ORAL ARGUMENT NOT YET 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,

UNITED STATES DEPARTMENT OF STATE,
Defendant.

On Appeal from the United States District Court for the District of Columbia
No. 1:18-cv-02709-TNM

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 32 MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and amici curiae

Except for the following amici, all parties, intervenors, and amici appearing before the district court and in this Court are listed in Appellant's brief: Reporters Committee for Freedom of the Press, The Associated Press, Atlantic Media, Inc., The Center for Investigative Reporting (d/b/a Reveal), The Center for Public Integrity, Columbia Global Freedom of Expression, Dow Jones & Company, Inc., The E.W. Scripps Company, First Amendment Coalition, Freedom of the Press Foundation, Gannett Co., Inc., The Guardian U.S., Inter American Press Association, International Documentary Assn., Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The Media Institute, MPA - The Association of Magazine Media, National Freedom of Information Coalition, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, The News Leaders Association, PEN America, POLITICO LLC, Quartz Media, Inc., Radio Television Digital News Association, Reporters Without Borders USA, Reuters News & Media Inc., Society of Environmental Journalists, Society of Professional Journalists, Tully Center for Free Speech, and The Washington Post.

B. Rulings under review

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

C. Related cases

Counsel for amici are not aware of any related case pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Reporters Committee for Freedom of the Press certifies that it is an unincorporated association of reporters and editors with no parent corporation and no stock.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

Atlantic Media, Inc. is a privately held, integrated media company, and no publicly held corporation owns 10% or more of its stock.

The Center for Investigative Reporting (d/b/a Reveal) is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

The Center for Public Integrity is a nonprofit organization with no parent corporation and no stock.

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Dow Jones & Company, Inc. ("Dow Jones") is an indirect subsidiary of News Corporation, a publicly held company. Ruby Newco, LLC, an indirect subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. News Preferred Holdings, Inc., a subsidiary of News Corporation, is the direct parent of Ruby Newco, LLC. No publicly traded corporation currently owns 10% or more of the stock of Dow Jones.

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First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

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National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

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PEN American Center, Inc. has no parent or affiliate corporation.

POLITICO LLC's parent corporation is Capitol News Company. No publicly held corporation owns 10% or more of POLITICO LLC's stock.

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Reporters Without Borders USA is a nonprofit association with no parent corporation.

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is traded on the New York Stock Exchange and Toronto Stock Exchange. There are no intermediate parent corporations or subsidiaries of Reuters News & Media Inc. or Thomson Reuters U.S. LLC that are publicly held, and there are no publicly-held companies that own 10% or more of Reuters News & Media Inc. or Thomson Reuters U.S. LLC shares.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

WP Company LLC d/b/a The Washington Post is a wholly-owned subsidiary of Nash Holdings LLC, a holding company owned by Jeffrey P. Bezos. WP Company LLC and Nash Holdings LLC are both privately held companies with no securities in the hands of the public.

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GLOSSARY

ACLU	American Civil Liberties Union
CIA	Central Intelligence Agency
CPJ	Committee to Protect Journalists
DNI	Office of the Director of National Intelligence
DOD	Department of Defense
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
FOIA or the Act	Freedom of Information Act
IRS	Internal Revenue Service
NSA	National Security Agency
SEC	Securities and Exchange Commission

IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF

Amici have obtained consent to file this brief from both parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2) and D.C. Circuit Rule 29(b).

Amici are the Reporters Committee for Freedom of the Press, The Associated Press, Atlantic Media, Inc., The Center for Investigative Reporting (d/b/a Reveal), The Center for Public Integrity, Columbia Global Freedom of Expression, Dow Jones & Company, Inc., The E.W. Scripps Company, First Amendment Coalition, Freedom of the Press Foundation, Gannett Co., Inc., The Guardian U.S., Inter American Press Association, International Documentary Assn., Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The Media Institute, MPA - The Association of Magazine Media, National Freedom of Information Coalition, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, The News Leaders Association, PEN America, POLITICO LLC, Quartz Media, Inc., Radio Television Digital News Association, Reporters Without Borders USA, Reuters News & Media Inc., Society of Environmental Journalists, Society of Professional Journalists, Tully Center for Free Speech, and The Washington Post.

Lead amicus the Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Amici are news organizations and organizations that advocate on behalf of journalists and the press. Amici or the news outlets and reporters whose interests they represent frequently rely upon access to records requested under the Freedom of Information Act ("FOIA" or "the Act") to report on matters of public concern. Accordingly, amici have a powerful interest in ensuring that courts interpret FOIA, consistent with its plain language and statutory purpose, to be a powerful tool "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation marks omitted). In this case, Defendants-Appellees refused to confirm or deny the existence of records requested by Plaintiff-Appellant under FOIA, instead issuing what are commonly known as "Glomar" responses. Because Defendants-Appellees' refusal to disclose the existence *vel non* of the requested records—which pertain to a matter of substantial concern for amici and all

members the press, particularly for journalists working abroad—amici write to explain the importance of stringent judicial review by district courts of agency Glomar responses in FOIA lawsuits, generally, and in this case, in particular.

RULE 29(a)(4)(E) CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than amici, their members, or counsel—contributed money that was intended to fund preparing or submitting the brief.

