# 15-1606

*To Be Argued By*:
BENJAMIN H. TORRANCE

## United States Court of Appeals
**FOR THE SECOND CIRCUIT**
**Docket No. 15-1606**

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, and 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

# BRIEF FOR DEFENDANTS-APPELLANTS

BENJAMIN C. MIZER,
*Principal Deputy Assistant Attorney General*

DOUGLAS N. LETTER,
MATTHEW M. COLLETTE,
CATHERINE H. DORSEY,
*Attorneys*,
*Appellate Staff*
*Civil Division*,
*Department of Justice*

PREET BHARARA,
*United States Attorney for the Southern District of New York*,
*Attorney for Defendants-Appellants*.
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2703

BENJAMIN H. TORRANCE,
TARA M. LA MORTE,
SARAH S. NORMAND,
*Assistant United States Attorneys*,
*Of Counsel*.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEPARTMENT OF STATE, FEDERAL BUREAU OF INVESTIGATION, CENTRAL INTELLIGENCE AGENCY, UNITED STATES DEPARTMENT OF JUSTICE, and its Components CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE OF INFORMATION AND PRIVACY, OFFICE OF INTELLIGENCE, POLICY AND REVIEW, FEDERAL BUREAU OF INVESTIGATION,

*Defendants.*

## TABLE OF CONTENTS

PAGE

## TABLE OF AUTHORITIES

*Cases*:

PAGE

PAGE

PAGE

PAGE

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 15-1606**

---

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

*Defendants-Appellants.*

---

## BRIEF FOR DEFENDANTS-APPELLANTS

---

### Preliminary Statement

In 2009, Congress enacted a statute that, by its terms, specifically precludes application of the Freedom of Information Act to compel disclosure of the photographs at issue in this litigation. The statute, known as the Protected National Security Documents

Act ("PNSDA"), provides that if the Secretary of Defense issues a certification stating that release of certain photographs would endanger U.S. citizens, military personnel, or employees abroad, then those photographs are not subject to disclosure under FOIA. Shortly after the passage of the statute, the Secretary of Defense issued just such a certification, and the district court correctly held, without reviewing the underlying basis of that certification, that the photographs covered by the certification could not be ordered released in this FOIA action.

Yet when the Secretary of Defense issued an essentially identical renewal certification three years later to justify the continued withholding of these photographs, as permitted by the PNSDA, the district court changed course. The district court conducted a *de novo* review, based on its own assessment of the military and political situation in Iraq and Afghanistan, and concluded that it could not verify whether the Secretary's predictive judgment about the possibility of harm—which was based on the recommendations of three of the most high-ranking officers in the U.S. Armed Forces—was, in fact, correct. The district court further held that the PNSDA required the Secretary to consider each photograph individually, in order to maximize disclosure; that the Secretary could not rely on the judgments of others; and that his certification must describe the set of photographs and specify the harms that would be caused by their disclosure.

Those holdings contradict the plain terms of the statute and should be reversed. The PNSDA provides

that the Secretary's issuance of a certification is alone sufficient to preclude disclosure of covered photographs. Judicial review of the underlying basis for the Secretary's determination is not warranted, nor is it appropriate in this matter of national security and military affairs, where Congress specifically intended such a certification to preclude the disclosure of these photographs. Furthermore, the requirement the district court created—that the Secretary of Defense have personal knowledge of each individual photograph—is entirely absent from the statute, and improperly constrains the Secretary's authority to choose for himself the method of carrying out his duties and to utilize the assistance of his subordinates in doing so.

Finally, separately from the PNSDA, FOIA's exemption 7(F) also precludes disclosure of the photographs at issue, as their release could reasonably be expected to endanger the lives and safety of U.S. and other persons abroad.

For all those reasons, the district court's judgment should be reversed.

## Jurisdictional Statement

The district court had jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. The district court entered final judgment compelling disclosure of the photographs at issue on April 1, 2015 (Joint Appendix ("JA") 333), and the government filed a timely notice of appeal on May 15, 2015 (JA 335). This Court accordingly has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

## Questions Presented

1. Whether the Secretary's certification under the PNSDA, that public disclosure of certain detainee photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the U.S. Government deployed abroad, conclusively precludes disclosure of those photographs.

2. Whether FOIA's exemption 7(F) exempts the relevant photographs from mandatory FOIA disclosure on the ground that their public release "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F).

## Statement of the Case

### A. Procedural History

This appeal arises out of a Freedom of Information Act ("FOIA") suit brought by the ACLU against multiple government agencies seeking the release of records relating to the treatment of detainees held by the United States outside the territory of the United States. The DoD and the Army are the only remaining defendants, and the only remaining records at issue are certain DoD photographs responsive to ACLU's FOIA request.

The district court first ordered the release of DoD photographs responsive to the ACLU's FOIA request nearly a decade ago, on September 29, 2005. (JA 120). This Court affirmed the district court's holdings with respect to those photographs. *ACLU v. DoD*, 543 F.3d 59 (2d Cir. 2008), *vacated*, 558 U.S. 1042 (2009). The

government then petitioned for a writ of certiorari. To prevent the release of these photographs, Congress subsequently enacted the Protected National Security Documents Act, and then-Secretary of Defense Robert Gates signed a certification under the terms of that statute to support withholding of the photographs sought by the ACLU. The Supreme Court granted certiorari, vacated this Court's judgment, and remanded for further consideration in light of the PNSDA and the Secretary's certification. 558 U.S. 1042 (2009).

On remand, in an oral ruling in July 2011, the district court granted summary judgment for the government, concluding that the certification by the Secretary of Defense was valid and exempted the DoD photographs from FOIA's disclosure requirements. (JA 202).

Shortly before the Secretary of Defense's initial certification expired, the Secretary issued another PNSDA certification in November 2012, supporting the continued withholding of the DoD photographs. (JA 246). The district court, while recognizing that the new certification was "virtually identical" to the original certification, nevertheless concluded that the 2012 certification was insufficient under the PNSDA, and ordered disclosure of the DoD photographs. (JA 246, 330). Final judgment was entered on April 1, 2015 (JA 333), and this appeal followed (JA 335). On June 2, 2015, this Court granted the government's motion for a stay of the district court's disclosure order pending appeal. (ECF No. 47).

### B. The FOIA Request, Initial District Court Decision, Initial Appeal, and Petition for Certiorari

On June 2, 2004, the ACLU filed a complaint challenging the government's responses to its FOIA request, which sought records related to the treatment of individuals apprehended after September 11, 2001, and held by the United States at military bases or detention facilities outside the United States. The responsive records identified by DoD included a set of photographs depicting detainees held at Abu Ghraib prison in Iraq, which the government withheld pursuant to FOIA Exemptions 6, 7(C), and 7(F). In September 2005, the district court ordered the release of the withheld photographs. In rejecting the government's exemption 7(F) claim, the district court recognized "[t]here is a risk that the enemy will seize upon the publicity of the photographs and seek to use such publicity as a pretext for enlistments and violent acts," but discounted the possibility of additional violence because "[t]he terrorists in Iraq and Afghanistan do not need pretexts for their barbarism." 389 F. Supp. 2d 547, 576, 578 (S.D.N.Y. 2005). Instead, the district court held that any risk to the lives or safety of U.S. military personnel and civilians must be balanced against the perceived benefits of disclosure, and held that disclosure was justified despite the risk of violence. *Id*. The government appealed, but withdrew that appeal after those photos were published by a third-party source.

