ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5045

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,

-against-

CENTRAL INTELLIGENCE AGENCY, FEDERAL BUREAU OF INVESTIGATION, NATIONAL SECURITY AGENCY, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE,

Defendants-Appellees,

UNITED STATES DEPARTMENT OF STATE

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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GLOSSARY

CIA	Central Intelligence Agency
DEA	Drug Enforcement Administration
DNI	Director of National Intelligence
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
IC	U.S. Intelligence Community
NSA	National Security Agency
ODNI	Office of the Director of National Intelligence
OPM	Office of Personnel Management
OSJI	Open Society Justice Initiative

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Plaintiff-Appellant.

SUMMARY OF THE ARGUMENT

This Court should hold that the *Glomar* responses of the Central Intelligence Agency ("CIA"), Federal Bureau of Investigation ("FBI"), National Security Agency ("NSA"), and Office of the Director of National Intelligence ("ODNI") (collectively, the "Intelligence Community Elements" or "IC Elements") cannot stand, and that the IC Elements must comply with the next steps in the FOIA process: acknowledging that responsive documents do or do not exist, and if they do exist, then either producing documents or arguing on a document-specific basis why the documents cannot be produced. Or alternatively, at a bare minimum, they should be required to submit more detailed declarations, which may be reviewed *in camera* if necessary. The three core grounds for reversal, established in the Committee to Protect Journalist's ("CPJ's") opening brief and undisturbed by the IC Elements' opposition brief, are as follows:

First, this is an extraordinary case where the IC Elements' position demands the closest scrutiny in the interests of justice and human rights. The brutal murder of U.S. journalist Jamal Khashoggi, at the hands of government agents of his native Saudi Arabia, has been and remains a "matter of exceptional public importance." *Open Soc'y Just. Initiative v. CIA*, 399 F. Supp. 3d 161, 167 (S.D.N.Y. 2019) (processing documents responsive to a FOIA request seeking

documents on Mr. Khashoggi's murder warranted a "heightened commitment of resources"); Br. for Pl.-Appellant 8-14 [hereinafter CPJ Br.].

To this day, intense demand continues—across borders and political lines—for more information about how the murder happened and was allowed to happen. *See* CPJ Br. 8-14 (discussing public calls for accountability regarding Mr. Khashoggi's murder); *see also* Reuters Staff, *Fiancee of Khashoggi, human rights group sue Saudi crown prince in U.S.*, REUTERS (Oct. 20, 2020, 3:02 PM), https://www.reuters.com/article/us-usa-saudi-khashoggi-idUSKBN2752OE (discussing a lawsuit launched by Mr. Khashoggi's fiancée and a human rights group against the crown prince of Saudi Arabia, seeking damages for Mr. Khashoggi's murder). The House Foreign Affairs Committee renewed those calls just last month by voting on a bill mandating that the Director of National Intelligence produce a report on the whether the Intelligence Community fulfilled its duty to warn Mr. Khashoggi about threats to his life. *See* Protection of Saudi Dissidents Act of 2019, H.R. 4507, 116th Cong. §6 (2020), https://www.congress.gov/bill/116th-congress/house-bill/4507/text.[1]

[1] This Court may take judicial notice of the ongoing public demand for transparency about Mr. Khashoggi's murder. *See, e.g.*, *Wash. Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (citing *Agee v. Muskie*, 629 F.2d 80, 81 n.1, 90 (D.C.Cir.1980)) (taking judicial notice of facts generally known as a result of newspaper articles); *Reporters Comm. for Freedom of Press v. FBI*, 369 F. Supp. 3d 212, 215 n.2 (D.D.C. 2019) (taking judicial notice of news articles); *see generally* FED. R. EVID. 201(b), (c).

Not surprisingly, the IC Elements offer no rebuttal to the proposition that this case is exceptionally important and that their position demands close scrutiny. Its brief says not a word on that point. The IC Elements' quiet concession on this core point should not escape this Court's notice.

