No. 17-779

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE, and VETERANS FOR PEACE,

Plaintiff-Appellees,

v.

UNITED STATES DEPARTMENT OF DEFENSE, and its components DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY, UNITED STATES DEPARTMENT OF THE ARMY.

Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (No. 04-cv-4151-AKH)

BRIEF OF PLAINTIFF-APPELLEES

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PRELIMINARY STATEMENT

Plaintiffs have long sought an undisclosed number of photographs depicting abuse of detainees in U.S. custody after 9/11 under the Freedom of Information Act (FOIA). In 2005, the district court examined related photographs *in camera* and considered the statement of a U.S. General that their release would result in violence against Americans. *ACLU v. DOD*, 389 F.Supp.2d 547, 575 (S.D.N.Y. 2005). The court held it could not "defer to our worst fears" under FOIA, which "'promote[s] honest and open government [] to assure the existence of an informed citizenry [in order to] hold the governors accountable to the governed.'" *Id.* at 551 (citation omitted). Finding "[c]larity and openness are the best antidotes" to the "flagrantly improper conduct by American soldiers" in the photographs, the court ordered their release. *Id.* at 578.

After this Court affirmed the district court's decisions, Congress responded by enacting the Protected National Security Documents Act of 2009 (PNSDA), which permitted the Secretary of Defense to withhold a photograph if, after evaluating it individually, he determined that "disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." Since then, the Secretary has three times so certified with regard to the photographs here at issue.

In a series of decisions, the district court has sought to fulfill its obligation to determine whether the government has properly withheld documents in accordance with FOIA Exemption 3, which covers withholding statutes. Initially, the district court found that the Secretary had properly withheld photographs in accordance with the criteria set forth in the PNSDA. In two subsequent opinions, however, the court has held that Department of Defense (DOD) frustrated judicial review by its failure to conduct the individualized review of photographs required by the language of the PNSDA or to explain why the photographs posed the threat at which the statute is aimed.

DOD responds not by demonstrating that an individualized review was in fact undertaken or by explaining how the release of these photos would, in fact, pose a threat to Americans abroad, but contends that the Court has no role in this process. The agency offers a number of theories: either the PNSDA itself eviscerates all judicial review, or it limits that review to the simple fact of whether a certification was filed, or it requires that it be undertaken pursuant to the arbitrary and capricious standard of the APA rather than the *de novo* standard of FOIA. In so responding, DOD does not merely seek to circumvent FOIA, which has an express provision (Exemption 3) governing withholding statutes like the PNSDA, but more fundamentally seeks unilateral and unreviewable authority to decide whether it will comply with Congress' requirements, all in the name of keeping

important information from the public. For the reasons set forth below, and in the interest not only of the government transparency that FOIA promotes but more profoundly the preservation of our democracy, with its checks and balances that assure that we are a government of laws, DOD's position should be rejected, and the photographs, at long last ordered released.

STATEMENT OF THE CASE

On October 7, 2003, Plaintiffs filed a FOIA request with DOD and other agencies seeking records relating to the treatment, death, or rendition of detainees held in U.S. custody abroad since 9/11. *ACLU v. DOD*, 339 F.Supp.2d 501, 502 (S.D.N.Y. 2004). When no agency responded, Plaintiffs filed suit on July 2, 2004. *Id.* In order to streamline the proceedings, in August 2004, Plaintiffs provided the Defendants with a list of priority items, which included photographs in DOD's possession provided by Army Specialist Joseph Darby. *ACLU*, 389 F.Supp.2d at 550-51. Those photographs—depicting abuse of detainees held at Abu Ghraib prison—were released by a third party, but DOD later identified similar, responsive photographs. *ACLU v. DOD*, 229 F.Supp.3d 193, 198-99 (S.D.N.Y. 2017). DOD has never confirmed their number, *id.* at 202, but they are believed to exceed 2,000. *See ACLU v. DOD*, 40 F.Supp.3d 377, 380 n.2 (S.D.N.Y. 2014). Those photographs are the subject of this appeal.

A. The District Court's 2005 Order and This Court's Affirmance

Before the Darby photographs were published by a third party, DOD withheld them on the basis of FOIA Exemptions 6 and 7(C), 5 U.S.C. § 552(b)(6), (7)(C), arguing that disclosure would infringe the privacy interests of the detainees depicted in the photos even if they were redacted. *ACLU*, 389 F.Supp.2d at 569. After oral argument, DOD added that Exemption 7(F), 5 U.S.C. § 552(b)(7)(F), also justified withholding because the photos were "compiled for law enforcement purposes" and because disclosure "could reasonably be expected to endanger the life or physical safety of any individual." *ACLU*, 389 F.Supp.2d at 574.

The district court rejected these arguments. DOD's concerns for privacy, the court held, could be protected through appropriate redactions. *Id.* at 571-74. And the court refused to permit withholding under Exemption 7(F), because the "core values of FOIA" outweighed the "risk that the enemy [would] seize upon the publicity of the photographs and seek to use such publicity as a pretext for enlistments and violent acts." *Id.* at 578. In "[t]he fight to extend freedom," the court held, the U.S. could not "sacrific[e] the transparency and accountability of government" if it was to "show our strength as a vibrant and functioning democracy to be emulated." *Id.* at 578. Accordingly, it ordered that the photographs be produced with redactions. *Id.*

DOD appealed but withdrew the appeal when a third party published the Darby photographs. *ACLU v. DOD*, 543 F.3d 59, 65 (2d Cir. 2008). Subsequently, DOD disclosed that it had discovered 29 new, responsive photos. *Id.* The district court reviewed these *ex parte* and *in camera*, finding eight nonresponsive, but ordering production with redactions of the remainder. *ACLU v. DOD*, No. 1:04-cv-4151, 2006 WL 1722574, at *1 (S.D.N.Y. June 21, 2006). On June 29, 2006, DOD revealed that there were 23 more responsive photographs, and that it planned to withhold them under the same exemptions as the previous 29. *ACLU*, 543 F.3d at 65 n.2. The district court determined that its decision with respect to DOD's claim for withholding of these photographs would be governed by the court's order regarding the others. *ACLU*, 229 F.Supp.3d at 198.

DOD appealed, and a unanimous panel of this Court affirmed. *ACLU*, 543 F.3d 59. Regarding Exemption 7(F), this Court held that its reference to "any individual" in the statute "indicates a requirement that the subject of the danger be identified with at least reasonable specificity." *Id.* at 67-68. DOD's projection of harm, the Court held—"gesturing to the populations of two nations and two international expeditionary forces and showing that it could reasonably be expected that at least one person within them will be endangered"—failed this specificity requirement. *Id.* at 70-71. As to Exemptions 6 and 7(C), the Court held that the district court's redaction's left "no cognizable privacy interest," and that

"there is a significant public interest in the disclosure of these photographs" because they "yield evidence of governmental wrongdoing" and thus serve "FOIA's central purpose of furthering governmental accountability." *Id.* at 87. Accordingly, the Court affirmed.

B. The Protected National Security Documents Act

On April 29, 2009, DOD declared that it would release the photos with redactions, adding that it had identified and was processing for release a "substantial number" of other photographs. *ACLU*, 229 F.Supp.3d at 229. However, on May 13, 2009, President Obama announced that the Government would oppose release of the photographs, following "an urgent request by the Prime Minister of Iraq," Nouri al Maliki, who warned that publication would destabilize the Iraqi government and threaten U.S. interests. JA235; *see also* Nancy A. Youseff, *Why'd Obama Switch on Detainee Photos? Maliki Went Ballistic*, McClatchy D.C. Bureau (June 1, 2009), *available at* http://www.mcclatchydc.com/news/politics-government/article24540448.html. Accordingly, on August 7, 2009, DOD petitioned the Supreme Court for a writ of certiorari. *See ACLU*, 40 F.Supp.3d at 381. While the petition was pending, on October 28, 2009, Congress passed and the President signed the Protected National Security Documents Act (PNSDA), Pub. L. 111-83, Title V, 123 Stat. 2142, § 565 (2009). *See ACLU*, 40 F.Supp.3d at 381.

The PNSDA states, "Notwithstanding any other provision of the law to the contrary, no protected document, as defined in subsection (c), shall be subject to disclosure under [FOIA] or any proceeding under that section." PNSDA § 565(b). A "protected document" is defined as "any record"

> (A) for which the Secretary of Defense has issued a certification, as described in subsection (d) . . . ;
>
> (B) that is a photograph that—
>
> > (i) was taken during the period beginning on September 11, 2001, though January 22, 2009; and
> >
> > (ii) relates to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States.

PNSDA § 565(c). Certification is regulated under subsection (d):

> (d) For any photograph described under subsection (c), the Secretary of Defense shall issue a certification if the Secretary of Defense determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.

PNSDA § 565(d). Certifications expire after three years but may be renewed. PNSDA § 565(d)(3). Finally, "[t]he Secretary of Defense shall provide Congress a timely notice of the Secretary's issuance of a certification and of a renewal of certification." PNSDA § 565(d)(4).

According to Senator Lieberman, the co-sponsor of the PNSDA, the Act's purpose was to allow the President to "fight the release of the photographs" in

court. 155 Cong Rec S5650, 5672.[1] As Senator Graham, the other co-sponsor, explained, "[the Act] doesn't change FOIA, in its basic construct, but it provides congressional support to the President's decision that we should not release these photos." *Id*.