While that appeal was pending, however, the government identified other potentially responsive pho-

tographs to plaintiffs' FOIA request, and withheld those photos pursuant to FOIA Exemptions 6, 7(C), and 7(F). The district court rejected the government's exemption claims, and ordered the majority of those photographs released. The district court did not issue a written opinion, but instead adopted the same reasoning used with respect to the Abu Ghraib photographs. The government appealed again, and in September 2008, this Court affirmed the district court's decision, rejecting the government's arguments and holding that the potential harm to unspecified members of large groups of people (such as U.S. troops or civilians in Afghanistan and Iraq) does not meet exemption 7(F)'s requirement to identify harm to "any individual." *ACLU v. DoD*, 543 F.3d 59 (2d Cir. 2008), *vacated*, 558 U.S. 1042 (2009). The Court denied the government's request for rehearing en banc, and the government filed a petition for a writ of certiorari.

### C. Passage of the Protected National Security Documents Act

While the government's petition for certiorari was pending, Congress passed the PNSDA. *See* Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142, § 565 (2009). The Act was intended to "[c]odif[y] the President's decision to allow the Secretary of Defense to bar the release of detainee photos." (JA 201 (Conference Summary by the United States Senate and the U.S. House of Representatives Committees on Appropriations on the Department of Homeland Security Appropriations Act, FY2010, dated October 7, 2009)).

The PNSDA provides: "Notwithstanding any other provision of law to the contrary, no protected document, as defined in subsection (c), shall be subject to disclosure under section 552 of title 5, United States Code or any other proceeding under that section." PNSDA, § 565(b). To fall within the definition of a "protected document," a record must:

> (a) be a "photograph" that "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," *id.* § 565(c)(1)(B)(ii);
>
> (b) have been created between "September 11, 2001, through January 22, 2009," *id.* § 565(c)(1)(B)(i); and
>
> (c) be a record "for which the Secretary of Defense has issued a certification, as described in subsection (d), stating that disclosure of that record 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," *id.* § 565(c)(1)(A).

The "term 'photograph' encompasses all photographic images, whether originals or copies, including still photographs, negatives, digital images, films, video tapes, and motion pictures." *Id.* § 565(c)(2).

The PNSDA does not specify the procedures by which Secretary should make the certification. How-

ever, the statute states that the Secretary "shall issue [such] a certification" if he "determines that disclosure of that photograph would endanger" U.S. citizens, servicemembers, or employees abroad. *Id.* § 565(d)(1).

The PNSDA further provides that any such certification "shall expire 3 years after the date on which the certification . . . is issued by the Secretary of Defense." *Id.* § 565(d)(2). The PNSDA allows for the Secretary to issue "a renewal of a certification at any time," although, like the original certification, a renewal certification will expire 3 years after the Secretary issues it. *Id.* § 565(d)(2), (d)(3). Finally, the PNSDA provides for direct congressional oversight of any certification issued under the PNSDA by requiring the Secretary to provide "timely notice" to Congress when he issues a certification or renewal certification. *Id.* § 565(d)(4).

### D. The 2009 Certification by the Secretary of Defense Pursuant to the PNSDA

In November 2009, shortly after the passage of the PNSDA, then-Secretary of Defense Robert Gates signed a certification with respect to the DoD photographs at issue in this case (the "2009 certification"). The 2009 certification specified that it pertained to "a collection of photographs assembled by the Department of Defense . . . [that] are contained in, or derived from, records of investigations of allegations of detainee abuse, including the records of investigation processed and released in" the district court proceedings in this case, which include the "photographs re-

ferred to in the decision of the United States Court of Appeals for the Second Circuit in [*ACLU v. DoD*], 543 F.3d 59, 65 & n.2 (2d Cir. 2008)." (JA 196). The certification also states that the photographs "relate to the treatment of individuals engaged, captured or detained after September 11, 2001 by the Armed Forces of the United States in operations outside the United States" and "were taken in the period between September 11, 2001 and January 22, 2009." (JA 196).

The 2009 certification explains that before its issuance, Secretary Gates sought and received the recommendations of "the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, and the Commander of the Multi-National Forces-Iraq," and then determined that "public disclosure of these photographs 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." (JA 196). Finally, and as contemplated by the PNSDA, the certification directs that notice of the Secretary's certification be provided to Congress. (JA 196).

### E. The Supreme Court's Remand and Subsequent District Court Opinion in 2011

The Supreme Court then granted the government's petition for certiorari, vacated this Court's judgment upholding the district court's disclosure order, and remanded the action for further consideration in light of the PNSDA and the 2009 certification. *DoD v. ACLU*, 558 U.S. 1042 (2009). On remand, the district court granted summary judgment for DoD,

concluding that Secretary Gates's certification supported the withholding of the DoD photographs pursuant to the PNSDA. (JA 202). In an oral ruling, the district court rejected ACLU's suggestion that the court should conduct a *de novo* review of the Secretary's determination of harm, noting that "these kinds of certifications need to be given conclusive respect," and that the legislative history of the PNSDA did not "suggest[] any further *de novo* review or any kind of review by the court." (JA 216, 238).

### F. The 2012 Certification by the Secretary of Defense Pursuant to the PNSDA

In November 2012, then-Secretary of Defense Leon Panetta signed a renewal certification. The 2012 certification, as the district court recognized, is "virtually identical" to the 2009 certification. (JA 246).

In advance of the certification, an attorney in DoD's Office of the General Counsel was designated by the General Counsel to review each photograph individually on the Secretary's behalf. (JA 280, 282). During her review, the attorney sorted the photographs into three categories based on their content, including the extent of any injury suffered by the detainee pictured, whether U.S. servicemembers were also in the photograph, and the location of the detainee in the photograph. (JA 283). Working with the leadership of the Office of General Counsel, the attorney then selected between five and ten photographs from each category that were representative of all of the photographs in each category. This repre-

sentative sample was then provided to the Commander of U.S. Forces in Afghanistan, the Commander of U.S. Central Command, and the Chairman of the Joint Chiefs of Staff, who reviewed the sample and recommended to the Secretary that all of the photographs be recertified pursuant to the PNSDA. (JA 283-84, 286-92).

The 2012 certification, refers explicitly to the photographs at issue in this case, and explains that "the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, and the Commander, International Security Assistance Force/United States Forces—Afghanistan" each recommended that the Secretary's certify that "public disclosure of these photographs would 'endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside of the United States.'" (JA 240).

For instance, General John R. Allen, then the Commander of the International Security Assistance Force/U.S. Forces—Afghanistan, concluded that "the release of these photographs will endanger the lives of U.S. Soldiers, Airmen, Marines, Sailors and civilians presently serving in Afghanistan, as well as the lives of our Coalition partners." (JA 286). "The photographs will likely cause a very public and emotional response in Afghanistan and the larger Muslim world," with "devastating" consequences. (JA 286). General Allen also concluded, based on past events, that release "will almost certainly exacerbate the conditions that foster 'insider threat' attacks," and extremist groups "would undoubtedly use the release

of these photographs to further justify and encourage" attacks and for recruitment and fundraising. (JA 286-87). General James Mattis, Commander of U.S. Central Command, agreed that release of the photographs would "fuel[] civil unrest, causing increased targeting of U.S. and Coalition forces, and providing a recruiting tool for insurgent and violent extremist groups." (JA 289). General Mattis also noted that the "insider threat" had increased since the prior certification in 2009, such that the release of the photographs in 2012 actually posed a "far greater threat" than before. (JA 290). That conclusion was bolstered by General Mattis's first-hand experience with the results of prior publications of controversial images that had incited violence. (JA 290). Finally, General Dempsey, the Chairman of the Joint Chiefs of Staff, "strongly concur[red]" in the generals' recommendations, concluding that "public disclosure of these photos at this time would endanger citizens of the United States, members of the U.S. Armed Forces, or employees of the U.S. Government deployed outside the United States." (JA 291).

