[ORAL ARGUMENT NOT YET SCHEDULED]

No. 23-5118

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES G. CONNELL, III,

Plaintiff–Appellant,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant–Appellee.

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

REPLY BRIEF FOR PLAINTIFF–APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

*Authorities upon which Plaintiff chiefly relies are marked with asterisks.

Other Authorities

GLOSSARY OF ABBREVIATIONS

ACLU	American Civil Liberties Union
CIA	Central Intelligence Agency
DOD	Department of Defense
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
OPM	Office of Personnel Management
SSCI	Senate Select Committee on Intelligence

INTRODUCTION[1]

The CIA has, through a Glomar response, refused to confirm or deny whether it has records—well, at least *more* records—that concern its "operational control" of Camp VII, a facility for "high-value detainees" at Guantánamo Bay. That refusal is neither logical nor plausible. The record evidence in this case, including the CIA's own documents, establishes that the CIA maintained a measure of operational control over the facility, and that merely acknowledging the existence of records would not reveal anything that the evidence does not already show.

Congress enacted the FOIA to ensure that the public could access official records because it believed that such access was a prerequisite to a functioning democracy. The Glomar doctrine has a legitimate purpose, but it has always been a narrow exception to the ordinary requirements of the statute. Once extraordinary, the CIA's use of Glomar over the past decades has become commonplace. In past cases, the agency's Glomar habit has stretched the public's and the courts' credulity to a breaking point, but in this one, its

[1] Plaintiff–Appellant, James G. Connell, III, though contracted by the Department of Defense, acts only in his individual capacity, and does not represent the position of that agency or the United States. Mr. Connell does not confirm or deny any classified information in this brief, and any citation to publicly reported information should not be read to confirm or deny such information.

refusal to confirm or deny is simply beyond belief.

SUMMARY OF ARGUMENT

The CIA asserted a Glomar response to Mr. Connell's FOIA request, claiming that the agency could not confirm or deny the existence of responsive records about its operational control of Camp VII beyond the three documents it had already disclosed. But in light of the record evidence and the agency's own disclosures, the CIA's Glomar response makes no sense.

Instead of honestly accounting for that record, the CIA attempts to collapse Plaintiff's entire argument into one about the official acknowledgment doctrine. As explained below, the agency is simply wrong in its account of this Court's cases as standing for the proposition that, for Glomar challengers, it's "official acknowledgment or bust." And when the record evidence is properly considered, the CIA's justifications for invoking Glomar fall apart. The CIA's own documents—including a Memorandum of Agreement with the DOD about each entity's respective roles at Camp VII—establish its operational control. So do the Senate Intelligence Committee's Torture Report ("SSCI Report"), and materials from the government's ongoing military commissions proceedings. There is a good reason that government agents of various sorts—including a military prosecutor, the former commander of Camp VII, and a military judge—have failed to treat the

existence of a CIA role at Camp VII even as sensitive. Even the formal classification guidance at Guantánamo Bay covering the CIA's operational control at Camp VII does not treat the "existence of specifics" about that control as classified. For the CIA to simply acknowledge the existence of additional records in this case would not reveal anything the record does not already lay bare.

Separately, the CIA has also waived its ability to assert a Glomar response through official acknowledgment. Its own documents firmly establish that the agency had a measure of operational control over Camp VII. That is enough to conclude that the disclosed documents are not the only ones in the CIA's files. Moreover, although the CIA's own documents establish waiver, the Court can also rely on the public disclosures in the SSCI Report to find waiver through official acknowledgment.

This Court need not play along with the CIA's word games in this case. Respectfully, the Court should reject the CIA's illogical and implausible assertion of a Glomar response and vacate the judgment below.

ARGUMENT

I. Contrary record evidence demonstrates that the CIA's Glomar response is not logical or plausible.

It is the most ordinary requirement that a court consider the entire evidentiary record on summary judgment, and FOIA cases are no different. If the CIA's justifications for its Glomar response do not stand up to the record, then summary judgment is inappropriate. Here, reams of record evidence establish that the CIA's Glomar response is not logical or plausible.