C. The 2009 Certification and the District Court's 2011 Oral Ruling

On November 13, 2009, Secretary of Defense Gates certified the photographs under the PNSDA. JA196. The Gates Certification stated, on the basis of recommendations from three high-ranking military officials, that release of the photographs would cause the harm described in the PNSDA; it did not, however, otherwise set forth the Secretary's reasons or describe DOD's methodology. *Id.*

On November 30, 2009, the Supreme Court granted DOD's petition for certiorari, vacated this Court's opinion, and remanded. *DOD v. ACLU*, 558 U.S. 1042 (2009). On remand, Plaintiffs argued that the Secretary had not provided a basis "to explain how any one of the photographs would lead to [the harm the PNSDA was designed to prevent]." JA210. DOD responded that because "of the Protected National Security Documents Act, we're now operating under FOIA

[1]Senator Lieberman's statements also contain the best estimate of the number of photographs. 155 Cong. Rec. S5987 (saying Act concerned "nearly 2,100 photographs").

Exemption 3," claiming the Secretary's certification alone justified withholding. JA221.

The district court ruled in favor of DOD. Noting that it was "as familiar as almost any person outside the CIA or the Department of Defense" with the reasons for the Secretary's decision, it found "by reason of [its] familiarity" that it "[could not] say that there is a lack of a rational basis for what Secretary Gates has certified." JA 224. Since anything "beyond looking for a rational basis," would "arrogate [the court's] own thinking and policy considerations [in] derogation[] of the Legislative and Executive branches," the court refused to order release of the photographs. JA237, 239.

D. The 2012 Recertification and the District Court's 2014 Decision

Before the 2009 certification was due to expire on November 9, 2012, Secretary of Defense Panetta renewed it. JA240; *see ACLU*, 40 F.Supp.3d at 382. The 2012 Recertification, like the original, found the requisite harm on advice from high-ranking officers, and without elaboration. JA240.

The parties cross-moved for summary judgment. *ACLU*, 40 F.Supp.3d at 382. DOD argued that the district court's decision regarding the 2009 Certification was the law of the case, *id.* at 384, but the court disagreed, holding that "[t]hree years is a long time in war," and "while the entire legislative history of the PNSDA supported the 2009 certification, the factual basis for the 2012 recertification is

uncertain." *Id.* at 385. On the merits, the parties agreed that the PNSDA was an Exemption 3 statute, and that under *A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138 (2d Cir. 1994), DOD's claim for withholding was subject to *de novo* review. *ACLU*, 40 F.Supp.3d at 385. But Plaintiffs argued that the court was required to ascertain whether "the Secretary of Defense's review was of each photograph individually, and if the Secretary was correct in invoking the risk of harm to American lives as a basis for withholding that individual photograph." *Id.* DOD maintained that the court's review was limited to whether the Secretary had issued a certification, *id.* at 385, and renewed its claim under Exemption 7(F), *id.* at 383 n.3.

The district court agreed with Plaintiffs. Finding the text and legislative history of the PNSDA silent as to the scope of judicial review, the court looked to FOIA's "background norm of 'broad disclosure of Government records,'" and the "'strong presumption that Congress intends judicial review.'" *Id.* at 386-87 (quoting *CIA v. Sims*, 471 U.S. 159, 166 (1985), and *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986))). "Accordingly," the court held, DOD was required to show "why, on November 9, 2012, the release of pictures taken years earlier would continue to 'endanger [Americans abroad].'" *Id.* at 388. The district court also found that the plain text of the PNSDA requires the Secretary to review and certify photographs individually. *Id.* at 389 (citing

PNSDA § 565(d)(1) (requiring certification "for any photograph" if "disclosure of that photograph" would result in specified harms)). Individualized review, the court held, was also supported by FOIA's "broad disclosure" norm, since—as the court had itself observed previously—some photos were likely innocuous. *Id.*

Applying these principles, the court found the 2012 Recertification deficient because it discussed the photographs in the aggregate and failed to provide the factual basis for the Secretary's decision. *Id.* at 390. Before requiring disclosure, however, the district court provided DOD an "opportunity to create a record in this Court justifying its invocation of the PNSDA." *Id*. The court clarified DOD's burden stating, "what is necessary, is that the submission to me show an accountability, by the Secretary of Defense, of having considered and having made a finding [of harm] with regard to each and every photograph, individually and in relation to the others." JA274. If DOD met this burden, the court said, "the law requires the Court substantially to defer to the judgment exercised by the government." JA275.

E. The Weis Declaration and the District Court's 2015 Rulings

On December 19, 2014, DOD submitted a declaration from Megan Weis, a Department of the Army attorney, explaining the 2012 Recertification process. JA280. Weis reviewed the photos, placing them into three categories based upon three criteria—"the extent of any injury suffered by the detainee, whether U.S.

service members were depicted, and the location of the detainee in the photograph"—from which a representative sample of 5-10 photographs per category was drawn. JA282 ¶ 8. The sample of between 15 and 30 photographs was then sent to three Generals for their recommendations. JA283-84 ¶¶ 9-12. Each General recommended withholding all of the photographs, referring to them collectively. JA286-92. Weis then drafted a renewal certification which was sent to the Secretary along with the sample, the written recommendations of the Generals, and a compact disc containing all of the photographs. JA284 ¶ 13. The Secretary signed the certification. *Id.*

After submission of the Weis Declaration, the parties renewed their cross-motions for summary judgment but the district court found that DOD's showing "remained deficient," JA-327, because only a sample of photographs was reviewed for prospective harm, while the sampling criteria and methodology were not disclosed, and because the Generals' recommendations, which were done "*en gros*[*se*]," JA319, did not explain their reasoning. JA 318-20. Nonetheless, the court provided DOD another chance to supplement the record. JA320-21. When DOD requested clarification of the court's instructions, the court repeated that the Secretary's reliance on sampling failed to provide the sampling criteria and methodology, and that its submission had not set forth the factual basis for the Secretary's determination that disclosure would harm U.S. citizens abroad. JA328-

329. "At a minimum," the court wrote, "the submission must describe the categories of objectionable content contained in the photographs, identify how many photographs fit into each category, and specify the type of harm that would result from disclosing such content." JA329. The court gave DOD until March 17, 2015, on which date the Government filed a letter indicating it would submit nothing further. JA330. On March 20, the court entered judgment for Plaintiffs, JA331, and on May 15, DOD appealed to this Court. JA335. During the pendency of the appeal, however, the 2012 Recertification expired and this Court remanded. *ACLU*, 229 F.Supp.3d at 202.

F. The 2015 Recertification

Secretary Carter renewed the certification on November 7, 2015, based upon recommendations from several Generals that disclosure would cause the harms described in the statute. JA343. His process was described in the Declaration of DOD Deputy General Counsel Liam Apostol, JA337: first, an unnamed attorney "sorted the photographs into different categories based on what the photographs depicted and then further/additionally sorted based on how likely it was that the public release of the photographs would result in the harm the PNSDA was intended to prevent[.]" JA338 ¶ 5. "The purpose of this sorting was to ensure [] a true representative sample[.]" *Id.* Next, officers assigned to Joint Staff 37 "conducted an independent second phase of review with the same purpose—to

independently review each photograph based on the likelihood of harm that the PNSDA was intended to prevent and to independently assess whether the initial sorting of the photographs would ensure a true representative sample." *Id.* ¶ 6. Then, four attorneys "conducted a third review, on behalf of the Secretary, of the combined work product of the initial attorney and the officers assigned to Joint Staff J37." *Id.* ¶ 7. "This third review consisted of the attorneys reviewing each photograph to assess the likelihood of harm[.]" *Id.* Then, the participants in each of these three reviews "coordinated . . . to reach final consensus." *Id.* As a result of this process, "[a] determination was made that 198 photos were least likely to cause harm and should be considered for non-certification." *Id.* ¶ 8. This group also "developed a representative sample of the remaining photographs[.]" *Id.*

That sample was sent to General Lloyd J. Austin, U.S. Central Command; General David M. Rodriguez, U.S. Africa Command; Major General Jeffrey S. Buchanan, U.S. Forces, Afghanistan; and General Joseph F. Dunford, Chairman of the Joint Chiefs of Staff. *Id.* at ¶¶ 8-18. Each General noted the threat of hostilities in his area and recommended, on the basis of the sample, withholding all the photos as an undifferentiated group. JA339-41 ¶¶ 9-18.

Finally, the recommendations of the Generals, the 198 photographs recommended for non-certification, and the sample were sent to Secretary Carter. JA 341 ¶ 19. The Secretary declined to certify the 198 photos, which were

produced on February 5, 2016, but certified the remainder on November 7, 2015. JA 341-42 ¶ 19.

G. The Decision Below

The district court began by identifying the PNSDA as an Exemption 3 statute under the requirements of 5 U.S.C. § 552(b)(3) because the PNSDA "establishes particular criteria for withholding." *ACLU*, 229 F.Supp.3d at 204-05 (quoting 5 U.S.C. § 552(b)(3); PNSDA § 565(c)(1)). Next, noting that FOIA cannot be superseded except by express provision, the court examined the plain text and found no such provision. *Id.* at 205 (citing *Church of Scientology of California v. IRS*, 792 F.2d 146, 149 (D.C. Cir. 1986)). The PNSDA's clause, "notwithstanding any other provision of the law to the contrary," did not suggest otherwise because such "notwithstanding" provisions are the typical language of Exemption 3. *Id.* (citing *Newport Aeronautical Sales v. Dep't of Air Force*, 684 F.3d 160, 165 (D.C. Cir. 2012); *O'Keefe v. DOD*, 463 F.Supp.2d 317, 325 (E.D.N.Y. 2006)). And as the Supreme Court had held, "[u]nlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district court to 'determine the matter *de novo*.'" *Id.* at 207-08 (quoting *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 755 (1989) (quoting 5 U.S.C. § 552(a)(4)(B))).