CIRCUIT RULE 29(d) CERTIFICATION

Pursuant to D.C. Circuit Rule 29(d), amici certify that this brief is necessary to provide the perspective of media organizations and journalists. Amici submit this brief to address the vital interests served by FOIA, which enable the press to fulfill its constitutional role of informing the public about executive branch agencies, including Defendants-Appellees.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Glomar doctrine emerged during the Cold War in response to FOIA requests for agency records related to covert actions of the government. *See Phillippi v. Cent. Intelligence Agency*, 546 F.2d 1009 (D.C. Cir. 1976) ("*Phillippi I*"). In *Phillippi I*, this Court considered a Central Intelligence Agency ("CIA") response to a FOIA request made by an investigative reporter for *Rolling Stone*. *See id.*; *Phillippi v. CIA*, 655 F.2d 1325, 1327 (D.C. Cir. 1981) ("*Phillippi II*"). The CIA stated that it would "neither confirm nor deny" the existence of records about its efforts to suppress reporting about the Hughes Glomar Explorer, a ship that was part of a government operation to recover a Soviet nuclear submarine that had sunk in the Pacific Ocean in 1968. *See Phillippi I*, 546 F.2d at 1010–11; *see also Phillippi II*, 655 F.2d at 1326–27; *Military Audit Project v. Casey*, 656 F.2d 724, 728–36 (D.C. Cir. 1981). The "classified CIA program," of which the Hughes Glomar Explorer was a part, was designed to "recover the missiles, codes, and communications equipment onboard [the Soviet submarine] for analysis by United States military and intelligence experts." *Phillippi II*, 655 F.2d at 1327.

In *Phillippi I*, the government argued that "[o]fficial acknowledgment of the involvement of specific" U.S. government agencies in that operation "would disclose the nature and purpose of" the CIA's classified program, "and could . . . severely damage the foreign relations and the national defense of the United

States." *Phillippi I*, 546 F.2d at 1013–14. The Court's opinion, while implicitly approving the CIA's response, also made clear that the case before it was unique and involved uniquely sensitive national security information. *See id.* at 1010–15. There is no indication that the Court anticipated that what has now come to be known as a Glomar response to a FOIA request would become commonplace. *See id.*

Since *Phillippi I*, federal agencies have submitted "increasingly boilerplate"[1] declarations or affidavits to justify invoking the Glomar doctrine—and they have done so in droves.[2] And, while courts may review agency affidavits in support of a Glomar response *in camera*, that practice is atypical; generally, "[c]ourts give tremendous deference to agency arguments."[3] In this case, the district court determined that Defendants-Appellees could refuse to confirm or deny the existence of responsive records if their justification for doing so "appear[ed]

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[1] Michael D. Becker, Comment, *Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check*, 64 Admin. L. Rev. 673, 689 (2012).

[2] *See id.*

[3] Nathan Freed Wessler, Note, *"[We] Can Neither Confirm nor Deny the Existence or Nonexistence of Records Responsive to Your Request": Reforming the Glomar Response Under FOIA*, 85 N.Y.U. L. Rev. 1381, 1393 (2010). In fact, judicial review of Glomar responses has typically been so deferential that commenters have called on courts to conduct *more in camera* review, despite the fact that such closed-door deliberations are themselves contrary to the goals of openness and government transparency. *See, e.g.*, *id.* at 1409.

logical or plausible." *Knight First Amendment Inst. at Columbia Univ. v. CIA*, 424 F. Supp. 3d 36, 42 (D.D.C. 2020) ("District Court Opinion").[4]

This low bar often applied by district courts to agency assertions of the Glomar doctrine is contrary to the statutory language of the Act and has undermined the legislative purpose of FOIA, which is intended to assure government openness and transparency. Particularly as the FOIA requests at issue in this case seek information that touches on matters of fundamental public concern, the district court should have applied a higher degree of scrutiny to the justifications asserted by Defendants-Appellees for their Glomar responses. Given the unbridled growth of Glomar responses across federal agencies, the pernicious way in which overclassification of documents interacts with the Glomar doctrine, and the press freedoms implicated by the records at issue, district courts should be required to apply a heightened standard of proof in this case and others like it to bring the doctrine back in line with the language and purpose of the Act.

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[4] This standard is frequently coupled with the notion that district courts should, absent certain circumstances, afford "substantial weight to an agency affidavit," as it was here. *See* District Court Opinion, 424 F. Supp. 3d at 42; *see, e.g.*, *Am. Civil Liberties Union v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013) ("*ACLU v. CIA*"). "Substantial weight" is a phrase that arises from the legislative history of the 1974 FOIA amendments, which amici discuss below. Plaintiff-Appellant argues that Defendants-Appellees' justifications for asserting a Glomar response here are neither logical nor plausible, and that the district court erred in applying substantial weight to those justifications, and amici agree. Amici write, however, to urge the Court to reverse and require the district court to subject the agencies' justifications for Glomar responses to more rigorous scrutiny, as FOIA requires.

ARGUMENT

I. Glomar responses demand careful judicial scrutiny, especially when records of fundamental public concern are at stake.

A. The language and purpose of FOIA and decisions of this Court require district courts to closely scrutinize agency justifications for Glomar responses.

