UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| OPEN SOCIETY JUSTICE INITIATIVE,<br><br>Plaintiff,<br><br>v.<br><br>DEPARTMENT OF DEFENSE *et al.*,<br><br>Defendants. | No. 20 Civ. 5096 (JMF)<br><br>ORAL ARGUMENT REQUESTED |
| OPEN SOCIETY JUSTICE INITIATIVE,<br><br>Plaintiff,<br><br>v.<br><br>DEPARTMENT OF HEALTH AND HUMAN SERVICES *et al.*,<br><br>Defendants. | No. 20 Civ. 6359 (JMF)<br><br>ORAL ARGUMENT REQUESTED |

**PLAINTIFF OPEN SOCIETY JUSTICE INITIATIVE'S MEMORANDUM OF LAW IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO CENTRAL INTELLIGENCE AGENCY'S MOTION FOR SUMMARY JUDGMENT**

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## PRELIMINARY STATEMENT

The American public has a profound interest in knowing what its government knew about the novel coronavirus, when it knew it, and what the government did to protect the public from a pandemic that has now killed more than 400,000 Americans. Transparency is a bedrock principle of our democracy and enshrined in the Freedom of Information Act ("FOIA"), which gives the people the right to access information held by government agencies.

CIA seeks to thwart this principle. It rebuffed Plaintiff's FOIA Request seeking information about the government's knowledge of and response to the COVID-19 pandemic with a "Glomar response"—the most extreme form of nondisclosure—claiming that it can neither confirm nor deny the existence of any records pertaining to any of the 21 topics in Plaintiff's FOIA request. Under well settled law, CIA's Glomar response is invalid.

An agency may not invoke a Glomar response where, as here, it offers only conclusory, sweeping, and vague statements about how disclosure would cause harm to national security or reveal intelligence sources and methods. CIA's supporting declaration suggests it could never disclose information on any subject, whatsoever, because everything CIA does relates to intelligence gathering and national security. If that were sufficient, CIA would simply be exempt from the FOIA statute altogether. It is insufficient.

Nor may an agency invoke Glomar to conceal whether it has an intelligence interest in a given subject where that agency has already officially and publicly acknowledged that interest. CIA did so when it joined a statement on behalf of the entire intelligence community saying that it had been consistently providing critical support to U.S. policymakers and those responding to the virus, and that it would continue to examine information and intelligence about the outbreak.

In the face of CIA's unsupported and attenuated claims of harm, as well as its public admission that it has an interest and role in responding to the pandemic, the Court should deny

CIA's motion for summary judgment, grant Plaintiff's cross-motion for summary judgment, and order CIA either to produce responsive records or to provide a *Vaughn* index that identifies withheld records and the basis for withholding them. A *Vaughn* index would allow Plaintiff and the Court to assess whether there actually is any merit to CIA's claims, protecting any legitimately classified and exempt information while not requiring the Court, Plaintiff, or the public to simply take CIA's word for it.

## BACKGROUND

### I. Factual Background

The statistics on the coronavirus pandemic are familiar and dire: As of this writing, the United States leads the world in reported COVID-19 cases, 25,312,454, and deaths, 422,017.[1] The United States makes up just 4.25% of the world's population, but accounts for 25% of worldwide COVID-19 infections and 20% of worldwide deaths. No other developed country comes even close.[2]

Since the first case of the virus was reported in the U.S. around the beginning of 2020,[3] the federal government's response has been riddled with failures, with fatal consequences for hundreds of thousands. Chief among these failures was the Trump administration's refusal to disclose truthful and timely information to the public about the virus. During January and February 2020, U.S. intelligence agencies reportedly warned then-President Trump of the virus on numerous occasions.[4] But President Trump consistently misled the public about the severity

[1] *See* COVID-19 Dashboard, Exhibit F; *see also COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins (JHU)*, Johns Hopkins Univ. & Med., https://coronavirus.jhu.edu/map.html (last visited Jan. 26, 2021).

[2] *See* Ex. F.

[3] *See* CDC Press Release, Exhibit G.

[4] Greg Miller & Ellen Nakashima, *President's intelligence briefing book repeatedly cited as virus threat*, Wash. Post (Apr. 27, 2020, 5:22 PM), https://www.washingtonpost.com/national-security/presidents-intelligence-briefing-book-repeatedly-cited-virus-threat/2020/04/27/ca66949a-8885-11ea-ac8a-fe9b8088e101_story.html ("U.S. intelligence

of the pandemic and the efficacy of his administration's response to it. The day after the first case was reported in the U.S., President Trump noted that he was not worried about a pandemic, stating "[w]e have it totally under control . . . It's one person coming in from China. We have it under control. It's going to be just fine."[5] Later in January 2020, President Trump reiterated during a speech that the virus was "going to have a very good ending for us. . . . that I can assure you."[6]

On February 7, 2020, President Trump privately told journalist Bob Woodward in a recorded interview that the virus was airborne and that it was "deadly stuff," "more deadly than even your strenuous flus."[7] Yet, on the same day, President Trump tweeted that "as the weather starts to warm . . . the virus hopefully becomes weaker, and then gone."[8] At a New Hampshire campaign rally on February 10, President Trump said "[l]ooks like by April, you know, in theory, when it gets a little warmer, it miraculously goes away."[9] On February 24, he tweeted that "[t]he Coronavirus is very much under control in the USA."[10] At a February 26, 2020 press conference, he said that the virus was "a little like the regular flu that we have flu shots for," and

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agencies issued warnings about the novel coronavirus in more than a dozen classified briefings prepared for President Trump in January and February").

[5] Matthew J. Belvedere, *Trump says he trusts China's Xi on coronavirus and the US has it 'totally under control'*, CNBC (Jan. 22, 2020, 5:01 AM), https://www.cnbc.com/2020/01/22/trump-on-coronavirus-from-china-we-have-it-totally-under-control.html.