A. Record evidence can foreclose summary judgment in FOIA cases.

For more than 40 years, this Court has held that government agencies are not entitled to summary judgment in FOIA cases if their affidavits justifying the invocation of FOIA exemptions are "called into question by contradictory evidence in the record." *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *see also Mil. Audit Project v. Casey*, 656 F.2d 724, 738 n.49 (D.C. Cir. 1981) (referring to the standard as "well established" and collecting cases). Courts must consider "whether on the *whole record* the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility." *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (emphasis added). In other, familiar words, the agency's justifications for invoking a FOIA exemption must be "logical" or "plausible." *Wolf v. CIA*, 473 F.3d 370, 374–75

(D.C. Cir. 2007) (citations omitted). And that requirement extends to Glomar cases. *See Schaerr v. DOJ*, 69 F.4th 924, 926 (D.C. Cir. 2023); *Knight First Amend. Inst. v. CIA*, 11 F.4th 810, 818 (D.C. Cir. 2021); *Elec. Priv. Info. Ctr. v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012).[2]

Anticipating that the CIA would seek to collapse into one inquiry the consideration of (a) record evidence and (b) waiver through official acknowledgment, Plaintiff explained in his opening brief that the two arguments are distinct. *See* Connell Br. 32–35. Under the official acknowledgment doctrine, an agency's official and public acknowledgment of information can waive even a facially plausible justification for secrecy based on that same information. *See Leopold v. CIA*, 987 F.3d 163, 167 (D.C. Cir. 2021); *see also Wolf*, 473 F.3d at 378. Put another way, official acknowledgment presupposes the existence of valid claims and asks whether an agency has waived them. On the other hand, considering contrary record evidence is part of the initial inquiry into whether an agency's exemption claims are valid in the first place.

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[2] Importantly, this is not a matter of agency "bad faith." *See* CIA Br. 38 (quoting *Elec. Priv. Info. Ctr. v. NSA*, 678 F.3d at 931). Summary judgment is defeated when record evidence contradicts the government's affidavit *or* provides evidence of agency bad faith. *See Gardels*, 689 F.2d at 1104–05 (holding that summary judgment is defeated in either scenario); *Wolf*, 473 F.3d at 374–75 (same); *Knight*, 11 F.4th at 818 (same).

That distinction is precisely what the Second Circuit put into practice in *Florez v. CIA*, 829 F.3d 178 (2d Cir. 2016). As described in detail in Plaintiff's opening brief, *see* Connell Br. 33–35, there the court concluded that disclosures from the FBI were relevant to the CIA's Glomar response because, "at minimum," 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." *Florez*, 829 F.3d at 184–85 (cleaned up). The court found the FBI documents germane even though they did not "reveal the CIA's activities or involvement" in what was at issue in the request, but merely because they might "bear" on the "'reasonableness, good faith, specificity, and plausibility'" of the CIA's justification. *Id*. at 185–86 (quoting *Gardels*, 689 F.2d at 1105).

The CIA argues that *Florez* is "inconsistent with the law of this Circuit." CIA Br. 42. But as the CIA well knows—and carefully avoids outright contesting—this Court has never squarely addressed the arguments aired in *Florez*. Because of that, all the CIA can do is what the dissenting judge in *Florez* did: "attempt[] to extrapolate this limitation from the 'animating principles' of the official acknowledgment doctrine, which, it contends, bar [an] anomalous result." 829 F.3d at 187 n.9 (cleaned up). But as the *Florez* majority concluded, there is nothing anomalous about two different legal paths yielding two

different results. *Id.* at 185–87. And not even the dissenting judge in *Florez* would have held that an evidentiary record could *never* defeat a Glomar response short of official acknowledgments. *See id.* at 187 n.9; *id.* at 195 (Livingston, J., dissenting). Just as in *Florez*, "[p]ut simply, the official acknowledgment doctrine has no impact on" Plaintiff's primary argument. *Id.* at 187 (majority op.).

Indeed, Plaintiff does not dispute the CIA's argument that in applying the official acknowledgment test to a particular agency, this Court will generally not consider statements from other agencies to conclude that the agency has *waived* a valid claim of exemption. *See* CIA Br. 31–32. Nor does he dispute that official acknowledgment is significant because it may, in certain cases, "remove . . . lingering doubts" about a purported secret. *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (quoted at CIA Br. 43). But sometimes, as in this case, the record itself removes those doubts, even without an official acknowledgment. That was the Second Circuit's insight in *Florez*: that when it comes to what evidence is credible, official acknowledgment is not the only game in town. And when plausible deniability is no longer plausible, the courts should not "give their imprimatur" to absurd "fiction[s]." *ACLU v. CIA*, 710 F.3d 422, 431 (D.C. Cir. 2013).

