No. 24-520

In the Supreme Court of the United States

JAMES G. CONNELL, III, PETITIONER

v.

CENTRAL INTELLIGENCE AGENCY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record
YAAKOV M. ROTH
Acting Assistant Attorney General
SHARON SWINGLE
THOMAS PULHAM
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Petitioner submitted a request to the Central Intelligence Agency (CIA) under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking agency records relevant to whether the CIA had "operational control" during a five-month period of an area labeled "Camp 7" at the United States Naval Base Guantanamo Bay, Cuba. After releasing two documents with redactions and identifying one other, the agency responded with a so-called *Glomar* response, declining to confirm or to deny the existence of responsive records on the ground that such confirmation or denial would, as relevant here, disclose "intelligence sources and methods" protected from disclosure by Section 102A(i)(1) of the National Security Act of 1947, 50 U.S.C. 3024(i)(1), which FOIA incorporates through FOIA Exemption 3, 5 U.S.C. 552(b)(3). The question presented is:

Whether the CIA's justification for its response under 50 U.S.C. 3024(i)(1), in this context where the CIA's confirmation or denial of the existence of responsive records would disclose intelligence sources or methods, may be undermined by information from non-CIA sources that, petitioner contends, is relevant to the existence of responsive CIA records.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, executive orders, and rule: Page

Miscellaneous:

In the Supreme Court of the United States

No. 24-520

JAMES G. CONNELL, PETITIONER

v.

CENTRAL INTELLIGENCE AGENCY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 110 F.4th 256. The opinion of the district court (Pet. App. 29a-45a) is not published in the Federal Supplement but is available at 2023 WL 2682012.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2024. A petition for a writ of certiorari was filed on November 4, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Ammar al-Baluchi is a senior member of al-Qaeda—now detained at the United States Naval Base Guantanamo Bay, Cuba (GTMO)—who previously worked with his uncle, Khalid Sheik Mohammed (KSM), and, among other things, facilitated the terrorist attacks of September 11, 2001. Pet. App. 30a; D. Ct. Doc. 96-1, at

5-7, 16-24, 26-27, *Al-Baluchi* v. *Gates*, No. 1:08-cv-2083 (D.D.C. Jan. 7, 2010) (habeas factual return); see *Paracha* v. *Trump*, 453 F. Supp. 3d 168, 207-210, 212 (D.D.C. 2020). The Senate Select Committee on Intelligence (SSCI) has reported that al-Baluchi was captured in Pakistan in April 2003 when Pakistani authorities disrupted his plot to attack the United States Consulate in Karachi; that al-Baluchi was then transferred into Central Intelligence Agency (CIA) custody, where he was subjected to enhanced interrogation techniques (EITs) over a four-day period in May 2003; that the CIA "stopped using [EITs] on * * * al-Baluchi on May 20, 2003"; and that al-Baluchi remained in CIA custody until he was "transfer[red] to U.S. military custody at Guantanamo Bay, Cuba, in September 2006." S. Rep. No. 288, 113th Cong., 2d Sess. 243-244, 246, 357, 388 n.2190 (2014) (*SSCI Report*); cf. *id.* at 295 (noting that, after KSM's capture, al-Baluchi and another had "responsibility for the planning" of a multiple-airplane-based attack on Heathrow Airport).[1]

Petitioner is an attorney who represents al-Baluchi in ongoing military-commission proceedings, Pet. App. 4a, 30a, in which petitioner's duties "include safeguarding [the] national security information" he obtains in that representative capacity, C.A. App. 295. This case concerns a request that petitioner submitted to the CIA under the Freedom of Information Act (FOIA), 5 U.S.C. 552, for any CIA records relevant to "'operational con-

---

[1] The Committee's full 6700-page report is classified. See *SSCI Report* 8-9. But the Committee's Findings and Conclusions (*id.* at x-xxviii), its 499-page Executive Summary (*id.* at 1-499), and the separate views of its members have been published—after declassification by the Executive Branch—as a Senate Report. See *id.* at ii, 9-10 & n.6.

trol'" purportedly exercised by the CIA over detainees in a specific part of GTMO labelled "Camp 7" from September 2006 through January 2007. Pet. App. 2a, 4a-5a. The court of appeals affirmed the district court's determination that the CIA permissibly responded to that request by, as relevant here, declining to confirm or to deny the existence of such records on the ground that doing either would reveal "intelligence sources and methods" that are protected from disclosure by a provision of the National Security Act of 1947, 50 U.S.C. 3001 *et seq.*, which FOIA incorporates through FOIA Exemption 3, 5 U.S.C. 552(b)(3). See Pet. App. 7a-26a.