### G. The District Court's Rejection of the 2012 Certification

The parties filed cross motions for summary judgment regarding the sufficiency of the 2012 certification to justify withholding the DoD photographs. In August 2014, the district court entered an order concluding that the 2012 certification was insufficient. (JA 260). The district court first rejected the notion that its prior ruling, upholding the 2009 certification, governed its decision with respect to the

2012 certification, even though the certifications were "virtually identical." (JA 246). And despite the district court's contrary statements in its 2011 ruling, the court now stated that in 2009 it had "effectively conducted a *de novo* review" of Secretary Gates's certification, and had concluded that the PNSDA was passed in order to support the President's determination that these images should not be disclosed. (JA 250). The district court noted that Secretary Panetta's 2012 certification "was issued under different circumstances," reasoning that, at the time of the 2012 certification, "the United States' combat mission in Iraq had ended (in December 2011), and all (or mostly all) American troops had been withdrawn from Iraq." (JA 250). "Given the passage of time," the court continued, "I have no basis for concluding either that the disclosure of photographs depicting the abuse or mistreatment of prisoners would affect United States military operations at this time, or that it would not." (JA 251).

The district court further determined that it should conduct a *de novo* review of the 2012 certification, to include review of whether the Secretary had a sufficient factual basis to conclude that release of the photographs at issue would endanger U.S. citizens, military personnel, or employees abroad. (JA 256). Because the court determined that the record did not include adequate information to support Secretary Panetta's determination of harm, the court provided the government with an opportunity to create a record to "support[] the factual basis" for its assertion that the photographs should be withheld. (JA 256).

The district court also determined that the PNSDA requires the Secretary to consider each photograph individually, rather than collectively, as such a process "may allow for more photographs to be released, furthering FOIA's 'policy of full disclosure.'" (JA 258-59). The court held that the 2012 certification suggested that the Secretary reviewed the photographs as a collection, and thus was insufficient. (JA 259). The court provided the government with an opportunity to submit additional evidence to demonstrate that the Secretary of Defense considered each photograph individually. (JA 260).

The government then submitted a declaration explaining the process behind the 2012 certification, as described *supra* Point F. The government argued that, while not required under the PNSDA, DoD had conducted an individualized review of each of the photographs and that the three recommendations relied upon by Secretary Panetta in making his recertification provided more than ample basis for his conclusion that public disclosure of the photographs would endanger U.S. citizens, servicemembers, or employees abroad.

In February 2015, the district court found the additional materials submitted by the government insufficient to satisfy the PNSDA. (JA 327). The district court entered an order stating that the "Secretary must demonstrate knowledge of the contents of the individual photographs rather than mere knowledge of his commanders' conclusions," in order to certify such photographs. (JA 328). "He may obtain such knowledge either by reviewing the photographs per-

sonally or having others describe their contents to him," the district court continued, "but he may not rely on general descriptions of the 'set' of 'representative samples,' as such aggregation is antithetical to individualized review without precise criteria for sampling." (JA 328-29). The court also stated that the certification must make clear "the Secretary's factual basis for concluding that disclosure would endanger U.S. citizens, Armed Forces, or government employees." (JA 329). "At minimum, 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." (JA 329).

The district court provided the government with another opportunity to make further submissions (JA 329), which the government declined given the considerable material it had already submitted (Dist. Ct. ECF No. 547). The district court then ordered disclosure of the photographs. (JA 331). On April 1, 2015, the district court entered final judgment.

This appeal followed.

## Summary of the Argument

The district court erred in holding that FOIA requires the disclosure of the photographs at issue in this case. The PNSDA provides that photographs that meet the terms of that statute's definition of a "protected document" are not subject to FOIA at all. At the very least, the PNSDA is a withholding statute within the meaning of FOIA Exemption 3, that specif-

ically exempts the photographs from disclosure. Either way, under the plain terms of the PNSDA, the photographs may not be ordered released. *See infra* Point I.A.

As the PNSDA requires, the Secretary of Defense has issued a certification stating that the release of the photographs could endanger U.S. citizens, military personnel, or employees abroad. The issuance of that certification alone means that the PNSDA forecloses disclosure, and judicial review is limited to whether the Secretary issued such a certification (and to whether the photographs otherwise meet the statute's terms, an issue that is not contested in this case). That limitation is apparent from the statute itself, which requires only that the Secretary issue a certification "stating" his prediction of danger, but does not require any statement or elaboration of the Secretary's basis for that determination. Additionally, in the context of national security matters, courts should not lightly presume their authority to second-guess the predictive judgments of those in the executive branch with the necessary expertise, at least absent specific congressional authorization. Moreover, Congress required the Secretary to notify Congress of any certifications under the PNDSA, thus indicating that the legislative branch, rather than the judicial branch, would serve as a check on the Secretary's power. That Congress intended no judicial review of the Secretary's certification is confirmed by the PNSDA's legislative history, which manifests a clear intent to halt the prior court-ordered disclosure of the very photographs at issue here, and to do so without further litigation. Finally, even if the Secretary's de-

termination is reviewable, it should be upheld under the deferential standards courts apply in reviewing administrative action, particularly in sensitive areas of national security. The Secretary's judgment is well rooted in the carefully considered judgment of senior military leaders, and cannot be overcome by the district court's own views of the risks currently presented in Iraq and Afghanistan. *See infra* Point I.B.

The district court further erred in prescribing the methods by which the Secretary must make his prediction of harm. Nothing in the statute requires that the Secretary consider each photograph individually or that the Secretary himself review each photograph prior to his certification. Because the PNSDA does not specify the means by which the Secretary must conduct his duty, he may choose any reasonable means of doing so. Thus, the sampling method that the Secretary chose here to review the relevant photographs, conducted with the aid of subordinates, was entirely appropriate. *See infra* Point I.C.

Finally, apart from the PNSDA, FOIA exemption 7(F) protects the relevant photographs from disclosure. While this Court previously held in this case that exemption 7(F) does not apply when the individuals at risk from disclosure are identified solely as members of a large group, that decision was vacated by the Supreme Court and is therefore no longer binding. Moreover, in the intervening time, the D.C. Circuit has held to the contrary, concluding that when the government shows that disclosure poses a concrete danger to a group of unspecified individuals, as the government has shown here, exemption 7(F) is

satisfied. Accordingly, exemption 7(F) shields the photographs at issue from disclosure. *See infra* Point II.

Therefore, the district court's judgment should be reversed.

## ARGUMENT

### Standard of Review

This Court reviews *de novo* a grant of summary judgment, including in FOIA cases or cases involving a question of statutory interpretation. *Peterson v. Islamic Republic of Iran*, 758 F.3d 185, 189 (2d Cir. 2014); *National Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir. 2005).

## POINT I

### Disclosure of the Protected Photographs Is Foreclosed by the PNSDA

The Protected National Security Documents Act was enacted specifically to prevent the release of the very photographs at issue in this case, so long as the Secretary of Defense issues a certification that makes them "protected documents" under the PNSDA. The Secretary did just that. His 2012 certification complies with the express terms of the PNSDA, and that is the end of the matter: the photographs are therefore not subject to FOIA disclosure. The district court erred in questioning the Secretary's determination that disclosure of the photographs would endanger Americans serving abroad, and in imposing proce-

dural requirements for obtaining a certification that are nowhere in the statute itself. Its judgment should therefore be reversed.

