17-779

To Be Argued By:
BENJAMIN H. TORRANCE

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 17-779

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

Plaintiffs-Appellees,

—v.—

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

Defendants-Appellants,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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Defendants.

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Plaintiffs-Appellees,

—v.—

UNITED STATES DEPARTMENT OF DEFENSE, ITS COMPONENTS DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY, UNITED STATES DEPARTMENT OF THE ARMY,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

Congress's intent in passing the Protected National Security Documents Act ("PNSDA") was to "defeat this lawsuit"—the one now before this Court—and to "prevent the detainee photos"—the ones at issue in this

case—"from being released." Yet plaintiffs still maintain that this lawsuit should succeed and the photographs should be released. That contradicts the plain language of the PNSDA, the clear indicators of congressional intent, decades of case law from this Court and the Supreme Court, and common sense.

Plaintiffs' objections revolve around the process by which the photographs were reviewed. But under any reasonable standard, DoD's review of the photographs was thorough and complete. The photographs were individually reviewed on three separate occasions, by both Department of Defense lawyers and specially trained uniformed officers, who then passed on their recommendations to be considered by the highest ranking officers in the U.S. military and the Secretary of Defense. The resulting certification, that release of these photographs would endanger Americans abroad, provided precisely what the PNSDA requires. The photographs therefore are not subject to FOIA proceedings or release under FOIA. The district court's judgment to the contrary must be reversed.

ARGUMENT

POINT I

The PNSDA Prohibits Disclosure of These Photographs

The PNSDA's text is clear: a record is "protected" if it is a photograph taken within a specified period, if it relates to the treatment of certain military detainees,

and if the Secretary of Defense "has issued a certification . . . stating that disclosure of that record would endanger" U.S. citizens, members of the armed forces, or employees abroad. Pub. L. No. 111-83, 123 Stat. 2142, § 565(c) (2009). If the document is protected, it is not "subject to disclosure under [FOIA] or any proceeding under [FOIA]." *Id.* § 565(b).

This statutory language is straightforward, and its requirements have been met here. The photographs at issue indisputably involve the covered subjects and time spans, the Secretary made the necessary certification, and the materials plaintiffs seek are thus not subject to FOIA disclosure or FOIA proceedings. Plaintiffs nevertheless argue in their brief that this Court should override the Secretary's conclusion that disclosure will endanger the specified persons, should create procedural requirements constraining the Secretary's discretion and ability to delegate, and should make FOIA apply even when Congress says that it does not. Each of these claims is mistaken.

A. Judicial Review Under the PNSDA Is Limited

1. PNSDA-Protected Documents Are Not Subject to FOIA

Plaintiffs assert that FOIA and its judicial review process applies because the PNSDA fits the description of an exemption statute under 5 U.S.C. § 552(b)(3). (Pls.' Br. 22-23). But while it is true that the PNSDA "establishes particular criteria for withholding or refers to particular types of matters to be withheld," § 552(b)(3)—and all parties agree that if

FOIA applies, then the PNSDA would be an exemption 3 statute—the PNSDA goes further than merely establishing criteria and states that no certified photograph "shall be subject to disclosure under [FOIA] or any proceeding under [FOIA]." The fact that the PNSDA would qualify as an exemption 3 statute does not suggest that its most natural reading—that FOIA does not apply—should be disregarded.

The PNSDA's carveout from FOIA applies "[n]otwithstanding any other provision of law to the contrary." PNSDA § 565(b). Plaintiffs attempt to read the statute's clauses in isolation (Pls.' Br. 23-24), but taken as a whole, as all statutes must be, *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), the PNSDA is clear that no certified photograph may be "subject to" FOIA disclosure or FOIA proceedings—a strongly stated mandate reinforced by the "notwithstanding" clause. By making the photographs subject to neither disclosure nor proceedings under FOIA, the PNSDA effects a broader command than statutes held to be exemption 3 statutes. *See A. Michael's Piano v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994) (considering statute, 15 U.S.C. § 57b-2, which states information "shall not be required to be disclosed"); (*contra* Pls.' Br. 24-25).