[6] Caitlin Oprysko, *Trump: Coronavirus will have 'a very good ending for us'*, Politico (Jan. 30, 2020, 6:25 PM), https://www.politico.com/news/2020/01/30/trump-close-cooperation-china-coronavirus-109701.

[7] Jamie Gangel et al., *'Play it down': Trump admits to concealing the true threat of coronavirus in new Woodward book*, CNN (Sept. 9, 2020, 8:11 PM), https://www.cnn.com/2020/09/09/politics/bob-woodward-rage-book-trump-coronavirus/index.html.

[8] Nadia Kounang, *President Trump tweeted the coronavirus could weaken as the weather warms. Scientists say it's too early to know*, CNN (Feb. 7, 2020, 8:03 PM), https://www.cnn.com/asia/live-news/coronavirus-outbreak-02-08-20-intl-hnk/h_bb2348969c52350ae308a76f4c6d9dad.

[9] David Leonhardt, *A Complete List of Trump's Attempts to Play Down Coronavirus*, N.Y. Times (Mar. 15, 2020), https://www.nytimes.com/2020/03/15/opinion/trump-coronavirus.html.

[10] Reuters Staff, *Trump says coronavirus under control in the U.S.*, Reuters (Feb. 24, 2020, 4:59 PM), https://www.reuters.com/article/us-china-health-usa-trump/trump-says-coronavirus-under-control-in-the-u-s-idINKCN20I2HV.

that the fatality ratio for the flu, based on the numbers until then, was higher than that for the virus.[11]

All the while, the administration failed to institute a robust nationwide COVID-19 response, leaving states largely to fend for themselves and enter bidding wars to acquire testing and protective equipment.[12] After misleading the public about the timeline for a Covid-19 vaccine, the federal government failed to oversee vaccine distribution, resulting in an alarmingly slow rollout and numerous instances of vaccine doses going unused and spoiled.[13]

Another hallmark of the Trump administration's COVID-19 response was the manipulation of information provided to the public to suit political ends.[14] The administration "[p]ressured health experts to adopt the Administration's talking points" about the pandemic.[15] It "[a]ltered, delayed, and suppressed guidance and scientific reports on testing, protecting

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[11] Jane C. Timm, *Fact checking Trump's comments on coronavirus*, NBC News (Feb. 26, 2020, 8:39 PM), https://www.nbcnews.com/politics/donald-trump/fact-checking-trump-s-comments-coronavirus-n1143856; *see generally* Tara Subramaniam & Christopher Hickey, *Timeline: Charting Trump's public comments on Covid-19 vs. what he told Woodward in private*, CNN (Sept. 16, 2020), https://www.cnn.com/interactive/2020/09/politics/coronavirus-trump-woodward-timeline/ (contrasting what President Trump broadcasted publically with his divergent private statements).

[12] *See* House Comm. on Oversight & Reform Press Release, Exhibit H; Lauren Feiner, *States are bidding against each other and the federal government for important medical supplies—and it's driving up prices*, CNBC (Apr. 11, 2020, 8:22 AM), https://www.cnbc.com/2020/04/09/why-states-and-the-federal-government-are-bidding-on-ppe.html (quoting the Governor of Kentucky as reporting "It is a challenge that the federal government says, 'States, you need to go and find your supply chain,' and then the federal government ends up buying from that supply chain.").

[13] *See* Editorial Board, *We Came All This Way to Let Vaccines Go Bad in the Freezer?*, N.Y. Times (Dec. 31, 2020), https://www.nytimes.com/2020/12/31/opinion/coronavirus-vaccines-expiring.html ("Untold numbers of vaccine doses will expire before they can be injected into American arms, while communities around the country are reporting more corpses than their mortuaries can handle."); *see also* Dan Goldberg et al., *How thousands of scarce Covid shots could go to waste*, Politico (Nov. 22, 2020, 7:00 AM), https://www.politico.com/news/2020/11/22/scarce-covid-vaccine-waste-438928 (projecting the ways in which the "leadership vacuum" in the Trump administration could lead to vaccine waste).

[14] Select Subcomm. on the Coronavirus Crisis Rep., Exhibit I, at 1 ("The Select Subcommittee documented at least 47 separate incidents of political interference in the Administration's coronavirus response spanning from February through September 2020.").

[15] *See* Ex. I, at 1; *see also* Giuliana Viglione, *Four ways Trump has meddled in pandemic science—and why it matters*, Nature (Nov. 3, 2020), https://www.nature.com/articles/d41586-020-03035-4 ("Last month, a coronavirus-crisis sub-committee within the US House of Representatives released a report documenting 47 instances in which government scientists had been sidelined or their recommendations altered.").

children, reopening schools, voting safely, and other topics."[16] It ignored scientific advice and silenced and sidelined experts like Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, who attempted to tell the truth about the pandemic.[17] It approved questionable treatments for the virus despite evidence of their ineffectiveness.[18]

The Trump administration's political pressure on CIA and other members of the intelligence community reportedly reduced the public's access to information about the COVID-19 pandemic. In contrast to previous years, during which intelligence agency chiefs released a public worldwide threat assessment and testified publicly before Congress, intelligence agency chiefs in 2020 did not release a public worldwide threat assessment or testify in public, reportedly for fear of displeasing President Trump.[19]

Significantly, in previous years, Worldwide Threat Assessments of the US Intelligence Community routinely provided assessments of infectious diseases and pandemics. In January 2019, the Worldwide Threat Assessment stated: "We assess that the United States and the world will remain vulnerable to the next flu pandemic or large-scale outbreak of a contagious disease that could lead to massive rates of death and disability, severely affect the world economy, strain international resources, and increase calls on the United States for support."[20] The Assessment warned that there would be "frequent outbreaks of infectious diseases," and that "[t]he growing

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[16] Ex. I, at 1.