### A. The PNSDA Forecloses Disclosure of Protected Photographs under FOIA

The plain language of the PNSDA forecloses disclosure of the photographs at issue.

The PNSDA provides, "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 [i.e., FOIA] or any proceeding under that section." Pub. L. No. 111-83, § 565(b). A protected document, in turn, is "any record" that meets three criteria: (1) it must be "a photograph . . . taken during the period beginning on September 11, 2001, through January 22, 2009"; (2) it must "relate[] 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"; and (3) it must be a record "for which the Secretary of Defense has issued a certification, as described in subsection (d), stating that disclosure of that record 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." *Id.* § 565(c)(1).

The statute does not provide any procedures the Secretary must follow in making the required certification. Rather, as long as the Secretary determines that disclosure would endanger citizens, members of

the armed forces, or employees outside the United States, he "shall" issue a certification.§ 565(d)(1).

### 1. PNSDA-Protected Documents Are Not Subject to FOIA

For any "protected document" under the PNSDA," FOIA's disclosure requirement does not apply. The statute's operative provision begins with the phrase, "Notwithstanding any other provision of law to the contrary." "[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). FOIA "calls for broad disclosure of Government records." *CIA v. Sims*, 471 U.S. 159, 166 (1985). But the PNSDA calls for no disclosure at all of protected documents under any statute, including under FOIA. *See Lockhart v. United States*, 546 U.S. 142, 144-46 (2005). FOIA's mandate thus does not apply.[1] While

---

[1] The district court sought to incorporate FOIA's "background norm of 'broad disclosure'" by invoking the *in pari materia* canon of statutory interpretation. (JA 254-55). Under that rule, "statutes addressing the same subject matter generally should be read 'as if they were one law.'" *Wachovia Bank v. Schmidt*, 546 U.S. 303, 305 (2006) (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)). Whether or not a statute that restricts disclosure of specified documents should be considered as *in pari materia* with a statute that creates a presumption of broad

the statute allows the Secretary to voluntarily disclose photographs in his discretion, PNSDA §565(e), it precludes court-ordered disclosure. Nor does FOIA's imposition of the burden of proof on the government to justify withholding in litigation pertain, 5 U.S.C. § 552(a)(4)(B), as made clear by the PNSDA's reference to "any proceeding under [FOIA]," PNSDA § 565(b). The PNSDA, therefore, clearly prohibits disclosure of protected documents, including under FOIA or in any proceeding under FOIA.

### 2. Even If FOIA Applies, the PNSDA Is an Exemption 3 Statute That Authorizes Withholding of the Photographs.

Even if FOIA governs, FOIA itself provides that it "does not apply" to matters that are "specifically exempted from disclosure by statute," if that statute "refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Exemption 3 applies when "(1) the statute invoked qualifies as an exemption 3 withholding statute, and (2) the materials withheld fall

---

disclosure generally, the canon is inapplicable because it may only be used to resolve ambiguities, not to introduce them. *Erlenbaugh*, 409 U.S. at 244-45. Here, the plain text of the PNSDA governs. "When the words of a statute are unambiguous . . . this first canon"—"that a legislature says in a statute what it means and means in a statute what it says there"—"is also the last: judicial inquiry is complete." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quotation marks omitted).

within that statute's scope." *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994).[2] The agency's burden, therefore, is simply to "prov[e] that the documents withheld pursuant to Exemption 3 fell within the scope" of a withholding statute. *Id.* at 144.

"[E]xemption 3 . . . incorporates the policies of other statutes," and should be applied in accord with the meaning and policy of those separate withholding statutes. *Id.* at 143-44. "[This Court] follow[s] the approach taken by the Supreme Court in construing withholding statutes, looking to the plain language of the statute and its legislative history, in order to determine legislative purpose." *Id.* The Court adopted that approach after considering, and rejecting, the views of other courts of appeals, which have held that withholding statutes should be given a narrow construction due to FOIA's disclosure principles, and ruling that "the Supreme Court has never applied a rule

---

[2] The OPEN FOIA Act of 2009 added a further requirement for a statute to qualify as an exemption 3 withholding statute: "if enacted after the date of enactment of the OPEN FOIA Act of 2009 [Oct. 28, 2009]," the statute must "specifically cite[ ] to this paragraph [i.e., 5 U.S.C. § 552(b)(3)]." 5 U.S.C. § 552(b)(3)(B). Because the OPEN FOIA Act and the PNSDA were sections 564 and 565, respectively, of the same appropriations act, Public Law No. 111-83, the PNSDA was not "enacted after the date of enactment of the OPEN FOIA Act." This requirement, therefore, does not apply here.

of narrow or deferential construction to withholding statutes." *Id.* at 144.

Under these principles, the PNSDA precludes disclosure of the DoD photographs even if FOIA applies. The PNSDA plainly (and uncontestedly) qualifies as an exemption 3 withholding statute, as it refers to particular "protected document[s]" that, once certified by the Secretary of Defense, are not "subject to disclosure." And the photographs at issue here equally plainly fall within the PNSDA's scope. The Secretary's certification established that the photographs are protected documents because (1) the Secretary issued a certification stating that disclosure would endanger United States citizens, members of the U.S. Armed Forces, or U.S. government employees abroad, (2) the photographs were taken between September 11, 2001, and January 22, 2009, and (3) the photographs relate to the treatment of individuals engaged, captured, or detained abroad after September 11, 2001.[3]

Indeed, whether considered under the exemption 3 test or as a statute that on its own provides that FOIA does not apply, the "'plain meaning' of the

---

[3] The PNSDA's latter two criteria are not contested in this case: there is no dispute that the records at issue were photographs taken during the specified period, and relate to the treatment of the specified persons. Nor is there any question that the 2009 and 2012 certifications encompass the photographs for which plaintiffs seek release under FOIA.

[PNSDA] is sufficient to resolve the question" of whether the statute protects the covered photographs from disclosure. *Sims*, 471 U.S. at 167-68. The plain meaning provides that the Secretary's certification—and nothing else—is required to protect the documents from disclosure. Just as in *Sims*, which also considered whether FOIA mandated disclosure of national security-related information, an agency head was given "very broad authority to protect [that information] from disclosure." *Id.* at 168-69. And just as in *Sims*, the PNSDA "does not state" that protection from disclosure must be justified by a showing by the agency that such protection is "needed." *Id.* at 169-70. Instead, Congress through the PNSDA "simply and pointedly protected" all qualified documents whose disclosure the Secretary predicted would result in danger. *Id.* at 169-70.

Thus, the only issue in this case is whether the Secretary of Defense has "issued a certification," "stating" that disclosure of the photographs would endanger U.S. citizens, servicemembers, or employees abroad. There is no question that he has. (JA 240). Accordingly, the PNSDA provides that the photographs covered by the certification are "protected document[s]" that are not "subject to disclosure" under FOIA or "any proceeding under" FOIA.

### B. Judicial Review Is Limited to Whether the Secretary Issued a Certification and the Documents Otherwise Satisfy the PNSDA

When the withholding of photographs under the PNSDA is challenged, a court may review whether

the statute's clear terms have been satisfied. But here, the district court went much further, undertaking a skeptical reassessment of the Secretary's determination that release of the photographs would cause harm and imposing requirements on the Secretary's process for making that determination. Such requirements are either not found in the PNSDA or directly contrary to its text. They are also contradicted by legal principles allowing the Secretary to choose the method of performing his statutory mandate, and according deference to his predictive judgments in the fields of military and national security affairs.