Second, the Department of State's public statement that "the United States had no advance knowledge of Jamal Khashoggi's disappearance" was an official acknowledgment that binds State's fellow IC members, and makes their *Glomar* position untenable. CPJ Br. 27-35. The IC Elements offer two basic responses on this point, neither of them credible:

- The IC Elements emphasize repeatedly that the Department of State prefaced its admission with the words that it could "not comment on intelligence matters." This repetition is in vain, because the obvious fact remains that the Department proceeded to comment on intelligence matters. What was the assertion of "no advance knowledge" on behalf of "the United States," if not an assertion of no advance knowledge across the United States government, IC Elements included? The IC Elements apparently would have this Court read the Department of State's statement as if it included at the end, "except for whatever the intelligence agencies knew or didn't know." The

statement did not include those words. Common sense demands that the statement be taken at face value, not rewritten after the fact.

- It is unavailing for the IC Elements to argue that, even if the statement is about intelligence matters, it does not constitute official acknowledgment. Recognizing the statement as binding across the IC Elements in these novel circumstances is squarely consistent with FOIA law. This Court and others have made clear that, in appropriate circumstances, one agency's statements can bind another for FOIA official acknowledgment purposes. Three specific characteristics of this case make it appropriate for application of the official acknowledgment doctrine: (1) The IC holds itself out as an integrated and collaborative whole, (2) Intelligence Community Directive 191 ("IC Directive 191") itself demands interagency cooperation and communication, and (3) the Department of State opted to speak on behalf of the entire "United States" and not only for itself. Contrary to the IC Elements' argument, applying the official acknowledgment doctrine in these narrow circumstances is entirely consistent with this Court's precedents, and it is hardly the gateway to a broad expansion of the doctrine.

Third, the IC Elements' rote declarations in support of its *Glomar* position fail the test of being logical and plausible in these circumstances. Even if the Department of State's statement is not considered an official acknowledgment binding across the IC, it remains clear that the government has already publicly denied advance knowledge of the murder threat—which, if true, necessarily means it has no documents responsive to CPJ's FOIA requests. The burden thus falls on Appellees to explain how, by confirming that statement, they could possibly disclose intelligence sources and methods, or otherwise harm national security. It is an intrinsically illogical position, which the declarations fail to support.

The IC Elements err by suggesting that CPJ is simply being "pejorative," Br. for Appellees 38 [hereinafter IC Elements Br.], by suggesting that the IC Elements' true, and legally impermissible, motive is to avoid embarrassment. The circumstances of this case in fact present specific reasons to suspect embarrassment as a motive. Only one of two factual scenarios is plausible. On the one hand, the Department of State's denial of advance knowledge across the government might be true—in which case the IC failed to detect a grave threat to a leading dissident, U.S. resident, and prominent journalist. On the other hand, the statement might be false—*i.e.*, the IC did detect the threat but failed to warn Mr. Khashoggi, or worse, opted not to warn him because the government prioritized the Saudi strategic relationship over a human life. *See* Br. of Amici Curiae Human

Rights Watch et al. in Supp. of Pl.-Appellant 16-19 (arguing why both of these factual scenarios are plausible and support greater transparency regarding the operation of the duty to warn with respect to Mr. Khashoggi). Both scenarios are inevitably embarrassing to the IC. The record thus presents the distinct possibility that the government issued *Glomar* responses here to avoid public embarrassment, a legally impermissible motive. *See* CPJ Br. 39-44.

This exceptionally important case does not present the "rare situation" in which a *Glomar* response is appropriate." *Bartko v. U.S. Dep't of Just.*, 898 F.3d 51, 63 (D.C. Cir. 2018). Significant record evidence undermines the IC Elements' justifications for refusing to confirm or deny the existence of documents. "The *Glomar* responses thwart the public's ability to meaningfully oversee, and hold accountable." Br. of Amici Curiae Human Rights Watch et al. in Supp. of Pl.-Appellant 19. CPJ thus respectfully urges this Court to reverse, and to remand with instructions that the IC Elements must take the next steps required by FOIA, beginning with an acknowledgment of the existence or non-existence of documents related to the duty to warn Mr. Khashoggi.

ARGUMENT

I. REVERSAL UNDER THE OFFICIAL ACKNOWLEDGMENT DOCTRINE IS SQUARELY SUPPORTED BY THE RECORD AND THE LAW

A. When The Department Of State Repeatedly Denied "Advance Knowledge" Of Mr. Khashoggi's Murder By "The United States,"

It Obviously Spoke To The IC Elements' Duty To Warn That Is Addressed By CPJ's FOIA Requests

Reversal is in order under the well-settled rule that one government entity's statement can be an official acknowledgment that binds related agencies for purposes of FOIA. *Marino v. DEA*, 685 F.3d 1076, 1082 (D.C. Cir. 2012) (public filing by U.S. Attorney's Office bound the DEA because they were both "component[s] *within* the Department of Justice") (emphasis in original); *Ctr. for Pub. Integrity v. U.S. Dep't of Energy*, 287 F. Supp. 3d 50, 68 (D.D.C. 2018) ("official disclosure by one component binds another component of the same agency").

