the import of denying the existence of responsive records, CPJ agrees. CPJ Br. 40 (urging that for the Agencies "to admit

that they have no responsive documents" would show that they "did not detect a grave threat to a prominent U.S.-based Saudi dissident"). Each declaration further explains that this fact "pertains to" intelligence matters, *supra* pp. 11-14, 25-29; *see* Exec. Order 13,526, § 1.1(a)(4), 75 Fed. Reg. at 707, as CPJ also acknowledges. *See* CPJ Br. 40 (urging that for the Agencies "to admit that they have no responsive documents would be to admit a serious failure of intelligence"). And each declaration explains, in as much detail as a public document permits, why unauthorized disclosure could damage national security; indeed, the declarations echo the same national security concerns to which this Court properly afforded deference in upholding the agencies' *Glomar* responses in *Freedom Watch* and *Wolf*. *Supra* pp. 13-14, 25-29. There is no basis for a different outcome here.

b. CPJ's contrary arguments lack merit.

i. CPJ principally argues (Br. 36, 44-55) that the Agencies' declarations are inadequate because they do not disprove "many plausible factual scenarios that would produce responsive records and yet would not entail disclosure of *specific* intelligence details." CPJ Br. 45 (emphasis added); *see* CPJ Br. 50-51 (deeming it "utterly implausible" that "particular intelligence sources and methods would necessarily be revealed by acknowledging the existence or nonexistence of documents"); CPJ Br. 54 (urging that the Agencies must describe why a *Glomar* response is necessary to protect "specific intelligence sources and methods" or avoid "actually identif[ying] a source or method"). This misunderstands Exemption 1 and the legal standard in *Glomar* cases.

Information need not identify a "particular" source or method, or reveal "specific" "details" about intelligence matters, to be exempt from disclosure under FOIA. As discussed above, Exemption 1 shields "matters that are * * * specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1). Executive Order 13,526 authorizes the classification of information that "*pertains to* * * * intelligence activities (including covert action), intelligence sources or methods, or cryptology." Exec. Order No. 13,526, § 1.4, 75 Fed. Reg. at 708 (emphasis added). As this Court has explained in construing this language, "pertains is not a very demanding verb." *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 715 F.3d 937, 941 (D.C. Cir. 2013). The Agencies' detailed declarations explain why confirming or denying the existence of responsive records would reveal information about intelligence activities, sources, and methods, and confirm that this information is properly classified. *Supra* pp. 11-14, 25-29. That is all that Exemption 1 and Executive Order 13,526 require.

Moreover, each of the Agencies also described why the records requests here implicate specific details about their intelligence activities, with as much particularity as public documents allow. ODNI explained that the records CPJ sought "would only exist" if the Agencies had information acquired through "surveillance efforts targeted at particular individuals or entities that were discussing Mr. Khashoggi during a specific period of time." JA69-70. The CIA explained that confirming the existence of records "would tend to reveal, at a minimum, targets of intelligence collection at a

given point in time and could also reveal sources, capabilities, resources, and/or relationships with domestic or foreign entities." JA124-25. The FBI explained that confirming the existence of records would endanger "specific intelligence interests and collection capabilities," JA159, by tending "to confirm or refute the FBI's acquisition and reliance on a particular intelligence activity, source, or method." JA158. And NSA explained that the records requests implicated intelligence activities where "[t]he identity of the specific communicants whose communications are intercepted, the degree of success in exploiting these communications, and the vulnerability of particular foreign communications are all maintained in strictest secrecy." JA87-88; *see also* JA92, 97-98. The "only" question before this Court is thus whether the Agencies' expert judgments about such "predicted danger[s]" are "a reasonable expectation; and it is precisely on this point that a court, lacking expertise in the substantive matters at hand, must give substantial weight to agency statements." *Halperin v. CIA*, 629 F. 2d 144, 149 (D.C. Cir. 1980).