As described above, the PNSDA imposes only three specific requirements before a photograph becomes "protected": it must have been taken during a specified period; it must relate to the treatment of certain persons by the U.S. armed forces; and the Secretary must have issued a certification stating his determination that disclosure would endanger U.S. citizens, servicemembers, or employees abroad. Those criteria provide clear and easily reviewable guidelines for determining if a photograph is properly withheld under the PNSDA.

Judicial review should go no further than determining if those criteria were satisfied. "[A] reviewing court's 'task is to apply the text of the statute, not to improve upon it.'" *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600-01 (2014) (quoting *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989)). The PNSDA's protection of photographs from disclosure does not turn on the "correctness" of the Secretary's determination, much

less on a district court's assessment of that "correctness." Instead, protection from disclosure is triggered merely by the fact that the Secretary issued such a certification, stating that disclosure would result in danger to the specified people. PNSDA § 565(c)(1)(A), (d)(1). As the district court acknowledged in its review of the 2009 PNSDA certification, "these kinds of certifications need to be given conclusive respect" (JA 216), and the statute "requires [the court] to accept the point of danger" certified by the Secretary (JA 222). In eschewing "any further *de novo* review" (JA 238), the district court in 2011 correctly apprehended the proper scope of judicial scrutiny of a PNSDA certification.

Yet the district court erroneously reversed course in reviewing the Secretary's 2012 certification. While conceding that the 2012 certification was "virtually identical" to the 2009 certification it had previously upheld, the district court ruled that the 2012 certification was "not sufficient to prevent publication of redacted photographs," as it was "conclusory as to all" of those photographs, instead of focusing on each photograph separately. (JA 242). The court therefore held that the government had "failed to show that it had adequate basis for the certification." (JA 242). In doing so, the district court exceeded the scope of judicial review permitted under the PNSDA—which is limited to whether the Secretary issued a certification—and instead reviewed the basis for that certification and substituted its own judgments for that of the Secretary. The district court's "narrowing of [the Secretary's] authority . . . contravenes the express intention of Congress." *Sims*, 471 U.S. at 168-69.

### 1. The PNSDA Demonstrates That Judicial Review Is Limited to the Fact of the Certification

The PNSDA on its face makes the protection of a document turn solely on whether the Secretary has "issued a certification . . . stating" that danger to U.S. citizens, servicemembers, or employees deployed abroad will result from disclosure. That the statute requires the Secretary's certification to merely "stat[e]" that the danger will occur is telling—nothing in the PNSDA requires the Secretary to justify or explain his determination, or even provide any factual basis for it, in the certification or elsewhere. In contrast, Congress has in numerous enactments expressly required the Secretary to explain or provide a basis for a determination. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1063, 128 Stat. 3292, 3503-04 ("The certification shall include a discussion of the basis for such determination"); National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 832, 124 Stat. 4137, 4275-76 (Secretary's "determination" to include "an explanation of the basis for such determination"); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1074, 122 Stat. 3, 331 (Secretary to make a "determination . . . in writing . . . based on a threat assessment by an appropriate law enforcement, security, or intelligence organization" and that the Secretary "include . . . the reason for such determination."). That Congress omitted such a mandate here demonstrates its intent that the certification alone suffices for withholding, and that judicial review of the underlying basis for

the certification is not appropriate. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) (courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply").

The lack of judicial review of the Secretary's underlying determination (as opposed to the fact of certification) is confirmed by the subject matter of that determination: matters of military affairs and national security. This Court and the Supreme Court have long been reluctant to undertake judicial review in the sphere of national security: "'Recognizing the relative competencies of the executive and judiciary, we believe that it is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies' regarding whether disclosure of [information] would pose a threat to national security." *ACLU v. DOJ*, 681 F.3d 61, 70-71 (2d Cir. 2012) (quoting *Wilner v. NSA*, 592 F.3d 60, 76 (2d Cir. 2009)); *accord Center for National Security Studies v. DOJ*, 331 F.3d 918, 922 (D.C. Cir. 2003). Thus, where the "language and structure" of a statute indicate that Congress meant to commit national security judgments to an executive-branch agency, judicial review of those judgments is precluded. *Webster v. Doe*, 486 U.S. 592, 601 (1988).

The district court observed that the PNSDA is silent regarding judicial review, and thus resorted to the general presumption that judicial review is available. (JA 255-56). But the general availability of judicial review provides no basis for going beyond the four corners of the statute, let alone delving into mat-

ters of national security to second-guess the predictive judgments of seasoned military officials.

Indeed, the Supreme Court has urged caution in relying upon the general presumption of judicial review to review executive-branch national security judgments. "One perhaps may accept" the proposition that in the "absence of any statutory provision precluding" judicial review, such review is presumed—but that "proposition is not without limit, and it runs aground when it encounters concerns of national security." *Department of the Navy v. Egan*, 484 U.S. 518, 526-27 (1988) (quotation marks omitted). Indeed, "[t]he authority to protect" national security information rests with the executive branch, and "flows primarily from th[e] constitutional investment of power in the President and exists quite apart from any explicit congressional grant." *Id.* And that authority is at its peak where, as here, Congress concurs that protection from disclosure is necessary: "when 'the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.'" *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring)). The "[p]redictive judgment" required for national security determinations "must be made by those with the necessary expertise," and "it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what consti-

tutes an acceptable margin of error in assessing the potential risk." *Egan*, 484 U.S. at 529.

For those reasons, contrary to the district court's conclusion, the PNSDA's silence regarding judicial review does not indicate that such review should be available to determine whether the Secretary was correct in his judgment that disclosure would cause an unreasonable risk of harm. "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530. Nor is there a "meaningful judicial standard of review" in this context: "[s]hort of permitting cross-examination of the [Secretary of Defense] concerning his views of the Nation's security" in issuing the PNSDA certification, there is "no basis on which a reviewing court could properly assess" the Secretary's predictive judgment of harm. *Webster*, 486 U.S. at 600. Instead, the district court imposed its own nonexpert national security judgment—an error compounded by the district court's apparently exclusive reliance on news reports or its own impressions regarding the military situation in Iraq and elsewhere. (JA 249-51); *contra Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010) (court should not "rely exclusively on [its] own inferences drawn from the record evidence" when "litigation implicates sensitive and weighty interests of national security and foreign affairs"). "[W]hen it comes to collecting evidence and drawing factual inferences in this area [of national security], the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate"—particularly

where, as here, they involve "efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess." *Id.* (quotation marks and citation omitted).

Congress's intent to preclude judicial review of the Secretary's predictive judgment of harm is also reflected in Congress's decision to itself monitor the certification process. The PNSDA requires the Secretary to notify Congress when he issues a certification or a certification renewal. PNSDA § 565(d)(4). By further limiting the life of a certification to three years, the statute requires the Secretary to periodically reassess the danger that disclosure may cause to U.S. citizens, servicemembers, or employees abroad, and thus to ensure that that danger is still current and to provide Congress with regular updates on his determinations. *Id.* § 565(d)(2), (3). By providing that Congress—which, of course, could repeal or modify the statute at any time—would itself monitor the Secretary's certifications, the PNSDA provides a powerful check on the Secretary's actions. The presence of that check further indicates that Congress saw no need for judicial review of PNSDA certifications. "The lack of any authorization for petitions by the public or review at the behest of members of the public, when viewed in the context of the limits on review built into the statute and the explicit provision of congressional oversight as a mechanism to keep the [Secretary] to his statutory duty, strongly suggests that Congress intended no review at the behest of the public." *Banzhaf v. Smith*, 737 F.2d 1167, 1169 (D.C. Cir. 1984); *accord Dellums v. Smith*, 797 F.2d 817, 823

(9th Cir. 1986) ("Central to our analysis is the Ethics Act's provision for oversight of the Attorney General's compliance with the Ethics Act by members of the congressional judiciary committees, not the public.").