Plaintiffs' effort to avoid that conclusion is simply wrong, as it depends on incorrectly equating the word "proceeding" with "legal process." (Pls.' Br. 25 (citing *City of Chicago v. ATF*, 423 F.3d 777, 780-82 (7th Cir. 2005) (holding statute making data "immune from legal process" falls under exemption 3; noting that "legal process" there means a judicial command to respond like a summons or writ)). But the PNSDA does not use

the narrower term "legal process"; it directs that no "proceeding under [FOIA]" may occur regarding a certified photograph. In effect, plaintiffs interpret the PNSDA as if the phrase "any proceeding under [FOIA]" were not there, and the statute simply forbade "disclosure under [FOIA]." But that runs counter to the established presumption of statutory interpretation, "that each word Congress uses is there for a reason." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017).[1]

And the fact that in other statutes, different "notwithstanding" clauses have been interpreted to create exemption 3 statutes is irrelevant: none of the statutes addressed in the cases plaintiffs cite stated as strongly and unequivocally as the PNSDA does that records will not be "subject to" FOIA. Indeed, *Public Citizen v.*

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[1] Plaintiffs' argument that the PNSDA "does not say that determining *whether* a document is 'protected' . . . cannot occur in a proceeding under FOIA," and therefore that question must be answered under FOIA (Pls.' Br. 25-26), is incoherent, as it appears to suggest that a court utilize FOIA proceedings to determine that FOIA proceedings may not occur. Whether a document is "protected" within the meaning of the PNSDA should be determined by looking to the text of the PNSDA, which clearly defines the term, and the specific facts, which are uncontested in this case. *See King v. IRS*, 688 F.2d 488, 493 (7th Cir. 1982) ("FOIA analysis . . . is not germane to the determination whether given documents in fact [meet threshold requirement for nondisclosure statute].").

FAA, which plaintiffs rely on, concerned a statute that said an agency head could prohibit disclosure "as he may deem necessary," "[n]otwithstanding [FOIA]." 988 F.2d 186, 189 (D.C. Cir. 1993). As the court concluded, that statute, much like the PNSDA, was intended "to *broaden* the [agency's] power to withhold sensitive information," and thus must be read to "trump[ ] FOIA's disclosure requirements" and preclude disclosure under any other statute as well. *Id.* at 194-95.[2]

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[2] *Public Citizen* did not appear to decide whether the statute at issue was an exemption 3 statute or one that provided that FOIA does not apply. In *Electronic Privacy Information Center v. Transportation Security Administration*, a district court relied on *Public Citizen* to hold that a statute giving an agency official discretion to designate information to be withheld "[n]otwithstanding [FOIA]" fell under exemption 3—but there, the issue of the standard of judicial review did not matter as the agency's decisions under that statutory scheme were not reviewable in district court, under FOIA or otherwise. 928 F. Supp. 2d 156, 161-63 (D.D.C. 2013). (Plaintiffs mistakenly attribute this case to the D.C. Circuit. (Pls.' Br. 24).)

No case has held that a "notwithstanding" clause is the "textbook Exemption 3 language," as plaintiffs posit. (Pls.' Br. 15, 23-24). Plaintiffs cite *Newport Aeronautical Sales v. Dep't of the Air Force*, 684 F.3d 160, 165 (D.C. Cir. 2012), but the court there did not address the effect of the "notwithstanding" clause in concluding that disclosure was not warranted.

Plaintiffs protest that "'Congress may not supersede FOIA through subsequently passed legislation unless it does so expressly.'" (Pls.' Br. 22 (quoting JA 397-98)). But Congress did precisely that: the PNSDA could hardly be more express in referring to FOIA, and says protected documents are not "subject to" its disclosure requirement or its proceedings. *See Lockhart v. United States*, 546 U.S. 142, 145-46 (2005) (later statute's citation of earlier provision is "exactly the sort of express reference . . . necessary to supersede" the earlier provision). Congress made its intent clear in the statutory language, and that language controls here.[3]

Sounding the same note, plaintiffs point to the Administrative Procedure Act's provision that a "[s]ubsequent statute may not be held to supersede or modify