1. a. FOIA generally requires that a federal agency, like the CIA, make agency records available to "any person" who has submitted a "request for [such] records," unless a statutory exemption or exclusion applies. 5 U.S.C. 552(a)(3)(A); see 5 U.S.C. 552(b) (FOIA exemptions) and (c) (exclusions). Two FOIA exemptions are relevant here. First, Exemption 1 provides that agency records are exempt from mandatory disclosure if they are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. 552(b)(1). The classification of national-security information is governed by Executive Order 13,526, 3 C.F.R. 298 (2009 Comp.) (available at 50 U.S.C. 3161 note), which provides that information may be classified, *inter alia*, only upon a determination that its unauthorized disclosure "reasonably could be expected to result in damage to the national security." *Id.* § 1.1(a)(4); see *id.* §§ 1.2(a), 6.1(*l*) and (t).

Second, FOIA Exemption 3 exempts agency records that are "specifically exempted from disclosure by statute (other than [5 U.S.C. 552b]), if that statute," as per-

tinent here, "refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3)(A)(ii). The Exemption 3 statute in this case is Section 102A(i)(1) of the National Security Act of 1947, which provides that "[t]he Director of National Intelligence [DNI] shall protect * * * intelligence sources and methods from unauthorized disclosure." 50 U.S.C. 3024(i)(1); see *CIA* v. *Sims*, 471 U.S. 159, 167 (1985) (holding that the provision's statutory predecessor "qualifies as a withholding statute under Exemption 3"); Pet. App. 17a-18a. The President and the DNI have delegated such authority to protect intelligence sources and methods to the Director of the CIA. See Exec. Order No. 12,333, § 1.6(d), 3 C.F.R. 200 (1981 Comp.), as amended (available at 50 U.S.C. 3001 note); Intelligence Community Directive 700, § E.2.a (June 7, 2012), https://dni.gov/files/documents/ICD/ICD-700.pdf; see also *DiBacco* v. *United States Army*, 795 F.3d 178, 197 (D.C. Cir. 2015) (discussing that delegation).

b. Petitioner's FOIA request concerning the CIA's purported "operational control" at Camp 7 is based on a passage in the SSCI report's executive summary that states that, in September 2006, when 14 CIA detainees were transferred to military custody at the United States Navy Base Guantanamo Bay, Cuba, those detainees "were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA." *SSCI Report* 160.[2] The foot-

[2] The CIA has disagreed with various conclusions in the SSCI report. See Memorandum from John O. Brennan, Dir., CIA, *CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention, and Interrogation Program* (June 27, 2013), https://go.usa.gov/x6yR8. This brief does not address whether the report is accurate regarding the factual matters implicated by petitioner's FOIA request.

note attached to that statement—footnote 977—cites a single document: a "CIA Background Memo for CIA Director visit to Guantanamo, December [redacted], 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility." *Id.* at 160 n.977. The executive summary also elsewhere cites in another footnote a "September 1, 2006, Memorandum of Agreement [MOA] between the Department of Defense (DOD [or DoD]) and the [CIA] Concerning the Detention by DOD of Certain Terrorists at a Facility at Guantanamo Bay Naval Station." Pet. App. 4a (citation omitted).

Petitioner's FOIA request, as amended, sought all CIA records relevant to the purported "'operational control'" mentioned in the SSCI report for the period from September 2006 through January 2007, including the CIA background memorandum "cited in * * * footnote 977." C.A. App. 58, 63; see Pet. App. 31a-32a. Petitioner added that he was "already aware" of the DoD–CIA MOA cited in the report. C.A. App. 63. Petitioner also clarified that his request sought records that would shed light on "what 'operational control' means," and he provided an illustrative, but non-exhaustive, list of seven "possible topics" that responsive records could address, including the scope and duration of CIA's "operational control," whether it involved CIA personnel, how other agencies obtained access to detainees during that period, and how the agency transitioned "operational control" to DoD. Pet. App. 32a (quoting document at C.A. App. 63); see *id.* at 4a-5a.

In response, the CIA "search[ed] a database for records cleared for public release or previously released" and produced with partial redactions the two documents specifically identified in petitioner's FOIA request and cited in the SSCI report: the September 2006 DoD–CIA MOA and two versions of the December 2006 CIA back-

ground memorandum cited in footnote 977. Pet. App. 2a, 5a-6a, 33a. The CIA also identified, but did not produce, a third document that petitioner no longer seeks in this case. *Id.* at 6a & n.2. The CIA then provided petitioner with what is known as a "*Glomar* response" with respect to potentially responsive agency records, *i.e.*, the agency declined either to confirm or to deny whether such records exist. *Id.* at 6a; see *id.* at 3a, 30a n.1 (observing that the seminal case involving such a response, *Phillippi* v. *CIA*, 546 F.2d 1009 (D.C. Cir. 1976), concerned a FOIA request for records concerning a vessel named the *Glomar Explorer*).