The applicable three-part legal test is easily satisfied here: (1) "the information requested [by CPJ is] as specific as the information previously released [i.e., disclaimed by State]," (2) the requested information "match[es] the information previously disclosed [i.e., disclaimed]," and (3) the requested information was already "made public through an official and documented disclosure," *i.e.*, an on-the-record Department of State briefing. *See BuzzFeed, Inc. v. Dep't of Justice*, 344 F. Supp. 3d 396, 407 (D.D.C. 2018) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (internal quotation marks omitted)).

As for the first two prongs, the Department of State's statement spoke precisely to the existence (or not) of documents subject to CPJ's request. *Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007) ("if the prior disclosure establishes the

existence (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information") (emphasis in original). There can be no "duty to warn" records if the United States had no prior knowledge of threats to Mr. Khashoggi's life. As for the third prong, the government resorts to citing *Fitzgibbon* for the proposition that "speculation" by a reporter or author outside the government is not binding in these circumstances. IC Elements Br. 45. CPJ agrees. The on-the-record public briefing by the Department of State, repeated three times at that briefing, is hardly a form of third-party speculation.

B. The Government's Arguments For Rejection Of The Official Acknowledgment Doctrine Lack Merit

The IC Elements offer two principal reasons why the Department of State's multiple disavowals of "advance knowledge" by "the United States" somehow lack legal impact. Neither reason has merit.

First, the IC Elements' argument strains common sense by asking this Court to give weight to the fact that the Department of State prefaced the denial of "advance knowledge" by disclaiming comment on "intelligence matters." IC Elements Br. 45-46. This view of the disclaimer would render the denial itself meaningless.

"Advance knowledge" of a clandestine murder by a foreign government logically would only come via intelligence sources. "Intelligence is information gathered within or outside the U.S. that involves threats to our nation, its people, property, or interests . . . ." *What is Intelligence*, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, https://www.dni.gov/index.php/what-we-do/what-is-intelligence. The denial of "advance knowledge" thus necessarily was a comment on intelligence matters.

The disclaimer might fairly be taken as expressing caution toward the ***details*** of intelligence matters. But the statement cannot credibly be construed as ***fully excluding any reference to intelligence matters from the words that follow***. The suggestion that it should be construed that way is litigation make-weight.

Even if the IC Elements are right that the State Department somehow addressed the issue of advance knowledge without disclosing intelligence matters, that simply confirms that other IC Elements can do the same. The IC Elements' position thus confirms that a non-*Glomar* response would not necessarily divulge intelligence activities, sources, or methods or threaten national security.

Second, the IC Elements err by suggesting that CPJ is arguing for a sweeping or legally unsupported version of the official acknowledgment doctrine. *See* IC Elements Br. 46-52. The facts and law squarely support the limited proposition argued for by CPJ here, *i.e.*, that when one IC Element makes a public

statement on a matter of shared responsibility, fellow IC Elements are bound by that statement for FOIA purposes.

As for the facts, the IC Elements do not and cannot dispute that the Intelligence Community operates as an "integrated" whole. CPJ Br. 31 (principle of "integrated" IC is dictated by the plain language of Exec. Order No. 12,333 § 1.7, 46 Fed. Reg. 59,941, 59,952 (Dec. 8, 1981), *reprinted as amended in* 50 U.S.C. § 3001 note, while the fact that the IC "relies heavily on collaboration among its constituent elements" is stated on IC's own website). IC Directive 191 itself specifically commands interagency collaboration and communication regarding the duty to warn. CPJ Br. 31-32. The IC Elements cannot credibly assert that it is every IC Element for itself when a FOIA official acknowledgment occurs.