CPJ nonetheless urges that the Agencies' declarations are owed no deference because CPJ believes that, for example, the declarations do not address the possibility that "agency employees may have emailed to share a news article inquiring about the duty to warn Mr. Khashoggi." CPJ Br. 45; *see also* CPJ Br. 49 (asserting further that ODNI's declaration is inadequate because records "could have been developed from numerous sources"); CPJ Br. 52-53 (asserting that CIA's declaration is inadequate because "the CIA could have come across intelligence" through "a tip or direct

report"); *cf.* CPJ Br. 50-52 (asserting that NSA's declaration is "implausible" because it does not exclude the possibility that NSA "could have received a tip [or] a direct report" and that the possibility of damage to national security is thus "far-fetched at best"); CPJ Br. 55 (asserting that FBI's declaration is "simply lacking in any logical sense"). But agencies are not required to disprove a FOIA requester's speculation to justify a *Glomar* response. The long-established standard is whether a declaration is "logical or plausible" in its own right, *Wolf*, 473 F.3d at 374-75 (quotations omitted),[4] not whether an agency has anticipated or excluded any hypothetical situation a FOIA requester might choose to invent. The Agencies' declarations here "ampl[y]" satisfy that modest burden. JA351; *supra* pp. 24-32.

Besides, there is no reason to think that the scenarios CPJ imagines would be any more likely to yield responsive records, much less records whose existence could (CPJ speculates) be "easily" confirmed or denied without harming national security. CPJ Br. 45. As the Supreme Court has explained, Congress intended Exemption 1 to do more than "simply protect[] sources of secret intelligence information." *Sims*, 471 U.S. at 176. The "broad sweep of 'intelligence sources' warranting protection in the

[4] Citing an out-of-circuit case, CPJ periodically asserts that "the legal standard" is whether the Agencies' declarations are "particularly persuasive." CPJ Br. 36 (quoting *Florez v. CIA*, 829 F.3d 178, 182 (2d Cir. 2016)); *see also* CPJ Br. 44, 46, 47. But CPJ acknowledges (sometimes on the same pages) that "the legal test" is whether the declarations are "logical or plausible." CPJ Br. 36 (quotations omitted); *see also* CPJ Br. 25, 27, 37, 38, 44, 48. Regardless, CPJ never suggests that the two formulations are substantively distinct, or that any such distinction makes a difference here.

interest of national security," *Wolf*, 473 F.3d at 375, encompasses "a wide range and variety of sources." *Sims*, 471 U.S. at 174. CPJ's supposition about news articles underscores the point: adversaries "can learn a great deal" about intelligence activities "by knowing the public sources of information that interest" intelligence agencies, because "the inquiries pursued by [intelligence agencies] can often tell our adversaries something that is of value to them." *Id.* at 176-77 (reasoning that "had foreign governments learned the Agency was using certain public journals," for example, "they might have been able to infer both the general nature of the project and the general scope that the Agency's inquiry was taking").

Indeed, the level of detail that CPJ would require to justify *Glomar* responses would undermine the doctrine. The *Glomar* doctrine "flows from the[] purpose" of the FOIA exemptions. *ACLU v. CIA*, 710 F.3d at 431. "[T]he basic purpose of Exemption 1 of [FOIA] is to ensure that FOIA requests will not result in the disclosure of sensitive materials if a court has satisfied itself that the materials have been properly classified." *Military Audit Project v. Casey*, 656 F.2d 724, 751 (D.C. Cir. 1981). As this Court has explained, requiring an agency to show an "identifiable concrete harm" would "be overstepping by a large measure the proper role of a court in a national security FOIA case." *Halperin*, 629 F.2d at 149. In national security cases, "more detailed information itself may compromise intelligence methods and sources." *Military Audit Project*, 656 F.2d at 751. The *Glomar* doctrine is not so self-defeating.

