KNIGHT
FIRST AMENDMENT
INSTITUTE at
COLUMBIA UNIVERSITY

475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500
info@knightcolumbia.org

April 13, 2021

Via ECF

The Honorable Analisa Torres
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Knight First Amendment Inst. at Columbia Univ. v. Centers for Disease Control & Prevention*, Case No. 1:20-cv-02761-AT

Dear Judge Torres,

Plaintiff the Knight First Amendment Institute at Columbia University writes to bring to the Court's attention the Supreme Court's recent decision in *U.S. Fish & Wildlife Service v. Sierra Club, Inc.*, 141 S. Ct. 777 (2021) (attached as Exhibit 1), which supports Plaintiff's contention that the CDC's withholding of Document 12 is unjustified.

Sierra Club involved a challenge to the government's withholding under the deliberative process privilege of "drafts of draft biological opinions" created during a multi-step regulatory process. 141 S. Ct. at 788. The Supreme Court held that the drafts in question were properly withheld under the privilege. Crucially, however, the Court explained that the mere fact that the records were labeled "draft" was not determinative. *Id.* at 786. Rather, what matters is whether the agency treats the document as "final," which "is a functional rather than formal inquiry." *Id.* at 786, 788. When considering whether the government had treated the records as final, the Court found determinative that (1) the decisionmakers had not approved the drafts; (2) the decisionmakers had not sent the drafts to the "action agency"; and (3) these particular drafts "died on the vine." *Id.* at 788. The Court also considered the drafts in their administrative context, noting that they were created early on during a multi-step process. *Id.* at 786–87.

The Supreme Court's analysis underscores the deficiencies in the CDC's justification for withholding Document 12, titled "DRAFT CDC Communication and Media Strategy for the Coronavirus Disease 2019 Response." Though the CDC calls Document 12 a draft and broadly states that the media strategy was never finalized, *see, e.g.*, Gov't Reply 7, ECF No. 41, *Sierra Club* makes clear that this is not the end of the inquiry: the agency must establish that it *treated* Document 12 like a draft. It has not done so. For example, the agency's filings do not explain key aspects of Document 12's function that the Supreme Court relied upon in *Sierra Club*, such as whether decisionmakers approved Document 12 and disseminated it for implementation, or whether Document 12 instead died on the vine. *See* Pl.'s Br. 20–21; Pl.'s Reply 13. Because the agency omits this information, it has failed to meet its burden. In fact, Plaintiff has pointed to evidence suggesting that Document 12 was indeed "functionally final." *See* 141 S. Ct. at 788; *see also* Pl.'s Br. 18–19, ECF No. 39; Pl.'s Reply 11–12, ECF No. 44.

The CDC instead emphasizes that the nature of the pandemic required the agency to change its media strategy over time, preventing a "static" media strategy from *ever* being "finalized." Gov't Reply 7. But a constantly changing policy is still final in each of its iterations. In *Sierra Club*, the Court explained that documents "subject to change" prior to ever taking effect are covered by the deliberative process privilege, 141 S. Ct. at 786–77, but it made clear that documents that are "functionally final" and have "real operative effect" are not deliberative—even if "hidden" in "draft form," *id.* at 787–88. In other words, revisions taking place after a policy is operative are *not* part of an interminable deliberative process, as the government appears to suggest, but rather a new and separate deliberative process.

Respectfully,

/s/ Anna Diakun

Anna Diakun
Knight First Amendment Institute at
Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500
anna.diakun@knightcolumbia.org