Given this *de novo* standard, the district court required DOD to fulfill two requirements. First, because "the statute refers to photographs individually ('*that* photograph')," it "requires the Secretary of Defense to consider 'each photograph individually, not collectively.'" *ACLU*, 229 F.Supp.3d at 211 (citation omitted). The court noted that the Secretary could delegate his review, but that the Secretary must establish the "criteria to be utilized in categorizing the photographs and assessing the likely harm upon release." *Id.* at 212. And "[t]he Secretary's methodologies and criteria, whether by himself or through delegation, must be disclosed." *Id.* at 211.

Second, the court held that DOD was required to explain the Secretary's harm determination—"'with reasonably specific detail, demonstrat[ing] that the information withheld logically falls within the claimed exemption, and [is] not controverted by [] contrary evidence in the record[.]'" *ACLU*, 229 F.Supp.3d at 207 (quoting *Wilner*, 592 F.3d at 73). Thus, DOD had to "'describe the categories of objectionable content contained in the photographs, identify how many photographs fit into each category, and specify the type of harm that would result from disclosing such content.'" *Id.* at 208 (citation omitted). Further, DOD needed to explain "the relationship between the substance of the photographs and the specific endangerment referred to in the PNSDA." *Id.* at 210. Finally, the court noted that even under the APA, "a 'court must be satisfied from the record

that 'the agency . . . examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.'" *Id.* at 208 (citations omitted). Thus, whatever the standard, the court concluded that "at a bare minimum, [DOD] must disclose the criteria upon which it based its decision that release of the photographs would endanger Americans deployed outside the United States." *Id.* at 208. The court recognized that the PNSDA concerns national security and so calls for deference. *Id.* But it found this deference subject to the limitation that DOD at least "'"'supply the court[] with sufficient information to allow [it] to make a reasoned determination that [DOD was] correct' in withholding certain materials.'" *Id.* at 206-07 (citations omitted).

This, the court found, DOD had failed to do. The court noted that the Secretary's "methodologies and criteria" remained entirely opaque. *Id.* at 208-10. In particular, DOD had failed to disclose the criteria used to create the sample which the Generals viewed in making their recommendations. *Id.* at 212. Nor had the Generals provided the bases for their recommendations, all of which made judicial review impossible. *Id.* at 210 ("The generals, for example, concluded that the photographs 'would be used to fuel distrust, encourage insider attacks against U.S. military forces, and incite anti-U.S. sentiment across the region.' Apostol Decl. ¶ 10. But they did not explain what it was about the photographs that would produce these results."). They had not, for example, explained the distinction

between the 198 photographs that were released and the remainder that were certified for withholding. Finally, the court held that under this Court's prior ruling, withholding under Exemption 7(F) remained improper. *Id.* at 212-13. It granted Plaintiffs' motion for summary judgment. JA413.

This appeal followed.

SUMMARY OF ARGUMENT

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB. v. Robbins Tire & Co.*, 437 U.S. 215, 242 (1978). "Although Congress enumerated nine exemptions from [FOIA's] disclosure requirement, 'these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Pub. Citizen v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir. 2008) (citation and quotation marks omitted). "Accordingly, FOIA's exemptions are to be narrowly construed." *Id.* And "[t]he burden is on the agency to demonstrate . . . that the materials sought . . . have not been improperly withheld.'" *DOJ v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989). "A withholding agency must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information." *King v. DOJ*, 830 F.2d 210, 219 (D.C. Cir. 1987) (emphasis in original). The agency must

"'describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and [that it is] not controverted by [] contrary evidence in the record [.]'" *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (citation omitted).

This case involves the application of Exemption 3, *ACLU*, 229 F.Supp.3d at 204, which governs claims of withholding authorized by federal statutes like the PNSDA. As set forth above, the district court concluded that DOD did not sustain its burden of establishing either that it had conducted the required individualized review or that its withholding was justified. On appeal, DOD devotes most of its brief to attacking the degree of scrutiny applied by the district court. Its arguments are numerous and inconsistent, but amount to the basic contention that courts have no role in meaningfully reviewing the Secretary's decision to withhold evidence of government wrongdoing from the public. According to DOD, the judiciary should not review at all the basis for the Secretary's determination either because (a) the PNSDA supersedes FOIA and provides for no review; (b) even if FOIA applies, review is only available as to whether the Secretary in fact signed a certification; or (c) any review is governed by the arbitrary and capricious standard of the APA, rather than the *de novo* standard of FOIA. Almost in passing, DOD offers a brief argument that the Secretary did, in fact, meet his burden. Additionally, DOD maintains its claim under Exemption 7(F), previously rejected by this Court.

DOD may prefer that this case arose under a different statutory scheme than FOIA, one less "vital to the functioning of a democratic society," one that does not serve to "hold the governors accountable to the governed," one in which the Government may keep information secret without justification. *Nat'l Labor Relations Bd.,* 437 U.S. at 242. But this is a FOIA action. And under FOIA, courts must conduct *de novo* review of an agency's claim of exemption—here Exemption 3. Of course, the Secretary may ultimately justify withholding photos under the PNSDA, but first, he must adequately explain the process he utilized to review them, so that the Court may assure the individualized review required by Congress, and then he must provide the reasons for this withholding, sufficient for meaningful judicial review to assure compliance with the statute. Because that did not happen here, the judgment of the district court should be affirmed.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment in a FOIA matter *de novo*. *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir. 2005).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FULFILLED ITS RESPONSIBILITY TO PERFORM MEANINGFUL JUDICIAL REVIEW OF DOD'S WITHHOLDING OF THE PHOTOS AND CORRECTLY DETERMINED THAT SUCH WITHHOLDING WAS NOT JUSTIFIED.

A. The PNSDA is an Exemption 3 Statute Subject to Review under FOIA.

A statute qualifies under FOIA Exemption 3 if it "establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]" 5 U.S.C. § 552(b)(3); *A. Michael's Piano*, 18 F.3d at 143. In this case, the district court correctly held that the PNSDA qualifies as an Exemption 3 statute because it establishes particular criteria for withholding: a withheld record must be a photograph taken during a particular time period, must relate to a particular subject matter, and the Secretary must have determined that its release would cause a particular type of harm. *ACLU*, 229 F.Supp.3d at 204-05 (citing PNSDA § 565(c)(1)). It followed that the district court appropriately reviewed this matter *de novo*, the standard applied under FOIA for all agency claims of exemption. *Id.* at 206 (citing 5 U.S.C. § 552(a)(4)(B)).

DOD argues that rather than create a basis for withholding, the PNSDA supersedes FOIA entirely, precluding any judicial review of the Secretary's certification. GB27-29. Alternatively, DOD claims, even if the Court regards the PNSDA as an Exemption 3 statute, the Court's only role is to determine whether

the Secretary in fact issued a certification, *i.e.* DOD contends that there is no judicial review of the Secretary's determination of harm, and thus, the Secretary need not explain his decision. GB32-43. Finally, DOD contends that the decision of the Secretary should be subjected not to the *de novo* review of FOIA but to the arbitrary and capricious standard of review of the APA. Each of these arguments is wrong, and unfaithful to the text and the legislative history of both the PNSDA and FOIA.

(1) *The PNSDA Is a FOIA Withholding Statute.*

The district court correctly found that the PNSDA "establishes particular criteria for withholding," and therefore qualifies as an Exemption 3 statute. *ACLU*, 229 F.Supp.3d at 204-05 (quoting 5 U.S.C. § 552(b)(3)). As then Judge Scalia expressed it, "FOIA is a structural statute, designed to apply across-the-board to many substantive programs; it expressly accommodates other laws by excluding from its disclosure requirement documents 'specifically exempted from disclosure' by other statutes." *Church of Scientology of California v. IRS*, 792 F.2d 146, 149 (D.C. Cir. 1986) (Scalia, J.) (quoting 5 U.S.C. § 552(b)(3)). Accordingly, as the district court held, "Congress may not supersede FOIA through subsequently passed legislation unless it does so expressly," and "nothing in the PNSDA" supersedes FOIA. 229 F.Supp.3d at 205. Indeed, as the district court also noted, FOIA is a part of the Administrative Procedures Act, and thus is governed by 5

U.S.C. § 559, which makes clear that a "[s]ubsequent statute may not be held to supersede or modify [the APA], except to the extent that it does so *expressly*." *ACLU*, 229 F.Supp.3d at 205 (quoting *Church of Scientology* , 792 F. 2d at 149; *see also Environmental Integrity Project v. EPA*, 864 F.3d 648, 649 (D.C. Cir. 2017)).[2] Here, as the court held, "[t]he PNSDA's legislative history indicates that Congress had no intent to 'change FOIA, in its basic construct.'" *Id.* at 205 (quoting 155 Cong. Rec. S5650, S5672 (statement of Sen. Graham)).