[17] *See* Viglione, *supra* note 15 ("This display follows a pattern of Trump attempting to silence and discredit Fauci throughout the pandemic: in May, in an unprecedented move, the administration blocked Fauci from testifying about the US pandemic response in front of the Democrat-led House of Representatives' appropriations committee.").

[18] *See id.* (explaining that the Trump Administration "leaned heavily" on the FDA to approve a treatment "despite a lack of solid evidence that it helps people" and that the FDA "had to revoke its authorization of hydroxychloroquine, which Trump had touted as a 'game changer'").

[19] *See* Ken Dilanian, *U.S. intel agencies warned of rising risk of outbreak like coronavirus*, NBC News (Feb. 28, 2020), https://www.nbcnews.com/politics/national-security/u-s-intel-agencies-warned-rising-risk-outbreak-coronavirus-n1144891 ("So far this year, the intelligence agency chiefs have not agreed to release a public worldwide threats assessment or testify in public, because, officials tell NBC News, they are reluctant to discuss intelligence that might displease President Donald Trump.").

[20] Jan. 2019 Worldwide Threat Assessment of U.S. Intel. Comm., Exhibit J, at 21.

proximity of humans and animals has increased the risk of disease transmission. The number of outbreaks has increased in part because pathogens originally found in animals have spread to human populations."[21] The COVID-19 pandemic is believed to have originated through such a spread from animals to humans.[22] Similarly, in January 2018, the Worldwide Threat Assessment of the US Intelligence Community warned: "A novel strain of a virulent microbe that is easily transmissible between humans continues to be a major threat, with pathogens such as H5N1 and H7N9 influenza and Middle East Respiratory Syndrome Coronavirus having pandemic potential if they were to acquire efficient human-to-human transmissibility."[23]

To deflect attention from its failures in combating the virus, the Trump administration blamed China, and reportedly pressured CIA and other intelligence agencies to support the President's claim that the coronavirus originated in a Chinese laboratory in Wuhan.[24] In the face of this pressure, the intelligence community, including CIA, joined in issuing a press release from the Office of the Director of National Intelligence on April 30, 2020, regarding the COVID-19 virus (hereinafter, the "Joint Statement"). Entitled "Intelligence Community Statement on Origins of COVID-19," the Joint Statement reads:

> The *entire* Intelligence Community has been consistently providing critical support to U.S. policymakers and those responding to the COVID-19 virus, which

[21] Ex. J, at 21.

[22] Smriti Mallapaty, *Animal source of the coronavirus continues to elude scientists*, Nature (May 18, 2020), https://www.nature.com/articles/d41586-020-01449-8 ("There is strong evidence that the virus originated in bats. The biggest mystery remains how it got from bats to people.").

[23] Feb. 2018 Worldwide Threat Assessment of U.S. Intel. Comm., Exhibit K, at 17.

[24] Mark Mazzetti et al., *Trump Officials Are Said to Press Spies to Link Virus to Wuhan Labs*, N.Y. Times (Apr. 30, 2020), https://www.nytimes.com/2020/04/30/us/politics/trump-administration-intelligence-coronavirus-china.html ("Senior Trump administration officials have pushed American spy agencies to hunt for evidence to support an unsubstantiated theory that a government laboratory in Wuhan, China, was the origin of the coronavirus outbreak. . . . The effort comes as . . . Trump escalates a public campaign to blame China for the pandemic."); Patrick Wintour, *US Intelligence Agencies Under Pressure to Link Coronavirus to Chinese Labs*, The Guardian (Apr. 30, 2020, 9:49 AM), https://www.theguardian.com/world/2020/apr/30/cia-pushes-back-at-trump-efforts-to-link-coronavirus-to-chinese-laboratories ("Intelligence analysts fear Donald Trump is looking for propaganda to be used in the escalating blame game over whether China covered up the crisis or even generated the virus in its laboratories.").

> originated in China. The Intelligence Community also concurs with the wide scientific consensus that the COVID-19 virus was not manmade or genetically modified.
>
> As we do in all crises, the Community's experts respond by surging resources and producing critical intelligence on issues vital to U.S. national security. The IC will continue to rigorously examine emerging information and intelligence to determine whether the outbreak began through contact with infected animals or if it was the result of an accident at a laboratory in Wuhan.

Joint Statement, Exhibit A (emphasis added). These facts provide the context for assessing CIA's refusal even to confirm or deny the existence of records responsive to Plaintiff's FOIA request.

## II. Procedural Background

On April 27, 2020, Plaintiff Open Society Justice Initiative ("OSJI") submitted FOIA requests to CIA and other federal agencies. *See* Compl. ¶ 29, Dkt. No. 1. From CIA, OSJI requested documents concerning three separate categories: (1) documents concerning when CIA received notice of SARS-CoV-2 and COVID-19; (2) documents concerning the Executive Branch's efforts to counter SARS-CoV-2 and COVID-19; and (3) the Executive Branch's SARS-CoV-2 and COVID-19 communications with Congress, State Governors, and the World Health Organization ("WHO"). *See* OSJI FOIA Req. Exhibit B, at 2–3.

CIA responded on April 29, 2020, acknowledging receipt and granting expedited review. *See* CIA Acknowledgement Ltr. Exhibit C, at 4. On May 12, 2020, CIA provided a final response to OSJI's request, stating that it could "neither confirm nor deny the existence or nonexistence of records responsive to [OSJI's] request. The fact of the existence or nonexistence of such records is itself currently and properly classified and is intelligence sources and methods information protected from disclosure by Section 6 of the CIA Act of 1949, as amended, and Section 102(A)(i)(l) of the National Security Act of 1947, as amended." CIA Final Resp.,

Exhibit D, at 4. CIA therefore denied OSJI's Request "pursuant to FOIA exemptions (b)(1) and (b)(3)." *Id.* at 4.

