No. 24-520

IN THE

Supreme Court of the United States

JAMES G. CONNELL, III,

Petitioner,

—v.—

CENTRAL INTELLIGENCE AGENCY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY IN SUPPORT OF CERTIORARI

Arthur B. Spitzer
Scott Michelman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF THE DISTRICT OF COLUMBIA
529 14th Street NW, Suite 722
Washington, D.C. 20045

Brett Max Kaufman
Counsel of Record
Sara Robinson
Hina Shamsi
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
bkaufman@aclu.org

Cecillia D. Wang
Evelyn Danforth-Scott
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
425 California Street, Suite 700
San Francisco, CA 94104

Counsel for Petitioner

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INTRODUCTION

To make this case appear unworthy of review, the CIA glosses over an obvious circuit split and downplays the D.C. Circuit's nationwide impact on FOIA doctrine. Neither effort is persuasive. Absent this Court's intervention, the split will remain unresolved and the D.C. Circuit's rule will permit agencies, in the large majority of Glomar cases, to refuse to "confirm or deny" the existence of records responsive to a FOIA request even when the complete evidentiary record shows that those records exist. The Court should grant certiorari for three reasons.

First, there is a clear circuit split, as the D.C. Circuit acknowledged below. It held that when courts evaluate whether an agency's Glomar response is logical or plausible, they must ignore evidence from sources other than the responding agency. In *Florez v. CIA*, 829 F.3d 178 (2d Cir. 2016), the Second Circuit went entirely the other way, holding that courts must consider any relevant evidence, regardless of the source. The CIA's attempt to cabin that decision fails.

Second, the D.C. Circuit's decision is wrong because it is contrary to basic rules of evidence and the FOIA statute, which together require courts to weigh relevant record evidence when evaluating the logic and plausibility of an agency's justification for withholding information under one of the FOIA's narrow exemptions. The CIA suggests that this rule simply does not apply when it invokes FOIA Exemption 3 to protect intelligence sources and methods, but that extreme reading finds no support in statutory text or precedent. If the CIA were correct, courts would have to endorse even patently absurd

government claims of secrecy—but that is contrary to the FOIA statute that Congress wrote.

Finally, unable to dispute that the question presented is important, the CIA instead suggests that further percolation is warranted and downplays the importance of D.C. Circuit precedent to FOIA litigation. But the majority of FOIA cases are brought there, and other circuits routinely look to the D.C. Circuit's FOIA caselaw as authoritative. As a result, the opinion below has outsized nationwide implications for government transparency.

ARGUMENT

I. THIS CASE PRESENTS AN UNAMBIGUOUS CIRCUIT SPLIT ON THE QUESTION PRESENTED.

The D.C. Circuit held below that when courts assess the logic and plausibility of an agency's Glomar response, they may consider only evidence originating with the responding agency—in line with the judge-made, waiver-based "official acknowledgment" doctrine. In contrast, the Second Circuit held in *Florez* that, under the FOIA and the Federal Rules of Evidence, a court may weigh *any* relevant evidence bearing on the existence of responsive records. The CIA cannot eliminate this clear split by inventing distinctions based on *Florez*'s procedural posture and purported facts, as those features were irrelevant to the court's holding.

In *Florez*, the "threshold inquiry" was whether courts could consider disclosures made by the FBI in evaluating the logic and plausibility of the CIA's Glomar response to a FOIA request. *Id.* at 183. Even

though the information at issue did not come from the CIA, the Second Circuit held that the FBI's disclosures were relevant to the validity of the CIA's Glomar response because they had "appreciable probative value in determining, under the record as a whole, whether the justifications set forth in the CIA's declaration are logical and plausible." *Id.* at 184–85 (cleaned up). It did so even though the FBI disclosures did not actually "reveal the CIA's activities or involvement," but merely because they might "shift the factual groundwork" underlying the court's assessment of the "reasonableness, good faith, specificity, and plausibility" of the CIA's Glomar justification. *Id.* at 185–86 (citation omitted).

The CIA's attempt to read *Florez* narrowly does not stand up to scrutiny.

First, the D.C. Circuit explicitly disagreed with the Second Circuit's conclusion and aligned itself with the dissenting *Florez* judge to hold that a waiver by the responding agency's own official acknowledgment is the only available means to test a Glomar response. Pet. 22 (discussing App. 21a, 23a).