As for the law, it is well settled that one part of a government entity may bind another for purposes of FOIA. For example, in *Marino v. Drug Enforcement Administration*, this Court held that a disclosure by a U.S. Attorney's office was binding for FOIA purposes on the Drug Enforcement Administration ("DEA"). 685 F.3d at 1082. The U.S. Attorney's Office was deemed capable of binding the DEA simply because they were both "component[s] within the Department of Justice." *Id.* Similarly, in *Center for Public Integrity v. U.S. Department of Energy*, 287 F. Supp. 3d 50, 68 (D.D.C. 2018), a statement by the National Nuclear

Security Administration, a subcomponent of the Department of Energy, triggered an official-acknowledgment waiver on behalf of the Office of the Inspector General of the Department of Energy.

The circumstances of this case present at least as persuasive a reason to recognize an official acknowledgment. This Court has never held that the official acknowledgment doctrine is limited exclusively to circumstances where the two entities run up on an organization chart to the same Cabinet member. Neither precedent nor sound public policy favors such a mechanical approach to the doctrine.

To be clear, CPJ simply asks this Court to recognize that the official acknowledgment doctrine applies where the three specific elements presented here are satisfied: (1) the dispute revolves around an entity (the IC) that is described in its constitutive documents and public statements as an integrated and collaborative whole; (2) the specific matter in dispute relates to matters of shared IC responsibility, rather than matters that are siloed within a single IC Element; and (3) the statement proposed as the basis for official acknowledgment was expressly framed in interagency terms rather than as relating to a siloed responsibility of the agency doing the speaking.

Contrary to the IC Elements' position, IC Elements Br. 48-50, this Court's precedents hardly compel rejection of the official acknowledgment doctrine here.

In *Frugone v. CIA*, 169 F.3d 772 (D.C. Cir. 1999), the panel declined to allow the Office of Personnel Management ("OPM") to speak for the CIA regarding the existence of employment records for a CIA employee. That result was appropriate for the facts, given the lack of relationship between the CIA and the OPM and the fact that the FOIA request at issue did not speak to any duties and responsibilities that the two agencies shared. It is also entirely consistent with the approach proposed by CPJ here. *American Civil Liberties Union v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013), likewise does not dictate the position urged by the IC Elements here. In *American Civil Liberties Union v. CIA*, this Court ruled the President's counterterrorism advisor's statement that "the United States Government conducts targeted strikes" "d[id] not acknowledge that the CIA itself operates drones" even if it "leave[s] no doubt that some U.S. agency does[.]" 710 F.3d at 429. That statement, unlike the one at issue here, did not necessarily amount to an admission on behalf of the CIA or any other specific agency.

It is for this Court, and not the IC Elements, to say what its precedents mean. This Court has never considered application of the official acknowledgment doctrine in the circumstances presented here. It should accept the application of the doctrine on these specific facts.

II. REVERSAL IS ALSO IN ORDER BECAUSE THE CONCLUSORY DECLARATIONS OF THE IC ELEMENTS DO NOT CARRY THE AGENCIES' *GLOMAR* BURDEN

"*Glomar* responses are an exception to the general rule that agencies must . . . provide specific, non-conclusory justifications for withholding" information responsive to a FOIA request. *Roth v. U.S. Dep't of Just.*, 642 F.3d 1161, 1178 (D.C. Cir. 2011). The IC Elements' view that their conclusory statements are sufficient here expands the limited *Glomar* doctrine beyond its intended purpose. *See* Br. of Amici Curiae The Reporters Committee for Freedom of the Press et al. in Supp. of Pl.-Appellant 7-12. The burden that the justification for issuing a *Glomar* response be "logical or plausible" is just that—a meaningful burden imposed by this Court. It is not, as the government seemingly would have it, an absolute rule that putting boilerplate words on the page of a declaration allows the IC Elements to take shelter under *Glomar*. The IC Elements have not met their meaningful burden here.

A. The Department Of State's Public Statements, And The Government's Position In The *Open Society* Litigation, Provide Particularized Reasons Why *Glomar* Reliance Here Is Not Logical Or Plausible

Even if the Department of State's statements that "the United States" had no advance knowledge of the threat Mr. Khashoggi faced does not waive the IC Elements' ability to issue a *Glomar* response, these statements still support reversal of the District Court's decision. CPJ Br. 38-39. The statements make clear that

the IC Elements cannot demonstrate a logical or plausible basis for their *Glomar* responses.