"The Glomar doctrine is in large measure a judicial construct," not a legislative one. *ACLU v. CIA*, 710 F.3d at 431. It was "neither described in the [FOIA] statute nor contemplated by Congress when it passed the Act." Wessler, *supra*, at 1388; *accord Shapiro v. U.S. Dep't of Justice*, 153 F. Supp. 3d 253, 273 (D.D.C. 2016). Though the doctrine "flows from [the] purpose" of the FOIA exemptions, *ACLU v. CIA*, 710 F.3d at 431, it is also constrained by the express language of the Act, which requires district courts to review agency records de novo when an agency response is challenged in court:

> On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case *the court shall determine the matter de novo*, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and *the burden is on the agency to sustain its action.*

5 U.S.C. § 552(a)(4)(B) (emphasis added). In other words, FOIA requires the district court to conduct a thorough review of whether an agency's justification for withholding documents—or a refusal to reveal their existence *vel non*—meets the

requisite burden. Rigorous judicial oversight is a key feature of FOIA's overall statutory scheme, so much so that Congress overruled both a Supreme Court decision (*Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973)) and a Presidential veto "to make clear that precisely this sort of judicial role is essential if the balance that Congress believed ought to be struck between disclosure and national security is to be struck in practice." *CIA v. Sims*, 471 U.S. 159, 189 (1985) (Marshall, J., concurring).

In this case, the district court failed to conduct an adequately rigorous review of Defendants-Appellees' showing in support of their Glomar responses. In determining the standard of proof that Defendants-Appellees were required to meet, the district court drew on *ACLU v. CIA*, 710 F.3d 422, and *American Civil Liberties Union v. U.S. Department of Defense*, 628 F.3d 612 (D.C. Cir. 2011) ("*ACLU v. DOD 2011*"). *See* District Court Opinion, 424 F. Supp. 3d at 42. In each of these cases, the Court stated that a Glomar justification is sufficient when it "appears 'logical' or 'plausible.'" *ACLU v. CIA*, 710 F.3d at 427; *ACLU v. DOD 2011*, 628 F.3d at 619. Tracing this standard back through the years reveals that "logical" was introduced as part of the standard of proof required of an agency invoking Exemption 1 in *Weissman v. CIA*, 565 F. 2d 692, 697 (D.C. Cir. 1977).[5]

[5] *Accord Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (establishing a procedure for de novo review in cases where agency invoked Exemption 1 and

But *Weissman* was not a Glomar case. *See id.* at 694 ("All or part of over 50 documents developed by the CIA during its investigation were *withheld*.") (emphasis added). Neither, for that matter, was *Hayden v. National Security Agency*, the case in which this Court introduced "plausibility" into the standard of proof required of agencies invoking Exemption 1. 608 F.3d 1381, 1388 (D.C. Cir. 1979).[6]

The concept of a "logical or plausible" justification drifted into Glomar case law in *Military Audit Project*, 656 F.2d at 751–53, and *Gardels v. CIA*, 689 F.2d 1100, 1104–05 (D.C. Cir. 1982). In both cases, the Court appears to have applied

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stating "[t]o these observations should be added an excerpt from our opinion in *Weissman* (as revised): 'If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated.'"). In addition to *Ray v. Turner*, this proposition in *Weissman* was cited in the non-Glomar cases *Hayden v. National Security Agency*, 608 F.2d 1381, 1387 (D.C. Cir. 1979), *Lesar v. U.S. Department of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980), and *Baez v. U.S. Department of Justice*, 647 F.2d 1328, 1335 (D.C. Cir. 1980), which were in turn cited by *Military Audit Project*, 656 F.2d at 738. That case was summarily cited by the Court for the standard of review in *Miller v. Casey*, 730 F.2d 773, 776 & n.19 (D.C. Cir. 1984). *See ACLU v. CIA*, 710 F.3d at 427 (citing *Miller*, 730 F.2d at 776).

[6] *Accord Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) (applying plausibility standard and citing *Hayden*). In addition to *Halperin*, the Court's discussion in *Hayden* about whether an agency's rationale for invoking Exemption 1 was "implausible" was later cited for the proposition that "plausibility" is part of the requisite standard of proof in *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982), *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007), and *Larson v. U.S. Department of State*, 565 F.3d 857, 862 (D.C. Cir. 2009). *See ACLU v. DOD 2011*, 628 F.3d at 617 (citing *Wolf* and *Larson*).

the standard established for the review of agency justifications for *withholding* classified documents under Exemption 1 that was given in *Ray v. Turner*, 587 F.2d at 1195, to the Glomar context with little discussion. *See Gardels*, 689 F.3d at 1104–05; *Military Audit Project*, 656 F.2d at 738 & n.49; *cf.* Danae J. Aitchison, Comment, *Reining in the Glomar Response: Reducing CIA Abuse of the Freedom of Information Act*, 27 U.C. Davis L. Rev. 219, 230–31 (1993) (discussing *Ray v. Turner*). *Ray v. Turner* relied on the legislative history of the 1974 FOIA amendments, in which the Senate Committee discussed the appropriate standard for "determining [d]e novo whether agency records *have been properly withheld*" under Exemption 1, 587 F.3d at 1192 (quoting S. Rep. No. 93-1200, at 9, 12 (1974)) (emphasis added), and Exemption 3 "when the statute providing criteria *for withholding* is in furtherance of national security interests," 587 F.3d at 1195 (emphasis added).[7] Of course, Congress in 1974 could not have foreseen the Glomar doctrine, which did not arise in the case law until two years later.