Second, it is immaterial that the Second Circuit "did not actually determine" the "effect" of the FBI evidence on the CIA's Glomar response, Br. in Opp. ("BIO") 20. True, the *Florez* court chose to remand so that the district court would weigh the significance of the relevant evidence in the first instance. 965 F.3d at 183–84. But *Florez*'s "atypical remand context," BIO 21, does not change the Second Circuit's holding, which is not that the FBI evidence actually defeated the CIA's Glomar response, but that it *could*—and therefore it should have been considered in deciding

whether the CIA's Glomar assertion was logical and plausible. (After remand, the CIA withdrew its Glomar response and produced records. Pet. 21.)

Third, the CIA's wishful attempt to revise the nature of the intelligence interest before the court in *Florez* fails. In the CIA's gloss, the agency's "asserted rationale" for its Glomar response in *Florez* was protecting the "*government's* intelligence interest," not just the CIA's. BIO 18 (quoting *Florez*, 829 F.3d at 184–85). And so, the CIA continues, the Glomar assertion in *Florez* "swept more broadly than the [CIA]'s own interests and activities," such that the FBI's disclosure in that case "*could have* been understood" as relevant to this more general "government" (as opposed to CIA-specific) interest. BIO 18–20 (emphasis added).

The Second Circuit's single use of the phrase "government's intelligence interest," 829 F.3d at 185, does not change what the CIA argued and what the court understood was at stake. Just before and after that phrase, the court clearly described the CIA's assertion of its *own* agency interests as the basis for its Glomar response. *See id.* at 184 ("[T]he FBI Disclosures are germane to the *CIA's* asserted rationale for asserting a Glomar response, which is that confirming the existence or non-existence of responsive records would confirm either the *Agency's* interest or disinterest in Dr. Florez as an intelligence asset." (emphasis added)); *id.* at 185 ("This now-public information may bear on the CIA's position that the mere acknowledgement that it does or does not have possession of documents that reference Dr. Florez would . . . disclose *Agency* methods, functions, or sources." (emphasis added)).

And in litigating *Florez*, the CIA was unequivocal on this very point. In the agency's brief to the Second Circuit, it wrote "that the information the CIA invoke[d] Glomar to protect" in *Florez* "[wa]s the existence or nonexistence of a *CIA* interest in Dr. Florez, *not simply a government* interest." Br. for Def.-Appellee at 31 n.6, *Florez v. CIA*, No. 15-1055 (2d Cir. Sept. 29, 2015), ECF No. 36 (emphasis added). Further, the agency affidavit upon which that position was based said the same thing. Lutz Decl. ¶ 29, *Florez v. CIA*, No. 14-cv-1002 (S.D.N.Y. Apr. 28, 2014), ECF No. 12 ("confirmation" of records "would indicate that *the CIA* had an intelligence interest in Florez" (emphasis added)). In fact, the affidavit never once uses the "government's interest" phrase (or any variation of it) that the CIA makes central to its argument here.

Just as the CIA asserted its own agency interests—and not a broader government interest—in support of its Glomar response in *Florez*, the agency asserted its own interests in this case. *See, e.g.,* Blaine Decl. ¶¶ 25–26, *Connell v. CIA*, No. 21-cv-627 (D.D.C. Mar. 29, 2022), ECF No. 14 ("[M]ere confirmation or denial of the existence of responsive records, would . . . reveal . . . whether *the CIA* has an intelligence interest in . . . the subject of Plaintiff's Amended FOIA Request . . . .") (emphasis added)). With the cases plainly involving the same justifications for secrecy, the CIA's attempt to eliminate the split by reducing *Florez* to a distinct "government-intelligence-activity context" by cherry-picking a phrase the Second Circuit happened to use once, BIO 20, fails.

Fourth, contrary to the CIA's assertion, BIO 20–21, *New York Times v. CIA*, 965 F.3d 109 (2d Cir.

2020), does not support its cramped view of *Florez*'s holding. The CIA's argument confuses two distinct issues: the question presented here, and the "official acknowledgment" doctrine. As *Florez* explained, a Glomar response can be defeated in either of two ways: (1) through a responding agency's "official acknowledgment," which operates as a waiver of an otherwise valid exemption claim, or (2) through evidence in the record that undermines the logic and plausibility of the agency's justification for withholding. 829 F.3d at 186–87; Pet. 19–22. The live issue in *Florez*, just like in this case, concerned the second pathway (the response's logic and plausibility), not the first (official acknowledgment). *Id.* at 187; Pet. 17. In contrast, *New York Times* primarily involved official acknowledgment, which the *Florez* court made clear "ha[d] no impact on [its] opinion." 829 F.3d at 187.