On June 1, 2020, OSJI initiated an administrative appeal of CIA's determination, arguing that "[t]he CIA's summary response entirely fails to meet the agency's burden under the FOIA of demonstrating that it is entitled to refuse to confirm or deny the existence of records responsive to the Request." OSJI Admin. Appeal Exhibit E, at 2. OSJI further explained that "the fact of the existence or nonexistence of responsive records is not properly classified" and that CIA had not "demonstrated that the existence or non-existence of a single record responsive to the request [was] 'intelligence sources and methods information protected from disclosure.'" *Id.* at 2. OSJI also noted that much "information about the CIA's role in the coronavirus is already in the public domain, as are official government statements acknowledging the intelligence community's role in government's response to the virus." This rendered CIA's blanket and summary refusal to "confirm or deny the existence of responsive records [] untenable." *Id.* at 2.

Having received no response to its administrative appeal, OSJI filed this lawsuit against CIA and several other agencies. *See* Compl. CIA and OSJI subsequently negotiated a briefing schedule for adjudicating the parties' dispute by summary judgment and, on November 20, 2020, CIA filed its brief in support of its motion for summary judgment. Dkt. No. 56 ("CIA Op. Br."). CIA's brief argues, based on a declaration by Vanna Blaine, Dkt. No. 57 ("Blaine Decl."), that it is entitled to issue a "Glomar" response pursuant to FOIA Exemptions 1 and 3.

**STANDARD OF REVIEW IN FOIA CASES**

Summary judgment is proper when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The basic presumption under FOIA is that all government records responsive to a request should be disclosed. *ACLU* v. *NSA*, 925 F.3d 576, 588 (2d Cir. 2019). An agency may withhold

records and information only if it can prove that such records and information fall into one of nine exemptions under the FOIA statute. *Wilner* v. *NSA*, 592 F.3d 60, 69 (2d Cir.2009). The government always bears the burden of persuasion when it claims a FOIA exemption, and the touchstone inquiry for the Court is whether the agency's justification for invoking the exemption is logical and plausible. *Id.* at 73 (citations omitted).

Accordingly, "[s]ummary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith. . . . Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Larson* v. *Dep't of State,* 565 F.3d 857, 862 (D.C. Cir. 2009) (internal quotation marks and citations omitted). The agency must provide an explanation for its exemptions that is "full and specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *King* v. *DOD*, 830 F.2d 210, 218 (D.C. Cir. 1987).

Courts review the adequacy of an agency's justifications for invoking an exemption to disclosure under the FOIA statute *de novo*. *ACLU* v. *DOD ("ACLU 2018 I")*, 322 F. Supp. 3d 464, 473 (S.D.N.Y. 2018). When reviewing the applicability of the exemptions, the court must construe the FOIA exemptions narrowly, *Milner* v. *Dep't of Navy*, 562 U.S. 562, 565 (2011), "and all doubts as to the applicability of the exemption[s] must be resolved in favor of disclosure," *Wilner*, 592 F.3d at 69.

A Glomar response is the most extreme form of nondisclosure under FOIA. Rather than simply redact information or withhold particular records in their entirety, an agency that issues a

Glomar response states that it can neither confirm nor deny the existence of any records responsive to the FOIA request. A Glomar response is not codified as a separate exemption to FOIA disclosure—it must be founded on one of the nine exemptions in the FOIA statute. *ACLU* v. *CIA*, 710 F.3d 422, 431 (D.D.C. 2013) ("The Glomar doctrine is in large measure a judicial construct, an interpretation of FOIA exemptions that flows from their purpose rather than their express language.").

Given the extreme nature of a Glomar response, courts have held agencies that invoke it to a higher burden of persuasion. The Glomar response "applies only in rare cases when the very act of confirming or denying the existence of records 'would cause harm cognizable under a[ ] FOIA exception.'" *Nat'l Day Laborer Org. Network* v. *ICE*, 827 F. Supp. 2d 242, 253 (S.D.N.Y. 2011) (quoting *Wilner*, 592 F.3d at 68). The agency's affidavit must not only demonstrate a logical and plausible basis for invoking a FOIA exemption, but it must also be "particularly persuasive" and describe the "unusual circumstances" justifying a Glomar response. *Florez* v. *CIA*, 829 F.3d 178, 182 (2d Cir. 2016).

**ARGUMENT**

CIA cannot rely on its "customary practice" of issuing a Glomar response to Plaintiff's FOIA Request because it has failed to demonstrate the "unusual circumstances" justifying Glomar with a "particularly persuasive affidavit" setting forth the specific reasons for why disclosure would cause harm to national security or reveal intelligence sources and methods pursuant to Exemptions 1 and 3. *ACLU 2018 I*, 322 F. Supp. 3d at 468; *Florez*, 829 F.3d at 182.

First, CIA has failed to support its reliance on Exemptions 1 and 3 because its supporting declaration simply recites conclusory assertions of hypothetical harms and utterly fails to connect these perceived harms to the subject matter of any of Plaintiff's Request topics.

Second, CIA's reliance on Glomar is unavailable as to at least topics 2 and 18 of Plaintiff's FOIA Request because CIA has officially acknowledged its interest and activity regarding the pandemic, leaving "inescapable" the inference that records within the scope of these topics exist and implausible the claim that their disclosure would cause cognizable harm. *ACLU 2018 I*, 322 F. Supp. 3d at 475.

CIA should therefore be ordered to either disclose records responsive to Plaintiff's FOIA Request or submit a *Vaughn* index. Akin to a privilege log, a *Vaughn* index would allow Plaintiff and the Court to assess the basis for CIA's nondisclosure while allowing CIA to preserve any legitimately classified and exempt information.