### 2. The Legislative History of the PNSDA Shows That Congress Did Not Intend Judicial Review of the Secretary's Harm Determination

The legislative history of the PNSDA confirms that Congress intended for the Secretary's certification to be determinative of whether the photographs at issue in this case could be withheld.

On May 13, 2009, President Obama made a public statement expressing his concern that the release of the photos in this litigation would pose an unacceptable risk of danger to U.S. military personnel in Afghanistan and Iraq. (JA 235). Specifically, the President explained that based on his review of the DoD photos, their release "would not add any additional benefit" to the public's "understanding of what was carried out in the past by a small number of individuals." (JA 235). Rather, the President recognized that "the most direct consequence of releasing [the DoD Photos]. . . would be to further inflame anti-American opinion and to put our troops in greater danger." (JA 235).

A week later, Congress responded by introducing the first version of legislation to protect the DoD photographs from disclosure. 155 Cong. Rec. S5671-74 (daily ed. May 20, 2009) (Amendment 1157). As reflected in the comments of the bill's sponsor, the leg-

islation was introduced as an endorsement of the President's statements the previous week regarding the DoD photographs and this litigation. *See id.* S5672 (statement by Sen. Graham) (legislation "addresses the lawsuit before our judicial system about the photos"); *id.* (statement by Sen. Graham) ("Those photographs are the subject of a Freedom of Information Act lawsuit filed by the American Civil Liberties Union.").[4] Indeed, legislators made clear that their intent was to "establish a procedure to prevent the detainee photographs from being released." *Id.* (statement by Sen. Graham); *accord id.* at S5673 (statement by Sen. Graham) ("[T]he language in the bill is clear that it would apply to the current ACLU lawsuit that gave rise to the President's decision last week."); *id.* at S5674 (statement by Sen. Graham) (the proposed law "will help the President win a lawsuit that is moving through our legal system regarding the release of photos of past detainee abuse"); *see* 155 Cong. Rec. at S5987 (daily ed. June 3, 2009) (statement by Sen. Lieberman) ("Last fall, as part of [this] lawsuit, the Second Circuit Court of Appeals in New York ordered the release of many of these photographs.").

---

[4] Although several of the comments quoted in this discussion concerned versions of the bill that differed slightly from what was enacted, all of the proposals sought to prevent the release of post-September 11, 2001, detainee photographs that the Secretary of Defense certified would cause harm to U.S. citizens, servicemembers, or employees.

The discussion also reflected the Senate's concern, as a result of conversations with U.S. military leaders, over the danger to American citizens, members of the U.S. Armed Forces overseas, and employees of the U.S. government deployed outside the U.S. that would result from the release of the DoD photographs. *See id.* at S5672 (statement by Sen. Graham) ("The President is rightfully concerned that to release more photos would add nothing to the overall knowledge base we have regarding detainee abuse, and it is simply going to put American lives in jeopardy."); *id.* (statement by Sen. Graham) (describing question posed to General Petraeus, General Odierno, and others regarding whether "the public release of these pictures [will] endanger America, American military personnel, and American Government personnel serving overseas?," and describing the answer received as "loud and clear: Yes, it will."); *id.* at S5673 (statement by Sen. Graham) ("If you release these photos, Americans are going to get killed for no good reason."); 155 Cong. Rec. at S5987 (statement by Sen. Lieberman) ("nothing less than the safety and security and lives of our military service men and women is at stake—not to mention our non-military personnel deployed abroad, not to mention Americans here at home and throughout the world"); *id.* (statement by Sen. Lieberman) ("We know that photographs such as the ones at issue in the ACLU lawsuit are, in fact, used by Islamic terrorists around the world to recruit followers and inspire attacks against American service men and women.").

The bill's sponsors made clear that the intent of the legislation was to block the release of the photo-

graphs at issue in this case. 155 Cong. Rec. at S5987 (statement of Sen. Lieberman) ("the language in the bill . . . is clear . . . in that it would apply to the current ACLU lawsuit and block the release of these photographs, preventing the damage to American lives that would occur from that release"); *id.* at S5988 (statement of Sen. Graham) (bill meant "to make sure that the photos subject to the pending litigation were never released and Congress weighed in and agreed with the President's decision not to release those photos"); *id.* (statement of Sen. Graham) (expressing hope that "the courts will understand" that Congress's intent was to "change[ ] the law, directly on point, to give legislative backing to the idea that these particular photographs, and those like these photographs, should not be released for a period of 3 years, and that is in our national security interests to do so"). In conference, the relevant committees of the House and Senate confirmed that the PNSDA was intended to "[c]odif[y] the President's decision to allow the Secretary of Defense to bar the release of detainee photos." (JA 201).

This history makes clear that Congress intended the PNSDA to allow withholding of the photographs at issue in this very action, and to do so without further litigation. The statements above reflect Congress's goal to "bar the release" of the photographs, to "apply to the current ACLU lawsuit," and to "win [this] lawsuit" upon the issuance of the Secretary of Defense's certification. Congress thus acted to "establish a procedure to prevent the detainee photographs [at issue in this lawsuit] from being released," 155 Cong. Rec. S5672 (statement by Sen. Graham)—with

no mention, in the history or text of the statute, that such a procedure would be subject to review in the courts. Congress's intent of establishing a definitive mechanism for preventing the release of these photographs is inconsistent with the district court's holding that judicial review of the Secretary's underlying harm determination is available.

### 3. Even If the Secretary's Determination Is Reviewable, It Should Be Upheld

Even if the Secretary's determination were reviewable, it should be upheld. The Secretary's certification was well supported by the recommendations of senior military officials, whose predictive judgments of harm should not be disturbed by the courts.

Plaintiffs have never identified a standard of review for the courts to apply, but when judicial review of agency action is available, it is typically governed by the deferential standards of the Administrative Procedure Act. As provided in 5 U.S.C. § 706, a reviewing court must uphold agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Bechtel v. Administrative Review Bd.*, 710 F.3d 443, 446 (2d Cir. 2013). Courts applying this "'deferential standard'" "'may not substitute [their] judgment for that of the agency,'" instead ensuring that the agency has "'examined the relevant data and articulated a satisfactory explanation for its action.'" *Guertin v. United States*, 743 F.3d 382, 385-86 (2d Cir. 2014) (quoting *Bechtel*, 710 F.3d at 446, and *NRDC v. EPA*, 658 F.3d 200, 215 (2d Cir. 2011)). A court accordingly may set

aside agency action "only if [the agency] 'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Bechtel*, 710 F.3d at 446 (quoting *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007)). Deference is particularly warranted where, as here, matters of national security are implicated. *ACLU v. DOJ*, 681 F.3d at 70-71; *Wilner*, 592 F.3d at 76; *Center for National Security Studies*, 331 F.3d at 922.

The certification here easily passes the APA test. The Secretary of Defense stated in the certification itself that he based his decision on the "recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, and the Commander, International Security Assistance Force/ United States Forces–Afghanistan." (JA 240). Those officers—the nation's highest-ranking military officer, along with two other four-star generals who served as field commanders—agreed that "public disclosure of these photographs 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.'" (JA 240). The three generals based their recommendations on representative samples of three categories of photographs. (JA 282-84). The representative sample photographs, the generals' written recommendations, and copies of all the photographs were then presented

to the General Counsel of the Department of Defense, who met with the Secretary of Defense regarding the certification. (JA 284).