A sister IC Element's public statement "may well shift the factual groundwork upon which a district court assesses the merits of a [*Glomar*] response." *Florez v. CIA*, 829 F.3d 178, 184-86 (2d Cir. 2016) (rejecting CIA's *Glomar* response where FBI had already disclosed facts suggesting "that multiple government departments and agencies were investigating, monitoring, and had an intelligence interest in" a particular individual).[2] The Department of State's statements and the IC Elements' position in the *Open Society* litigation so undermine the IC Elements' conclusory claims of harm to national security and disclosure of intelligence activities, sources, and methods that it is reversible error for the District Court to have failed to consider it.

As in *Florez*, the Department of State's multiple denials of advance knowledge cast doubt on the IC Elements' explanations for their *Glomar* responses. The denials themselves necessarily make this much clear: acknowledging the lack of records of advance knowledge or warning about Mr. Khashoggi's death would not threaten national security, nor would it disclose intelligence sources or methods. The Department of State's statements are

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[2] *Florez* is persuasive out-of-circuit authority, particularly since it is not contradicted by decisions in this or other circuits. *See Schnitzer v. Harvey*, 389 F.3d 200, 203 (D.D.C. 2004) (citing *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1490 n.17 (D.C. Cir. 1984)).

"contradictory" record evidence that, at the very least, require a closer, more questioning look at the IC Elements' justifications for their *Glomar* responses than that taken by the District Court. *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013) (quoting *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 286 (D.C. Cir. 2006)).

Neither the District Court nor the IC Elements have acknowledged this contradiction or its legal impact. The IC Elements' assertion that the District Court did not "deliberately bury its head in the sand to avoid this argument," but rather "rejected it," IC Elements Br. 38, leaves unaddressed the impact of the statement on the "logical or plausible" analysis. The record fully supports a more skeptical approach. Far from engaging in mere "pejorative speculation," IC Elements Br. 38, CPJ has set out the particularized basis suggesting fear of embarrassment was the government's true motive for resorting to the *Glomar* doctrine, CPJ Br. 39-41. On the record here, there are only two plausible explanations of the IC's action—both deeply unflattering. The IC Elements either failed to gather the intelligence necessary to support a warning to Mr. Khashoggi, or they did gather that intelligence but failed to warn him. Either explanation casts the IC Elements in a negative light. No other explanation is, in FOIA parlance, logical or plausible.

The positions taken by ODNI and the CIA in *Open Society Justice Initiative v. CIA* underscore the District Court's error in declining to conduct a more

thorough exploration of the IC Elements' reasoning and motivation. *See* CPJ Br. 41-42. The IC Elements in that case acknowledged having non-public records relating to Mr. Khashoggi's killing. *Id.* at 42. The IC Elements' argument that their conduct in the *Open Society* case does not "cast[] any doubt on the [IC Elements'] conduct here," IC Elements Br. 39, is simply illogical.

If the CIA and the ODNI are able to acknowledge the fact that they have collected intelligence related to Mr. Khashoggi's murder after it occurred without jeopardizing sources and methods of intelligence collection, it is difficult to see why the fact of intelligence collection predating Mr. Khashoggi's death would implicate those concerns—unless the IC Elements are invoking *Glomar* to avoid embarrassment. Furthermore, the IC Elements' conclusory assertion that acknowledging the existence or nonexistence of responsive documents would reveal secret intelligence interests is implausible because the ODNI and the CIA have put the fact that the United States government has an intelligence interest in Mr. Khashoggi's death in the public domain—they both acknowledged in the *Open Society* litigation that they have documents regarding Mr. Khashoggi's brutal murder.

B. On Their Face, The IC Elements' Generic Declarations Are Insufficient As A Matter of Law

All parties agree that the standard for assessing a justification for invoking a FOIA exemption is whether the justification is logical or plausible. All parties agree that in the national security context, precedent indicates that government declarations receive substantial weight. CPJ simply asks this Court to recognize that these standards do not amount to a free pass for the IC Elements.