## I. CIA's Declaration Fails to Meet the Heightened Burden of Justifying a Glomar Response

It is well-established that the Glomar response is justified only in "rare" and "unusual circumstances" and only by a "particularly persuasive affidavit." *See Nat'l Day Laborer Org. Network*, 827 F. Supp. 2d at 253; *Florez*, 829 F.3d at 182. "To properly employ the *Glomar* response to a FOIA request, an agency must 'tether' its refusal to respond to one of the nine FOIA exemptions—in other words, 'a government agency may . . . refuse to confirm or deny the existence of certain records . . . if the FOIA exemption would itself preclude the *acknowledgment* of such documents.'" *Wilner*, 592 F.3d at 69 (quoting *Minier* v. *CIA*, 88 F.3d 796, 800 (9th Cir. 1996)). The agency may carry its burden by submitting an affidavit setting forth with "reasonable specificity" a "logical and plausible" explanation of how disclosure of the requested information would result in the harm recognized under the relied-upon exemption. *Florez*, 829 F.3d at 182, 185; *N.Y. Times Co.* v. *DOJ ("N.Y. Times I")*, 756 F.3d 100, 119 (2d Cir. 2014); *Halpern* v. *FBI*, 181 F.3d 279, 293 (2d Cir. 1999); *see also ACLU 2018 I*, 322 F. Supp. 3d at 473

("However, 'conclusory affidavits that merely recite statutory standards, or are overly vague or sweeping . . . will not carry the government's burden." (quoting *Larson*, 565 F.3d at 864)).

The agency's affidavit may not be conclusory, vague, or sweeping, or merely recite statutory standards, nor can it satisfy the agency's burden without describing how disclosure of the *specific* information requested would risk one of the cognizable harms recognized by these exemptions. *See Halpern*, 181 F.3d at 293–94; *ACLU* v. *DOD ("ACLU 2020")*, 17 Civ. 9972 (ER), 20 Civ. 43 (ER), ---F. Supp. 3d---, 2020 WL 5913758, at *6 (S.D.N.Y. Oct. 5, 2020); *N.Y. Times I*, 756 F.3d at 119; *ACLU 2018 I*, 322 F. Supp. 3d at 473. Rather, the government's supporting affidavit must provide enough "specificity . . . to confirm the rationality of [its] decision," *Wilson* v. *CIA*, 586 F.3d 171, 195 (2d Cir. 2009), such that it "educate[s] the Court on the connection between" the cognizable harm recognized by the asserted exemption "in the context of this case," *ACLU 2020*, 2020 WL 5913758, at *7, "giving reasonably detailed explanations why any withheld documents fall within an exemption," *N.Y. Times I*, 756 F.3d at 112. This burden is not one CIA can meet merely "through *ipse dixit*." *Id.* When reviewing the applicability of the exemptions, the Court must construe the FOIA exemptions narrowly, *Milner*, 562 U.S. at 565, "and all doubts as to the applicability of the exemption[s] must be resolved in favor of disclosure," *Wilner*, 592 F.3d at 69.

CIA invokes Exemptions 1 and 3 in support of its Glomar response. But its supporting declaration[25] is not "particularly persuasive" and does not describe any "unusual circumstances" justifying why confirming or denying the mere existence of responsive records would cause damage to national security or reveal intelligence sources and methods. CIA's Glomar response seems especially inapt given that prior to 2020, the intelligence community (which includes CIA)

[25] CIA submits a declaration, rather than an affidavit, in support of its motion for summary judgment; however, Plaintiff does not quibble over whether this format is proper.

routinely issued Worldwide Threat Assessments that described threats from contagious diseases and pandemics.[26]

### A. CIA's Declaration Fails to Meet Its Burden under Exemption 1

Exemption 1 "exempts from disclosure records that are 'specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy,' and 'are in fact properly classified pursuant to such Executive order.'" *Ctr. for Const. Rts.* v. *CIA*, 765 F.3d 161, 164 (2d Cir. 2014) (quoting 5 U.S.C. § 552(b)(1)). Here, CIA relies on Executive Order 13,526 ("EO 13526"), 75 Fed. Reg. 707 (Dec. 29, 2009), which permits classification of certain categories of information if its disclosure "reasonably could be expected to result in damage to the national security." EO 13526 at Part 1, Section 1.1(a)(4). Thus, CIA must justify its reliance on Exemption 1 with a particularly persuasive affidavit setting forth with reasonable specificity a logical and plausible basis for why confirming or denying the existence of records pertaining to each of Plaintiff's FOIA Request topics would likely result in harm to our national security. It has failed to meet this burden in this case.

CIA's declaration conjectures that "confirming or denying the existence or nonexistence of responsive records in this particular case could reasonably be expected to cause damage to national security by revealing information relating to intelligence activities, capabilities, authorities, sources and methods." Blaine Decl. ¶ 15. The declaration does not explain with reasonable specificity why merely confirming or denying the existence of records responsive to each of the 21 topics in Plaintiff's FOIA Request is justified under Exemption 1. Indeed, it does not even acknowledge or engage with the specific subject matter of topics 5–15 and 20–21 in Plaintiff's FOIA Request, *see* Ex. B, much less explain the connection between how confirming

[26] *See, e.g.*, Ex. J, at 21; Ex. K, at 17.

or denying the existence of records responsive to these topics would manifest in harm to national security. Rather, CIA's declaration is replete with sweeping statements that assert "through *ipse dixit*" that disclosure will cause harm to national security, without venturing to tether this purported harm to the subject matter of Request topics 5–15 and 20–21. *ACLU 2020*, 2020 WL 5913758, at *7. This is a basic failure of proof; it is not enough for CIA to simply state that harm will result without detailing how. *Id.* at *6 (recognizing that failure to "detail how" a cognizable harm would result from disclosure is "insufficient to show that the agencies' invocation of Exemption 1 was logical and plausible").