Here, based on each declarant's extensive expertise, and after reviewing the allegations in CPJ's complaint, each of the Agencies attested that their respective *Glomar* responses were necessary to protect national security under the particular circumstances at issue here, notwithstanding CPJ's claims. *Supra* pp. 13-14, 25-29; *cf.* CPJ Br. 45 (asserting that the declarations "fail[ed] to address" its complaint). "Mindful that courts have little expertise in" intelligence matters, courts are "in no position to dismiss" such "facially reasonable concerns." *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999). CPJ cannot gainsay the Agencies' expertise by asserting that "any legitimate national security interests in this case" could be protected by redactions or *in camera* review. CPJ Br. 56; *see* CPJ Br. 37, 42-44. When an agency avers that it cannot confirm or deny the existence of responsive records, "there are no relevant documents for the court to examine" beyond the agency's declaration. *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). And when the declaration suffices, "the court should not conduct a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinions." *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009).

ii. CPJ's claims (Br. 37-42, 44-48) that the district court abdicated its responsibility are meritless.

CPJ first alleges that the district court wrongly gave "unquestioning acceptance" to the Agencies' assertions of national security harm. CPJ Br. 46. Much of this argument simply reformulates CPJ's claim that the Agencies' declarations are

inadequate to justify their *Glomar* responses; as we explained above, that cannot be squared with the declarations themselves or this Court's past decisions. *Supra* pp. 24-32. The rest of the argument fares no better. CPJ quarrels (Br. 46) that the district court "applied no serious scrutiny" to the Agencies' declarations because the court "restated and adopted" the Agencies' analysis. Of course, "serious scrutiny" is not the test under the deferential standard of review that this Court has long applied, *see, e.g.*, *Wolf*, 473 F.3d at 374-75, and finding a party's presentation persuasive does not signal a lack of "fair and objective" judicial consideration. *See* CPJ Br. 47. The district court examined the Agencies' declarations individually, determined that they adequately described the national security harms that confirming or denying responsive records here could entail, and concluded that the Agencies' "assessment is due 'substantial weight.'" JA350 (quoting *ACLU v. CIA*, 710 F.3d at 427). Far from treating the "mere mention of national security as an impenetrable shield," CPJ Br. 46, the district court's reasoned refusal to "undercut" the deference that it determined the declarations here are owed rests on a faithful application of settled law. JA350-51.

CPJ also faults the district court (Br. 39) for "not even consider[ing]" whether the State Department's remarks made the Agencies' declarations illogical or implausible. But the district court did not (as CPJ suggests) "deliberately bury its head in the sand" to avoid this argument, *ibid.*; the court instead rejected it. The court concluded that the State Department spokesperson's remarks did not bear on whether the Agencies could invoke the *Glomar* doctrine because, as the court explained, "there

is a substantial difference between the State Department's general press statement, and confirmation (or denial) that the Intelligence Agencies had (or did not have) credible and specific information indicating an impending threat to Khashoggi that would trigger the duty to warn." JA348 (citations and quotations omitted). "Indeed," the court emphasized, "the State spokesperson qualified his statement to protect these same intelligence interests." *Ibid.* There is accordingly no contradiction between the State Department and the Agencies that could cast doubt on whether the Agencies' declarations "appear[] logical or plausible." *Wolf*, 473 F.3d at 374-75.

iii. CPJ's allegations of bad faith (Br. 39-42) are unfounded and misleading.

CPJ asserts (Br. 39-42) that the State Department's remarks create "the distinct possibility" that the Agencies issued *Glomar* responses to cover up lies to the public or avoid criticism for "deliberately turn[ing] a blind eye to human rights and the rule of law." CPJ cites no case entertaining the notion that a litigant's pejorative speculation about the government's motives is "evidence of agency bad faith," *Wolf*, 473 F.3d at 374 (quotations omitted); as this Court has explained, "[a]gency affidavits are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims." *Bartko v. DOJ*, 898 F.3d 51, 74 (D.C. Cir. 2018) (quotations omitted). Indeed, this Court has found "no evidence of bad faith" and granted summary judgment based on agency declarations "alone" despite similar accusations. *ACLU v. Dep't of Defense*, 628 F.3d 612, 622-26 (D.C. Cir. 2011) (involving allegations that agencies had

withheld "widely disseminated" information to avoid "embarrassing" the United States and revealing "illegal activities") (quotations omitted).