The CIA slices and dices this Court's words from various cases to suggest that the Court need not pay much heed to *Florez*, insinuating that this Court has already rejected it. But that is just not true. And, in fact, in *Florez*, the Second Circuit cited multiple cases from this Court in its analysis and viewed this Circuit's law as harmonious with it. *See id.* at 185–87.

First, cherry picking, the agency writes that, in *Knight First Amendment Institute v. CIA*, the Court "describ[ed] a legal analysis based in part on *Florez* as 'flawed.'" CIA Br. 42 (quoting *Knight*, 11 F.4th at 819). That is a highly misleading quotation. The "legal analysis based in part on *Florez*" that the *Knight* Court called "flawed" was the plaintiff's argument that *Florez* had actually heightened the substance of the "logical or plausible" standard itself. 11 F.4th at 819. In *Florez*, the Second Circuit had explained, borrowing a term from this Court, that a Glomar affidavit must be "particularly persuasive." 829 F.3d at 182 (quoting *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 122 (2d Cir. 2014) (quoting *ACLU v. CIA*, 710 F.3d at 433)); *see* Connell Br. 25 n.68. But that is not Plaintiff's theory in this case.

Second, the CIA represents that in *Military Audit Project v. Casey*—one of the early Glomar cases, and one literally about the Hughes Glomar Explorer—the Court "explained that a FOIA requester 'show[s] neither contrary evidence nor bad faith' sufficient to undermine an[] agency declaration by relying on

disclosures that fall short of official acknowledgments." CIA Br. 43 (cleaned up, but first alteration in original) (quoting *Mil. Audit Project*, 656 F.2d at 745). But the Court did not, as the agency implies, say that a requester *cannot ever* show contrary evidence or bad faith—it said that in *that case*, the plaintiff *had not* shown it. *See Mil. Audit Project*, 656 F.2d at 744–45, 752–53 (considering whether "there is evidence in the record that controverts the assertions in the [government's] affidavits"). The same is true of the CIA's citation to *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982) (cited at CIA Br. 43). And in *Knight*, a plaintiff pointed to a State Department press statement as "undercut[ting other] agencies' Glomar response even if it does not constitute an official acknowledgment." 11 F.4th at 821. The Court did not buy it—not because such evidence was categorically out of bounds, but because, in that particular case, it was not persuasive. *See id.* ("[T]he agencies maintained their prediction of future harm even after taking that press statement into account. This position was hardly illogical or implausible."). That kind of inquiry is all Plaintiff asks the Court to engage in here: consider the record evidence as a whole—and as distinct from official acknowledgment—when deciding whether the CIA's assertion of a Glomar response is logical or plausible.

Third, the CIA points to *Frugone v. CIA*, suggesting it is in tension with Plaintiff's *Florez* theory. See CIA Br. 40–41. But this Court resolved *Frugone* by

restating the official acknowledgment doctrine, specifically that "we do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought." 169 F.3d at 774. The CIA suggests that the holding implicitly rejects the *Florez* analysis, but the plaintiff's argument in *Frugone* "beg[an] and end[ed] with the proposition that the Government *waives* its right to invoke an otherwise applicable exemption to the FOIA when it makes an 'official and documented' disclosure of the information being sought." *Id.* (emphasis added) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). Again, Plaintiff's primary argument here is not waiver based on official acknowledgment, and with respect to *Florez*, *Frugone* is beside the point.

Fourth, the CIA quotes from *ACLU v. DOD*, 628 F.3d 612 (D.C. Cir. 2011), representing that it categorically concluded that "reliance on third-party agency disclosures to defeat a Glomar response is 'foreclosed' by this Court's official acknowledgment cases." CIA Br. 42 (quoting *ACLU v. DOD*, 628 F.3d at 625). The CIA's reading of that case—which did not involve Glomar—is not correct.