The September 2006 MOA between DoD and the CIA (C.A. App. 307-314) states that "unlawful enemy combatants (ECs)" who are "transferred to DoD and whose detention by DoD is subject to this MOA are DoD detainees under the exclusive responsibility and control of the Secretary of Defense," emphasizing that "[t]he Secretary, subject to the direction of the President, is solely responsible for the continued detention, release, transfer, or movement of the designated ECs." *Id.* at 307; see *id.* at 309 (similar). In a section entitled, "*Public Affairs*," the MOA notes that "DoD and CIA will coordinate with one another on all public affairs matters and, as necessary, other US agencies." *Id.* at 314.

The December 2006 CIA background memorandum (C.A. App. 303-305, 318-322)—the SSCI report's sole citation for its operational-control statement—states that, "[i]n order for a detainee to be considered for transfer from the CIA program to GTMO," the detainee, among other things, "must no longer be of significant intelligence value," explaining that "[t]he CIA desires to maintain custody of any given detainee only so long as that detainee continues to provide significant intelligence." *Id.* at 304; see *id.* at 319, 321 (same). The memorandum

adds that "[o]nce at GTMO, CIA's end game is to assist DoD in any way possible in the Military Commission process, while at the same time protecting CIA equities." *Id.* at 305; see *id.* at 320, 322 (same).

With respect to its *Glomar* response regarding any other potentially responsive CIA records, the CIA stated that it could "neither confirm nor deny" the existence of responsive records because "'confirming or denying the existence or nonexistence of such records would reveal classified intelligence sources and methods information that is protected from disclosure' under FOIA Exemptions 1 and 3." Pet. App. 6a (quoting C.A. App. 43). The CIA explained that confirming or denying the existence of such records "would reveal information that concerns intelligence sources and methods" because (1) "if the CIA were to confirm the existence of responsive records, such confirmation could reveal sensitive details about CIA's intelligence sources and methods," and (2) if the CIA were to "den[y] having records responsive to this request, that response could provide adversaries with insight into the CIA's priorities, resources, capabilities, and relationships with other agencies." C.A. App. 47, 49. The CIA noted that the National Security Act's protection of intelligence sources and methods incorporated into FOIA Exemption 3 differs from Exemption 1 because it does not require the government to identify any "damage to the national security that reasonably could be expected to result" if such information were disclosed. *Id.* at 50; cf. *id.* at 45.

2. Petitioner filed this FOIA action in district court, challenging only the CIA's *Glomar* response. Pet. App. 34a. The district court granted summary judgment to the CIA. *Id.* at 29a-45a. The court concluded that the agency's *Glomar* response was permissible under FOIA Exemptions 1 and 3. *Id.* at 36a-45a.

3. The court of appeals affirmed. Pet. App. 1a-28a. The court concluded that the CIA's *Glomar* response was permissible under FOIA Exemption 3. *Id.* at 7a-26a. The court therefore did not "discuss or reach Exemption 1." *Id.* at 17a.

a. The court of appeals first concluded that the CIA has not waived its ability to assert a *Glomar* response. Pet. App. 7a-16a. The court stated that an agency will waive its ability to assert a *Glomar* response where it has previously "officially acknowledged" the point by "confirm[ing] the existence or nonexistence of records responsive to the FOIA request," because, in those circumstances, the agency's own "official disclosure" has put "the *specific* information sought by the plaintiff * * * in the public domain," eliminating any "value in a *Glomar* response." *Id.* at 7a-8a (citations omitted). The court rejected petitioner's view that the CIA had "waived its ability to assert a *Glomar* response" based on the SSCI report's executive summary and the two CIA documents produced to petitioner. *Id.* at 9a.