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[3] Several times, plaintiffs criticize the government for citing non-FOIA cases. (*E.g.*, Pls. Br. 24 (*Cisneros v. Alpine Ridge Group*), 25 (*Lockhart*), 29 n.4 (*Department of the Navy v. Egan*), 46 (*United States v. Morgan* and *National Nutritional Foods Ass'n v. FDA*)). But the principles of law stated in those cases remain relevant, and courts have naturally cited these precedents in FOIA cases. *E.g.*, *Center for National Security Studies v. DOJ*, 331 F.3d 918, 926-27 (D.C. Cir. 2003) (citing *Egan*); *Lead Industries Ass'n v. OSHA*, 610 F.2d 70, 80 (2d Cir. 1979) (Friendly, J.) (citing *Morgan* and *Nutritional Foods*). And as this Court stated in *Michael's Piano*, even exemption 3 statutes are construed in the same way as other statutes. 18 F.3d at 144.

[FOIA] except to the extent that it does so expressly." 5 U.S.C. § 559; (Pls.' Br. 22-23). Again, Congress did just that in the PNSDA. The APA does not require Congress to "employ magical passwords" to effectuate such a modification—rather, the language Congress uses and the intent of Congress in enacting a later statute control. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); *see Lockhart*, 546 U.S. at 147-49 (Scalia, J., concurring) (Court has "made clear" that "an express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statute"; citing *Marcello*; *Great Northern Railway Co. v. United States*, 208 U.S. 452, 465 (1908); *Warden v. Marrero*, 417 U.S. 653, 659-60 n.10 (1974); *Hertz v. Woodman*, 218 U.S. 205, 218 (1910)). An express-reference provision can be "repealed by implication," as required by the longstanding principle that "an earlier Congress can[not] limit the manner in which a later Congress may express its legislative acts." *Church of Scientology v. IRS*, 792 F.2d 146, 149 n.2. (D.C. Cir. 1986) (Scalia, J.). "When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'" *Lockhart*, 546 U.S. at 149 (Scalia, J., concurring).

Thus, in *Church of Scientology*, the D.C. Circuit cited § 559's express-statement provision as one reason for its holding that 26 U.S.C. § 6103 does not "*sub silentio* repeal[ ]" FOIA. 792 F.2d at 149. But that was because § 6103 does not refer to FOIA. *Long v. IRS*, 742 F.2d 1173, 1177 (9th Cir. 1984). In contrast, there is nothing "*sub silentio*" about the PNSDA: its words

express Congress's intent that FOIA not apply to these photographs. And while it may be true that FOIA is a "structural statute, designed to apply across-the-board," 792 F.2d at 149, nothing about that precludes Congress from overriding FOIA's general disclosure scheme with a specific enactment governing these photographs. *See NLRB v. SW General, Inc.*, 137 S. Ct. 929, 941 (2017) ("It is a commonplace of statutory construction that the specific governs the general." (quotation marks and alteration omitted)); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 444-45 (1987) ("where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one" (quotation marks and alteration omitted)).

Plaintiffs point to Senator Graham's statement that Congress did not intend to "change FOIA, in its basic construct." 155 Cong. Rec. S5672 (statement of Sen. Graham) (daily ed. May 20, 2009). (Pls.' Br. 23). That comment correctly notes that Congress did not alter FOIA at all; it did not, for instance, create a new exemption under 5 U.S.C. § 552(b) to address records related to the military whose release could endanger Americans. Instead, Congress established a protection scheme wholly apart from FOIA, in order to "provide[ ] congressional support to the President's decision that we should not release these photos." *Id.* Put simply, Congress did not have to alter FOIA's basic construct, because Congress elected to supersede FOIA instead.[4]

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[4] Plaintiffs assert that DoD has "no response" to the legislative history of the PNSDA. (Pls.' Br. 26-27;

2. Even Under FOIA's Exemption 3, Review Is Limited to Whether the Secretary Issued a Certification and the Documents Otherwise Satisfy the PNSDA

Even if FOIA did apply, and the PNSDA were considered a FOIA exemption 3 statute, the result should be the same: the appropriate judicial review is not a *de novo* inquiry into the underlying basis for the Secretary's certification, but an inquiry into whether the Secretary has issued the certification described by the PNSDA. That is because the application of an exemption 3 statute is a "legal question[ ] normally governed by that Exemption 3 statute, not by the FOIA itself." *Aronson v. IRS*, 973 F.2d 962, 965-66 (1st Cir. 1992); *accord Michael's Piano*, 18 F.3d at 143 ("exemption 3 . . . incorporates the policies of other statutes"); *King v. IRS*, 688 F.2d 488, 493 (7th Cir. 1982); *White v. IRS*, 707 F.2d 897, 900 (6th Cir. 1983).