DOD argues, however, that the PNSDA expressly supersedes FOIA in the following passage: "Notwithstanding any other provision of the law to the contrary, no protected document … shall be subject to disclosure under section 552 of Title 5, United States Code [FOIA], or any proceeding under that section." GB27-29 (quoting PNSDA § 565(b)). But far from supporting DOD's argument, this language establishes that the PNSDA created a FOIA exemption. As the district court correctly held, a "notwithstanding" clause like that utilized here, is

[2]The D.C. Circuit Court of Appeals has also held that a statute may supersede FOIA if it creates "'rules and procedures—duplicating those of FOIA—for individual members of the public to obtain access' to agency records." *Environmental Integrity Project*, 864 F.3d at 650 n.2 (citation omitted); *see*, *e.g.*, *Riccio v. Kline*, 773 F.2d 1389, 1395 (D.C. Cir. 1985) (Presidential Recordings and Materials Preservation Act superseded FOIA because it "provided a comprehensive, carefully tailored and detailed procedure" for public access to President Nixon's papers). Here, DOD offers no argument that the PNSDA supersedes FOIA under this line of authority; nor could it, as the PNSDA does not create any procedure independent of FOIA for the release of photographs.

textbook Exemption 3 language. *ACLU*, 229 F.Supp.3d at 205 (citing *Newport Aeronautical*, 684 F.3d 160 at 165, and *O'Keefe*, 463 F.Supp.2d at 325). Indeed, Courts have specifically held that a "notwithstanding" clause may signal congressional intent to *create* an Exemption 3 statute. *See*, *e.g.*, *Elec. Privacy Info. Ctr. v. Trans. Sec. Admin.*, 928 F.Supp.2d 156, 162 (D.C. Cir. 2013) (statute qualified under Exemption 3 "particularly" in light of language "Notwithstanding [FOIA]"); *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 196 (D.C. Cir. 1993) ("We have little doubt that Congress added the 'notwithstanding' clause to overrule [] lower court cases [finding the statute did not qualify under Exemption 3].").

DOD cites to *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10 (1993), as an example of a "notwithstanding" clause that was interpreted to "'override conflicting provisions of any other section.'" GB28 (citing *Cisneros*, 508 U.S. at 18). But *Cisneros* is not a FOIA case, and the statute overridden in *Cisneros* was not a "structural [one] designed to apply across-the-board," as FOIA is. *See Cisneros*, 508 U.S. at 18. In fact, DOD cites to no FOIA matter—and Plaintiffs are aware of none—which treats "notwithstanding" language as superseding FOIA.

DOD's argument from the language "no protected document. . . shall be subject to disclosure under [FOIA]," GB28, fares no better. That the PNSDA shields a category of documents from disclosure is what makes it an Exemption 3 statute. *See*, *e.g.*, *A. Michael's Piano*, 18 F.3d at 143 (holding that 15 U.S.C. §

57b-2(f), which contains the language "shall not be required to disclose under [FOIA]," is an Exemption 3 statute). DOD cites *Lockhart v. United States*, 546 U.S. 142 (2005), for the proposition that a "later statute's citation of [an] earlier provision is 'exactly the sort of express reference . . . necessary to supersede' the earlier provision." GB28 (citing *Lockhart*, 546 U.S. at 145-46). But *Lockhart*, like *Cisneros*, is not a FOIA case, and the earlier statute in *Lockhart* was not a structural, "across-the-board" provision. *See* 546 U.S. at 145. Again, DOD cites to no FOIA matter to make its point, and none exists.

DOD's argument from the text "no protected document shall be subject to . . . any proceeding under [FOIA]" is likewise without merit. On this point, DOD cites no authority, simply asserting, "[t]hat language means that any FOIA proceeding, including application of exemption 3, should not occur regarding a certified document." GB29. To the contrary, courts have determined that statutory language removing documents from legal proceedings, like language limiting disclosure, simply creates an Exemption 3 statute. *See*, *e.g.*, *City of Chicago v. ATF*, 423 F.3d 777, 780, 782 (7th Cir. 2005) (statute mandating that firearms trace data "shall be immune from legal process," Pub. L. No. 108-447, 118 Stat. 2809 (2005), "qualifies as an Exemption 3 statute"). Moreover, under the PNSDA, only a "protected document" is immune from "any proceeding under [FOIA]," and whether or not a photograph qualifies as a "protected document" is the question the

district court held subject to review. *See ACLU*, 229 F.Supp.3d at 205-06. In other words, because the PNSDA does not say that determining *whether* a document is "protected" under PNSDA §565(c)(1)-(d) cannot occur in a proceeding under FOIA, but rather that a document is immune once properly determined "protected," the statute does not supersede FOIA but, again, creates an exemption to it.

Certainly DOD's claim is unavailing given the legislative history of the PNSDA, which demonstrates Congress's understanding that it was not superseding FOIA. In fact, the PNSDA was a direct response to this Court's holding that under Exemption 7(F), the phrase "any individual" does not "include individuals identified solely as members of a group so large that risks which are clearly speculative for any particular individuals become reasonably foreseeable for the group." *ACLU*, 543 F.3d at 67; *see* 155 Cong. Rec. S5650, S5672 (statement of Sen. Lieberman) (purpose was "to fight the Second Circuit decision"); 155 Cong. Rec. S5650, S5673 (statement of Sen. Graham) ("That is why we need to pass this amendment—to help the President defeat this lawsuit[.]"). Accordingly, the PNSDA authorized withholding in cases of prospective harm to exactly the large, undifferentiated group as to which this Court held withholding under Exemption 7(F) unjustified. This history makes manifest that Congress did not intend to remove the photographs from the scope of FOIA entirely—indeed, had it so

wished, it could easily have done so.[3] Instead, Congress created a new basis for withholding under FOIA, as the PNSDA's sponsor, Senator Graham, made explicit in noting that the Act would not "change FOIA, in its basic construct." *ACLU*, 229 F.Supp.3d at 205 (quoting 155 Cong. Rec. S5650, S5672). DOD offers no response to this legislative history. Plainly, then, the PNSDA is an Exemption 3 statute and as such, its application is subject to FOIA's review requirements.

(2) *Judicial Review of Withholding Decisions under the PNSDA Is Not Limited to Whether the Secretary Issued Any Certification.*

DOD concedes that, if FOIA applies, the PNSDA is an Exemption 3 statute. GB29-31. However, it argues that judicial review is limited to the simple question of whether the Secretary has signed the requisite certification, regardless of whether that certification was appropriate. Accordingly, DOD contends, judicial review of any PNSDA withholding does not include any review of the Secretary's determination that harm would result from release of particular photographs.

The district court correctly construed DOD's argument to be one that eviscerates judicial review under FOIA and rejected it, finding nothing in the text or legislative history of the PNSDA to rebut the "'strong presumption that

[3]For example, Congress superseded FOIA Exemption 4, 5 U.S.C. § 552(b)(4), in the Toxic Control Substances Act (TCSA) with the language, "the Administrator may not deny the request [for particular records] on the basis of section 552(b)(4)." 15 U.S.C. § 2613(b)(5); *see Environmental Integrity Project*, 864 F.3d at 649 (noting that TCSA supersedes Exemption 4 by express language).

Congress intends judicial review.'" *ACLU*, 229 F.Supp.3d at 206 (quoting *Bowen*, 476 U.S. at 670). That presumption is particularly applicable in the FOIA context, the court held, because "'FOIA clearly contemplates judicial review of agency decisions to withhold information.'" *Id.* (quoting *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999)). Such judicial review is in keeping with FOIA's "'background norm of 'broad disclosure of government records,'" *id.* at 205 (quoting *Sims*, 471 U.S. at 166) (other citation and quotation marks omitted), because FOIA "'provided *de novo* review by federal courts so that citizens and the press could obtain information wrongfully withheld. . . . [and] to prevent courts reviewing agency action from issuing a meaningless judicial imprimatur on agency discretion,'" *id.* at 206 (quoting *A. Michael's Piano*, 18 F.3d at 141).

The court observed that, while a degree of deference to the executive branch in matters of national security is appropriate, such deference "may limit the *scope* of judicial review, but it does not *preclude* judicial review." *Id.* at 207 (emphasis in original). Although DOD contends that, "the proposition that in the 'absence of any statutory provision precluding' judicial review, such review is presumed . . . 'runs aground when it encounters concerns of national security,'" GB36-37 (quoting *Dep't of the Navy v. Egan*, 484 U.S. 518, 526-27 (1988)), courts including this one frequently exercise judicial review of FOIA matters concerning national security, including in the very cases cited by DOD. *See* GB36 (citing *ACLU v.*

DOJ, 681 F.3d 61, 70-71 (2d Cir. 2012); *Wilner v. NSA*, 592 F.3d 60, 76 (2d Cir. 2009); *Ctr. for Nat. Sec. Studies v. DOJ*, 331 F.3d 918, 922 (D.C. Cir. 2003)); *see also Sims*, 471 U.S. at 165, 179; *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). And while the judiciary must show a measure of deference to the executive in matters of national security, such deference in the FOIA context is predicated on "the executive provid[ing] the Court with enough information to permit the Court to carry out its own duty of judicial review." *ACLU*, 229 F.Supp.3d at 207; *accord Gardels v. CIA*, 689 F.2d 1100, 1104 (D.C. Cir. 2003) (deference is appropriate once a court is "satisfied that the proper procedures have been followed and that the information logically falls into the exemption claimed"). Nor is this review a rubber stamp: this Court has ordered the disclosure of materials that an agency asserts would cause national security harm because the agency's contentions were neither logical nor plausible. *See N.Y. Times Co. v. DOJ*, 756 F.3d 100, 119–20 (2d Cir. 2014) (rejecting agency withholding of national security document because it was not "logical or plausible" that release of the document would cause national security harm); *see also ACLU v. CIA*, 710 F.3d 422, 429-430 (D.C. Cir. 2013) (holding that the CIA's assertion of harm to national security was neither logical nor plausible).[4]

[4]Cases outside the FOIA context, like *Egan*, are of little assistance to the Court, for they ignore both the plain text of FOIA, 5 U.S.C. § 552(a)(4)(B), and its

More generally, this Court and others have repeatedly held that judicial review of a claim for withholding under Exemption 3, whether in the national security context or not, includes review of matters left to agency judgment and determination to assure that "the materials withheld fall within that statute's scope." *A. Michael's Piano*, 18 F.3d at 143. *See Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (holding that, with respect to National Security Act, which assigns responsibility to the Director of the CIA "for protecting intelligence sources and methods," 50 U.S.C. § 403(d)(3), "the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role"). *See also DeSalvo v. IRS*, 861 F.2d 1217, 1221 (10th Cir. 1988) (holding that Exemption 3 claims under 26 U.S.C. § 6103(e)(7), which permits disclosure of tax return information "if the Secretary determines that such disclosure would not seriously impair tax administration," permits judicial review of the basis of the Secretary's determination of harm); *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986) (same); *Church of Scientology*, 792 F.2d at 152 (same); *Lindsteadt v. IRS*, 729 F.2d 998, 1001-02 (5th Cir. 1984) (same); *Currie v. IRS*, 704 F.2d 523, 528-29 (11th Cir.