CPJ's claim that ODNI and the CIA took contradictory positions in other litigation is also baseless. CPJ Br. 41-42 (citing *Open Soc'y Justice Initiative v. CIA*, 399 F. Supp. 3d 161 (S.D.N.Y. 2019)). As CPJ acknowledges, "[t]he central issue" here "is what, if anything, the [Agencies] knew *in advance* about the threat to Mr. Khashoggi." CPJ Br. 3 (emphasis added). The plaintiff in the *Open Society* case, who is represented by the same law firm that represents CPJ in this case, expressly "agreed to limit its request to records created on or after Oct[ober] 1, 2018"—and thus to any non-exempt records from the agencies' *after-the-fact* activities. Joint Status Letter at 3 n.4, ECF No. 27, Dkt. No. 19-234 (S.D.N.Y. Apr. 15, 2019).[5] The agencies produced records of incoming requests from the media and similar documents, and refused under Exemptions 1 and 3 to identify the number or nature of any other responsive records. Nothing about *Open Society* casts any doubt on the Agencies' conduct here.

2. The Agencies' *Glomar* responses are also independently justified under Exemption 3.

a. FOIA Exemption 3 applies to matters that are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Three statutes are relevant here. The

[5] CPJ's assertion (Br. 53-54) that the CIA acted in bad faith because the agency "has already publicly confirmed the existence of CIA intelligence on the Khashoggi killing" is wrong for the same reason. CPJ cites no statements about the existence or absence of intelligence in advance of the murder, *ibid.*, even assuming that press reports of comments by individuals outside the CIA could be relevant to bad faith.

National Security Act of 1947, as amended, provides that the Director of National Intelligence "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). Section 6 of the National Security Agency Act of 1959 provides that "nothing in * * * any other law * * * shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof." *Id.* § 3605(a). And 18 U.S.C. § 798 prohibits the unauthorized disclosure of classified information "concerning the communication intelligence activities of the United States" or "obtained by the processes of communication intelligence from the communications of any foreign government." *Id.* § 798(a)(3)-(4). Matters within these statutes fall under Exemption 3. *ACLU v. U.S. Dep't of Defense*, 628 F.3d at 619 (National Security Act of 1947); *Larson*, 565 F.3d at 868 (National Security Agency Act of 1959 and 18 U.S.C. § 798).

Either Exemption 1 or Exemption 3, "standing alone, may justify [an agency's] *Glomar* response." *Wolf*, 473 F.3d at 375. Courts afford "even greater deference" to agency declarations assessing whether information falls under a national security statute encompassed by Exemption 3. *See id.* at 377; *see also Sims*, 471 U.S. at 168-69 (explaining that agencies have "sweeping power" to protect intelligence sources and methods).[6] The existence of such a statute shows that "Congress has already, in

[6] In *Sims*, the statutory provision at issue was Section 102(d)(3) of the National Security Act of 1947, which mandated that the Director of Central Intelligence protect "intelligence sources and methods." 471 U.S. at 167 (quotations omitted). In

enacting the statute, decided that disclosure of" the information that the statute protects "is potentially harmful." *See Electronic Privacy Info. Ctr. v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012) (quotations omitted). "[T]he only question is whether the withheld material satisfies the criteria of the exemption statute"; the Agencies need not make a specific showing of potential harm to national security to justify withholding statutorily-protected information. *Id.* at 931-32.