In an exemption 3 statute, "Congress has decided that . . . confidentiality, not sunlight, is the proper aim." *Aronson*, 973 F.2d at 966; *accord King v. IRS*, 688 F.2d at 493 (statute's "privacy-protecting purpose is precisely the opposite of that of the FOIA"). To effectuate that purpose, "once a court determines that the

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but see Gov't Br. 40-43 (setting out legislative history)). But DoD and plaintiffs agree that the legislative history clearly shows, as plaintiffs quote it, that the PNSDA's purpose was to "'defeat this lawsuit'" (Pls.' Br. 26 (quoting 155 Cong. Rec. S5650, S5673))—namely, the lawsuit before this Court.

statute in question is an Exemption 3 statute, and that the information requested at least arguably falls within the statute, FOIA *de novo* review normally ends." *Aronson*, 973 F.2d at 967; *accord Ass'n of Retired Railroad Workers v. U.S. Railroad Retirement Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987) ("congressional intent to withhold is made manifest in the withholding statute itself. In effect, the purpose of Exemption 3—to assure that Congress, not the agency, makes the basic nondisclosure decision—is met once [the 'particular types of matters to be withheld' clause of § 552(b)(3)(A)(ii)] is found to apply. Hence the policing role assigned to the courts in [such a] case is reduced.").

Thus, this Court has held that exemption 3 statutes should not be "construed narrowly." *Michael's Piano*, 18 F.3d at 143-44. Instead, contrary to the review urged by plaintiffs, the Court "look[s] to the plain language of the [exemption 3] statute and its legislative history, in order to determine legislative purpose." *Id.* The purpose of the PNSDA, to prevent disclosure of photographs the Secretary of Defense determines will endanger Americans, is evident.

Indeed, the import of the PNSDA is that Congress gave the Secretary the authority to decide whether or not to disclose these photographs. Consistent with that, Congress evidently did not intend the courts to look beyond the clear and easily reviewable statutory criteria for protection from disclosure: that the document be the specified type of photograph, and that the Secretary issue a certification stating his determina-

tion that disclosure will endanger U.S. citizens, servicemembers, or employees abroad. There is no support for plaintiffs' conclusion that the Secretary must do more: to shield materials from disclosure under FOIA exemption 3, the government need only show that they "fall within [the exemption] statute's scope." *Michael's Piano*, 18 F.3d at 143 (citing *CIA v. Sims*, 471 U.S. 159, 167 (1985)). The government has done so here: the photographs satisfy the statutory criteria of having been taken during the relevant period and contain the relevant subject matter (which is undisputed), and the Secretary has issued a certification stating his determination that disclosure will endanger U.S. citizens, servicemembers, or employees abroad.

Once this Court has determined that those statutory criteria have been met, further review is unwarranted. That hardly "eviscerates" judicial review (Pls.' Br. 27) or contradicts "our tripartite form of republican government" (Pls.' Br. 34) or "the functioning . . . of our democracy" (Pls.' Br. 52); it simply requires that the scope of judicial review is governed by the applicable statute, as this Court held in *Michael's Piano*.

The conclusion that reviewing courts are not empowered to override the underlying basis for the Secretary's predictive judgment of danger is bolstered by the national security implications of the Secretary's determination. (Gov't Br. 36-37). As the government pointed out before, the general presumption of judicial review "runs aground when it encounters concerns of national security." *Department of the Navy v. Egan*, 484 U.S. 518, 526-27 (1988). It is true (Pls.' Br. 28-29)

that courts have reviewed national security determinations in FOIA cases such as *ACLU v. DOJ*, 681 F.3d 61 (2d Cir. 2012), and *Wilner v. NSA*, 592 F.3d 60 (2d Cir. 2009). But those cases concerned review under FOIA's exemption 1, which applies to information that is "properly classified," 5 U.S.C. § 552(b)(1)—that is, in exemption 1 cases "Congress specifically has provided" that the courts may review "the authority of the Executive in military and national security affairs," *Egan*, 484 U.S. at 530; *see Sims v. CIA*, 642 F.2d 562, 567 (D.C. Cir. 1980).