"background norm of 'broad disclosure of Government records.'" *ACLU*, 229 F.Supp.3d at 205 (quoting *Sims*, 471 U.S. at 166).

1983) (same); *Long v. IRS*, 742 F.2d 1173, 1176 (9th Cir. 1984) (Exemption 3 claim under 26 U.S.C. § 6103(b)(2), which allows withholding "'if the Secretary determines that [] disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws,'" requires *de novo* review of the Secretary's determination of harm).

Indeed, review of the Secretary's determination of harm is in accord with the purpose of Exemption 3. "The exemption was amended in 1976" because Congress believed that the original statutory language, as interpreted by the Supreme Court, gave agencies "'carte blanche to withhold any information [they] please[].'" *Assn. of Retired R.R. Workers, Inc. v. R.R. Retirement Bd.*, 830 F.2d 331, 333 (D.C. Cir. 1987) (quoting *American Jewish Congress v. Kreps,* 574 F.2d 624, 628 (D.C. Cir. 1978) (quoting H.R.Rep. No. 880, 94th Cong., 2d Sess., pt. 1, at 23 (1976))). Thus, Congress amended Exemption 3 to assure that agencies not be allowed unfettered discretion in withholding decisions, and the text of Exemption 3 puts "basic policy decisions on governmental secrecy" in the hands of the "'Legislative rather than the Executive branch.'" *Id.* at 333 (citation omitted). Judicial review, then, insures that the Executive is faithful to Congress' policy decisions with regard to secrecy. As the Ninth Circuit held in *Long*, Exemption 3 mandates review of the basis for discretionary agency decisions to withhold because:

> It is totally inconceivable that Congress, on the one hand, would seek to limit discretion by requiring that it be exercised according to particular criteria spelled out in the statute and, on the other hand, would render its exercise completely unreviewable, even where it had been clearly abused.

742 F.2d at 1181.

DOD claims, however, that the text and history of the PNSDA preclude review of the Secretary's harm determination. Specifically, DOD claims that the text of the PNSDA "provides clear and easily reviewable guidelines" under PNSDA § 565(c)(1), which defines a "protected document" as a photo taken during the time period and depicting the subject matter identified by the statute,[5] and as to which the Secretary has issued a certification. GB32. Any attempt to review the basis for the Secretary's certification under PNSDA § 565(d)(1), DOD argues, is an improper attempt to "'improve'" the Act, with the implication that DOD need not provide the factual basis for the Secretary's decision. *Id.* (quoting *EPA v. EME Homer City Generation*, *LP*, 134 S.Ct. 1584, 1600-01 (2014)).

But DOD's argument overlooks that PNSDA § 565(c)(1) expressly incorporates § 565(d) into its withholding criteria, defining a "protected document" as one "for which the Secretary of Defense has issued a certification, as described in subsection (d)…." And subsection (d), in turn, describes that certification as one which the Secretary issues if he "determines that disclosure of [a] photograph

[5]It is undisputed that the photographs satisfy the statute's timing and subject matter requirements.

would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." PNSDA § 565(d)(1). That is, the Secretary's harm determination as to a particular photograph is integral to whether that photograph "logically falls within the claimed exemption," *Wilner*, 592 F.3d at 73—the very subject of judicial review, pursuant to "established[d] particular criteria," 5 U.S.C. § 552(b)(3).

DOD counters that the PNSDA does not require the Secretary to explain the basis for his decision because the text mandates only that he "state," or "determine[]" that release of the photographs at issue would cause the requisite harm. GB34-35 (quoting PNSDA § 565(c)(1)(A), (d)(1)). This word choice, DOD claims, "show[s] that Congress intended to leave the assessment of risk to the Secretary" and thus to "'foreclose[] the application of any meaningful judicial standard of review.'" GB34 (quoting *Webster v. Doe*, 486 U.S. 592, 600 (1988)). But the language identified by DOD establishes only that the PNSDA identifies the Secretary as responsible for withholding decisions; it says absolutely nothing about the scope of judicial review. And, of course, that the Secretary is responsible for withholding decisions does not insulate such decisions from judicial review under FOIA, as the above-cited Exemption 3 cases demonstrate.

Nor do the cases upon which DOD relies support its extraordinary effort—fundamentally contrary to our tripartite form of republican government—to preclude judicial review of executive branch action. *See U.S. v. Windsor*, 133 S.Ct. 2675, 2688 (2013) ("[W]hen Congress has passed a statute and the President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court."). *Webster v. Doe*, 486 U.S. 592 (1988), for example, was decided under the APA, which precludes judicial review when "agency action is committed to agency discretion by law," at § 701(a)(2), *i.e.*, when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Webster*, 486 U.S. at 599-600 (citation omitted). But the PNSDA, like other Exemption 3 statutes, provides such a meaningful standard in the form of the "particular criteria for withholding," which the agency must apply. 5 U.S.C. § 552(b)(3)(ii). Of course, agencies are—like the Secretary here—assigned responsibility for the initial determination of whether those criteria are fulfilled. But far from precluding judicial review, the existence of these criteria—and particularly whether disclosure "would endanger citizens of the United States, members of the United States Armed Forces, of employees of the United States Government deployed outside the United States," PNSDA § 565(c)(1)—provides

the basis for the judicial review mandated by FOIA. 5 U.S.C. § 552(a)(4)(B). That review is, then, appropriate even for "agency action [] committed to agency discretion by law," at § 701(a)(2). *See Long v. IRS*, 742 F.2d 1173, (9th Cir. 1984) (even if APA provided the appropriate standard of review under Exemption 3, the statute's withholding criteria provided a standard for judicial review). *Webster* compels no different conclusion.

DOD misreads *CIA v. Sims*, 471 U.S. 159, which concerns judicial creation of criteria that appear nowhere in the withholding statute. In *Sims*, a FOIA Exemption 3 case, the CIA withheld information under the National Security Act (NSA), claiming an exemption for "intelligence sources and methods." *Id.* at 167-69. The Court of Appeals engrafted an additional requirement onto the statute, deciding that "intelligence sources" protected under the statute were only those "who supplied the Agency with information unattainable without guaranteeing confidentiality," but the Supreme Court rejected that limitation, which did not appear in the statute. *Id.* at 174. DOD strains to analogize the district court's decision here to the creation of a non-statutory requirement in *Sims*, arguing that the PNSDA "'does not state' that an agency must make a showing of need to justify protection from disclosure." GB31. DOD claims that "Congress through the PNSDA 'simply and pointedly protected' all qualified documents whose disclosure the Secretary predicted would result in danger." GB31 (quoting Sims,

471 U.S. at 169-70). But the differences are obvious: in *Sims*, the "showing of need" was the requirement that information provided by a source be "unattainable without guaranteeing confidentiality," a requirement created entirely by the Court of Appeals. Here, by contrast, the district court did no more than assure that the actual statutory criteria were in fact met: it is Congress, not the district court, that required that withholding under the PNSDA be limited to photographs whose "disclosure . . . would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." PNSDA § 565(d). Nor does *Sims* undermine the notion of robust judicial review. To the contrary, it demonstrated the exercise of just such review, holding that the CIA's withholding decision was reasonable given the record. 471 U.S. at 174 ("the record developed in this case confirms [the CIA's withholding decision]"); *id.* at 179 ("[The district court's conclusion that withholding was justified] is supported by the record.").

Finally, DOD claims that because the PNSDA does not expressly require the Secretary to justify or explain his determination of harm, there can be no review of that determination. GB35. In support, DOD cites three funding statutes wherein Congress has "expressly required the Secretary to explain or support a determination," arguing that the absence of such language in the PNSDA precludes judicial review. *Id.* But this argument ignores that FOIA requires judicial review

of the basis for withholding decisions. 5 U.S.C. § 552(a)(4)(B); *Halpern*, 181 F.3d at 287 ("FOIA clearly contemplates judicial review of agency decisions to withhold information."). Since, as discussed above, this review is overcome only by an express statement from Congress to the contrary, *Church of Scientology*, 792 F.2d at 149, the funding provisions that DOD cites—which have no relationship to FOIA and no provision for judicial review—are of no relevance whatever.