The Court need not have relied on *Ray v. Turner*'s treatment of the legislative history of the 1974 Amendments—and the resultant standard of proof for withholdings—in *Military Audit Project* and *Gardels*, because *Phillippi I* had already incorporated that legislative history into the Glomar doctrine. *Phillippi I*,

[7] *See*, *e.g.*, *Morley v. CIA*, 508 F.3d 1108, 1123–26 (D.C. Cir. 2007) (decoupling the requirement to justify an Exemption 1 and 3 withholding from that required to justify a Glomar response).

546 F.2d at 1012–13 & n.4 ("It is important to note that Congress has been peculiarly sensitive to expansive judicial interpretations of the exemptions to the FOIA. Through various amendments it has sought to insure that these exemptions not provide means by which government agencies could eviscerate the policy of the Act."). Far from requiring that an agency's justification for a Glomar response merely be logical or plausible, the Court in *Phillippi I* envisioned a standard that "would require the Agency to provide a public affidavit explaining in as much detail as is possible the basis for its claim that it can be required neither to confirm nor to deny the existence of the requested records." 546 F.2d at 1013. Further, rather than giving "substantial weight" to every agency affidavit, the *Phillippi I* Court envisioned that "[t]he agency's arguments should then be subject to testing by [the] appellant, who should be allowed to seek appropriate discovery when necessary to clarify the Agency's position or to identify the procedures by which that position was established." *Id*.

Simply put, the district court's formulaic application of a "logical or plausible" test for agency affidavits in Glomar cases is inconsistent with the language and purpose of the Act,[8] as well as what the Court envisioned would be the level of scrutiny applied to Glomar responses when it recognized the doctrine. When agencies clear this low bar for asserting a Glomar response the burden shifts

[8] Discussed below in Sections I.B–C.

to the requester, who has two principal avenues to overcome it. The requester must either (i) show that the agency has already officially acknowledged the existence of the record,[9] or (ii) that the agency is acting in bad faith. Wessler, *supra*, at 1393. Requesters often cannot satisfy these hurdles. As a result, an agency's declaration too frequently becomes, effectively, the last word on whether a Glomar response is justified. Predictably, this practice has led to an explosion in Glomar responses, with the trend growing worse over time. And, especially here, given the press freedom implications of the government's duty to warn,[10] a more stringent level of judicial scrutiny for the affidavits submitted by Defendants-Appellees is warranted.

B. Glomar responses are badly overused, and the trend is getting worse.

Forty-four years after this Court permitted the CIA to "neither confirm nor deny" the existence of records about the Hughes Glomar Explorer, "overuse of the Glomar response has been well documented." Becker, *supra*, at 677. Federal agencies far removed from national security considerations have seized upon the opportunity to avoid stating whether records requested under FOIA exist. For example, in 2002, the Securities and Exchange Commission ("SEC") issued almost

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[9] In this case, Plaintiff-Appellant argues that official acknowledgment precludes the Defendants-Appellees' assertion of a Glomar response. *See* Br. of Pl.-Appellant at 28. Amici do not discuss this argument, which is fully addressed by Plaintiff-Appellant.

[10] Discussed below in Section II.

100 Glomar responses to FOIA requests. *Securities and Exchange Commission Freedom of Information Annual Report for the Fiscal Year Ending September 30, 2003*.[11] The SEC is not alone; the Internal Revenue Service ("IRS") and the U.S. Postal Service have also issued Glomar responses. Alex Richardson & Joshua Eaton, *Postal Service and the IRS Join the CIA in Handing Out Glomar Denials*, MuckRock (Mar. 17, 2015).[12]

It is difficult to determine exactly how frequently federal agencies invoke the Glomar doctrine. *See* Wessler, *supra*, at 1395 & n.88 ("Because the Glomar response is never invoked independently of the nine FOIA exemptions, it is not considered an independent reason for denying a request" in required annual reports.). However, although most FOIA cases do not result in litigation, the sheer increase in the use of Glomar responses can still be seen in miniature by the growth, over time, in federal cases in which the doctrine is invoked by the government and subsequently addressed by a court. According to the National Security Archive, a non-profit research and journalism center within The George

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[11] Available at https://perma.cc/7WEZ-JN33. It is unusual that the SEC published the number of Glomar responses that it issued that year; agencies typically do not publicly disclose those numbers.

[12] Available at https://perma.cc/4RBN-B26K. The article documents a Glomar response by the U.S. Postal Service to a FOIA request for records that had already been released to another reporter, and which had formed the basis for two stories in *The New York Times*, along with a Glomar response by the IRS to a request premised on an open letter from an attorney in the IRS Office of Chief Counsel to several agency executives.