There are two instances where CIA arguably accomplished the bare minimum of acknowledging the subject matter of some of Plaintiff's FOIA Request topics. Request topic 16 seeks records discussing Remdesivir and other potential treatments for COVID-19 and Request topic 19 seeks communications between the Executive Branch and non-governmental entities capable of developing testing for the COVID-19 virus. One could strain to read paragraphs 20 and 21 of the Blaine Declaration as addressing these topics. But CIA's declaration still fails to "detail how" or why confirming or denying the existence of records on these topics would harm national security. *Id.* Instead, CIA conjectures that its activities "cannot be viewed in isolation" because everything it does is "inextricably linked with the national security interests," Blaine Decl. ¶ 20, essentially asking this Court to blindly accept, without scrutiny, that any disclosure would cause cognizable harm. The Court does not owe CIA such absolute deference. *ACLU* v. *DOD ("ACLU 2018 II")*, 901 F.3d 125, 134 (2d Cir. 2018) ("[C]oncerns of national security and foreign relations do not warrant abdication of the judicial role." (quoting *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010)).

In short, the essence of CIA's position appears to be that, because it is an intelligence agency charged with protecting national security, it can never reveal whether it does or does not have any information.[27] That logical Möbius strip would allow CIA (and many agencies) a permanent exemption from FOIA, because nearly any government activity or interest could be framed as securing our nation's security, and would render FOIA a dead letter.[28] And while courts may accord "substantial weight" to agency affidavits in the national security context, "deference is not equivalent to acquiescence." *Campbell* v. *DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998). "[C]oncerns of national security and foreign relations do not warrant abdication of the judicial role" and "[d]eference to the executive's national security and military judgments is appropriate only where [courts] have sufficient information to evaluate whether those judgments were logical and plausible." *ACLU 2018 II*, 901 F.3d at 134 (citing *Holder*, 561 U.S. at 34).

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[27] The Blaine Declaration makes this point plain throughout:

> [S]uch confirmation would show that the Agency determined that information about these specific treatments was of significant intelligence value. Conversely, if the CIA denied possessing such records, that response would reveal that the Agency did not consider those treatments to be of sufficient intelligence interest to warrant information gathering, analysis, or assessment, or that the CIA lacked the capability to gather such information.

Blaine Decl. ¶ 21.

[28] Moreover, its reasoning is at odds with its ongoing practice of disclosing some information about the state of COVID-19 around the world on its website. On its website, CIA explains that

> widespread ongoing transmission of a respiratory illness caused by the novel coronavirus (COVID-19) is occurring globally; older adults and people of any age with serious chronic medical conditions are at increased risk for severe disease; some health care systems are becoming overwhelmed and there may be limited access to adequate medical care in affected areas; many countries are implementing travel restrictions and mandatory quarantines, closing borders, and prohibiting non-citizens from entry with little advance notice[.]

*The World Factbook: The World*, CIA (Jan. 19, 2021), https://www.cia.gov/the-world-factbook/countries/world/, Exhibit L.

The website also provides updates about the coronavirus landscape in specific countries. *See, e.g.*, *The World Factbook: Italy*, CIA (Jan. 18, 2021), https://www.cia.gov/the-world-factbook/countries/italy/; *The World Factbook: South Africa* (Jan. 19, 2021), https://www.cia.gov/the-world-factbook/countries/south-africa/; *The World Factbook: China* (Jan. 19, 2021), https://www.cia.gov/the-world-factbook/countries/china/.

CIA's declaration cannot therefore satisfy its burden of providing a "particularly persuasive" justification for invoking Exemption 1 with "reasonable specificity" as a matter of law, nor justify the "rare" and "unusual circumstances" warranting this extreme manner of nondisclosure in the form of a Glomar response. *See Halpern*, 181 F.3d at 293 (rejecting reliance on Exemption 1 for information withheld in *Vaughn* index due to agency's failure to provide "fact-specific justification"); *Amnesty Int'l USA* v. *CIA*, 728 F. Supp. 2d 479, 506 (S.D.N.Y. 2010) ("Judicial deference for an agency's justifications under Exemption 1 is only warranted when the agency's affidavits are first found, at a minimum, to contain sufficient detail to forge the logical connection between the information withheld and the claimed exemption." (internal quotation marks omitted) (citation omitted)).

Accordingly, CIA has failed to support its claims to Exemption 1. CIA was required to "educate the Court on the connection," *ACLU 2020*, 2020 WL 5913758, at *7, between the subject matter of the specific information requested by Plaintiff and the cognizable harm under Exemption 1, not offer a "policy justification" for why any disclosure as to any subject matter in which CIA does or does not have an interest should be disfavored. *Halpern*, 181 F.3d at 293. CIA's boilerplate declaration reciting statutory standards for harm, untethered from the subject matter of Plaintiff's FOIA Request topics, does not meet the standard for a "particularly persuasive" and "reasonabl[y] specific" declaration justifying reliance on Exemption 1.

**B. CIA's Declaration Fails to Meet Its Burden under Exemption 3**

Exemption 3 covers records that are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Here, CIA relies on the National Security Act of 1947, 50 U.S.C. § 2034(i)(1), which generally exempts from disclosure information that would disclose intelligence sources and methods. Thus, CIA must justify its reliance on Exemption 3 with a particularly persuasive affidavit (or, in this case, declaration) setting forth a logical and plausible

basis for why "non-disclosure would 'protect our intelligence sources and methods from foreign discovery.'" *ACLU 2020*, 2020 WL 5913758, at *7 (quoting *N.Y. Times I*, 756 F.3d at 119).

CIA spends all of two pages of a 16-page declaration on this Exemption, implicitly acknowledging that its claim that confirming or denying the existence of records could reasonably be expected to reveal intelligence sources and methods is tenuous at best. Blaine Decl. ¶¶ 27. CIA's declaration simply makes the broad and imprecise statement that "[c]onfirming or denying the existence of records responsive to Plaintiff's specific requests here would jeopardize any intelligence sources or methods utilized to obtain the underlying information, as the sources or methods may often be readily inferred from the subject matter or content of the information collected." Blaine Decl. ¶ 27. The declaration fails to explain with reasonable specificity how confirming or denying the existence of records responsive to each of the 21 topics of information requested in Plaintiff's FOIA Request would jeopardize any intelligence sources or methods. Nor does it describe any "unusual circumstances" weighing against disclosure, and is not "particularly persuasive" in explaining why the Glomar response is justified under Exemption 3. As such, CIA's declaration is patently insufficient for meeting CIA's burden under Exemption 3.