In sum, the plain text of the PNSDA provides specific criteria which enable courts to do their job and exercise the judicial review mandated by FOIA as to the Secretary's determination of harm. DOD's position—that review should be limited to whether the Secretary made such a determination—engenders no review at all, but rather seeks a blank check from the judicial branch for this executive action. *Bowen*, 476 U.S. at 671 ("'It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.'") (quoting S.Rep. No. 752, 79th Congress, 1st Sess., 26 (1945)).

Nor, of course, is DOD correct that because the PNSDA requires the Secretary to "provide Congress timely notice of the Secretary's issuance of a certification and of a renewal certification," PNSDA § 565(d)(4), it is clear "that

Congress saw no need for judicial review of PNSDA certifications." GB39 (citing *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984); and *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986)). Certainly, the mere existence of legislative oversight cannot justify an inference that judicial review is precluded, lest review of any number of statutes be nullified by overlapping congressional oversight. *See, e.g.,* 50 U.S.C. §§ 1807–1808 (imposing congressional reporting requirements on the executive for surveillance under the Foreign Intelligence Surveillance Act); *id.* § 1810 (providing for judicial review of allegedly unlawful surveillance). Indeed, FOIA itself demonstrates that congressional oversight and judicial review can, do, and should coexist. *See* 5 U.S.C. §§ 552(a)(4)(B) (providing judicial review of withholding decisions), § 552(a)(4)(F) (providing congressional and executive oversight of improper withholdings).[6] Ultimately, no law supports DOD's

[6]Nor are *Banzhaf* or *Dellums* helpful. Those cases concerned APA review of the Attorney General's decision regarding whether to seek a special prosecutor under the Ethics in Government Act, 28 U.S.C. § 591 *et seq.*; these decisions applied *Block v. Community Nutrition Inst.*, 467 U.S. 350 (1984), which held that the general presumption in favor of review in APA matters could be overcome by "'inferences of intent drawn from the statutory scheme as a whole." *Banzhaf*, 737 F.2d at 1169 (quoting *Block*, 467 U.S. at 350-51); *Dellums*, 797 F.2d at 822 (same). That is directly contrary to the rule in FOIA cases that Congress must manifest intent to limit judicial review expressly. *See Church of Scientology*, 792 F.2d at 149. More substantively, under the Ethics in Government Act, Congress may seek independent counsel directly. *See Banzhaf*, 737 F.2d at 1169 (citing 28 U.S.C. § 595(e)). It was this involvement in the process—absent in the PNSDA context, where the Secretary does no more than inform Congress of any

contention that the availability of congressional oversight alone may reduce review in a FOIA matter to "a meaningless judicial imprimatur on agency discretion." *A. Michael's Piano*, 18 F.3d at 141.

Finally, DOD points to the legislative history of the PNSDA, quoting statements from Senators Lieberman and Graham that manifest Congress' intent to prevent disclosure of the photographs. GB40-43. That Congress intended that DOD be permitted to withhold documents—which meet the criteria dictated by Congress—is undisputed. But it does not follow, as DOD contends, that the congressional desire to prevent disclosure "strongly suggest[s]" an intention to curtail review." GB43.

To the contrary, as it has done with other Exemption 3 statutes, Congress set out specific criteria identifying which photographs could be withheld under the PNSDA; its actions were thus consistent with the legislative history of Exemption 3, discussed above, which makes clear that Congress sought to rein in precisely the sort of unfettered agency discretion regarding withholding decisions that DOD now seeks. Nothing in the PNSDA suggests that Congress intended to eliminate the judiciary's role in reviewing agency withholding decisions. As Senator

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certification—that led to the conclusion in *Banzhaf* and *Dellums* that Congress did not intend private suits. And even then, *Dellums* was careful to note "we do not undertake to decide here whether judicial review is in fact available [generally.]" 797 F.2d at 823.

Graham said, the legislation's purpose was not to "change FOIA, in its basic construct," but to "establish a procedure to prevent the detainee photographs from being released"—just as Congress has done through other Exemption 3 statutes. 155 Cong Rec S5650, 5672. In the final analysis, DOD's arguments as to the existence and scope of judicial review are without merit, and this Court should affirm the judgment below.

(3) *The PNSDA Is An Exemption 3 Statute and Determinations Made Pursuant To It Are Therefore Reviewed Under FOIA Standards.*

DOD retreats to the position that, if the Secretary's withholding decision is subject to judicial review, the Court should employ the APA's "arbitrary and capricious" standard rather than FOIA's *de novo* standard. GB44. But the Supreme Court has rejected precisely this contention, as the district court observed. *ACLU*, 229 F.Supp.3d at 207-08 (citing *Reporters Comm. for Freedom of Press*, 489 U.S. at 755 ("Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter *de novo*.'") (quoting 5 U.S.C. § 552(a)(4)(B))). Nor do the reasons for deference, embodied in the APA standard, apply in the FOIA context, as "[n]o single agency is entrusted with FOIA's primary interpretation, and agencies are not necessarily neutral interpreters insofar

as FOIA compels release of information the agency might be reluctant to disclose." *Assn. of Retired R.R. Workers*, 830 F.2d at 334 (adding, "'Congress intended that the primary interpretive responsibilities rest on the judiciary, whose institutional interests are not in conflict with [the purposes of FOIA].'" (citation omitted)). Nonetheless, DOD persists in seeking review under the more deferential APA standard, though it has yet "not identified a single case in which a court applied the arbitrary and capricious standard when reviewing an agency's invocation of a FOIA exemption." *ACLU*, 229 F.Supp.3d. at 207. Instead, DOD relies on inapposite APA decisions, thus presuming what it means to prove. GB45-46. Ultimately, DOD is simply mistaken: because the PNSDA is an Exemption 3 statute, judicial review must utilize FOIA's *de novo* standard. That said, for the reasons set forth below, under either standard, the district court was correct that DOD failed to justify its withholding of the photographs here at issue.

B. The District Court Correctly Set Forth the Showing that DOD is Required to Make to Justify Withholding under the PNSDA.

Exercising its obligation of judicial review, and in order to give effect to the plain language of the PNSDA, the district court first held, correctly, that the Secretary's certification must be individualized as to each photograph. *ACLU*, 229 F.Supp.3d at 211 (citing PNSDA § 565(d)(1) ("*that* photograph") (emphasis in decision)); *see also* PNSDA § 565(b) (defining "protected document" as "*a* photograph") (emphasis added); PNSDA § 565(d) (requiring certification "[f]or

any photograph" that meets the statutory criteria) (emphasis added). This requirement is supported by the law of FOIA generally, that "[a] withholding agency must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information." *King v. DOJ*, 830 F.2d 210, 219 (D.C. Cir. 1987) (citing *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973)) (emphasis in original); *accord Halpern*, 181 F.3d 291 ("'The agency [seeking to justify the withholding of information] . . . [must] describe with reasonable specificity the nature of the documents at issue and the justification for nondisclosure[.]'") (citation omitted). The district court held that the Secretary was free to delegate the duty of individualized review, and allowed that sampling might be permissible, but noted that the PNSDA "makes the Secretary personally responsible for the certification as to each photograph," and therefore held that "he must establish the criteria to be utilized in categorizing the photographs and assessing the likely harm upon release." *ACLU*, 229 F.Supp.3d at 212.

This, too, reflects the law of FOIA. Sampling is permissible where "the number of documents is excessive and it would not realistically be possible to review each and every one,'" *Meeropol v. Meese*, 790 F.2d 942, 958 (D.C. Cir. 1986) (quoting *Weisberg v. DOJ*, 745 F.2d 1476, 1490 (D.C. Cir. 1984)), but any sample must be fairly representative of the whole, *see Bonner v. Dep't of State*,

928 F.2d 1148, 1151 n.7 (D.C. Cir. 1991) (Ginbsburg, J.) (noting that "descriptive index, prepared by the State department to provide basic information on the [number of documents withheld in full], allowed [Plaintiff] and the court reasonably to anticipate that the [sample number] documents were in fact representative"). That is, an agency must demonstrate that a sample is "well-chosen" so that "a court can, with some confidence, 'extrapolate its conclusions from the representative sample to the larger group of withheld materials.'" *Bonner*, 928 F.2d at 1151 (quoting *Fensterwald v. CIA*, 443 F.Supp.667, 669 (D.D.C. 1977)); *ACLU v. DOJ*, 681 F.3d 61, 67 (2d Cir. 2012) (permitting use of sample where the Government disclosed the total number of responsive records, the number of records in the sample, and considerable detail regarding the type and subject matter of each sample record).[7]

Second, noting that a withholding agency "'must supply the courts with sufficient information to allow [the courts] to make a reasoned determination that they were correct' in withholding certain materials,'" *ACLU*, 229 F.Supp.3d at 207 (citation omitted), the district court held that DOD was required to "provide an

[7]Plaintiffs do not concede, and there has been no showing, that sampling was actually necessary in the present case. DOD has never even identified the total number of photographs in question, and DOD's own declarations make clear that review of each individual photograph—even if only for the purpose of creating a sample—is not impractical. JA282 ¶ 8, JA338 ¶¶ 5-7.

accounting of *how* it reached its conclusion," *id.* at 207 (emphasis in original). Specifically, DOD "was instructed to provide 'evidence supporting the Secretary of Defense's determination that there is a risk of harm," *i.e.*, "'the factual basis for concluding that disclosure would endanger U.S. citizens, Armed Forces, or government employees[.]'" *Id.* at 209 (citations omitted). Here again, the court applied FOIA correctly. In analyzing a claim for withholding under an Exemption 3 withholding statute, a reviewing court must ascertain whether "the materials withheld fall within that statute's scope." *A. Michael's Piano*, 18 F.3d at 143 (citing *Sims*, 471 U.S. at 167)). And this, of course, requires the agency to "describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed[.]" *King*, 830 F.2d at 217; *accord Halpern*, 181 F.3d at 290 ("[T]he documentation must include 'a relatively detailed analysis [of the withheld material]'") (citation omitted).