Indeed, rather than narrow *Florez* (as the CIA suggests), *New York Times* reinforced it. "To be sure," the Second Circuit explained, "there are times when other agency disclosures can be 'relevant evidence' regarding the 'sufficiency of the justifications set forth by the CIA in support of its Glomar response.'" 965 F.3d at 121 (quoting *Florez*, 829 F.3d at 184, 187). And then the *New York Times* court did just what *Florez* had allowed—considered relevant evidence originating outside the CIA—but simply found that evidence lacking. *See id.* at 121–22 (agreeing with the district court's assessment that the non-CIA evidence was "ambiguous" and did not affect its conclusion that the CIA's Glomar response was logical and plausible).

At bottom, the Second Circuit held in *Florez* that courts must consider all relevant record evidence in

determining whether a Glomar response is logical or plausible. The decision below explicitly rejects that rule, aligns itself with *Florez*'s dissenting judge, and holds that a Glomar response can be defeated only by waiver through official acknowledgment. Pet. 22. The circuit split could not be sharper.

II. IN THE ABSENCE OF THIS COURT'S REVIEW, THE DECISION BELOW WILL LEAD COURTS ACROSS THE COUNTRY TO ENDORSE IMPLAUSIBLE CLAIMS OF GOVERNMENT SECRECY.

A. The D.C. Circuit's opinion wrongly restricts judicial review of Glomar responses.

The D.C. Circuit's opinion is dangerously wrong. By concluding that federal courts assessing Glomar may never consider relevant evidence originating from an agency other than the one withholding information, the decision below rewrites the FOIA statute, the standards that courts widely apply in assessing agencies' asserted withholdings under the statute, and even the Federal Rules of Evidence. Pet. 23–28.

In defending the decision, the CIA does not dispute that under the FOIA, agencies have a basic and mandatory obligation to provide logical and plausible justifications for withholding particular records or asserting a Glomar response. BIO 14. Nor does it dispute that in assessing a statutory FOIA exemption against that standard, courts are required to consider the entire record. BIO 15–16.

Instead, the CIA argues that courts must cast these basic rules aside whenever it invokes the FOIA's Exemption 3 and the National Security Act, 50 U.S.C. § 3024(i)(1), to withhold information from the public—including through a Glomar response—on the basis that such a disclosure would reveal intelligence sources and methods. "[E]ven if," the CIA maintains, "non-CIA evidence indicates that some responsive records exist," that contrary record evidence "would not undermine the CIA's textually unqualified authority to decline to disclose 'intelligence sources and methods' . . . by refusing to make any disclosure about the existence or nonexistence of records." BIO 16. In other words, the CIA asserts authority to refuse to confirm or deny whether it has records even when, in light of the full record of relevant evidence, a court would conclude that assertion is illogical and implausible.

That argument would eviscerate Congress's purpose in enacting the FOIA and damage the legitimacy of the judiciary by obliging courts to endorse Glomar responses when they (and the public) know full well that responsive records exist and that acknowledging that fact would reveal nothing at all.

The FOIA was meant to establish a default of government transparency in order to curb the ability of those in power to deceive the public about government activities. Pet. 24–25. Thus, the statute requires courts to independently evaluate an agency's declared justifications for withholding information under narrow exemptions—a check against agencies circumventing statutory requirements based on their own say-so. 5 U.S.C. § 552(a)(4)(B) (mandating *de novo* review of withholding claims); *see Vaughn v.*

Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973) (explaining the importance of effective judicial review in FOIA cases).

The "logical and plausible" test implements that requirement, enabling courts to ensure that agencies do not have carte blanche to withhold whatever they wish. And as circuit courts across the country recognize, a defendant agency cannot carry that burden at the summary judgment stage when the justification for its claimed FOIA exemption is disputed by contrary record evidence. *See* Pet. 26 n.31 (collecting cases). Were it otherwise, an agency could take FOIA withholding decisions entirely into its own hands, reducing judicial review to the mere rubber-stamping of an obvious untruth. Pet. 23–24.

In passing, the CIA suggests that the Federal Rules of Evidence might not "govern" Exemption 3 cases involving intelligence sources and methods. BIO 15. But it points to nothing in the FOIA's text or purpose to support that extreme view, and it fails to elaborate on its shallow insinuation that the text of the National Security Act somehow accomplishes that radical result. Instead, the CIA mischaracterizes Petitioner's argument and misreads this Court's precedent.