And even there, courts applied highly deferential standards, and have refused to delve into the agency's justifications as plaintiffs here demand. *Wilner*, 592 F.3d at 73, 76 (courts "have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review"); *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) ("the court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions"). In contrast, neither the PNSDA nor exemption 3 contemplates judges' undertaking the extraordinary task of reviewing national security determinations—a task for which plaintiffs suggest no "meaningful judicial standard of review." *Webster v. Doe*, 486 U.S. 592, 600 (1988); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010); (Gov't Br. 37-39). The proper scope of judicial review is for the Court to decide if the terms of the PNSDA have been satisfied, not to second-guess the determinations that Congress committed to the Secretary of Defense.

B. The Process DoD Followed Satisfied the Requirements of the PNSDA and FOIA

As set out in the record, in making that determination DoD undertook a thorough and robust review process, one that exceeds what either the PNSDA or FOIA requires.

Neither the PNSDA's text nor its history or purpose requires the Secretary himself to consider each individual photograph separately, to certify each individual photograph separately, or otherwise to follow any particular procedure. (Gov't Br. 47-52). Indeed, the district court correctly held that the Secretary "need not *personally* review each photograph," but instead may delegate individual review of the photographs to DoD subordinates—and further concluded that the record here shows that the Secretary did in fact delegate that review, and that "each photograph was reviewed individually." (JA 408-09). Plaintiffs do not contest those points. Thus, while the government disagrees with plaintiffs' grammatical analysis of the PNSDA (Pls.' Br. 41-42), there is no need to reach the issue, as even the district court's standard for individual review of the photographs was satisfied.

Similarly, regarding the Secretary's certification, the district court agreed that the Secretary's most recent certification applies to "each photograph." (JA 408-09). To the extent the district court was correct that the PNSDA "makes the Secretary personally responsible for the certification as to each photograph," that requirement is satisfied by the plain language of the certification itself: the Secretary personally signed and "issued" a certification that covered

"each photograph." PNSDA § 565(c)(1)(A); (JA 343). Plaintiffs assert that because the Secretary is responsible for the certification, "therefore" he must "'establish the criteria to be utilized in categorizing the photographs and assessing the likely harm upon release.'" (Pls.' Br. 42 (quoting JA 409)). But that does not follow: the Secretary can be, and in fact was, responsible for the certification, but he may leave the method of reaching a recommendation up to his subordinates. Neither plaintiffs nor the district court cite any authority to the contrary.

Plaintiffs suggest that DoD must "'describe *each* document or portion thereof'" to justify withholding. (Pls.' Br. 41-42 (quoting *King v. DOJ*, 830 F.2d 210, 219 (D.C. Cir. 1987)), 52). But that is not the law: at least in an exemption 3 case (which *King v. DOJ* and other cases cited by plaintiffs were not), the government may support a decision to withhold documents "through generic, categorical showings" rather than document by document. *Maydak v. DOJ*, 218 F.3d 760, 766 (D.C. Cir. 2000); *see DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 777-80 (1989); *FTC v. Grolier, Inc.*, 462 U.S. 19, 27-28 (1983); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). Indeed, in *Church of Scientology*, the court applied exemption 3 and held that where "a claimed FOIA exemption consists of a generic exclusion, dependent upon the category of records rather than the subject matter which each individual record contains,"

document-by-document review such as through a *Vaughn* index would be "futile." 792 F.2d at 152.[5]