That careful consideration at the highest levels of the U.S. military and Department of Defense of the potential danger that would result from disclosure of the photographs was thorough and reasonable, and plainly survives the deferential review courts apply to agency action. *See Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008) ("where an agency's analysis of a controversial application is detailed and thorough," decision will not be found arbitrary and capricious even where agency might have done more). Nothing in the record—and certainly nothing in the district judge's own apparent impressions of the political situation and state of armed conflict in Iraq and Afghanistan (JA 249-51)—is sufficient to overcome the Defense Department's considered and expert assessment. Thus, even if this Court decides that judicial review of the Secretary's predictive judgment is available, it should uphold that determination and the certification that embodies it.

### C. The PNSDA Does Not Prescribe the Process by Which the Secretary Must Certify Harm

The district court further erred in imposing procedural requirements on the Secretary's PNSDA certification, requiring the Secretary to consider each photograph individually, and restricting the flexibility accorded the Secretary in determining how to perform the task allowed under the PNSDA.

### 1. The PNSDA Does Not Require Individual Consideration of the Photographs

The district court held that the "plain language [of the PNSDA] refers to the photographs individually—'*that* photograph'—and therefore requires that the Secretary of Defense consider each photograph individually, not collectively." (JA 258). The court reasoned that that conclusion would also further FOIA's purpose of broad disclosure, as some of the photographs that the district judge considered "relatively innocuous" could possibly be disclosed without danger. (JA 258-59). Accordingly, the district court held that the government "must prove that the Secretary of Defense considered each photograph individually." (JA 259).

That conclusion was incorrect for several reasons. First, in relying on the singular phrasing of the PNSDA's reference to a "photograph," the district court did not consider that the PNSDA itself defines the singular term "photograph" in plural terms: "The term 'photograph' encompasses all photographic images, whether originals or copies, including still photographs, negatives, digital images, films, video tapes, and motion pictures." PNSDA § 565(c)(2). Moreover, the district court disregarded background principles of statutory interpretation as embodied in the Dictionary Act, "which supplie[s] rules of construction for all legislation." *Ngiraingas v. Sanchez*, 495 U.S. 182, 190 (1990) (quotation marks omitted). That statute states: "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words importing the singular include and

apply to several persons, parties, or things." 1 U.S.C. § 1; *see European Community v. RJR Nabisco, Inc.*, 764 F.3d 129, 147 (2d Cir. 2014) (relying on Dictionary Act to accord plural meaning to singular statutory term); *Williams v. Wilmington Trust Co.*, 345 F.3d 128, 134 (2d Cir. 2003) ("The Dictionary Act . . . instructs that phrases given in the singular are generally presumed to include the plural."). While that general principle can be overcome when the "evident intent" of Congress is not to cover more than one thing, *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2187 (2014), it is plain in this case that Congress meant to protect multiple photographs (the photographs at issue here) from disclosure, *see Rowland v. California Men's Colony*, 506 U.S. 194, 209 (1993) ("broad definition . . . in 1 U.S.C. § 1 applies in spite of incongruities [when] some other aspect of statutory context independently indicate[s] the broad reading").

The use of the singular to include multiple photographs makes sense in the context of the PNSDA. That statute leaves to the Secretary the task of determining the danger posed by release of any number of photographs—one or more. Phrasing the statute in the singular permits the Secretary to consider just one photograph, if that is what is presented to him. In contrast, if the statute were phrased in the plural ("For any photographs . . . the Secretary shall issue a certification"), his ability to issue a one-photograph certification would be in doubt. To avoid such ambiguities, the House of Representatives' drafting manual directs legislators to "[a]void plurals." House Legislative Counsel's Manual on Drafting Style § 351(g) (1995 ed.), *available at* https://legcounsel.house.gov/

HOLC/Drafting_Legislation/draftstyle.pdf. As the manual explains,

> The clearest expression, even of complex policies, uses singular rather than plural nouns, if for no other reason than it cuts out one unnecessary layer of possible relationships. "Any employee who . . . " works the same as "Employees who . . . " yet it avoids any misreading that (1) an implicit precondition exists that 2 employees must be involved before either gets covered, or (2) the statement only applies to a group of employees, as such.

*Id.*[5] The same concern about preventing such an "implicit precondition" from being misread into the Secretary's certification authority applies here.

Taken together, these factors—the PNSDA's definition of "photograph" in the plural, the Dictionary Act, Congress's drafting practices, and the need to allow the Secretary to certify one or more photographs

---

[5] *See also* House Office of the Legislative Counsel Guide to Legislative Drafting, *available at* https://legcounsel.house.gov/HOLC/Drafting_Legislation/Drafting_Guide.html#VIICm ("In general, provisions should be drafted in the singular . . . ."); Senate Legislative Drafting Manual § 104(a) (1997), *available at* http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf ("A subject, direct object, or other noun should be expressed in the singular.").

as appropriate to the situation—undermine the district court's interpretation that the PNSDA requires the Secretary to consider each photograph individually.

Regardless, even if individualized review of the photographs is required by the PNSDA, it was conducted here. As described more fully below, a Department of Defense attorney reviewed each of the photographs encompassed by the Secretary's certification as part of the certification process. (JA 282-83). Thus, to the extent the PNSDA and its use of the singular term "photograph" mandates that each document be examined before it may be certified, that requirement was satisfied.

### 2. The PNSDA Permits the Secretary to Rely on His Subordinates for Individualized Review and to Utilize Sampling

The district court's ruling that the Secretary himself must consider each photograph individually also improperly constrains the Secretary's authority to determine how best to perform the statutory task of determining danger to U.S. citizens, servicemembers, and employees. Nothing in the PNSDA prescribes any particular means by which the Secretary is to make that determination; the Secretary therefore may choose any reasonable method of doing so. *See JTEKT Corp. v. United States*, 642 F.3d 1378, 1383 (Fed. Cir. 2011) (agency acts "within its discretion" to choose means of performing task when "statute is silent as to any . . . methodology"); *Kennedy for President Comm. v. FEC*, 734 F.2d 1558, 1563 (D.C. Cir.

1984) ("statute's silence . . . manifests a discernible congressional intent to accord to the [agency] discretion in the formulation of a method"). More generally, the Secretary has specific statutory authority, "[u]nless specifically prohibited by law," to "exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate." 10 U.S.C. § 113(d).[6]

In this case, the Secretary delegated the individualized review of all of the photographs to an attorney in the Department's Office of the General Counsel, and retained the authority to issue the certification himself based on that review and advice from the three generals. The attorney assigned to coordinate the certification process thus reviewed all of the photographs on the Secretary's behalf and grouped them into categories. (JA 282-83). The attorney then worked with the leadership of the Office of the General Counsel to select representative samples from each of the categories, ensuring that the samples chosen accurately represented all of the photographs in each category. (JA 282-83). The attorney then provided the representative sample to the senior attorneys for the three generals and obtained the generals' written recommendations regarding whether the PNSDA certification should be renewed. (JA 283). All three generals agreed that renewal was appropriate

---

[6] There are a few instances where Congress has prohibited delegation of the Secretary's authorities, *e.g.*, 10 U.S.C. § 2466(c), but Congress did not do so in the PNSDA.

as to all of the photographs. (JA 283-84, 286-92). The Department of Defense attorney then met with the Department's General Counsel, who in turn met with the Secretary of Defense to discuss whether to renew the certification. The Secretary then executed the certification. (JA 284).