In *ACLU v. DOD*, the plaintiff challenged redacted passages in the administrative hearing transcripts of fourteen high-value detainees at

Guantánamo.[3] The plaintiff's central argument was that, in a series of disclosures that took place during the pendency of the litigation, the government had already "formally disclosed" the same information that it sought to keep secret under the FOIA. Brief for Plaintiff–Appellant at 15, *ACLU v. DOD*, 628 F.3d 612 (D.C. Cir. Feb. 24, 2010) (No. 09-5386), *available at* https://perma.cc/2GP2-H6LS; *see id.* at 7 (arguing that "the declassified materials in the public record comprise official acknowledgments by government agencies"). To defend redactions the CIA had made to the transcripts, the agency submitted an affidavit "assert[ing] that despite the declassification and disclosure of some government documents, the specific operational details of the capture, detention, and interrogation of the 'high value' detainees remain classified." *ACLU v. DOD*, 628 F.3d at 620. The Court treated this, appropriately, as a dispute under the official acknowledgment doctrine, and rejected the plaintiff's argument, because "there [we]re substantive differences between the disclosed documents and the information that has been withheld." *Id*. at 621.

The Court also rejected an alternative argument by the plaintiff that disclosure of the sought-after information in the hearing transcripts "could

[3] The fourteen detainees whose proceedings were at issue in *ACLU v. DOD* are the same detainees who were held at Camp VII.

not cause harm to national security" because it had already been "'widely disseminated.'" *Id.* at 625. And that is where the CIA, in this case, centers its focus: on the Court's conclusion that the plaintiff's harm argument was "foreclosed by our requirement, *discussed above*, that information be 'officially acknowledged.'" *Id.* (emphasis added). "Above," the Court had concluded that the plaintiff's official acknowledgment argument failed because the government's redacted secrets were different from its official disclosures. And in the "foreclosed" passage, the Court determined that the same differences between the secrets and the disclosures likewise spiked the plaintiff's harm argument. The Court was just re-applying, in summary fashion, its prior analysis. It did not consider evidence outside of the official acknowledgment test. And it determined that regardless, whatever information had been "disseminated" was simply different from the information the government meant to keep secret.[4] In other words, the Court was not making a broad pronouncement about the exclusivity of the official acknowledgment doctrine

[4] *See ACLU v. DOD*, 628 F.3d at 625 ("The 'officially acknowledged' test recognizes that even if information exists *in some form* in the public domain that does not mean that official disclosure will not cause harm cognizable under a FOIA exemption. To the extent that the ACLU relies on the government's official disclosures in the OLC memoranda and CIA reports, we have repeatedly rejected the argument that the government's decision to disclose *some* information prevents the government from withholding *other* information about the same subject." (emphases added) (citations omitted)).

in FOIA cases. That is hardly the square rejection of *Florez* that the CIA projects it to be.

B. The record evidence in this case defeats the CIA's Glomar response because it leaves no doubt that the CIA maintained some measure of operational control over Camp VII during the relevant time period.

The record evidence unambiguously establishes that the CIA maintained some measure of operational control over Camp VII, contradicting the CIA's affidavit and making its Glomar response illogical and implausible.

As described in Plaintiff's opening brief, four documents—a Memorandum of Agreement that "sets out the duties and responsibilities" of the CIA and DOD at Camp VII, an agenda and memorandum for record from an interagency meeting that included the CIA, and the itinerary and background memorandum from the CIA director's trip to Guantánamo Bay—all provide details about the extent of CIA operational control over Camp VII. *See* Connell Br. 39–42 (discussing JA303–05, JA316–43, JA345–52, JA355–56, JA359–60). Additionally, the SSCI Report definitively states that Camp VII detainees "remained under the operational control of the CIA" during the relevant period, while providing the history of CIA involvement at Guantánamo, and citing to a CIA site daily report and cable about a Camp VII detainee. *Id.* at 35–38 (reviewing the SSCI Report in detail). The SSCI included all of this after

reviewing classified documents itself and engaging in a revision and declassification process with the CIA and other parts of the executive branch. *See id.* at 36–37 (referencing JA234–45, JA246–68, JA269–94).