The Agencies' declarations here easily pass muster. As described above, *supra* pp. 11-14, 25-29, each declarant explained why confirming or denying the existence of responsive records would compromise intelligence sources and methods; NSA also explained why CPJ's request implicated the agency's functions, activities, and communications intelligence. *See* JA72, 95-98, 126, 161. Under any standard of review, there can be no serious doubt that a request premised on discovering whether an intelligence agency has intelligence information implicates "intelligence sources and methods," 50 U.S.C. § 3024(i)(1); or that a request to NSA on the same premise implicates that agency's activities, functions, and communications intelligence. *Id.* § 3605(a); 18 U.S.C. § 798(a)(3)-(4). No more is required.

December of 2004, Congress shifted some of the responsibilities of the CIA director to the newly created Director of National Intelligence, whose statutory responsibilities, as relevant here, mirror that of the former Director of Central Intelligence under Section 102(d)(3). Pub. L. No. 108-458, 118 Stat. 3638 (2004) (codified 50 U.S.C. § 3024(i)(1)).

b. CPJ's counterarguments largely rehash the same assertions that CPJ raised under Exemption 1. CPJ Br. 49-50 (alleging that ODNI's declaration is inadequate to support invoking Exemption 1, and thus the agency cannot invoke Exemption 3); CPJ Br. 51 (same for NSA's declaration); CPJ Br. 54 (same for the CIA's declaration); CPJ Br. 55 (same for the FBI's declaration). These assertions fail on their own terms under Exemption 1, *supra* pp. 21-40, and ignore the independent basis that Exemption 3 provides for the *Glomar* responses here. They also fail to account for the additional deference the Agencies are owed when invoking Exemption 3.

CPJ's sole stand-alone argument is sheer *ipse dixit*. In a single unexplained sentence, CPJ asserts (Br. 50-51) that NSA cannot rely on the National Security Agency Act of 1959 because CPJ "has not even requested information" about NSA's functions or activities. NSA's declaration belies that claim, and demonstrates why the requested records would disclose information protected by the statute. JA95-98 (explaining that CPJ's request implicates NSA's functions or activities). CPJ is likewise wrong to urge (Br. 51-52) that NSA cannot rely on 18 U.S.C. § 798 because, according to CPJ, the fact that CPJ submitted "broad" FOIA requests makes it "implausible" that confirming or denying the existence of responsive records would implicate communications intelligence. That counterintuitive speculation too ignores NSA's declaration. JA97-98 (explaining that CPJ's request implicates communications intelligence). And in any event, communications intelligence is among NSA's

functions or activities, and thus information within 18 U.S.C. § 798 also falls under the protections of the National Security Agency Act. *See* JA96-97.

B. The State Department's Refusal to "Comment on Intelligence Matters" Does Not Compel the Agencies to Disclose Information on Intelligence Matters.

CPJ argues that the Agencies should be required to disclose the existence or non-existence of responsive records based on State Department press remarks expressly declining to "comment on intelligence matters." *Supra* pp. 10-11. It defies logic to characterize such remarks as disclosing anything about (much less duplicating) the specific information protected by the Agencies' *Glomar* responses: the existence or non-existence of intelligence information, in advance of the attack on Jamal Khashoggi, about a potential threat to his life or the people who may have been involved in his murder. In any event, it is undisputed that the State Department has no supervisory authority over the Agencies here; thus, its press remarks cannot waive the Agencies' *Glomar* responses. For each of these independent reasons, the State Department did not override the applicable FOIA exemptions and compel the Agencies to disclose classified and statutorily protected national security information.

1. Statements that disavow any comment on intelligence matters do not officially acknowledge the non-existence of records on intelligence matters.

a. i. This Court has developed an "official acknowledgment" doctrine that requires an agency to publicly disclose information that is otherwise exempt from FOIA only in carefully circumscribed circumstances in which the agency has already

officially and publicly acknowledged the same protected information. This doctrine, like the *Glomar* doctrine, is rooted in a long line of cases stretching back decades. In each case, this Court has applied the same narrow test: to compel disclosure, the protected material (1) "must be as specific as the information previously released"; (2) "must match the information previously disclosed"; and (3) "must already have been made public through an official and documented disclosure." *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (citing *Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983))). The three prongs of the test are interlocking: unless there is a specific match between what the agency allegedly said and what the plaintiff seeks, the protected material necessarily has not "already * * * been made public." *See ibid.* (quotations omitted).