## II. Official Government Acknowledgements Negate CIA's Glomar Response

CIA's Glomar response is also not justified with respect to topics 2 and 18 in Plaintiff's FOIA Request in this case because CIA has officially acknowledged its interest and role in the COVID-19 pandemic, and its acknowledgement necessarily reveals the existence of records within the scope of topics 2 and 18.

An agency cannot logically and plausibly claim that the harms contemplated by any of the FOIA exemptions will occur when the withheld records or information have been publicly acknowledged by the withholding agency. *See Florez*, 829 F.3d at 184–85; *N.Y. Times I*, 756

F.3d at 119. This is known as the official-acknowledgment doctrine. Thus, an agency "loses its ability to provide a Glomar response when the existence or nonexistence of the particular records covered by the Glomar response has been officially and publicly disclosed." *Wilner*, 592 F.3d at 70. The doctrine applies "directly" when an agency admits the existence of specific records and "indirectly" "when the 'substance of an official statement and the context in which it is made permits the inescapable inference that the requested records in fact exist.'" *ACLU 2018 I*, 322 F. Supp. 3d at 475 (quoting *James Madison Project* v. *DOJ*, 302 F. Supp. 3d 12, 22 (D.D.C. 2018)).

To invoke the official-acknowledgement doctrine, the FOIA requester bears the burden of demonstrating that the government or the withholding agency itself has made a prior disclosure of the requested information. The agency then bears the ultimate burden of persuasion that it is "logical and plausible" to contend that disclosure would reveal something not already officially acknowledged, as supported by a particularly persuasive and reasonably specific affidavit. *See Leopold* v. *CIA*, 380 F. Supp. 3d 14, 23 (D.D.C. 2019) ("When the plaintiff has pointed to the required specific information, courts must evaluate 'whether it is logical or plausible for the [agency] to contend that it would reveal something not already officially acknowledged' by disclosing the existence or absence of documents." (quoting *Wolf* v. *CIA*, 473 F.3d 370, 429 (D.C. Cir. 2007))).

In *Wilson* v. *CIA*, the court held that, for information that is the subject of a FOIA request to be deemed officially acknowledged or disclosed, it must be "as specific as the information previously released," "match[] the information previously disclosed," and "made through an official and documented disclosure." 586 F.3d at 186. Since the *Wilson* test was first articulated, the Second Circuit has explained that it does "not understand the 'matching' aspect of the *Wilson* test to require absolute identity" and that "such a requirement would make little sense" because

"[a] FOIA requester would have little need for undisclosed information if it had to match precisely information previously disclosed." *N.Y. Times I*, 756 F.3d at 120 & n.19 (stating that "rigid application" of the *Wilson* test "may not be warranted in view of its questionable provenance").[29] This makes good sense. If the plaintiff needed to show that the *identical* information it seeks through a FOIA request has been officially acknowledged by the withholding agency, it would be a foregone conclusion that the withholding agency cannot muster a logical and plausible justification for why disclosing that information in response to a FOIA request would result in any cognizable harm that did not already occur as a result of the official acknowledgement. Such an analytical framework would also turn well settled FOIA precedent on its head, which holds that it is always the withholding agency's ultimate burden to persuade, with a logical and plausible explanation, that disclosure would cause harm. *See Wilson*, 586 F.3d at 186.

Thus, as cases since *Wilson* have shown, properly understood, *Wilson*'s matching test must be applied in light of the central legal requirement that the withholding agency's claim that disclosure of the requested information would cause harm is logical and plausible despite the information the agency is alleged to have officially acknowledged. *See N.Y. Times I*, 756 F.3d at 120 (holding that disclosure "adds nothing to the risk" given information the withholding agency official disclosed).

[29] The Second Circuit has also questioned the "provenance" of the matching aspect of the *Wilson* test, *N.Y. Times I*, 756 F.3d at 120 n.19, tracing its roots to a line of District of Columbia Circuit cases originating with *Ashfar* v. *Department of State*, 702 F.2d 1125 (D.C. Cir. 1983), which the Second Circuit noted did "not mention a requirement that the information sought 'match[es] the information previously disclosed.'" *Id.*; *see also Osen* v. *U.S. Cent. Command*, 969 F.3d 102, 111 n.5 (2d Cir. 2020) ("[O]ur Circuit adopted the official disclosure doctrine from a line of D.C. Circuit cases, the first of which relied in part on a district court decision and never articulated a 'matching' requirement. Thus, the *New York Times [I]* panel expressed skepticism over relying on the matching prong of the *Wilson* test." (citing *N.Y. Times I,* 756 F.3d at 120 n.19)).

Here, CIA's justification for invoking Glomar as to topics 2 and 18 of Plaintiff's FOIA Request is neither logical nor plausible in light of its official acknowledgement contained in an April 30, 2020 Joint Statement issued on behalf of the *entire* intelligence community, including CIA.[30] *See* Factual Background, *supra* pp. 2–7; Ex. A. This Joint Statement disclosed in no uncertain terms CIA's interest and role in responding to the pandemic, including devoting resources to respond to the pandemic, investigating the origins of the outbreak, evaluating the scientific community's consensus about the natural origins of the virus itself, and committing itself to continue its focus on responding to the pandemic. *Id*.