The record also includes a litany of materials produced as part of ongoing proceedings before the military commissions at Guantánamo Bay. Such materials include hearing transcripts in which the prosecutor confirmed on two separate occasions that the CIA sent site daily reports about the goings-on at Camp VII. *Id.* at 46 (citing JA182–84, JA209, JA216). The record further includes testimony from the first commander of Camp VII, a member of the military, about operations at the facility, the interagency processes involved in certain everyday aspects of operating it, and the types of documents that were generated as a result of such processes. *Id.* at 46–48 (referencing JA182-84, JA 194, JA209, JA216, JA363–64, JA383–89, JA399–14, JA429, JA472). And the record includes a decision issued by a military judge, in the prosecution of a detainee who had been held at Camp VII. In the decision, the judge made detailed findings of fact about the CIA's involvement in the detainee's confinement, including in crafting "limited rights advisements" to replace *Miranda* warnings. *Id.* at 48–49 (discussing JA498–547).[5]

[5] Rather than engage with the substance of the military commission opinion, the CIA argues that the Court cannot consider it, because it did not exist when

Further, the record shows that the CIA could have prevented government officials from publicly discussing undisclosed CIA documents about its operational control over Camp VII, but it did not. At the military commissions, the judge and a prosecutor had a long colloquy about particular, undisclosed documents going to CIA operational control, but the CIA did not stop the hearing or redact the transcript. *Id.* at 43–44 (quoting JA212–13). The CIA also could have redacted mentions of such documents in the SSCI Report, but it did not. *Id.* at 35–39. And perhaps most telling, the existing classification guidance on this exact subject matter states that while specifics of CIA operational control at Camp VII are classified, the "existence of specifics" are

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the district court issued its judgment. CIA Br. 40 n.2 (citing *Bonner v. Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991)). That is wrong.

The CIA failed to account for the footnote included in the same paragraph of the decision it relies upon. There, this Court noted that "[i]n certain limited situations," it "may be appropriate for a court to review the agency decision in light of post-decision changes in circumstances." *Bonner*, 928 F.2d at 1153 n.10 (collecting cases). This is one of those circumstances. *See ACLU v. CIA*, 710 F.3d at 431 (taking notice of statements post-dating district court's grant of summary judgment); *Florez*, 829 F.3d at 188 (considering FBI disclosures made after the CIA asserted Glomar and holding that "proceeding to decision while willfully ignoring relevant materials would breed judicial inefficiency and produce an outcome contrary to that which might result from consideration of additional materials that—through no fault of Mr. Florez's—were unavailable to him at the time the FOIA request was made."); *N.Y. Times Co.*, 756 F.3d at 111 n.8 (similar).

not.[6] *Id.* at 45 (citing JA83); *see also id.* at 44–45 (discussing JA83–84, JA78–79, JA157, JA296–96). In other words, the CIA's insistence on a Glomar response in this case is inconsistent with its own behavior in the commissions, casting further doubt on whether the response is truly logical or plausible.

The CIA hardly engages with all of this evidence, making plain that its objections to Plaintiff's primary argument are doctrinal rather than factual. *See* CIA Br. 43–48. On the facts, all the agency can say is that Plaintiff is attempting "to leverage previous, limited disclosures to compel the disclosure of *additional* information . . . on the basis that it might relate to the same topic." CIA Br. 48. As to that supposedly "additional" information that being compelled to issue an ordinary FOIA response would yield, the agency maintains that "confirming or denying the existence of any other responsive documents—*i.e.*, documents that might reflect a classified or unacknowledged relationship between the agency and the subject matter of Connell's request—would disclose classified and statutorily protected information." CIA Br. 1–2; *see id.* at 33, 39; Blaine Decl. at JA43 ¶ 26 (asserting that "confirming or denying the existence or nonexistence of such records would reveal classified

[6] The classification guidance purports to represent the combined guidance of all relevant original classification authorities, including the CIA. Connell Decl. at JA297–98 ¶ 15.

intelligence sources and methods information that is protected from disclosure"); *id.* at JA41, 43, 45–49 ¶¶ 22, 25, 32–35, 39 (same); Final FOIA Resp. at JA74 (same).