The specific-match requirement is "strict." *Moore v. CIA*, 666 F.3d 1330, 1333 (D.C. Cir. 2011). By design, it sets "a high hurdle for a FOIA plaintiff to clear." *Public Citizen v. Dep't of State*, 11 F.3d 198, 203 (D.C. Cir. 1993). To establish prior public disclosure, a plaintiff "must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Afshar*, 702 F.2d at 1130. "Prior disclosure of similar information does not suffice" to be an official acknowledgment. *Wolf*, 473 F.3d at 378. "[I]nstead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure." *Ibid.*

The specific-match test is strict because the stakes are high. As this Court has explained, judges must "insist[] on exactitude" to protect "the Government's vital

interest in information relating to national security and foreign affairs." *Wolf*, 473 F.3d at 378 (quotations omitted). "[I]t is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so." *Fitzgibbon*, 911 F.2d at 765 (quotations omitted). Thus, "the fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods and operations." *Id.* at 766. Accordingly, whatever information is conveyed by a prior official disclosure, the effects of that disclosure on a defendant agency's ability to claim FOIA exemptions are cabined to that specific information.

ii. As the district court correctly recognized, the State Department's "general press statement" did not make public any information about intelligence matters. JA348. The spokesperson expressly limited his remarks to safeguard intelligence interests, repeatedly emphasizing that he "cannot comment on intelligence matters" and "can't go into intelligence matters." *Supra* pp. 10-11. Statements that disavow disclosing intelligence matters cannot disclose intelligence matters—much less waive the Agencies' ability to refuse to confirm or deny that they had "'credible and specific information indicating an impending threat' to Khashoggi that would trigger the duty to warn." JA348 (quoting Intelligence Community Directive 191 ¶ E.1.). It is difficult to imagine a more "substantial difference" between what the State Department said

and what CPJ seeks. *Ibid.* That is the antithesis of the "exactitude" that this Court's official acknowledgment doctrine demands. *Wolf*, 473 F.3d at 378.

b. CPJ devotes one sentence (Br. 29-30) to arguing that the State Department made public that the Agencies lacked records about any duty to warn involving Jamal Khashoggi: CPJ claims that the spokesperson's remarks "necessarily match and speak with specificity to the information CPJ seeks" because "[a]cross the Executive Branch, there can be no 'duty to warn' records if the United States had no prior knowledge of threats to Mr. Khashoggi's life." This entirely ignores the spokesperson's express caution that his remarks offered no "comment on intelligence matters," *supra* pp. 10-11, underscoring that he did not purport to speak on behalf of the Agencies or the entire federal government. JA346. And it falls far short of clearing the "high hurdle" that this Court's well-established precedents erect. *See Public Citizen*, 11 F.3d at 203.

2. The State Department did not waive the Agencies' *Glomar* responses because it did not make an official statement on behalf of the Agencies.

a. i. As discussed above, a plaintiff who asserts that an agency has officially acknowledged information must do more than prove that the information is already public by showing an exact match between what the agency said and what the plaintiff seeks. The plaintiff also bears the burden to prove that the agency made the same information public "through an official and documented disclosure." *Wolf*, 473 F.3d at 378 (quotations omitted). This Court has repeatedly reaffirmed that it will "not deem 'official' a disclosure made by someone other than the agency from which the

information is being sought." *Frugone*, 169 F.3d at 774; *see, e.g.*, *Mobley v. CIA*, 806 F.3d 568, 583 (D.C. Cir. 2015) ("Disclosure by one federal agency does not waive another agency's right to assert a FOIA exemption."); *Moore*, 666 F.3d at 1333 n.4 (same).