Washington University, there were approximately 20 judicial opinions involving a Glomar response between 1976 and September 11, 2001, an average of fewer than one per year. *See* Amicus Curiae Brief of National Security Archive in Support of Appellants to Vacate and Remand at 9, *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60 (2d Cir. 2009).[13] Between September 11, 2001, and the end of 2008, however, there were approximately 60 decisions involving a Glomar response, for an average closer to eight cases per year. *Id.* In the roughly 11.5-year period between the submission of that brief and the present, there have been at least 168 such decisions, an average of nearly 14.5 per year.[14]

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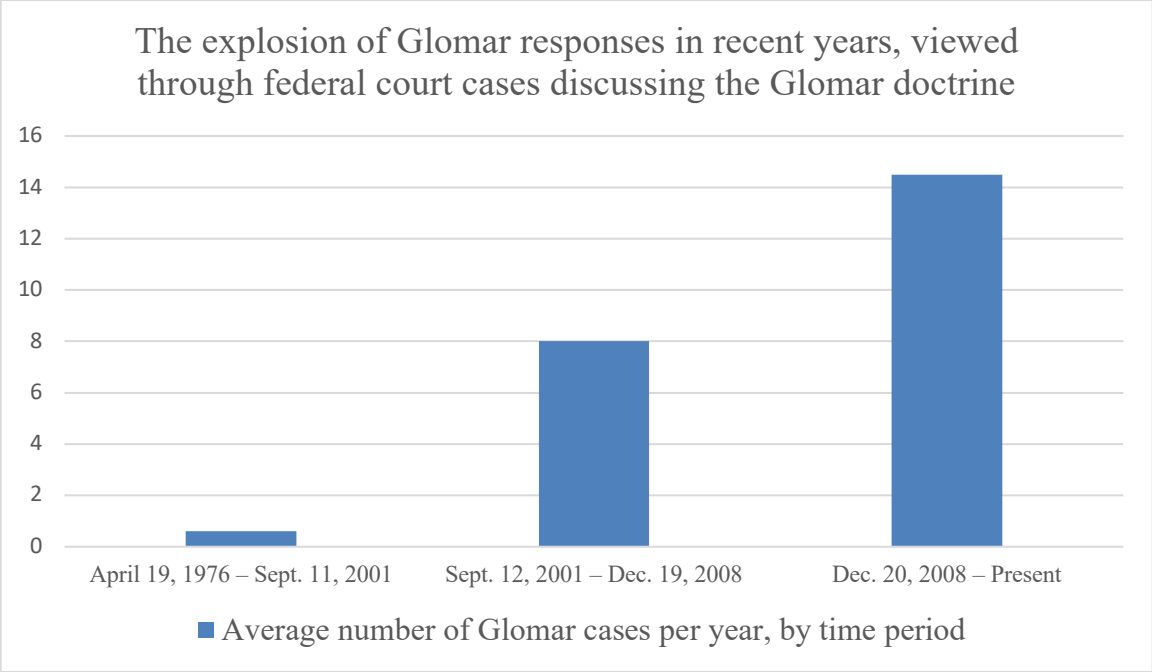
[13] Available at https://perma.cc/U2Q9-3VXQ.

[14] The National Security Archive submitted its brief in *Wilner* on December 19, 2008. A Westlaw search in all federal courts for the dates between December 19, 2008, and April 30, 2009, yielded 9 Glomar-related decisions. The U.S. Department of Justice ("DOJ") online archive of decisions spanning May 1, 2009 – December 31, 2012, includes 28 judicial decisions involving the issuance of a Glomar response. *See* U.S. Department of Justice, *Court Decisions*, The United States Department of Justice Archives, archived at https://perma.cc/KKH9-7M3V (last visited July 15, 2019). A search of the DOJ's archive of decisions spanning January 1, 2013 – present yielded 131 decisions, *see* U.S. Department of Justice, *Court Decisions*, archived at https://perma.cc/KKH9-7M3V (last visited July 15, 2019), for a total of 168 during the period December 20, 2008 – present.



This Court, when it decided *Phillippi I*, could not have foreseen the substantial rise in Glomar responses, given the unique circumstances of that case. Yet several decades later, the Glomar doctrine is now a regular feature of FOIA litigation. Every appellate court that has considered the issue has permitted Glomar responses in some circumstances. *See Bassiouni v. CIA*, 392 F.3d 244 (7th Cir. 2004); Wessler, *supra*, at 1391 & n.62 (collecting cases). And despite arising solely in the national security context, the doctrine has now been adopted by the courts of some states, including New York in *Abdur-Rashid v. New York City Police Department*, 992 N.Y.S.2d 870, 895 (2014), and New Jersey in *New Jersey Media Group Inc. v. Bergen County Prosecutor's Office*, 146 A.3d 656, 660 (App. Div. 2016). *See* Adam Marshall, *Glomar Surfaces in State Courts*, Reporters

Committee for Freedom of the Press (2015);[15] *see also* A. Jay Wagner, *Controlling Discourse, Foreclosing Recourse: The Creep of the Glomar Response*, 21 Comm. L. & Pol'y 539, 556 (2016).[16]

C. The interaction between the Glomar doctrine and overclassification poses particular problems for government transparency.

The Glomar doctrine frequently works hand-in-hand with widespread overclassification of government information to keep the public in the dark about government activities. Indeed:

> The danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods. . . . The practice of secrecy, to compartmentalize knowledge to those having a clear need to know, makes it difficult to hold executives accountable and compromises the basics of a free and open democratic society.

Am. Civil Liberties Union v. U.S. Dep't of Defense, 389 F. Supp. 2d 547, 561–62 (S.D.N.Y. 2005) ("*ACLU v. DOD 2005*"). Classification of records and

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15 Available at https://perma.cc/KJ2G-S7VK.