But it never explains how. The agency prefers to simply project the details contained in any additional responsive *documents* into the Glomar *response* itself. *See* Connell Br. 32–35 (discussing the district court's same error). Of course, the documents the CIA has about any "classified or unacknowledged relationship" might contain secret information. As the CIA explains, those documents might include "details about the agency's role [at Camp VII], including how broadly it reached, who carried it out, when and how it might have ended, and which other organizations were involved." CIA Br. 17. But Glomar does not protect any of these potential secrets. *See* Connell Br. 28. It only protects the purported secret maintained by the Glomar response itself. *See Roth v. DOJ*, 642 F.3d 1161, 1182 (D.C. Cir. 2011) ("But the mere fact that records fall within a FOIA exemption provides no justification for failing to acknowledge their existence."). That means the question in this case is whether confirming the existence of additional agency records responsive to Plaintiff's request—without necessarily even saying how many—would reveal anything at all that the record does not already show.

It would not. Credible evidence shows that the CIA had at least some measure of operational control at Camp VII, and the agency created records about that control—including the CIA site daily reports and cables referenced in the SSCI Report and in hearing transcripts, and the documents generated as part of the interagency processes about which the first Camp VII commander testified. None of those responsive records were disclosed to Mr. Connell, nor were they withheld under any FOIA exemption. At bottom, that evidentiary record "render[s] it impossible to believe that" the records it released to Plaintiff "are the only . . . documents . . . in the Agency's files." *ACLU v. CIA*, 710 F.3d at 432. To endorse a Glomar response in these circumstances would be to give the Court's blessing to a "fiction . . . that no reasonable person would regard as plausible." *Id.* at 431.

Plaintiff acknowledges that this all might seem like a game of semantics. Unfortunately, that is what Glomar litigation has become.[7] In any event, the stakes here are, for better or worse, much lower than the CIA maintains.

[7] The CIA has taken full advantage of the availability of Glomar. *See* Connell Br. 22 (discussing the increased use of Glomar over the last ten years). By issuing a Glomar response, even one that is ultimately held to be unlawful, the CIA can delay for years the need to actually engage in a FOIA search for records. *See id.* at 24–26. That potential for abuse is one reason why it is so important that this Court not permit the agency "to stretch that doctrine too far." *ACLU v. CIA*, 710 F.3d at 431.

Defeating the CIA's Glomar response might even seem somewhat pointless, because it will not give Plaintiff any information (or records) about the agency's "operational control" over Camp VII that he does not already have. Perhaps all that will happen is the agency will acknowledge the existence of additional records, but refuse to further describe or enumerate them. Perhaps, if challenged, it will then win. But as this Court remarked in *ACLU v. CIA*, "[t]here may be cases where [an] agency cannot plausibly make" a Glomar "argument with a straight face, but where it can legitimately make" another. 710 F.3d at 433. That is a problem for Plaintiff to address later on.[8] For the moment, the immediate problem is whether the CIA is following the law with its Glomar response. It is not, and this Court should require it to defend the withholding of whatever it *is* actually hiding, rather than permitting it to simply skip that step.

II. Separately, the CIA waived its ability to assert a Glomar response through official acknowledgment.

The CIA's Glomar response is unlawful for a second, independent reason: the CIA waived its ability to invoke Glomar under the official acknowledgment doctrine. In the Glomar context, to constitute official

[8] Plaintiff's counsel has faced this "problem" before and is prepared to encounter it again. *See* Connell Br. 25–26 (discussing *ACLU v. DOJ*, 640 F. App'x 9 (D.C. Cir. 2016)).

acknowledgement, a prior disclosure must confirm, directly or by implication, the existence or nonexistence of records responsive to the FOIA request. *ACLU v. CIA*, 710 F.3d at 427; *Knight*, 11 F.4th at 813. Here, the CIA's own records and the SSCI Report constitute official acknowledgments and waive the agency's ability to invoke Glomar.

A. The CIA's own records demonstrate waiver.

Various CIA records waive the agency's Glomar response. The first record, the Memorandum of Agreement between the CIA and DOD, "sets out the duties and responsibilities" of the two agencies concerning the government's detention of individuals at Camp VII. DOD–CIA MOA at JA307. The CIA's role is mostly redacted, though some information about its operational role at Camp VII is not. *Id.* at JA313–14. Second, the itinerary and background memorandum prepared for the CIA Director's visit to Guantánamo similarly includes redacted information about the CIA's role at Camp VII while also disclosing the CIA's "end game" with respect to the Camp VII detainees. Expanded Background Mem. At JA320. The CIA does not even dispute that these documents establish that the CIA had some measure of operational control at Camp VII.