The Joint Statement thus makes the inference that records within the scope of topics 2 and 18 of Plaintiff's FOIA Request "inescapable" and "unavoidable." *ACLU 2018 I*, 322 F. Supp. 3d at 475, 478–79. Topic 2 of Plaintiff's FOIA Request seeks records relating to the "Executive Branch's response when it was first informed of what is now known as SARS-CoV-2 and/or COVID-19," and topic 18 seeks communications between CIA and the White House "regarding what is now known as SARS-CoV-2 and/or COVID-19." Ex. B, at 2. CIA is part of the Executive Branch.[31] Thus, given the disclosures in the Joint Statement, particularly the admission that CIA, along with the rest of the intelligence community, "has been consistently providing critical support to U.S. policymakers and those responding to the COVID-19 virus," there can be no doubt that records exist relating to the Executive Branch's response—specifically CIA's response—upon being informed of the COVID-19 pandemic. *Cf. ACLU 2018 I*, 322 F.

[30] *Members of the IC*, Off. of the Dir. of Nat'l Intel., https://www.dni.gov/index.php/what-we-do/members-of-the-ic, Exhibit M.

[31] *See The Executive Branch*, White House, https://obamawhitehouse.archives.gov/1600/executive-branch, Exhibit N ("Fifteen executive departments . . . carry out the day-to-day administration of the federal government. They are joined . . . by other executive agencies such as the CIA and Environmental Protection Agency, the heads of which are not part of the Cabinet, but who are under the full authority of the President."); *see also ACLU* v. *CIA*, 823 F.3d 655, 660 (D.C. Cir. 2016) (categorizing CIA as one of the "components of the Executive Branch").

Supp. 3d at 475, 478–79. Likewise, it is implausible to read the Joint Statement without being left with the "inescapable" and "unavoidable" inference that CIA and the White House communicated about the virus. *Id.* at 475, 479. Indeed, it is difficult to believe CIA, much less the entire intelligence community, would have been permitted to issue the Joint Statement at all without communicating with the White House.

Accordingly, CIA may not refuse to confirm or deny the existence of records pertaining to topics 2 and 18. Like the situation presented in *N.Y. Times I*, CIA's mere disclosure that records do or do not exist as to these topics would "add[] nothing to the risk" CIA claims disclosure would cause, making its justification for invoking Glomar *per se* illogical and implausible. 756 F.3d at 120.

CIA relegates the issue of official acknowledgement to the last two pages of its brief. CIA Op. Br. at 15–16; *see also* Blaine Decl. ¶ 24. Its only engagement with the Joint Statement itself is the terse, conclusory assertion that it just "does not suffice to satisfy the relevant 'precise and strict' test." CIA Op. Br. at 16. CIA acknowledges that "it may be fairly inferred that the U.S. intelligence community has an intelligence interest in COVID-19 generally. . . ." Blaine Decl. ¶ 17. But CIA asserts that "whether and to what extent the CIA has been involved in monitoring and responding to the COVID-19 pandemic has not been officially acknowledged and remains currently and properly classified," Blaine Decl. ¶ 24. This claim is contradicted by the Joint Statement, which describes the role of the *entire* intelligence community in responding to the pandemic. *See* Ex. A. CIA's declaration also contends that the Joint Statement provides "no insight into the role or involvement of any particular agency in the COVID-10 response," Blaine Decl. ¶ 24—again, a fact that is easily refuted by a plain reading of the Joint Statement. Accordingly, CIA's declaration cannot be accorded the "substantial weight" it asks of the Court

because its justification for invoking Glomar in light of the Joint Statement is "controverted by contrary evidence in the record." *Wilner*, 592 F.3d at 68.

## III. The Court Should Order CIA Either to Produce Responsive Records or to Provide a *Vaughn* Index Explaining Its Basis for Withholding Them

CIA's justifications for nondisclosure are even less credible in light of Plaintiff's requested relief, which is for the Court to compel CIA to either produce responsive records or provide a *Vaughn* index explaining its basis for withholding responsive records. CIA seeks to bolster its dire warnings of harm to national security (insufficient as they are) by setting up the straw man argument that the universe of options is either complete, unmitigated transparency or absolute secrecy. A *Vaughn* index, however, would not bring about any cognizable harms, particularly in light of CIA's failure to prove entitlement to Exemptions 1 and 3 for the reasons set forth in Sections I and II above.

"Once a FOIA request has been made for documents, the preparation of a *Vaughn* index is now an accepted method for the Government to identify responsive documents and discharge its obligation to assert any claimed FOIA exemptions to the various documents withheld." *N.Y. Times Co.* v. *DOJ ("N.Y. Times II")*, 758 F.3d 436, 438 (2d Cir.), *supplemented*, 762 F.3d 233 (2d Cir. 2014). "A *Vaughn* index typically lists the titles and descriptions of the responsive documents that the Government contends are exempt from disclosure." *Id.* at 438–39; *see Citizens for Resp. & Ethics in Wash.* v. *DOJ*, 746 F.3d 1082, 1088 (D.C. Cir. 2014) ("Agency affidavits sometimes take the form of a '*Vaughn* index,' but there is 'no fixed rule' establishing what such an affidavit must look like.") (citation omitted)). "[T]he index gives the court and the challenging party a measure of access without exposing the withheld information." *N.Y. Times II*, 758 F.3d at 439 (alteration in original) (quoting *Jud. Watch, Inc.* v. *FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006)). And "it enables the adversary system to operate by giving the requester as

much information as possible, on the basis of which he can present his case to the trial court." *Id.* at 438–39 (citing *Keys* v. *DOJ*, 830 F.2d 337, 349 (D.C. Cir. 1987)).

In light of CIA's failure to support its claim to the most extreme form of nondisclosure—a Glomar response—the Court should order CIA to either disclose responsive records or provide a *Vaughn* index so that Plaintiff can assess the basis for any information withheld by CIA with sufficient particularity and CIA can still seek to preserve any legitimate classifications that might exist.

## CONCLUSION

For the foregoing reasons, the Court should deny CIA's motion for summary judgment, grant Plaintiff's cross-motion for summary judgment, and order CIA to either produce records responsive to Plaintiff's FOIA Request or a *Vaughn* index identifying the records it is withholding and its basis for doing so.

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Respectfully submitted,

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