DOD reads the PNSDA to require no such description or justification, contending that "[n]othing in the PNSDA requires the Secretary to justify [his] determination, provide factual support, or explain the process used to reach it." GB35. *See also* GB48-51. But in fact, the PNSDA, by its terms, requires individualized review and allows withholding only in the event of a specific

determination of harm, as the district court held. *ACLU*, 229 F.Supp.3d at 207, 211-12 (citing PNSDA §§ 565(c)(1), (d)).

DOD, however, cites to three decisions and one statute—all non-FOIA authority—for the proposition that, "as nothing in the PNSDA prescribes any particular means by which the Secretary is to make his determination, he has discretion to choose how to do so." GB48 (citing *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011); *Kennedy for President Comm. v. FEC*, 734 F.2d 1558 (D.C. Cir. 1984); *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1207 (2015); and 10 U.S.C. § 113(d)). But whether or not the Secretary has discretion is not the question; it is uncontested that, beyond those withholding criteria prescribed by the PNSDA, the Secretary may choose a reasonable methodology, including by delegation under 10 U.S.C. § 113(d), so long as it is consistent with the statute. Here, the district court correctly held that methodology was required to include individualized review. The Secretary's failure to perform it was appropriately reviewed by the court.[8]

[8]The cases relied upon by DOD make this point well, limiting an agency's discretion, with regard to the procedures used, to those that are "reasonable." *See JTEKT*, 642 F.3d at 1383 (holding, since there was "no statutory mandate," the agency was free to, "in its discretion, determine a reasonable [] methodology"); *Kennedy*, 734 F.2d at 1563 (holding that agency's discretion "does not authorize [it] to abandon its responsibility to arrive at some reasonable method," and invalidating agency methodology as "patently *unreasonable*") (emphasis in original). *Perez*, 135 S.Ct. 1199, the third case cited by DOD, GB48, held that

DOD also argues that *United States v. Morgan*, 313 U.S. 409 (1941), and its progeny, do not allow the district court to "look behind the Secretary's decision regarding his degree of personal participation or the process by which he reached his determination." GB49. But *Morgan*, and the other early administrative law cases cited by DOD, were not FOIA cases, in which "looking behind" agency decisions is mandated under 5 U.S.C. § 552(a)(4)(B). Nor did the district court run afoul of *Morgan*'s prohibition against "prob[ing] the mental processes of the Secretary." 313 U.S. at 1004. The court's decision did not question the Secretary's motives; it merely sought to measure his compliance with the statutory process. *See* Jerry L. Mashaw, *Reasoned Administration*, 76 Geo. Wash. L. Rev. 99, 109 (2007) (courts must require agencies to show compliance with a statutory process, as *Morgan* holds only that "reviewing courts should make no further inquiry into the mental processes of administrative decisionmakers").

DOD, however, responds that the district court conducted "precisely the inquiry into the Secretary's 'knowledge,' [and] 'methods,'" forbidden by the

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courts may not impose upon an agency their own ideas about "which procedures are 'best' or most likely to further some vague, undefined public good." 135 S.Ct. at 1207 (citation and quotation marks omitted). But the district court did no such thing here; instead, it imposed upon DOD precisely the requirement of individualized review mandated by the PNSDA. *See Ethyl Corp. v. EPA*, 306 F.3d 1144, 1150 (D.C. Cir. 2002) (agency action contrary to methodology established by "clear congressional command" is "'not in accordance with law'") (citation omitted).

Morgan jurisprudence, in seeking to "micromanage" the Secretary's process. GB50-51. Specifically, DOD alleges that the district court improperly required the Secretary to compare the harm caused by released photos with those withheld and consider the lapse of time, including the reduced U.S. troop presence, altered objectives in Iraq, and the fact that the Secretary's first certification was directly preceded by a plea for withholding from the Iraqi prime minister. GB50-51.

But in recommending the consideration of these factors, among others, *see* 229 F.Supp. 3d at 210 ("Relevant factors might include …"), the district court was simply directing the Secretary to do that which he was required to do under either FOIA or the APA: to assure that his decision is not contradicted by record evidence. *See Wilner*, 592 F.3d at 73 (under FOIA, withholding decision must be "not controverted by [] evidence in the record"); *Bechtel*, 710 F.3d at 446 (under APA, reversal is warranted where agency "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency"). DOD's argument that this is improper amounts to a proposal that the Secretary be permitted to ignore the facts, and that the courts be left powerless to review the Executive's action. This proposal should be rejected.

C. DOD Did Not Meet Its Burden to Justify Withholding under the PNSDA.

There can be little question that DOD has not "support[ed] the factual basis for [its] assertion" that the harm identified in the PNSDA would follow as to each photograph certified. *ACLU*, 40 F.Supp.3d at 388. Whether under the appropriate *de novo* standard, or even APA review, as the district court found, the Apostol Declaration is insufficient to satisfy DOD's burden. *ACLU*, 229 F.Supp.3d at 208-12.

First, neither the Secretary nor his staff "considered" or "ma[d]e a finding with regard to each and every photograph." JA274. Instead, the Secretary's certification makes clear that he relied on the recommendations of four Generals who, DOD concedes, received only a sample of the photographs. JA338 ¶ 8. Unsurprisingly, their recommendations refer only to "the photographs" in the plural, *id.* at ¶ 9-18, such that the generals' blanket recommendation that release of any photographs would endanger American lives could not and did not follow upon an evaluation of the risks posed by "each separate photograph," as the district court properly held was required by the plain language of the PNSDA. *ACLU*, 40 F.Supp.3d at 380.

That staff "review[ed]" "each photograph," ultimately identifying 198 for release,[9] does not cure this deficiency. JA337 at ¶¶ 2, 8. This is because it is unclear whether staff review for prospective harm was to determine the propriety of withholding, or instead solely "for the purpose [of] . . . ensur[ing] . . . a true representative sample." JA338 at ¶ 5; *see id.* at ¶¶ 6-8. As the district court noted, DOD's explanation of the initial phase of review—during which photographs were examined individually—is vague and difficult to parse. *See ACLU*, 229 F.Supp.3d at 209 (finding that the interplay between the initial tiers of review, the methodology employed, and the basis for any determinations are unclear, making it "impossible to know how this tiered review process yielded the recommendations that the Secretary adopted").

But regardless, the Secretary' certification was not based on these assessments but rather upon the recommendations of the Generals who viewed only a sample. And because the criteria and methodology used to create that sample are undisclosed—the number of categories, the number of photos, the number of photos per category, the criteria of the categories, and the type of harm expected to result from particular categories are all unknown—the district court

[9]That 198 photographs were determined unproblematic (after having been withheld from the public for so many years) proves little since, as the district court accurately observed, "we do not know what distinguishes those [198] photographs from all the others[.]" *ACLU*, 229 F.Supp.3d at 209.

was unable to determine whether the sample was sufficiently fair and representative to satisfy the requirement of individualized review. *See* JA329; *see also Bonner*, 928 F.2d at 1151 (sample must be "well-chosen" to permit extrapolation from sample to larger group). The district court thus found, correctly, that the "disconnect between the staff that conducted the individual reviews and the generals who made the final recommendation to the Secretary is further indication that the Secretary's certification does not comply with the requirements of the PNSDA." *ACLU*, 229 F.Supp.3d at 212.

Second, DOD failed to "support[] the factual basis for its assertion that these photographs should be withheld." *ACLU*, 40 F.Supp.3d at 388. Under the PNSDA, the Secretary may withhold images only if he "determines that disclosure of [a] photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." PNSDA § 565 (d)(1). In other words, there is only one reason to withhold: the risk of harm triggered by release. The Secretary based his withholding decision on the recommendations of the Generals, JA341-42 at ¶ 19, but these fail to satisfy DOD's burden. Those recommendations include many considerations that go far beyond the harm that permits withholding under the PNSDA; for example, they note that release of the photographs would "[result in] misrepresentation of the photographs as evidence of U.S.

noncompliance with international and humanitarian law," "significantly and adversely impact the [U.S. Forces-Afghanistan] and NATO-led Resolute Support Mission (RSM) to build a stable, secure, prosperous, and democratic Afghanistan," and "erode the Afghanistan-Pakistan military-to-military relationship and the willingness to cooperate to prevent ISIL from establishing a credible presence in Afghanistan." JA340-41 ¶¶ 13, 15-17. Untethered from harm to Americans, these rationales suggest that the decision to withhold was not based upon the grounds authorized by Congress.