The CIA argues that acknowledging the existence of additional records would reveal "whether or not there is a classified or otherwise

unacknowledged relationship between CIA and the detention of certain individuals at Camp VII during the five months at issue." CIA Br. 39. But as discussed above, it cannot adequately explain how that is so. "Operational control" is such an elastic, qualitative term that simply disclosing the existence *vel non* of additional records will not tell the public anything meaningfully new *about* that control. *See* Connell Br. at 27–31. Given the contents of the agency's own acknowledgments, it is simply not credible for the agency to maintain that these are the only documents in its files relating to the topic.

In *ACLU v. CIA*, the President and his counterterrorism adviser had officially acknowledged that, whatever the details, the United States government engaged in drone strikes abroad to kill people it suspected were terrorists. 710 F.3d at 430. This Court concluded that it "strain[ed] credulity" to suggest that "the Central *Intelligence* Agency" does not have an interest in drone strikes. *Id.* (emphasis in original). The Court held that this meant it was clear the CIA had responsive records, which in turn meant that the CIA had waived its Glomar response under the official acknowledgment doctrine. *Id.* And after discussing a parallel FOIA request in which the government had provided two responsive records, the Court concluded that the "official statements . . . render it impossible to believe that those two [responsive documents] [we]re the only documents related to drone strikes in the

Agency's files." *Id.* at 432.[9]

The same thing is true here. The CIA's own documents make out the agency's waiver and defeat its Glomar response.

B. The SSCI Report also establishes waiver.

Although the CIA's disclosures are official acknowledgments that independently establish waiver, the disclosures in the SSCI Report constitute a separate basis to conclude that the CIA has waived its ability to assert a Glomar response.[10]

Plaintiff recognizes the longstanding precedent of this Court, which precludes official acknowledgment when the disclosure is not made by the

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[9] The CIA overstates the differences between this case and *ACLU v. CIA*. *See* CIA Br. 38–39. Indeed, in both cases, the agency's declarant used the term "intelligence interest" to describe the secret its Glomar response was protecting. *Compare* Cole Decl. at JA26 ¶12, *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. Mar. 15, 2012) (No. 11-5320), *available at* https://perma.cc/7F9Y-4F47 (declaring that acknowledging records would reveal "at least" whether the CIA "has an intelligence interest in drone strikes," which in turn "would implicate information concerning clandestine intelligence activities" and "intelligence sources and methods"), *with* Blaine Decl., JA43 at ¶¶ 25–26 (declaring that a Glomar response is warranted where the "mere confirmation or denial of the existence of responsive records would . . . reveal . . . whether the CIA has an *intelligence interest* in, or clandestine connection to" the subject matter. (emphasis added)).

[10] Moreover, "[e]ven if" the SSCI Report "[is] not [itself] sufficient[] . . . to establish waiver, . . . [it] establish[es] the context in which" the CIA's own official disclosures "should be evaluated." *N.Y. Times Co.*, 756 F.3d at 115.

agency from which the information is sought. *See* Connell Br. 54 (citing caselaw); CIA Br. 31–32, 34–37 (same). But none of that authority post-dates the Supreme Court's decision in *United States v. Zubaydah*, where the Court held in a "roughly" analogous context, that when contractors for an agency play a "central role in relevant events," their disclosures are "tantamount to a disclosure from the [agency] itself." 595 U.S. 195, 210–11 (2022). That decision—along with other recognized exceptions in the doctrine, *see* Connell Br. 54–56—suggest that the "same agency" rule is not as ironclad as it might otherwise appear.

The CIA responds by distinguishing the facts here from those in *Zubaydah*, remarking that "Congress is not an agent of the CIA," but "an entirely separate branch of government." CIA Br. 34. But that is a distinction without a difference here.