The court of appeals determined that the SSCI executive summary's "reference to CIA 'operational control'" was not "an 'official' disclosure attributable to the CIA" or its "parent" entity in the government hierarchy and thus could not waive the CIA's own ability to assert a *Glomar* response under FOIA. Pet. App. 10a-11a; see *id.* at 8a-9a. The court also concluded that the CIA's release to petitioner of two documents, which had been previously disclosed to the public, did not constitute a waiver. *Id.* at 13a-16a. The court observed that the CIA produced the two records cited in the SSCI report "as responsive documents" because petitioner's FOIA request had "specifically referenced the SSCI executive summary and its footnote citations"—not because "the CIA was confirming that they showed 'operational con-

trol' on any independent understanding of the term." *Id.* at 16a. Moreover, the court noted, the DoD–CIA MOA "indicates DOD, not CIA, control over detainees at Guantanamo," and the "only reference to the CIA's role" in the CIA background memorandum is a description of the CIA's goal to "'assist[] DoD in any way possible in the Military Commission process, while at the same time protecting CIA equities.'" *Id.* at 13a-14a (citation omitted).

b. The court of appeals then determined that the CIA had "properly issued [its *Glomar*] response" in this case based on justifications that were sufficiently "'plausible'" and which were "'not substantially called into question by contrary record evidence,'" Pet. App. 16a-17a (citation omitted). See *id.* at 16a-26a. The court stated that, to justify its *Glomar* response under FOIA Exemption 3, the CIA had to establish that "disclosing whether it has other records responsive to [petitioner's] request would itself reveal intelligence sources and methods protected by the National Security Act." *Id.* at 17a-18a. The court explained why the CIA's declaration had done so, *id.* at 18a-20a, and emphasized that petitioner did "not dispute any of [the court's relevant analysis]" or that the CIA's justification was "sufficiently logical or plausible on its own terms." *Id.* at 20a.

The court of appeals rejected petitioner's distinct contention that "the CIA cannot plausibly claim that it has no further documents in light of 'contrary record evidence,'" namely, the two records that the CIA released to petitioner and "disclosures from other government entities," Pet. App. 21a (citation omitted). See *id.* at 21a-26a. The court explained that the DoD–CIA MOA and the CIA memorandum "do not make it implausible" that "intelligence sources and methods protected by the National Security Act" would be revealed

if the CIA were to confirm the "existence or nonexistence of records" concerning a further "unacknowledged connection between the CIA and 'operational control' over Camp 7 in the specified period." *Id.* at 25a-26a.

The court of appeals also concluded that "the non-CIA documents" that petitioner identified do not undermine the CIA's explanation that confirming or denying the existence of other records would reveal "protected intelligence" sources and methods. Pet. App. 21a-24a. The court noted petitioner's argument that the "already-public information" he identified indicates that the CIA possesses "other documents responsive to his FOIA request" and that his evidence—even if not an "official acknowledgement[]" constituting a CIA "waiver"—is "still relevant evidence to consider when assessing whether [the CIA's *Glomar* justification] is plausible." *Id.* at 21a. The court rejected that argument. *Ibid.* The court explained that "'agencies with responsibility in the national security sphere,' like the CIA," cannot be required "to reveal protected intelligence information" based on disclosures by different entities. *Id.* at 22a (citation and brackets omitted). The court added that it would not be proper to "assume the answer to th[e] question" here "based on 'public speculation, no matter how widespread.'" *Ibid.* (citation omitted).

The court of appeals noted that petitioner had identified a divided Second Circuit decision—*Florez* v. *CIA*, 829 F.3d 178 (2016)—that "arguably" relied on "non-official statements in the way [petitioner] urges," but the court found that decision to be "[un]persuasive" in this context. Pet. App. 23a n.3. The *Florez* majority, the court noted, merely determined that certain FBI disclosures that were made after the district court's decision upholding a CIA *Glomar* response "were 'relevant'" disclosures that warranted a "remand[] for the district

court to consider [them] in the first instance." *Ibid.* (citation omitted). The court emphasized that the *Florez* decision did not conclude that the FBI's disclosures rendered the "CIA's *Glomar* response implausible." *Ibid.* The court added that "[t]o the extent the *Florez* majority" viewed the FBI's disclosures "as 'relevant' to the CIA's justification for its *Glomar* response," such a view would "improperly circumvent[] the official acknowledgement doctrine," "at least as applied to [the court's] analysis of [petitioner's] argument here." *Ibid.*

Finally, the court of appeals observed that it is "far from clear" that the non-CIA materials that petitioner identified can be "properly read to undermine the CIA's justification for its *Glomar* response." Pet. App. 24a n.4. The court noted, for instance, that a reference in the SSCI report to a "site daily report and cable" and a separate military-judge decision in a GTMO detainee case are "not responsive" because they do "not correspond to the dates [relevant to petitioner's] FOIA request"; that certain "interagency meeting materials" from 2006 show, "at most, interagency communication related to Camp 7"; and that testimony from Camp 7's commander "never identifies the CIA." *Ibid.*

c. Judge Ginsburg noted that he "concur[red] fully" in the court's opinion but wrote separately to make additional points. Pet. App. 27a.