Plaintiffs' central contention is that DoD must explain "'*how* it reached its conclusion.'" (Pls.' Br. 43-44 (quoting JA 401)). But no law supports that view. There is nothing in the PNSDA that says the Secretary must do more than certify the photographs. Nor is there anything in FOIA or its case law that would require an agency to explain its methodology: all that is needed under FOIA is for the government to show that the records fit within the exemption. (*Contra* Pls.' Br. 46 (asserting "'looking behind' agency decisions is mandated under 5 U.S.C. § 552(a)(4)(B)")). Plaintiffs cite no FOIA case stating that an agency has to justify its procedure for asserting an exemption, or that, contrary to this Court's precedent, a court may inquire into "the methods by which [the Secretary] reached his determination." *National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974) (Friendly, J.);

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[5] Plaintiffs' reference to sampling is beside the point. Putting aside whether sampling is appropriate where individual review is practically impossible (Pls. Br. 42-43), here such an individual review in fact happened within DoD. To the extent plaintiffs are criticizing the samples DoD staff sent to the four reviewing generals as not being "well-chosen" (Pls.' Br. 49-50), the cases they cite concern samples provided to the court for review, not the internal agency process of delegating the assessment of the records. For the latter, the government has discretion to choose any reasonable method. (Gov't Br. 48).

accord United States v. Morgan, 313 U.S. 409, 422 (1941).[6]

While plaintiffs concede that "the Secretary may choose a reasonable methodology" for making his determination, "including by delegation," they contend that "[t]he Secretary's failure to perform [individualized review of the photographs]" was improper. (Pls. Br. 45). Even the district court recognized that the individualized review it held was required could be, and in fact was, performed by subordinates. (JA 408-09). Plaintiffs do not explain how, if delegation is proper (as they concede), a procedure in which the Secretary's subordinates conducted an individualized review of all the photographs is somehow improper. To the extent plaintiffs are asking this Court to go beyond what the district court held and direct the Secretary personally to undertake individualized review, that approach is inconsistent with the case law of this Court and the Supreme Court. (JA 409 ("'government would become impossible'" if agency head were required to "'personally familiarize himself' with all evidence related to a decision he is responsible for" (quoting *Nutritional Foods*, 491 F.2d at 1146))).

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[6] The district court relied on *Campbell v. DOJ*, 164 F.3d 20 (D.C. Cir. 1998) (JA 401), but as the government explained (Gov't Br. 51), that case does not support the proposition. Plaintiffs do not defend the district court's citation of *Campbell*, failing to even mention it in their brief.

In fact, the procedure DoD employed was more than adequate. Plaintiffs protest that the Secretary relied on the recommendations of the four four-star generals, because those generals did not themselves review all the photographs. (Pls.' Br. 48-49).[7] But had DoD omitted the generals, and had the three groups of DoD lawyers and counterterrorism specialists who conducted three separate individualized reviews presented their recommendations directly to the Secretary, plaintiffs—having conceded, as they must, that the Secretary's delegation of review to subordinates was proper and lawful—would have nothing to complain about. *See Nutritional Foods*, 491 F.2d at 1146 (Secretary need only "confer[ ] with his staff" or "consider[ ] summaries"). It makes little sense to conclude, as plaintiffs ask of this Court, that by seeking the added input of four generals, who brought experience and expertise derived from their field commands and position as the highest-ranking officer in the U.S. military, DoD has made its process invalid.

Plaintiffs next criticize the three individualized reviews for failing to "'consider[ ]'" or "'make a finding with regard to each and every photograph'" (Pls.' Br. 48 (quoting JA 274))—an argument impossible to square with the record, which shows that at the first step, a DoD attorney reviewed each photograph to determine "how likely it was that the public release of the photographs would result in the harm the PNSDA

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[7] For perspective, the maximum number of four-star flag officers in the U.S. military is twenty-four. 10 U.S.C. § 525.

was intended to prevent"; at the second step, uniformed counterterrorism officers "independently review[ed] each photograph based on the likelihood of harm that the PNSDA was intended to prevent"; and at the third step, a new team of attorneys "review[ed] each photograph to assess the likelihood of harm it would cause to U.S. citizens, Armed Forces, and employees deployed abroad if publicly disclosed." (JA 338). That the DoD personnel at these three levels of individualized review also worked to create a representative sample to present to the generals and ultimately the Secretary does not make the process "vague," "unclear," or "difficult to parse." (Pls.' Br. 49).