FOIA's broad command of transparency, and this Court's recognition of the narrow role of *Glomar* responses, demand careful scrutiny here. "[D]eference [in considering IC responses to FOIA requests] is not equivalent to acquiescence." *Campbell v. U.S. Dep't of Just.*, 164 F.3d 20, 30 (D.C. Cir. 1998). The declarations must actually demonstrate that the mere fact that responsive records do or do not exist is covered by the statute or is properly classified. They fail to do that here, and therefore do not merit deference. Deferring to the IC Elements' "talismanic incantations of 'national security' . . . inappropriately permits [the IC Elements] to sidestep scrutiny of their activities and undermines accountability." Br. of Amici Curiae Human Rights Watch et al. in Supp. of Pl.-Appellant 23; *see also id.* at 8, 19-23 (brief of multiple former IC Element personnel, detailing the history of judicial review of agency claims of harm to national security in the FOIA context, and noting that the IC Elements' *Glomar* responses "defy the national security disclosure obligations imposed by Congress").

The IC Elements attempt in vain to contrast the declarations produced in this case with other, "less detailed," declarations that prior cases have deemed sufficient. Those cases are very different. In *Freedom Watch, Inc. v. NSA*, 783 F.3d 1340 (D.C. Cir. 2015), plaintiff sought documents "concerning a leak of information about cyberattacks on Iran's nuclear facilities." The Department of Defense argued that acknowledging the existence or nonexistence of such records would "reveal whether the United States, and specifically [the Department of Defense], conducts or has conducted cyber-attacks against Iran." *Id.* at 1345. The requests in this case, in contrast, allow for non-*Glomar* responses that do not necessarily disclose intelligence activities, sources, and methods.

The facts here are distinguishable, too, from *Wolf v. CIA*. There, this Court contemplated that national security could be harmed in the future if the existence or nonexistence of the documents at issue was acknowledged because "confirming or denying an Agency interest in a foreign national reasonably could damage sources and methods by revealing CIA priorities." 473 F.3d at 377. Here the IC Elements have already discussed Mr. Khashoggi and his death in the public record. *See supra* Section I. More fundamentally, this case is not about whether the IC Elements chose, as a matter of ***discretion***, to take an interest in Mr. Khashoggi before his death. This case is about whether the IC Elements, if they did have

information on Mr. Khashoggi, acted on their ***mandatory*** duty to warn under IC Directive 191.

The IC Elements make much of the length of their declarations. *See* IC Elements Br. 24 ("the Office of the Director of National Intelligence submitted a 13-page declaration"), 26 ("the National Security Agency submitted an [*sic.*] 16-page declaration"), 27 ("the Central Intelligence Agency submitted a 22-page declaration"), 28 ("the Federal Bureau of Investigation submitted a 13-page declaration"). Many pages of legally insufficient statements are still legally insufficient. With regard to the deficiency of each of these declarations, CPJ stands on its opening brief.

The specific arguments the government has raised concerning the NSA (IC Elements Br. 12, 17-18, 26-27, 33, 42-43) are without merit. The NSA has failed to explain why acknowledging the existence or nonexistence of responsive records would necessarily reveal anything about the NSA's communications intelligence even though the NSA also collects electronic intelligence and foreign instrument signals intelligence. *See* What is Intelligence, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, https://www.dni.gov/index.php/what-we-do/what-is-intelligence (emphasis added). Furthermore, the D.C. Circuit has previously held that with respect to 50 U.S.C. § 3605, "a term so elastic as 'activities' should be construed with sensitivity to the hazard(s) that Congress foresaw." *Founding*

Church of Scientology v. NSA, 610 F.2d 824, 829 (D.C. Cir. 1979) (internal citations omitted). Accordingly, the NSA's conclusory statement that acknowledging or denying the existence of responsive documents would reveal generalized NSA "activities" is insufficient, particularly in light of the aforementioned information that the IC Elements have put into the public domain.

FOIA favors disclosure. *See, e.g.*, *Nat'l Council of La Raza v. Dep't of Just.*, 411 F.3d 350, 355 (2d Cir. 2005) ("FOIA strongly favors a policy of disclosure"); *Irons v. FBI*, 880 F.2d 1446, 1457 (1st Cir. 1989) ("A policy of forthright and expansive disclosure undergirds the FOIA."). Where public statements by qualified officials cast doubt on—or in this case directly contradict—an IC Element's *Glomar* response, particularly in a situation such as this where there are substantial grounds to question the accuracy of those statements, then the level of scrutiny should be particularly serious. It is difficult to see how, if the government's position here is accepted, *Glomar* is anything less than an absolute shield, and the requirement that information may not be classified to "prevent embarrassment to a person, organization, or agency," Exec. Order No. 13,526 § 1.7(a)(2), 3 C.F.R. 298, 302 (2010), is an unenforceable nullity. The Second Circuit's view that IC justifications for a *Glomar* response must be "particularly persuasive," *Florez*, 829 F.3d at 182 (quoting *N.Y. Times Co. v. Dep't of Just.*, 756 F.3d 100, 122 (2d Cir. 2014)), should be applied by this Court here.