ARGUMENT

The CIA in this case justified its *Glomar* response on the ground that its confirmation or denial of the existence of CIA records responsive to petitioner's FOIA request would, as relevant here, disclose information about intelligence sources and methods protected by Section 102A(i)(1) of the National Security Act of 1947, 50 U.S.C. 3024(i)(1), and, hence, by FOIA Exemption 3.

Petitioner contends (Pet. 23-28) that the CIA's justification should have been evaluated in light of information from non-CIA sources that petitioner contends is "relevant evidence" contradicting that justification because, in petitioner's view, it indicates that "some responsive records exist," Pet. 23. Petitioner further contends (Pet. 19-22) that the decision of the court of appeals conflicts with the Second Circuit's decision in *Florez* v. *CIA*, 829 F.3d 178 (2016). The court of appeals correctly upheld the CIA's *Glomar* response under the National Security Act and Exemption 3, and its decision does not conflict with any decision of this Court or any other court of appeals. The Court should deny review.

1. The court of appeals correctly determined that the CIA's *Glomar* response in this case is appropriate under 50 U.S.C. 3024(i)(1), a provision of the National Security Act of 1947 that is incorporated by FOIA Exemption 3. "[Petitioner] does not dispute" that Section 3024(i) qualifies as an Exemption 3 withholding statute. Pet. App. 17a-18a; see *CIA* v. *Sims*, 471 U.S. 159, 167 (1985) (holding that Section 3024(i)(1)'s predecessor was an Exemption 3 statute). And as the court of appeals concluded, the CIA's *Glomar* response is fully justified under Section 3024(i)(1) because—as petitioner has not contested—confirming or denying the existence of responsive CIA records "would itself reveal intelligence sources and methods," Pet. App. 18a. See *id.* at 18a-20a.

a. The National Security Act provides that "[t]he Director of National Intelligence shall protect * * * intelligence sources and methods from unauthorized disclosure." 50 U.S.C. 3024(i)(1). Congress enacted that provision to "protect[] the heart of all intelligence operations —'sources and methods'"—by vesting the DNI (and, by delegation, the Director of the CIA) with "very broad authority" to protect such information. *Sims*, 471 U.S.

at 167-169 (interpreting Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. 403(d)(3) (1982), which was materially identical, and the statutory predecessor, to Section 3024(i)(1)); see p. 4, *supra*.[3] This Court has explained that, for "reasons [that] are too obvious to call for enlarged discussion," Congress granted that "sweeping power to protect" all information about "'intelligence source and methods'" in order to safeguard "the secrecy and integrity of the intelligence process." *Sims*, 471 U.S. at 169-170. "[T]he broad sweep of this statutory language" therefore contains no "limiting language" that might restrict the type of information about intelligence sources and methods that it protects. *Id.* at 169. Congress "simply and pointedly protected *all* sources [and methods] of intelligence" without restricting that statutory protection, for instance, to "only confidential or nonpublic intelligence sources [or methods]." *Id.* at 169-170 (emphasis added).

As a result, when the CIA Director invokes the authority to protect information under Section 3024(i)(1) in response to a FOIA request, the "only remaining inquiry" for the court (after confirming that Section 3024(i)(1) is an Exemption 3 statute) "is whether the withheld [information] relates to intelligence sources and methods." *Larson* v. *Department of State*, 565 F.3d

---

[3] Section 102(d)(3) provided that, as pertinent here, "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. 403(d)(3) (1982) (repealed 1992). Congress replaced that provision without material change in 1992. 50 U.S.C. 403-3(c)(5) (1994) (enacted 1992; redesignated as (c)(6) in 1996 and (c)(7) in 2001; repealed 2004). In 2004, when Congress created the Office of the DNI, Congress enacted Section 102A(i)(1), which was initially codified at 50 U.S.C. 403-1(i)(1) (Supp. V 2005) before it was editorially reclassified as 50 U.S.C. 3024(i)(1) in 2013.

857, 865 (D.C. Cir. 2009). And as this Court has made clear, that National Security Act authority includes the "power to withhold [even] superficially innocuous information" that might disclose an intelligence source or method because "'[w]hat may seem trivial to the uninformed[] may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.'" *Sims*, 471 U.S. at 178 (citation omitted). Decisions on such matters by "the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference." *Id.* at 179. And in this case, the court of appeals correctly determined that the CIA had sufficiently shown that confirming or denying the existence of "records responsive to [petitioner's] FOIA request would itself reveal intelligence sources and methods protected by the National Security Act." Pet. App. 18a; see *id.* at 18a-20a.