This rule has special force in the national security arena, where official statements by the particular agency in question carry unique meaning and weight. *Frugone*, 169 F.3d at 775. In this context, "there can be a critical difference between official and unofficial disclosures." *Fitzgibbon*, 911 F.2d at 765. Adversaries or foreign partners may deem statements by other agencies "informal" or "possibly erroneous" and calibrate their actions accordingly. *Frugone*, 169 F.3d at 775. By contrast, statements by the agency from which information is sought are "authoritative," *Afshar*, 702 F.2d at 1130-31, and "end[] all doubt," giving an adversary "a firmer basis for its own strategic or tactical response," *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982), and inflicting correspondingly "greater" harm. *Frugone*, 169 F.3d at 775.

ii. Applying these principles, the district court properly refused to find that the State Department had waived the Agencies' ability to protect classified information. JA345-49. Not only did the State Department spokesperson repeatedly disavow any "comment on intelligence matters," *supra* pp. 10-11, the court correctly reasoned that finding an official acknowledgment here would be independently at odds with *Frugone v. CIA*, 169 F.3d 772 (D.C. Cir. 1999), where this Court rejected claims that the CIA had officially disclosed an individual's status as a CIA employee because the Office of Personnel Management had informed the individual that his benefits records were

"maintained by the CIA." *Id.* at 773. As the district court observed, the State Department is "no more able to speak about intelligence matters on behalf of the entire United States Government than OPM could speak for the CIA. Less so, arguably, given that OPM has some supervisory duties over executive agencies," while the State Department does not supervise the Agencies here. JA346 (citations and quotations omitted). *Frugone* thus forecloses CPJ's claim.

Frugone exemplifies the strict boundaries of the official acknowledgment doctrine, which this Court has guarded closely. In addition to refusing to find an official acknowledgment even where the source is an official statement by another agency, *see, e.g.*, *Frugone*, 169 F.3d at 773, this Court has declined to impute to defendant agencies statements by coordinate branches of government, *see, e.g.*, *Fitzgibbon*, 911 F.2d at 767, and former officials from the same agency at issue, *see, e.g.*, *Phillippi*, 655 F.2d at 1325, even when the former official spoke with the permission of the agency itself. *See, e.g.*, *Afshar*, 702 F.2d at 1133. Even official statements by the agency itself are not deemed binding if there is reason to doubt that the statements were deliberate, accurate, authorized, or intended to reach the plaintiff. *See, e.g.*, *Mobley*, 806 F.3d at 583-84 (refusing to rule that agencies had officially acknowledged information that was disclosed in error or information that an agency provided to a foreign government, even if the agency did so "without any restrictions on its use").

The breadth of the same-agency rule is underscored by the rare circumstances where this Court has attributed statements to agency defendants. *See* JA347-48. Only

when statements are made by the authorized representative of an entity with plenary supervisory authority over an agency will this Court deem the statements to be official acknowledgments by that agency. *See, e.g.*, *Marino v. DEA*, 685 F.3d 1076, 1082 (D.C. Cir. 2012) (concluding that the Drug Enforcement Administration could not withhold information officially acknowledged by the Department of Justice because it is a "component *within* the Department of Justice"); *ACLU v. CIA*, 710 F.3d at 428-32 & n.7 (ruling that the CIA could not withhold information officially acknowledged by the President and the President's counter-terrorism adviser, as well as the sitting CIA Director, because "the disclosures [we]re made by an authorized representative of the agency's parent"). These cases are an application of the rule that "each agency speaks for itself on FOIA disclosure": where the speaker's relationship to the agency is such that an authorized statement by one binds the other, there is no meaningful legal distinction for FOIA purposes between the speaker and the agency itself. JA348. The district court rightly ruled that no such circumstances exist here. JA345-49.

b. CPJ's contrary arguments (Br. 31-35) boil down to the proposition that, although the State Department and the Agencies are separate and independent from one another, the fact that all are members of the Intelligence Community and thus collaborate to support a shared mission of safeguarding national security makes their statements interchangeable. As the district court recognized, this "is just a reformulation of the claim that one executive agency can speak for another one." JA347. CPJ never explains when under its theory the equities of the many agencies in

our complex system of government might *not* overlap; at a sufficiently high level, all agencies coordinate and share responsibilities. Nor does CPJ identify any case where this Court has held that it matters whether a statement concerns a topic on which other agencies might have interests.