16 Arguing that *Better Gov't Ass'n v. Zaruba*, 21 N.E.3d 516, 518 (Ill. App. 2d 2014), represented "[e]rratic or unreasoned implementation" of the Glomar doctrine in the Illinois courts. Adoption by the states of this doctrine is particularly troubling given what some commenters have described as a comparatively lower level of transparency already present in some state and local public records regimes. *See generally* Christina Koningisor, *Transparency Deserts*, 114 Nw. U. L. Rev. 1461 (2020) (discussing non-federal open records regimes generally, and covering the incorporation of the Glomar doctrine into New York law at 1545 n.478).

information by the federal government has become "rampant" in the last few decades. *See* Elizabeth Goitein and David M. Shapiro, *Reducing Overclassification Through Accountability*, Brennan Center for Justice 1 (2011).[17] As the late Senator Daniel Patrick Moynihan—who also chaired the Commission on Protecting and Reducing Government Secrecy—noted, this trend toward greater secrecy threatens the "singularly American" commitment to open government. *See* Daniel Patrick Moynihan, *Secrecy* 226–27 (1998); *accord ACLU v. DOD 2005*, 389 F. Supp. 2d at 562.

The feedback loop between overclassification and the overuse of Glomar responses can lead to absurd results. For instance, in *Taylor v. National Security Agency*, the National Security Agency ("NSA") stated that pursuant to FOIA Exemptions 1 and 3 it could neither confirm nor deny the existence of "[e]ach application for the order authorizing and/or approving the reading of requester's mind, to listen to requester's thoughts, and to eavesdrop on the requester's thoughts[,]" because, inter alia, doing so "would allow [the United States'] adversaries to accumulate information and draw conclusions about [the NSA's] technical capabilities, sources, and methods." No. CV 313-045, 2014 WL 12788725, at *1, *3 (S.D. Ga. Mar. 28, 2014); *see also* David E. McCraw, *Truth in Our Times* 220–21 (2019). The district court in *Taylor* held that the NSA had

[17] Available at https://perma.cc/43J6-JSRM.

adequately justified its Glomar response. 2014 WL 12788725, at *7–8 ("An agency's justification for invoking FOIA Exemption 3 is sufficient if it appears logical or plausible. . . . these justifications are both logical and plausible.") (internal quotation marks omitted). The pro se plaintiff failed to timely challenge the holding, No. CV 313-045, 2014 WL 4926269, at *4 (S.D. Ga. Sept. 30, 2014), and the Eleventh Circuit eventually affirmed summary judgment for the agency. 618 F. App'x 478 (11th Cir. 2015). Similarly, in *Roman v. Dailey*, the district court held that agencies' Glomar responses to requests for records related to "satellites able 'to read the pulses and patterns of the human brain'" were justified. No. 97-1164, 1998 U.S. Dist. LEXIS 6708, at *2, *8–9, *12 (D.D.C. May 8, 1998).

The relationship between the Glomar doctrine and classification also introduces another means by which the executive branch can selectively circumvent disclosure under FOIA. As one commentator has noted, "[T]he enthusiasm with which the FOIA is followed often depends on the sitting president's ideology." Becker, *supra*, at 680 & n.49.[18] And, indeed, that the Glomar doctrine provides a pathway for a presidential administration—of any political affiliation, *see* Chart, Section I.B—to sidestep the Act has been apparent

[18] "For example, President Ronald Reagan significantly weakened the public's right to information through Executive Order 12,356 and several amendments adopted in the 1980s," which "increased the ability of government agencies to withhold information under Exemption 1 and permitted officials to reclassify documents during the FOIA review process." *Id.*

almost from its inception. As amici noted above, the Court heard three FOIA cases involving requests for agency records about the Hughes Glomar Explorer, beginning with *Phillippi I*, which was decided on November 16, 1976. 546 F.2d 1009. Two weeks earlier, Jimmy Carter had defeated the incumbent Gerald Ford in the 1976 presidential election; he took office on January 20, 1977. Meanwhile, litigation continued in *Military Audit Project v. Casey*, and on June 9, 1977, the government "suddenly changed [its] position . . . on the grounds that: 'It has now been determined that the fact that the Central Intelligence Agency, one of the defendants in this case, was involved in the Hughes Glomar Explorer Program may be made public.'" *Military Audit Project*, 656 F.2d at 734.[19] That reversal, the Court noted, "apparently resulted from a shift in the perception of national security interests that occurred when the Carter administration took office." *Id.* at 735. By the time the Court decided *Phillippi II* later in 1981, no Glomar responses remained at issue in the case. 655 F.2d at 1328 (noting the Carter administration's reversal of position and stating that "in May 1977 the government acknowledged both that the CIA was responsible for the project and that CIA officials had tried to dissuade members of the press from publishing stories about it").

[19] This left only a small set of documents for which a Glomar response was asserted. *Id.* at 741–45.

D. This Court should remand and require the district court to apply careful scrutiny to Defendants-Appellees' justifications for asserting Glomar responses.