Petitioner, as the court of appeals observed, "does not dispute any [of the court's relevant analysis]" and thus does not contend either that the CIA's "declaration [in this case] lacks sufficient specificity about which intelligence sources and methods would be revealed" or that "the CIA's explanation for its *Glomar* response [is] otherwise [in]sufficiently logical or plausible on its own terms." Pet. App. 20a. That ends the relevant inquiry. Because petitioner does not dispute that confirming or denying the existence of responsive records would reveal "intelligence sources and methods," 50 U.S.C. 3024(i)(1), the CIA is entitled to provide a *Glomar* response so that its response to petitioner's FOIA request does not itself disclose statutorily protected intelligence information.

b. Petitioner nevertheless contends (Pet. 23-28) that the court of appeals erred because, in petitioner's view,

he has identified information from non-CIA sources that indicates that at least "some responsive records exist," Pet. 23. See Pet. 2, 29-30 (asserting that certain evidence shows that such "records exist"). Petitioner claims that such evidence is "relevant" within the meaning of the Federal Rules of Evidence because it has the tendency to make "a fact more or less probable than it would be without the evidence." *Ibid.* (quoting Fed. R. Evid. 401). But even if federal evidentiary rules were to govern the proper inquiry, petitioner focuses on the wrong "fact." Petitioner asserts (Pet. 23-24) that the evidence indicates that "some responsive [CIA] records exist," which, he believes, suggests that the CIA's *Glomar* response is not "logical and plausible." But the legally dispositive "fact" under Section 3024(i)(1) is that the CIA's confirmation or denial of the existence of such records would itself disclose "intelligence sources and methods." Petitioner, for good reason, has not contested that dispositive fact. Cf. *Sims*, 471 U.S. at 169 (explaining that the National Security Act contains no "limiting language" restricting its protections, for instance, to "only confidential or nonpublic intelligence sources [and methods]").

Petitioner instead suggests (Pet. 25) that the D.C. Circuit's decision is a "marked departure from ordinary (i.e., non-Glomar) FOIA cases" where courts may consider "contrary record evidence." That is incorrect. It is well established in the D.C. Circuit that a court "considering a *Glomar* response" in a FOIA case must "apply the 'general exemption review standards established in non-*Glomar* cases.'" *Knight First Amendment Inst.* v. *CIA*, 11 F.4th 810, 813 (D.C. Cir. 2021) (quoting *Wolf* v. *CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)); see also, *e.g.*, *ACLU* v. *CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013). As in any case involving a FOIA ex-

emption, "[a]gencies may carry their burden of proof through declarations explaining why a FOIA exemption applies" and summary judgment for an agency is warranted if the declarations both "justify the nondisclosure 'with reasonably specific detail'" and "are 'not controverted by either contrary evidence in the record [or] by evidence of agency bad faith.'" *Knight First Amendment Inst.*, 11 F.4th at 818 (citation omitted); accord *Schaerr* v. *United States Dep't of Justice*, 69 F.4th 924, 929 (D.C. Cir. 2023). The court of appeals followed that approach here. Pet. App. 16a.

In any event, and significantly for this case, petitioner nowhere explains how any purported "contrary record evidence" (Pet. 25) could disprove the dispositive (and uncontested) fact that a CIA response confirming or denying the existence of responsive records in this case would itself disclose "intelligence sources and methods." Petitioner makes no effort to respond to the court of appeals' observations about that evidence's failure to "undermine the CIA's justification for its *Glomar* response." Pet. App. 24a n.4; see p. 11, *supra*. Instead, he asserts (Pet. 27 n.32) that this Court "need [not] weigh Petitioner's evidence itself." Perhaps petitioner believes that the non-CIA evidence indicates that some responsive records exist and further tends to suggest that the CIA has used certain intelligence sources and methods. But such a belief, even if correct, would not undermine the CIA's textually unqualified authority under Section 3024(i)(1) to decline to disclose "intelligence sources and methods"—even publicly ascertainable ones—by refusing to make any disclosure about the existence or nonexistence of records.

Finally, petitioner is doubly wrong in contending (Pet. 27) that his position finds support in the principle that FOIA exemptions should be narrowly construed.