C. The Common-Sense Scenarios Set Out In CPJ's Opening Brief Provide Further Grounds For Rejecting *Glomar* Reliance Here.

If the IC Elements are going to assert, as they do here, that the very acknowledgment of the existence or nonexistence of responsive records would harm national security, then it must in fact be the case that the acknowledgement of the existence or nonexistence of responsive records would *necessarily* harm national security in every reasonably plausible circumstance. *Glomar* responses "are permitted only when confirming or denying the existence of records ***would itself*** 'cause harm cognizable under an FOIA exception.'" *Am. Civil Liberties Union v. CIA*, 710 F.3d at 426 (quoting *Roth v. U.S. Dep't of Justice*, 642 F.3d at 1178). The IC Elements' reading of the standard would require this Court to replace the word "would" with "could," therefore greatly expanding a doctrine that is supposed to only apply in "limited circumstances," *id.*, as an "exception" to the general rule, *Roth. v. U.S. Department of Justice*, 642 F.3d at 1178. *See* Br. of Amici Curiae The Reporters Committee for Freedom of the Press et al. in Supp. of Pl.-Appellant 7-12 (setting out how the *Glomar* doctrine has expanded beyond its original purpose).

The IC Elements' argument that they are "not required to disprove a FOIA requester's speculation to justify a *Glomar* response" because "[t]he long-established standard is whether a declaration is 'logical or plausible' in its own right," IC Elements Br. 34 (internal citation omitted), is yet another example of the

government's effort to dispose of this extraordinary case with generic arguments. The hypothetical situations CPJ has raised demonstrate with particularity why the IC Elements' conclusory statements are not logical or plausible in the circumstances of this very case . If there are plausible factual situations, like there are here, where the fact that responsive records were or were not generated says nothing about intelligence activities, sources, or methods, and has no impact on national security, then a *Glomar* response is a disproportionate and thus inappropriate protection to potential harm under a FOIA exemption.

As CPJ explained in its opening brief, the declarations cannot be deemed logical or plausible because there are a number of factual scenarios in which responsive records could exist that would not implicate specific intelligence activities, sources, and methods, nor have the potential to harm national security. For example, it is possible that IC Element employees may have emailed internally or received a newsletter with a news article related to the duty to warn Mr. Khashoggi. Likewise, an employee may have written an email referencing news regarding the duty to warn Mr. Khashoggi or discussing news about the threats to Mr. Khashoggi's life. It is possible that the IC Elements could have been contemplating after the fact their duty to warn Mr. Khashoggi while he was still alive. It is also possible that the IC Elements could have received a tip regarding threats to Mr. Khashoggi. None of these scenarios involve the intelligence

activities, sources, or methods related to the active collection of intelligence on Mr. Khashoggi. Acknowledging or denying the existence of responsive records is just the next step in the FOIA process. In and of itself, that step would not tell the public whether the documents contained actual intelligence or if they fell into scenarios like the one described above.

There is no merit to the IC Elements' assertion that "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." IC Elements Br. 34-35 (quoting *CIA v. Sims*, 471 U.S. 159, 174 (1985)). This misses the point. The only issue before this Court is whether acknowledgment of the *fact* that responsive records do or do not exist (not their source or contents should they exist) harms national security. CPJ's news article example amply demonstrates that, were the IC Elements to acknowledge that responsive records do exist (should that be the case), that fact alone would in no way provide any information as to the source or type of responsive records that exist.

The IC Elements strain credulity with the argument that adversaries "can learn a great deal" from the news sources that interest intelligence agencies. IC Elements Br. 35 (quoting *CIA v. Sims*, 471 U.S. at 176-77). Surely the standard of deference has morphed into absolute acquiescence if this Court accepts that it is a

state secret what newspapers or television news feeds are reviewed by the IC Elements. In any event, the IC Elements' argument avoids the relevant issue under Exemptions 1 and 3. Disclosure that responsive records exist which reference public media sources does not itself reveal any information about intelligence activities, sources, or methods, involved in the actual collection of intelligence, that could not be addressed by redaction or withholding. Even under the more deferential standard of review under Exemption 3, the IC Elements' justifications are legally insufficient.