The Glomar doctrine must be interpreted and applied in accordance with the purpose of FOIA. *See ACLU v. CIA*, 710 F.3d at 431. Here, the district court departed from the rigorous de novo review required by the Act in failing to carefully scrutinize the declarations submitted by Defendants-Appellees in support of their Glomar responses. The low bar set for Defendants-Appellees in this case is particularly troubling, as their Glomar responses pertain to serious matters implicating press freedom.[20]

If there are multiple "plausible" interpretations of a statute, "a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). The Glomar doctrine is not described in the Act or its legislative history, *see* Wessler, *supra*, at 1388; *accord Shapiro*, 153 F. Supp. 3d at 273, and it is subject to multiple plausible interpretations. Government agencies' use of the Glomar doctrine to refuse to either confirm or deny the existence of records that may show that the government

[20] *See* Section II, describing the press freedom implications of the Intelligence Agencies' refusal to acknowledge the existence *vel non* of records relating to the duty to warn directive.

purposefully failed to warn a journalist of a plot against him should be carefully circumscribed in light of both the constitutional protections for the freedom of the press and the purpose of FOIA. The Court should thus "consider the necessary consequences" of the district court's determination that a merely "logical or plausible" justification for Defendants-Appellees' Glomar responses is adequate.

II. Journalists' safety demands the government be transparent about its duty to warn them of threats.

Defendants-Appellees issued Glomar responses to several of the FOIA requests at issue here:

> Request 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.
>
> Request 3: All records concerning any "issue arising among [intelligence community] elements" regarding a determination to warn Jamal Khashoggi or waive the duty to warn requirement, or regarding the method for communicating threat information to him.
>
> Request 4: All records relating to any dispute referred to the 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.[21]

District Court Opinion, 424 F. Supp. 3d at 40 n.7. By refusing to confirm or deny the existence of these records, Defendants-Appellees may be concealing a serious

[21] For the Office of the Director of National Intelligence ("DNI") only.

press freedom issue. In any event, refusing to disclose the existence or nonexistence of the records makes journalists abroad less safe.

In 2015, then-Director of National Intelligence James Clapper issued a directive publicly formalizing the responsibility of Defendants-Appellees to "provide warning regarding threats to specific individuals or groups of intentional killing, serious bodily injury, and kidnapping" in certain circumstances. Intelligence Community Directive 191, Office of the Dir. of Nat'l Intel. ¶¶ B, E.1, F.1 (Jul. 21, 2015) ("Directive 191");[22] *see Investigation of, Accountability for and Prevention of Intentional State Killings of Human Rights Defenders, Journalists and Prominent Dissidents*, United Nations General Assembly (Oct. 4, 2019) ¶ 56 ("Special Rapporteur Investigation").[23] As Plaintiff-Appellants argued before the district court, the existence of this directive, combined with the State Department's public denial that the United States government had advance knowledge of Saudi Arabia's plot to kill Khashoggi, leads to a few likely conclusions. Either (i) Defendants-Appellees failed to consider or execute their obligations under Directive 191; (ii) a failure of intelligence meant that Defendants-Appellees in fact had no advance knowledge of the imminent threat to Khashoggi's life; or (iii)

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22 Available at https://perma.cc/7EFU-SCVL.

23 Available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/36.

Defendants-Appellees were aware of the threat to Khashoggi, but were ordered not to act in accordance with Directive 191.[24]

The third possibility—that Defendants-Appellees were specifically ordered not to warn a U.S. resident, journalist, and Global Opinions contributing columnist for *The Washington Post* of Saudi Arabia's plot to murder him—in particular warrants special scrutiny of Defendants-Appellees' affidavits justifying their Glomar response.[25] The scenario is not farfetched. In 2017, following the publication of an article by *New York Times* reporter Declan Walsh about a student found dead in Egypt,[26] the *Times* received a warning from a government official that Walsh would soon be arrested by the Egyptian government. Declan Walsh, *The Story Behind the Times Correspondent Who Faced Arrest in Cairo*, N.Y. Times (Sept. 24, 2019) ("Walsh 2019").[27] Distressingly, as the *Times'* publisher A.G. Sulzberger later recounted, "[T]he official was passing along this warning without the knowledge or permission of the Trump Administration. Rather than trying to stop the Egyptian government or assist the reporter, the official believed, the Trump administration intended to sit on the information and let the arrest be

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[24] *See* Memorandum of Points and Authorities of Plaintiff CPJ, Knight First Amendment Institute at Columbia Univ., et al. v. CIA et al. at 42–43, ECF No. 38-1 (Sept. 30, 2019).

[25] *See* Section I.

[26] Declan Walsh, *Why Was an Italian Graduate Student Tortured and Murdered in Egypt*, N.Y. Times (Aug. 15, 2017), https://perma.cc/T7EP-CRJR.

[27] Available at https://perma.cc/NZ6A-53RD.

carried out." A.G. Sulzberger, *The Growing Threat to Journalism Around the World*, N.Y. Times (Sept. 23, 2019);[28] *see also* Walsh 2019, *supra*, ("The official told my editor that his supervisors were unlikely or unwilling to intervene, and he risked his career just to get out this warning."). The current administration is also on the record dismissing the possibility of further investigation into Khashoggi's murder because "Saudi Arabia is a big buyer of American product. . . . It's a big producer of jobs." Kayla Epstein, *Trump Brushes Off Calls to Investigate Jamal Khashoggi's Death*, Wash. Post (June 24, 2019);[29] *see* Mark Landler, *In Extraordinary Statement, Trump Stands with Saudis Despite Khashoggi Killing*, N.Y. Times (Nov. 20, 2018) ("'We may never know all of the facts surrounding the murder of Mr. Jamal Khashoggi,' Mr. Trump added. 'In any case, our relationship is with the Kingdom of Saudi Arabia.'").[30]

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28 Available at https://perma.cc/NRF2-96Z3.