Nor is there any merit to the suggestion that individualized review had to be performed by the generals, rather than the officers of Joint Staff J37 and the teams of DoD lawyers. (Pls.' Br. 48; JA 410). Nothing in the PNSDA supports a rule that the Secretary's power to delegate extends only to four-star officers. Nor do plaintiffs offer any principle or demarcating line to govern which types of DoD review would suffice —whether, for instance, a three-star general, or a team of colonels, would satisfy their artificial standard.

Plaintiffs are dissatisfied with the amount of detail they have received about the process, complaining that they should know more about "the number of categories, the number of photos, the number of photos per category," etc., so that they can further critique the manner in which DoD has chosen to do its statutorily assigned job. (Pls.' Br. 49-50). But that is not for them, or the courts, to decide. *Perez v. Mortgage Bankers*

Ass'n, 135 S. Ct. 1199, 1207 (2015) ("courts lack authority to impose upon an agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good" (quotation marks and alterations omitted)); *Nutritional Foods*, 491 F.2d at 1145 ("courts will not entertain an inquiry . . . as to the methods by which [the Secretary] reached his determination" (quotation marks omitted)).

Lacking any support in the PNSDA, FOIA, or the case law, plaintiffs' arguments about process are ultimately nothing more than an effort to find fault with DoD's thorough evaluation in order to avoid the result Congress mandated: the end of this action and the protection of these photographs from disclosure. The Court should reject that attempt to read the meaning out of the PNSDA, and reverse the district court's judgment.

C. The Secretary's Decision Should Be Upheld on Its Merits

If the Court were to reach the merits of the Secretary's certification of harm, that determination must be upheld under any standard.

Plaintiffs second-guess DoD's actual harm determination, suggesting that the bases the generals asserted for their conclusions are irrelevant to the risk of harm to Americans. (Pls.' Br. 50-51). In doing so, plaintiffs only demonstrate their own lack of knowledge and expertise as to what puts American lives at risk around the world. For instance, they point to General Rodriguez's observation that release of the photographs could lead to their misportrayal as "evidence of

U.S. noncompliance with international and humanitarian law," a goal they deem "far beyond the harm" contemplated by the PNSDA. But the view of executive officials and military commanders is different. *See Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess. 3-4 (1955) (statement of John Foster Dulles, Secretary of State) (U.S. "participation [in the Geneva Conventions] is needed to . . . enable us to invoke them for the protection of our nationals"); Lt. Gen. James Mattis, Foreword, *in* U.S. Marine Corps, *War Crimes* (2005), available at https://fas.org/irp/doddir/usmc/mcrp4-11-8b.pdf ("Compliance with the Law of War . . . is also absolutely essential to mission accomplishment. Compliance encourages the civilian populace to cooperate with the Marines and turn-in the foe. It also facilitates the surrender of the enemy . . . ."); *see also* International Committee of the Red Cross, *Improving Compliance with International Humanitarian Law*, at 7 (2004), available at https://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_humanitarian_law.pdf (listing benefits of compliance with international law).

As for the goals, articulated by the generals, of " 'prevent[ing] ISIL from establishing a credible presence in Afghanistan' " or of " 'build[ing] a stable, secure, prosperous, and democratic Afghanistan,' " it is difficult to understand how plaintiffs could see those obviously security-related objectives as "[u]ntethered from harm to Americans"—including, apparently, Americans in Afghanistan. (Pls.' Br. 50-51 (quoting JA 340-41)). Plaintiffs' arguments merely underscore the wisdom of the Supreme Court's admonition that

national security and military judgments should be left to those in the executive branch with the experience and expertise to make them. *See Humanitarian Law Project*, 561 U.S. at 33-34.