The logic of *American Civil Liberties Union v. CIA* supports rejection of Glomar reliance in this case. There, this Court held that acknowledging the existence or nonexistence of responsive records would not necessarily reveal something about the ***CIA's*** operation of drones, but rather could simply reveal that ***some*** U.S. agency operated drones—which was public knowledge. 710 F.3d at 428-32. The CIA's justifications for its *Glomar* response were deemed insufficient. *Id.* The question then became whether the acknowledgment of the existence or nonexistence of the CIA's mere ***interest*** in drone strikes would harm national security, and this Court held that it would not.

Under *American Civil Liberties Union v. CIA*, it is not enough for the IC Elements to make the generic statement that there are cases in which acknowledging the existence or nonexistence of responsive records ***could*** put

intelligence sources or methods at risk. The plausible scenarios set out by CPJ in which that acknowledgment ***would not*** result in harm to national security further demonstrate why the IC Elements' *Glomar* responses are not logical or plausible in the circumstances of this case.

* * * *

CPJ seeks no change to the basic principle that FOIA should be carefully construed to protect legitimate national security and intelligence interests. Rather, CPJ is asking for this Court to restrain the IC Elements' inappropriately reflexive invocation of the *Glomar* doctrine here, and either order the IC Elements to acknowledge the existence or nonexistence of responsive records and submit *Vaughn* indices, or "direct the District Court to order the IC Elements to submit more detailed declarations," for review *in camera* if necessary. CPJ Br. 55-56.

The government cites in vain to *Phillipi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976), for the proposition that *in camera* review of more detailed declarations is unavailable here. The *Phillipi* court actually recognized that "to fulfill its congressionally imposed obligation to make a *de novo* determination of the propriety of a refusal to provide information in response to a FOIA request the District Court may have to examine classified affidavits *in camera* and without participation by plaintiff's counsel." *Id.* Furthermore, the Department of Justice itself has recognized that submitting declarations for review *in camera* is an

appropriate way to protect national security interests. *See FOIA Update: Approaching the Bench: In Camera Inspection*, U.S. DEP'T OF JUST. (Jan. 1, 1980), https://www.justice.gov/oip/blog/foia-update-approaching-bench-camera-inspection ("[I]f the agency determines that it cannot describe in a public affidavit the bases for withholding documents because to do so would reveal the information it is trying to protect . . . [the] only practical course is the submission of an affidavit *in camera* . . . . [*In camera* review] will most often occur in a case where the agency is withholding national security information and the courts generally have been receptive to such requests.").

The explosion in federal cases involving *Glomar* responses in the last twelve years clearly demonstrates that *Glomar* doctrine must have meaningful limits. *See* Br. of Amici Curiae The Reporters Committee for Freedom of the Press et al. in Supp. of Pl.-Appellant 13-16. Here the conclusory invocations of vague terms such as "national security" or "intelligence sources and methods" are not enough for the IC Elements to carry their burden in the face of the public's "right to be informed about what their Government is up to." *U.S. Dep't of Def. v. Fed. Lab. Relations Auth.*, 510 U.S. 487, 488 (1994).

CONCLUSION

For the foregoing reasons, the District Court's judgment should be reversed and remanded. On remand, the District Court should be instructed to direct the

four IC Elements to acknowledge the existence or nonexistence of responsive records to each of CPJ's FOIA Requests 2, 3, and 4; to release responsive records (should they exist); and to submit *Vaughn* indices explaining any redactions or withholdings. *Vaughn v. Rosen*, 484 F.2d 820, 826-27 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (defining *Vaughn* indices requirements). Alternatively, the District Court should be instructed to require the IC Elements to submit more detailed declarations in support of their *Glomar* responses, particularly in light of the Department of State's statements. The District Court also should be instructed to preserve CPJ's ability to challenge further withholdings or redactions and the sufficiency of additional declarations.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Jeremy Feigelson hereby certifies under penalties of perjury pursuant to 28 U.S.C. § 1746:

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). The brief contains 6,062 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. The foregoing brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in proportionally spaced typeface using Microsoft Word 2010, in Times New Roman 14-point font.

Respectfully submitted,

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