Instead, as explained above, this Court asks whether the alleged official acknowledgment comes from "an authorized representative of the agency's parent," *ACLU v. CIA*, 710 F.3d at 429 n.7; *accord Marino*, 685 F.3d at 1082, and it has rebuffed efforts to force agencies to disclose protected information because of statements made outside the formal chain of command even when the information at issue is "common to both" the defendant agency and the allegedly official source. *Marino*, 685 F.3d at 1082; *see, e.g.*, *Frugone*, 169 F.3d at 774. That makes good sense: particularly in the "highly sensitive" national security context, the choice to officially acknowledge otherwise protected information has serious and lasting consequences. *See Moore*, 666 F.3d at 1334; *see supra* pp. 47-48. The defendant agency is best positioned to make this judgment, after analyzing the complex array of nuanced considerations that inform the decision. *Cf. Sims*, 471 U.S. at 179-81.

CPJ underscores the sweep of its argument (and its break from precedent) by emphasizing (Br. 28, 31, 33) that one State Department comment referred to "the United States." In response to a question, the spokesperson replied, "As to your specific question regarding intelligence, I would say that although I cannot comment on intelligence matters, I can say definitively the United States had no advanced

knowledge of Jamal Khashoggi's disappearance." *Supra* p. 10. According to CPJ, this reference to "the United States" not only waived *Glomar* responses on behalf of the Agencies here, but bound the entire federal government. *See, e.g.*, CPJ Br. 28 ("*Glomar* Reponses Are Legally Impermissible Because The Government-Wide Nonexistence Of The Information Sought Has Been Officially Acknowledged").

CPJ does not point to any decision of this Court (or any other) that embraces such a sweeping proposition, and we are aware of none. Indeed, this Court has declined to find that statements about the activities of "the United States Government" necessarily constitute official acknowledgments as to the activities of individual U.S. government agencies, even when the speaker is the President's authorized representative. *ACLU v. CIA*, 710 F.3d at 429 (quotations omitted). In *ACLU v. CIA*, the plaintiff invoked an official statement by the President's counter-terrorism adviser that "the United States Government conducts targeted strikes * * * sometimes using remotely piloted aircraft, often referred to publicly as drones," which the adviser made expressly because the President had "instructed" him to do so. *Ibid.* This Court ruled that this statement "d[id] not acknowledge that the CIA itself operates drones" even if it "leave[s] no doubt that some U.S. agency does," *ibid.*, notwithstanding that the speaker was "an authorized representative of the agency's parent." *Id.* at 429 n.7. That reasoning applies all the more strongly here, where the State Department cannot and (contrary to CPJ's assertion) deliberately did not speak for its co-equal agencies. *Compare supra* pp. 10-11 (emphasizing, "I cannot comment

on intelligence matters" and "I can't go into intelligence matters."), *with* CPJ Br. 33 (asserting that the spokesperson "expressly purported to speak for the [Agencies] and indeed, the entire federal government.")

CONCLUSION

For all these reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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October 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,913 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Sonia Carson

Counsel for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Sonia Carson

Counsel for Defendants-Appellees

ADDENDUM

5 U.S.C. § 552 - Public information; agency rules, opinions, orders, records, and proceedings.

* * *

(b) This section does not apply to matters that are—

> **(1)(A)** specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and **(B)** are in fact properly classified pursuant to such Executive order; [or]
>
> * * *
>
> **(3)** specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—
>
> > **(A)(i)** requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
> >
> > **(ii)** establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
> >
> > **(B)** if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

* * *.