And even where the Generals reference the appropriate basis for withholding, they do so in abstract, conclusory language that makes review impossible. Thus, the Generals assert that release of the photos would "fuel[] unrest, increase[e] targeting of U.S. military and civilian personnel, and provid[e] a recruiting tool for insurgent[s] and [violent extremist organizations]," "exacerbate the conditions that foster insurgent 'insider threat' attacks," and "[allow] for exploitation and the potential for use as a tool by violent extremist organizations." JA340-41 41 ¶¶ 13, 15-18. In several places, the Generals simply parrot the PNSDA's withholding criteria, quoting the harms identified in the statute. *See* JA340-41 ¶ 13, 18. But, as the district court observed, *why* the Generals so conclude is never explained, and the factual basis that FOIA Exemption 3 requires is therefore never provided. *ACLU*, 229 F.Supp.3d at 206-07 ("the executive must

at least "'"'supply the courts with sufficient information to allow [the court] to make a reasoned determination that [the Government was] correct' in withholding certain materials.'") (quoting *Nat'l Immigration Project of Nat'l Lawyers Guild v. Dep't of Homeland Sec.*, 868 F.Supp.2d 284, 291 (S.D.N.Y. 2012) (citation omitted)); *see King*, 830 F.2d at 224 ("Categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate."); *Halpern*, 181 F.3d at 293 ("[A] conclusory statement completely fails to provide the kind of fact-specific justification that either (a) would permit appellant to contest the affidavit in adversarial fashion, or (b) would permit a reviewing court to engage in effective *de novo* review of the FBI's redactions.").

DOD devotes little of its brief to arguing otherwise. Thus, while it repeatedly lauds the Secretary's process, see GB45-46, 52, it says absolutely nothing about what was considered harmful in particular photographs, and why. This left the district court unable to perform its lawful role; as it stated, "[n]o matter how many levels of administrative review took place, the Government may not rely on a process that the court is unable to review." *ACLU*, F.Supp.3d at 209. That review is required by law, critical to the functioning of FOIA and of our democracy, and necessary to assure that the PNSDA, like all withholding statutes, fulfills its Congressionally-prescribed purpose rather than providing the Secretary

with "'carte blanche to withhold any information [it] please[s].'" *Long*, 742 F.2d at 1176 (quoting H.R.Rep. No. 880, 94th Cong., 2d Sess., pt. 1, at 23 (1976)). Ultimately, DOD's argument—beyond seeking to eviscerate or dramatically limit judicial review—is not an honest effort to bear the burden correctly defined by the district court, but rather a disrespectful rejection of that burden. The decision of the district court should be affirmed.

II. THIS COURT SHOULD NOT REVISIT ITS DECISION AS TO EXEMPTION 7(F).

Finally, DOD argues in the alternative that its withholding is justified under Exemption 7(F), an argument this Court previously rejected in a lengthy, well-reasoned, unanimous decision, *ACLU*, 543 F.3d at 71, which the Court declined to review *en banc*, *see ACLU v. DOD*, No. 06-cv-3140 (2d Cir. March 11, 2009). DOD argues that this Court should now reach a different conclusion in light of the decision of the D.C. Circuit in *Elec. Privacy Info. Ctr. v. United States Dep't of Homeland Sec.*, 777 F.3d 518 (D.C. Cir. 2015) ("*EPIC*"). Although this Court may, of course, revisit its earlier decision, neither *EPIC* nor any other decision suggests a reason for it to do so—simply put, this Court's prior decision interpreted Exemption 7(F) correctly.

Exemption 7(F) allows agencies to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected

to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). In its prior decision, this Court determined that the phrase "any individual" under this exemption cannot be construed to cover a limitless group. The phrase "may be flexible but it is not vacuous," wrote the Court, 543 F.3d at 67; it "connotes a degree of specificity above and beyond that conveyed by alternative phrases such as 'endanger life or physical safety.'" *Id*. Indeed, "[t]he legislature's choice to condition the exemption's availability on danger to an individual, rather than danger in general, indicates a requirement that the subject of the danger be identified with at least reasonable specificity." *Id*. at 68.

The Court supported its textual interpretation with an exhaustive explanation of Exemption 7's structure and statutory history, noting that the present language ("any individual") resulted from a 1986 amendment to Exemption 7(F) which "fixed the 'special problem'" created by the earlier language, identifying harm only to "law enforcement personnel." *Id.* at 79 (citation omitted). This "'absurd' limitation" left Exemption 7(F) unable to meet its initial purpose, which was to thwart "criminals [who] might deter or hinder law enforcement investigations by identifying those involved in such investigations and targeting the involved parties or associates or relatives[.]" *Id.* (citation omitted). The "any individual" language fixed this problem, this Court held, but it did not open up the exemption to vast populations of unidentified individuals. *Id.*

Moreover, this Court noted specifically that FOIA Exemption 1 already provided an avenue for DOD to protect sensitive national security information. *ACLU*, 543 F.3d at 73. Under DOD's theory, Exemption 7 would be transformed into an "ersatz classification system," one that would allow "an agency that could not meet the requirements for classification of national security material, by characterizing the material as having been compiled for law enforcement purposes, to evade the strictures and safeguards of classification and find shelter in exemption 7(F) simply by asserting that disclosure could reasonably be expected to endanger someone unidentified somewhere in the world." *Id.* 83. This would "reinvent exemption 7(F) as an all-purpose damper on global controversy," *id.* at 80, a result not intended by Congress.

Given this interpretation, the Court held that "in order to justify withholding documents under exemption 7(F), an agency must identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual." *Id*. at 71. But DOD has only made the speculative claim that release would endanger some American abroad, and thus, this is yet "not a case where the defendants have shown exemption 7(F)'s required reasonable expectation of endangerment with respect to one or more individuals, but one where the defendants attempt to cobble together that required

reasonable expectation of endangerment by aggregating miniscule and speculative individual risks over a vast group of individuals." *Id*.

The decision in *EPIC* provides no grounds for revision. First, the D.C. Circuit took pains to explain that it was not disagreeing with this Court's opinion, noting that the "context addressed by the Second Circuit involved vast populations," rather than a "discrete population." *Id*. at 524. The protocol at issue in *EPIC*, by contrast, limited its reach to a targeted population of people, those vulnerable to the "critical emergency" created by a terrorist attack conducted via a wireless system. As the *EPIC* Court explained, "[e]xactly who will be passing near an unexploded bomb when it is triggered somewhere in the United States may often be unknowable beyond a general group or method of approach (on foot, by car, etc.) but the critical emergency itself provides a limit (*e.g.*, a situs on the London transportation system)." *Id*. at 525. The court below correctly distinguished *EPIC* on precisely this basis. *ACLU*, 229 F.Supp.3d at 213.

That said, to the extent that *EPIC* reaches conclusions incompatible with this Court's prior decision, this Court's reasoning was the more sound. Thus, *EPIC* reasoned that "[g]enerally, the word 'any' has an expansive meaning." 777 F.3d at 525 (citations and quotation marks omitted). But this Court considered and rejected that claim, correctly holding that under established law, "any" must be read in context, and that the context of Exemption 7(F) does not support an

expansive interpretation. 543 F.3d at 68-71. *EPIC* also held that the overlap between Exemption 1 and Exemption 7(F) that would follow from its interpretation was unproblematic, because, in the case before the D.C. Circuit, there were "practical barriers" to classification of the document in question. 777 F.3d at 526. But surely the proper interpretation of FOIA exemptions is not a matter of assuring executive agencies the path of least resistance to justify withholdings—as this Court held, it remains the case that "separate standards for information threatening harm to national security severely undercuts [DOD's] asserted construction of exemption 7(F)." 543 F.3d at 73. And *EPIC* cited the legislative history of Exemption 7(F) to suggest that some legislators intended a "broad" interpretation, only to fall back to the position that the legislative history should be given no weight, because the plain text "any" was sufficiently clear. 777 F.3d at 527. But *EPIC*'s reading of the legislative history is unconvincing, particularly by comparison to the exhaustive review conducted by this Court, 543 F.3d at 79, and its interpretation of the plain text of the statute, *id.* at 67-74. In sum, Exemption 7(F) protects specific people with particular interests, neither of which is present in this case.

Finally, even under DOD's interpretation of Exemption 7(F), DOD would still be required to justify its withholding and provide sufficient information to permit judicial review of its withholding decision. In *EPIC*, the Government

submitted a declaration stating the factual basis for its conclusion of harm, 777 F.3d at 521, and the D.C. Circuit held, "[that] explanation shows that [] production could reasonably be expected to place many individuals at risk," *id.* at 523. As discussed above, DOD has never submitted sufficient information in this case to conduct the requisite review. Accordingly, even if Exemption 7(F) were available here, it is not a basis to justify DOD's withholding.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: October 6, 2017

CERTIFICATIONS

1. Certification of Word Count, Identical Text, and Virus Check

I hereby certify that this Brief complies with the type and volume limitations set forth in Fed. R. App. P. 32(a)(7) and Local Rule 32.1(a)(4)(A). This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared using a proportionally spaced typeface using Microsoft Word with 14-point font. According to the word count feature of Microsoft Word, this Brief contains 13,668 words, excluding those parts exempted by Fed. R. App. P. 32(f). The text of the electronic version of this Brief is identical to the text in the paper copies. The electronic PDF brief has been prepared on a computer that is automatically protected with a virus detection program, namely a continuously updated version of Sophos Endpoint Security and Control, version 11.5.4, and no virus was detected.

2. Certification of Service

I hereby certify that on October 6, 2017, I caused the foregoing Brief to be electronically filed with the Clerk of the United States Court of Appeals for the Second Circuit through the Court's CM/ECF system, and to have six (6) paper copies of the Brief delivered to:

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I hereby certify that on October 6, 2017, I caused the foregoing Brief to be served upon the counsel of record for Appellee through the Notice of Docketing Activity issued by this Court's CM/ECF system.

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Lawrence S. Lustberg, Esq.

Dated: October 6, 2017