29 Available at https://perma.cc/5PYN-J9R2?type=image.

30 Available at https://perma.cc/6Y3B-UN2B. *Cf.* Sulzberger, *supra*, ("Eighteen months [after the Declan Walsh incident], another one of our reporters, David Kirkpatrick, arrived in Egypt and was detained and deported in apparent retaliation for exposing information that was embarrassing to the Egyptian government. When we protested the move, a senior official at the United States Embassy in Cairo [stated], "What did you expect would happen to him? . . . His reporting made the government look bad."); Declan Walsh, *Egypt Turns Back Veteran New York Times Reporter*, N.Y. Times (Feb. 19, 2019), https://perma.cc/AV27-KXPR; McCraw, *supra*, 233–37, 255 (describing Kirkpatrick's reporting on Egypt's covert support of the U.S. plan to move its embassy in Israel to Jerusalem, and the Egyptian government's investigation prior to detaining Kirkpatrick).

If Defendants-Appellees either failed or declined to act pursuant to Directive 191, or if they were simply not aware of the threat to Khashoggi, this information would be troubling in a different sense. Journalists reporting abroad have relied on Defendants-Appellees' ability to acquire evidence of impending threats and their responsibility to warn about those threats. For example, the award-winning Pakistani journalist Taha Siddiqui, who previously survived what he has described as an abduction and possible assassination attempt, "received a call from U.S. authorities . . . who told me they had intelligence about an assassination plot against me if I were to ever return to Pakistan." Taha Siddiqui, *I'm a Journalist Who Fled Pakistan, But I No Longer Feel Safe in Exile*, Wash. Post (Jan. 8, 2019).[31]

Tragically, Jamal Khashoggi is not the only American resident or citizen who is a journalist to be killed abroad in recent years, making Defendants-Appellees' actions pursuant to Directive 191 all the more important to journalists. Marie Colvin, a British-American conflicts reporter for *The Sunday Times* in London, was killed by the Syrian government in 2012, alongside the French

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[31] Available at https://perma.cc/28EM-QBX9?type=image. Other foreign intelligence agencies have warned journalists against imminent risks to their lives as well. "In 2018, Hasan Cücük, a Turkish reporter, who had been in Demark since the 1990s, was reportedly rushed to a safe place by Danish Security and Intelligence Service . . . after a serious threat to his life was detected." Special Rapporteur Investigation ¶ 59.

photographer Rémy Ochlik, in an attack "intended to intimidate journalists, inhibit newsgathering and the dissemination of information, and suppress dissent." *Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141, 165 (D.D.C. 2019); *id.* at 146 ("When the Syrian military uncovered the location of the Media Center, it launched an artillery attack against it, for the purpose of killing the journalists inside."). James Foley and Steven Sotloff, both freelance journalists, were separately kidnapped while reporting in Syria and killed by ISIS in 2014. Diane Foley, Art Sotloff, and Shirley Sotloff, *Our Sons Were Killed by the Islamic State. Don't Let ISIS Prisoners in Syria Go Free*, Wash. Post (Oct. 10, 2019).[32] David Gilkey, a photographer and editor for NPR, and the Afghan reporter Zabihullah Tamanna working for NPR, were killed by the Taliban while on assignment in Afghanistan in 2016. Robert Little, *Not a Random Attack: New Details Emerge from Investigation of Slain NPR Journalists*, NPR (June 9, 2017).[33] And Christopher Allen, a British-American freelance journalist, was killed while photographing rebel fighters in South Sudan in 2017. *See* Memorandum from United Nations Special Rapporteur Agnes Callmard to FBI Director Christopher Wray (Jan. 30, 2020);[34] Simona Foltyn, *After US Journalist Killed in South Sudan,*

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32 Available at https://perma.cc/V65M-WG6C?type=image.
33 Available at https://perma.cc/4N8P-3X7L.
34 Available at https://perma.cc/2SJB-4DCE.

a Quest for Answers, Columbia Journalism Review (Mar. 15, 2018).[35] Across the globe, many other journalists are attacked, abducted, kidnapped, imprisoned and otherwise improperly detained each year.[36] It is thus an utmost imperative that journalists know whether Defendants-Appellees consistently comply with their directive to warn when harm abroad is imminent.

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35 Available at https://perma.cc/T4J4-86JB.

36 *See Explore CPJ's database of attacks on the press*, Committee to Protect Journalists (June 15, 2020 9:32 PM), https://cpj.org/data/?status=Killed&start_year=1992&end_year=2020&group_by=year&motiveConfirmed%5B%5D=Confirmed&type%5B%5D=Journalist; McCraw, *supra*, at 248 (cataloguing various injuries to and detentions of *New York Times* reporters occurring abroad within the last ten years).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's determination that the affidavits submitted by Defendants-Appellees adequately justified their Glomar responses to Plaintiff-Appellant's FOIA requests.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because this brief contains 6,493 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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