First, the CIA distorts Petitioner's position in asserting that he "does not dispute that confirming or denying the existence of records would reveal intelligence sources or methods." BIO 14 (cleaned up); *see id.* at 15 (similar). This is a reference to the D.C. Circuit's recognition that Petitioner did not contest that *without the excluded evidence*, "the CIA's explanation for its *Glomar* response was . . .

sufficiently logical or plausible *on its own terms*." App. 20a (emphasis added). Petitioner's whole point below was that the CIA's "own terms" were contradicted by other relevant evidence. Indeed, an acknowledgment of records by the CIA would not reveal anything at all, because on the complete record, it is clear that such records exist. Pet. 5; App. 18a; *see* Reply Br. of Pl.-Appellant 13–19, *Connell v. CIA*, No. 23-5118 (Feb. 9, 2024); Opening Br. of Pl.-Appellant 35–49, *Connell v. CIA*, No. 23-5118 (Oct. 12, 2023); *see also* Pet. 14–17 (summarizing record evidence including the CIA's own documents, a Senate report, officially disclosed documents from the Office of the Director of National Intelligence, and materials from the government's ongoing military commissions proceedings).

Second, the CIA relies heavily on language in *CIA v. Sims*, 471 U.S. 159 (1985)—*see* BIO 12–15—but that case is inapposite. In *Sims*, this Court considered whether the CIA could withhold, as "intelligence sources" under the National Security Act, the identities of certain researchers who had participated in a controversial CIA project. 471 U.S. at 168–70. Through a novel limiting definition of "intelligence sources and methods" under the Act, the court of appeals had concluded that the researchers would not qualify as "intelligence sources" unless the CIA "needed to cloak its efforts in confidentiality in order to obtain the type of information provided by the researcher." *Id.* at 166. This Court reversed, holding that the court of appeals' "crabbed" definition of "intelligence source" was contrary to the text of the statute and that the researchers qualified as protected sources simply because they provided information to the CIA. *Id.*

The question in *Sims* was entirely different from the one presented here. *Sims* was about *who* qualifies as a protected source; this case is about whether a source will be *revealed*. App. 2a–3a. While the CIA gestures at *Sims* as authority for complete and total deference to the agency when it comes to source protection, BIO 15 ("*Cf. Sims*"), the holding of *Sims* did not go nearly that far. Nor could the Court's resolution of the question presented in *Sims* have silently displaced judicial inquiries required under the FOIA and the Federal Rules of Evidence.

The agency's argument, and the D.C. Circuit's decision endorsing it, would force courts to ignore contrary record evidence in Glomar cases, enabling agencies to bypass their FOIA obligations by offering patently implausible explanations that courts would have no choice but to accept. That outcome is wrong.

B. The decision below will have a nationwide impact that undermines the purposes of the FOIA.

The CIA fails in its effort to downplay the importance of the decision below by minimizing the primacy of the D.C. Circuit as a forum for FOIA litigation. That plaintiffs may file FOIA cases in district courts throughout the nation, BIO 21–22, does not change the fact that the large majority of FOIA litigation is brought within the D.C. Circuit. Pet. 28. In the roughly six months between the filing of the Petition and the CIA's opposition, 330 of the 550 FOIA cases brought in the federal courts—more than 65%—

were filed there.* Leaving the D.C. Circuit's ruling in place means that it will continue to control in a substantial majority of FOIA cases.

Moreover, courts in other circuits frequently look to the D.C. Circuit as authoritative on FOIA issues. *See, e.g., Milner v. Dep't of Navy*, 562 U.S. 562, 567 (2011) ("In the ensuing years, three Courts of Appeals adopted the D.C. Circuit's interpretation of Exemption 2."); *Wilson v. FBI*, 91 F.4th 595, 598 (2d Cir. 2024) (D.C. Circuit is "something of a specialist in adjudicating FOIA cases"); *Whitaker v. Dep't of Com.*, 970 F.3d 200, 206 (2d Cir. 2020) ("D.C. Circuit . . . has particular FOIA expertise"). Accordingly, regardless of where FOIA plaintiffs file their lawsuits, the erroneous decision below threatens government transparency nationwide.

CONCLUSION

This Court should grant the petition for writ of certiorari.

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Respectfully submitted,

Arthur B. Spitzer
Scott Michelman
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF THE
DISTRICT OF COLUMBIA
529 14th Street NW, Suite 722
Washington, D.C. 20045

Brett Max Kaufman
Counsel of Record
Sara Robinson
Hina Shamsi
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
bkaufman@aclu.org

Cecillia D. Wang
Evelyn Danforth-Scott
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
425 California Street, Suite 700
San Francisco, CA 94104

Counsel for Petitioners

June 6, 2025