First, it ignores the Supreme Court's logic in *Zubaydah*. There, the disclosures by the contractors were "tantamount to a disclosure from the [agency] itself" not based on their mere identities or job status, but because they had played a "central role in [the] relevant events." *Zubaydah*, 595 U.S. at 211. Based on that role, their acknowledgments about CIA activities would have been credible to the public and U.S. adversaries. Here, the SSCI Report is similarly credible. The Senate committee revised the report to address issues

raised in the CIA's reply to an initial draft, *see* Higgins Decl. at JA254–55 ¶ 17, and the CIA and the Director of National Intelligence, in consultation with other executive branch agencies, conducted a declassification review, *see* Lutz Decl. at JA271 ¶ 6. And despite that the "vast majority of the redactions" that were included in the report "concern CIA equities," *id.* at JA272 ¶ 8, the CIA did not redact the sentence stating that it had operational control over Camp VII and it did not redact the fact that undisclosed CIA documents supported that conclusion. As Plaintiff pointed out in his opening brief, it is simply not logical or plausible to conclude that after all this, the SSCI got things so wrong as to report that the CIA had *some* operational control where it had none. *See* Connell Br. 37–38. In these limited and unique circumstances, the SSCI Report's acknowledgments about the CIA's operational control over Camp VII are "tantamount" to disclosures from the CIA itself.

Second, the CIA's brushing aside of *Zubaydah* ignores this Court's decision in *Ameziane v. Obama*, 699 F.3d 488 (D.C. Cir. 2012), which is consistent with the Supreme Court's opinion. The agency represents that in *Ameziane*, this Court held that "statements made . . . *by the government's lawyers* in federal court would . . . be 'tantamount' to official acknowledgments" by the government. CIA Br. 34 (emphasis added) (quoting *Ameziane*, 699 F.3d at 493). But *Ameziane* was not about what *government*

lawyers could officially acknowledge—it was about what *a petitioner detainee's* lawyer could officially acknowledge. 699 F.3d at 493. And the Court held that such a lawyer, with no ties or responsibilities to the government, could officially acknowledge secret government information—because they would be seen by the public as entirely credible. *Id.* Based on that logic, this Court ordered the district court to impose a restriction on the detainee's lawyer's speech. *Id.*

The CIA suggests that if Plaintiff were correct about *Zubaydah* and *Ameziane*, then "*Frugone* would have come out the other way." CIA Br. 35. In *Frugone*, this Court rejected the argument that an official acknowledgment by the Office of Personnel Management ("OPM") that an individual's employment files were in the custody of the CIA could waive the CIA's own right to issue a Glomar response to his request for those files. 169 F.3d at 775. The Court did so because it was persuaded by the CIA's affidavit's assertions that, notwithstanding OPM's acknowledgment, compelling the CIA to "break its silence upon the subject of whether it had employed Frugone" would have "untoward consequences" for the agency. *Id.* But *Frugone* is not inconsistent with Plaintiff's SSCI argument. This Court determined that OPM's acknowledgment had not eliminated "'lingering doubts'" about whether the CIA had employed Frugone. *Id.* at 774 (quoting *Mil. Audit Project*, 656 F.2d at

745). Here, though, the SSCI Report leaves no such doubt. Particularly given the circumstances that produced the SSCI Report, *see* Connell Br. 54–56 (discussing JA244, JA254, JA271), the SSCI Report is an official acknowledgment that waives the CIA's Glomar response.

The CIA further claims that even if the SSCI Report *could* waive the CIA's Glomar response, nothing in the report actually does so. CIA Br. 35–36; *see also* Op. at JA495 (reaching a similar conclusion). But at the risk of belaboring the point, the CIA's Glomar response does not protect the existence or nonexistence of *specific* documents, it protects whether the CIA has any additional responsive documents at all—and the SSCI Report makes clear that it does. In fact, it specifically identifies two of them: a site daily report and a cable, both related to a high-value detainee's medical treatment at Camp VII, a topic straightforwardly connected to the measure of operational control the agency had there. SSCI Report at JA111 & nn.427–28; Pradhan Decl. at JA151 ¶¶ 6–8. The CIA contends, as the district court concluded, that this portion of the report "says nothing" about CIA operational control. CIA Br. at 36 (quoting Op., JA493). But at a minimum, it says that additional documents related to Plaintiff's request exist. That is all Plaintiff needs to defeat the CIA's Glomar response.

CONCLUSION

For the foregoing reasons and those in Plaintiff's opening brief, the Court should reject the CIA's Glomar response, reverse the district court's judgment, and remand the case with instructions to order the agency to search for all responsive records, to release responsive records, and to justify any withholdings of other responsive information or records.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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