First, petitioner does not present any disputed question involving the interpretation of FOIA Exemption 3 or any other textual component of FOIA. The statutory provision driving the CIA's *Glomar* response in this case is in the National Security Act. Second, even if petitioner had presented a question involving the proper interpretation of FOIA's own text, this Court has repudiated the contention that "FOIA exemptions should be narrowly construed." *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427, 439 (2019). "FOIA expressly recognizes that 'important interests are served by its exemptions,'" and this Court has therefore emphasized that courts have "'no license to give [those] statutory exemptions anything but a fair reading.'" *Ibid.* (citations and brackets omitted). Under the "fair"—not narrow—reading of the text that this Court requires, it would be improper to "arbitrarily constrict" Exemption 3's incorporation of Section 3024(a)(1)'s broad grant of authority to protect *all* intelligence sources and methods "by adding limitations found nowhere in its terms." *Ibid.*; cf. *id.* at 443 (Breyer, J., concurring in part and dissenting in part) (describing the Court's opinion as being "at odds with" the principle that "FOIA's enumerated exemptions 'must be narrowly construed'") (citation omitted).

2. Petitioner contends (Pet. 23-28) that the court of appeals' Exemption 3 decision in this case conflicts with the Second Circuit's 2016 decision in *Florez* v. *CIA*, 829 F.3d 178. No such conflict exists.

In *Florez*, the CIA provided a *Glomar* response to a request for records related to, or mentioning, Armando Florez (Dr. Florez), a former high-level diplomat for the Republic of Cuba who ultimately defected to the United States. 829 F.3d at 180-181. The district court upheld the CIA's *Glomar* response under FOIA Exemption 1,

which governs classified national-security information, as well as under FOIA Exemption 3 in light of two distinct withholding statutes: Section 3024(i)(1) and a provision of the CIA Act of 1949, 50 U.S.C. 3507. See *Florez*, 829 F.3d at 181, 183. While the FOIA requester's appeal was pending, the FBI released to him several then-"declassified" documents pertaining to Dr. Florez. *Id.* at 181. The Second Circuit determined that the recently released FBI documents were sufficiently "relevant" to warrant a remand to the district court "to pass on the import of those documents in the first instance." *Id.* at 182.

The Second Circuit determined that the FBI documents were "relevant" to "the CIA's asserted rationale for asserting a *Glomar* response," which the court understood to "rel[y] heavily on the import of [both] masking the *government's* intelligence interest (if any) in Dr. Florez" and "maintaining complete secrecy as to whether *any* intelligence activities were focused on him." *Florez*, 829 F.3d at 184-185 (emphases added). Without definitively resolving the question, the court stated that the "now-public [FBI] information *may* bear on the CIA's position," where the CIA had "proffered a single general rationale" concerning potential "harm [to] the national security" (Exemption 1) and the disclosure of intelligence "methods, functions, or sources" (Exemption 3). *Id.* at 185 & n.6 (emphasis added). The court noted that the FBI's "disclosures in fact reveal a wealth of information" potentially relevant to the CIA's rationale about the importance of concealing any "government[] intelligence interest" in Dr. Flores and of maintaining "complete secrecy" about "any intelligence activities" focused on him, because the declassified documents revealed that the FBI (an agency within the government's Intelligence Community) had "maintained an

active interest in Dr. Florez for well over a decade" and had shared its findings with a "myriad" of intelligence and other government agencies. *Id.* at 185. The court observed that the FBI's disclosures were not "official acknowledgement[s]" that would "waive the [CIA's] right to a *Glomar* response," but it deemed a remand appropriate because they could "well shift the factual groundwork upon which a district court assesses the merits of such a response." *Id.* at 186. The court of appeals emphasized, however, that its decision did not resolve "what weight or significance [the district court] must attach to the FBI Disclosures," and the court of appeals "unequivocally pass[ed] no judgment on the sufficiency of the agency's rationale" because those were issues for the district court to resolve "in the first instance." *Id.* at 190 n.14.

Nothing in the *Florez* court's conclusion that a post-judgment disclosure of FBI documents was "relevant" to the particular CIA rationale proffered in that case conflicts with the judgment of the court of appeals in the Exemption 3 context here. *Florez* addressed a single CIA rationale for a *Glomar* response under both Exemptions 1 and 3 that turned on the need for "maintaining complete secrecy" about "any intelligence activities" involving Dr. Flores and about the "government's intelligence interest" in him—not just the CIA's own activities and interests—where the FBI's recent disclosure of previously classified documents could have been understood as evidence of some broader "government" intelligence activities and interest. *Florez*, 829 F.3d at 185. In that context, where the agency's *Glomar* justification swept more broadly than the agency's own interests and activities, *Florez* merely deemed the FBI's disclosure sufficiently relevant to the CIA's proffered justification about "government" activities and inter-

ests to require a remand to allow the district court to consider the disclosure in the first instance. *Florez* thus did not address the distinct issues raised here, where the CIA's *Glomar* justification is simply that the CIA's confirmation or denial of the existence of responsive records would reveal the CIA's own sources and methods. See p. 7, *supra*.