More broadly, plaintiffs assert that DoD has failed to supply "sufficient information" to allow the courts to assess the correctness of DoD's determination. (Pls.' Br. 43-44 (quotation marks omitted)). But the very nature of the determination required by the PNSDA is a "predictive judgment[ ]" regarding military affairs and national security. *Wilner*, 592 F.3d at 76. Such a judgment call requires consideration of numerous shifting and difficult-to-discern or unknown factors, and the assessment of risk inherently requires line drawing about the probability of harm. That may appear "abstract" or "conclusory" to plaintiffs, but DoD could hardly have done better in making these difficult predictive judgments than by performing two separate individualized reviews by uniformed and civilian lawyers; a third individualized review by specialized counterterrorism military officers; consideration of representative samples by four-star field commanders and the Chairman of the Joint Chiefs of Staff, each of whom submitted written recommendations; and consideration by the Secretary of Defense, who issued a certification. No one could be better positioned, or have more combined expertise and experience relevant to

determining the danger to Americans that would result from the photographs' release, than these military and civilian officials.[8]

D. If This Court Holds That a Different Procedure Is Required, Remand, Not Release, Is the Appropriate Remedy

If this Court holds that DoD's procedure was deficient, the proper remedy is remand to the Department of Defense for further action. Although plaintiffs urge the Court to order the photographs' release (Pls.' Br. 3), "[g]enerally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam); *accord Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Although plaintiffs are correct that the district

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[8] Plaintiffs do not defend the criteria specified by the district court for reviewing photographs, instead recasting them as "recommend[ations]" (Pls.' Br. 47) despite the district court's language ("the Government should compare these photographs . . . ." (JA 406)). While plaintiffs assert that the district court's criteria were simply meant to "assure that [the Secretary's] decision is not contradicted by record evidence," they fail to point to any record evidence that contradicts the Secretary's certification. There is none; plaintiffs could only offer inexpert speculation about the dangers Americans may face abroad, rather than actual evidence that the Secretary was wrong.

court earlier invited DoD to supplement its submissions in order to comply with the district court's rulings, the government declined those invitations because to revisit the Secretary's determination under a more demanding procedure would, in the government's view, incur burdens on the Secretary that the PNSDA was designed to prevent. However, if the district court's holdings are upheld after appellate review, the government should be afforded the opportunity to conform to the courts' determination of the proper legal procedure before release is ordered.

POINT II

FOIA's Exemption 7(F) Shields the Photographs from Disclosure

In the alternative, the government has demonstrated that exemption 7(F) of FOIA permits DoD to withhold the photographs at issue, because their release "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). Namely, the record demonstrates that the photographs' release will put U.S. servicemembers and other personnel abroad at risk.[9] (Gov't Br. 48-59).

Besides urging the Court to reinstate its now-vacated 2008 decision, plaintiffs argue that there is no conflict between that decision and the D.C. Circuit's

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[9] Plaintiffs do not dispute that the photographs meet the threshold requirement of exemption 7, that they were "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7).

ruling in *Electronic Privacy Information Center v. Department of Homeland Security* ("*EPIC*"), 777 F.3d 518 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 876 (2016), because the population at risk in *EPIC* was far more "discrete" than the "vast" universe of endangered persons in this case. (Pls.' Br. 56). But in truth, there is no meaningful difference in the size or identifiability of the relevant populations. In *EPIC*, the government did not "point to a particularized threat to a discrete population"; instead, it identified the at-risk population as that of the entire United States, limited (in the context of a request for disclosure of a law-enforcement protocol designed to thwart the detonation of explosives) only to "people near unexploded bombs, people who frequent high-value targets, and bomb squads and other first responders." *Id.* at 524 (quotation marks omitted). The court observed that it will generally be "unknowable" "who will be passing near an unexploded bomb when it is triggered somewhere in the United States," and the only "limit" on the population in danger is the existence of a "critical emergency." *Id.* at 525.

Those same observations pertain here: it is unknowable which American servicemember, citizen, or employee abroad may be in the vicinity of violent unrest or targeted attacks occasioned by the release of the photographs in this case, or where and when such a critical emergency may occur. But just as in *EPIC*, the inability to identify the precise individual who will be endangered does not preclude the application of exemption 7(F): a "concrete and non-speculative danger to numerous albeit unspecified individuals" suffices. *Id.* at 526. Exemption 7(F) accordingly protects the

photographs in this case from FOIA disclosure, and this Court's now-vacated prior decision conflicts with the D.C. Circuit's correct interpretation of exemption 7(F).

CONCLUSION

The judgment of the district court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 5918 words in this brief.

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