Moreover, even in the government-intelligence-activity context that *Florez* discussed, the Second Circuit's ruling was exceedingly limited. Since *Florez*, that court has emphasized that "[t]he narrow issue [in *Florez*] was whether the FBI disclosures [there] were 'relevant' and, if so, whether remand was required." *New York Times* v. *CIA*, 965 F.3d 109, 121 (2d Cir. 2020). It has therefore rejected a FOIA plaintiff's effort to "read[] *Florez* [more] broadly." *Ibid.* The court has instead interpreted *Florez* in its narrow context as indicating merely that "there are times where other agency disclosures can be 'relevant evidence' regarding the 'sufficiency of the justifications set forth by [an agency] in support of its *Glomar* response.'" *Ibid.* In doing so, the Second Circuit has also made it clear that that *Florez* did not actually "determin[e] their effect on the [agency's] *Glomar* response." *Ibid.*

The Second Circuit's continued application of the "official acknowledgment" doctrine in evaluating the sufficiency of an agency's justification for its *Glomar* response further reinforces the narrowness of *Florez*. In *New York Times*, the Second Circuit stated that *Florez* "confirmed that the official acknowledgement doctrine is 'limited only to official and public disclosures made by the same agency providing the *Glomar* response'" and that *Florez* "therefore does not 'requir[e] [the agency] to break its silence' as a result of 'statements made by another agency.'" 965 F.3d at 121 (quoting *Florez*, 829

F.3d at 186) (brackets in original). And rather than limit that principle to the narrow question whether an agency has itself waived its right to assert a *Glomar* response, the Second Circuit upheld the CIA's *Glomar* response concerning the existence of agency records about "a covert program arming and training rebel forces in Syria," *id.* at 112, on the ground that statements by the President and a high-ranking Army general "were insufficient to amount to an official acknowledgment of the alleged covert program," *id.* at 122. The Second Circuit thus upheld as logical or plausible the CIA's explanation for its *Glomar* response because the court concluded that the CIA had sufficiently shown that "disclosing the existence or nonexistence of an intelligence interest in such a program would reveal something not already officially acknowledged and thereby harm national security interests." *Ibid.* Thus, the Second Circuit itself appears to understand that *Florez* is limited to the atypical remand context in which that case arose.[4]

3. Finally, petitioner contends (Pet. 28-30) that this Court's review is warranted because "the D.C. Circuit

---

[4] The decision below likewise viewed *Florez* as only "arguably" supporting petitioner's ability to invoke "nonofficial statements" to challenge the CIA's *Glomar* response. Pet. App. 23a n.3. The D.C. Circuit tentatively stated that "[t]o the extent" that *Florez* is read to treat the FBI disclosures in *Florez* "as 'relevant' to the CIA's justification for its *Glomar* response," the court would view such a reading as "improperly circumvent[ing] the official acknowledgement doctrine" and as being inconsistent with D.C. Circuit decisions, "at least as applied to [the court's] analysis of [petitioner's] argument here." *Ibid.* But, given the Second Circuit's post-*Florez* application of the official-acknowledgement doctrine in *New York Times*, see pp. 20-21, *supra*, the Second Circuit has yet to extend *Florez* in a manner that would conflict with D.C. Circuit precedent in any way material to this case.

is particularly influential in FOIA matters" and is "the forum for the vast majority of FOIA litigation," Pet. 28. To be sure, the District of Columbia possesses universal jurisdiction over FOIA claims. 5 U.S.C. 552(a)(4)(B). But Congress has also vested jurisdiction over FOIA claims in any district court in "the district in which the complainant resides" or "has his principal place of business." *Ibid.* Petitioner thus could have filed this FOIA action in the District of Maryland and appealed to the Fourth Circuit. See C.A. App. 58. Other plaintiffs may file FOIA actions challenging *Glomar* responses in district courts located throughout the Nation that will not be bound by D.C. Circuit precedent. In such an action, it is possible that future decisions by other courts of appeals might give rise to an entrenched conflict of authority that would, at that time, warrant this Court's review. But in the absence of such a conflict, petitioner provides no sound basis for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
YAAKOV M. ROTH
Acting Assistant Attorney General
SHARON SWINGLE
THOMAS PULHAM
Attorneys

MAY 2025