The Secretary's method of making the required determination was reasonable under the terms of the PNSDA. Although the use of representative samples means that the Secretary may not have personally reviewed every photograph at issue, that is irrelevant. Neither the PNSDA nor any other law authorizes a court to look behind the Secretary's decision regarding his degree of personal participation or the process by which he reached his determination. "'[W]hen a decision has been made by the Secretary . . . , courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination.'" *National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974) (Friendly, J.) (quoting *De Cambra v. Rogers*, 189 U.S. 119, 122 (1903)); *see United States v. Morgan*, 313 U.S. 409, 422 (1941) (improper to take cabinet officer's testimony regarding the "manner and extent of his study of the record and his consultation with subordinates" before making decision); *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (same), *cert. denied*, 134 S. Ct. 1510 (2014). Indeed, "government would become impossible if courts were to insist" that an agency head "personally familiarize himself" with all the evidence supporting

a decision committed to him by statute. *Nutritional Foods*, 491 F.2d at 1146.

There are literally hundreds of statutory and regulatory requirements that the Secretary of Defense make certain certifications, render determinations, or issue reports. In the National Defense Authorization Acts for fiscal years 2011 to 2015 alone, there are over seventy certification requirements, many of which require detailed and complicated analyses. Two examples among many illustrate the danger of the district court's holding. The NDAA for 2005 requires the Secretary to certify that certain persons who handle military detainees have been trained yearly in the law of war and the Geneva Conventions. Pub. L. No. 108-375, § 1092, 118 Stat. 1811, 2069-70. The 2015 NDAA requires the Secretary to certify whether a particular Air Force installation in the Azores is an "optimal location" for certain forces "based on an analysis of operational requirements." Pub. L. No. 113-291, § 1063, 128 Stat. 3292, 3503-04. If the Secretary were required to personally review or have described to him in detail all of the underlying information for each of those determinations, as well as dozens of others, and then specify a detailed basis for his conclusion in the certification, the Department of Defense, which has three million military and civilian personnel serving around the globe, would be literally unable to operate.

Instead, as this Court has held, it will "suffice" if the agency head "considered summaries" of the underlying matters "and conferred with his staff about them." *Id.* That is precisely what the Secretary of De-

fense did here. In holding that the Secretary must undertake a particular procedure—that he must "demonstrate knowledge of the contents of the individual photographs," "review[ ] the photographs personally or hav[e] others describe their contents to him," and specify the "factual basis" for his conclusions and the harm that would occur in the certification itself (JA 328-29)—the district court improperly constricted the Secretary's authority. None of the steps mandated by the district court are included in the PNSDA—to the contrary, the statute specifies what the certification must "stat[e]," and the requirements do not include a statement of the factual basis of the Secretary's certification or the particular harm that the Secretary predicts. PNSDA § 565(c)(1)(A). A court may not "lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply," *Jama*, 543 U.S. at 341, and may not "impose upon the agency its own notion of which procedures are 'best,'" *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978). The Department of Defense read the statute to mean that the determination of harm was the Secretary's to make, and he may make it by enlisting the assistance of his generals and his counsel to sample the photographs. *See* 10 U.S.C. § 113(d). That interpretation of the statute was reasonable and consistent with the PNSDA's text and purpose, and deserves the deference of this Court. *See United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001) (according deference to agency interpretation of statute pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)).

## POINT II

### The Photographs Are Exempt Pursuant to FOIA Exemption 7(F), as Their Release Could Endanger the Lives or Physical Safety of Individuals

Separately from the PNSDA, FOIA's exemption 7(F) protects the photographs from disclosure.

### A. Exemption 7(F) Protects a Record from Disclosure That Could Endanger the Life or Safety of an Unspecified Individual

Exemption 7(F) protects "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). Documents are "compiled for law enforcement purposes" if they are compiled for that purpose at the time the FOIA request is made, even if initially compiled for other purposes. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155 (1989); *Ortiz v. Dep't of Health and Human Services*, 70 F.3d 729, 732-33 (2d Cir. 1995). Here, it is undisputed that the photographs were compiled for law enforcement purposes. *ACLU v. DoD*, 543 F.3d at 67. Accordingly, the only question presented is whether release of the photos "could reasonably be expected to endanger the life or physical safety of any individual."

As explained below, the release of the photographs at issue in this case "could reasonably be expected to endanger the life or physical safety" of U.S. service-

members and other personnel abroad, due to the increased risk of anti-American violence.[7] By its terms, "[t]he scope of [exemption 7(F)] is broadly stated." *Electronic Privacy Information Center v. Department of Homeland Security* ("*EPIC*"), 777 F.3d 518, 523 (D.C. Cir. 2015), *rhg. en banc denied* (May 13, 2015). While it is true, as this Court noted in this case, that FOIA's exemptions "'are to be narrowly construed,'" *ACLU v. DoD*, 543 F.3d at 69-70 (quoting *FBI v. Abramson*, 456 U.S. 615, 630 (1982)), the Court is also obliged to give effect to the plain meaning of the exemption, which is "intended to have meaningful reach and application," *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). The exemption protects documents whose disclosure could be expected to endanger "*any* individual." The plain text resolves the matter: as the D.C. Circuit has held, "Congress' use in Exemption 7(F) of the word 'any' is instructive. Generally, 'the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."'" *EPIC*, 777 F.3d at 525 (quoting *Ali v. Fed.*

---

[7] This Court rejected that view in *ACLU v. DoD*, holding that exemption 7(F) does not apply because the phrase "any individual" should not, in the Court's view, be read "to 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." 543 F.3d at 67. As discussed below, that holding is not binding on the Court now, as it was vacated by the Supreme Court, and should not be followed as it was in error.

*Bureau of Prisons*, 552 U.S. 214, 219 (2008); quotation marks omitted); *accord Boyle v. United States*, 556 U.S. 938, 944 (2009) ("The term 'any' [in a definitional provision] ensures that the definition has a wide reach."); *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007) (use of the word "any" underscores intent to have broad scope); *Salinas v. United States*, 522 U.S. 52, 56-57 (1997) ("any" suggests that the scope is "expansive" and "unqualified"); *United States v. Ballistrea*, 101 F.3d 827, 836 (2d Cir. 1996) ("unnecessary to go beyond the plain language of the statute. 'Any' means 'any.'" (quotation marks omitted)). While in some contexts, "any" may have a narrower meaning, "in the context of Exemption 7(F) the word 'any' demands a broad interpretation." *EPIC*, 777 F.3d at 525. As the D.C. Circuit explained,

> Congress could have, but did not, enact a limitation on Exemption 7(F), such as "any specifically identified individual." *See Sims,* 471 U.S. at 169 n.13[.] By contrast, in the Privacy Act Congress afforded special treatment to certain law enforcement records associated with an "identifiable individual." *See* 5 U.S.C. §§ 552a(a)(6), (j)(2)(B), (*l*)(2); *cf. Sims,* 471 U.S. at 169 n. 13[.] The language of Exemption 7(F), which concerns danger to the life or physical safety of any individual, suggests Congress contemplated protection beyond a particular individual who could be identified before the fact.

*Id.*; *see United States v. Gonzales*, 520 U.S. 1, 5 (1997) (absent "language limiting the breadth of that word," term "any" should be given normal, expansive meaning)

Thus, "FOIA provides no textual basis for requiring the [government], for purposes of Exemption 7(F), to identify the specific individuals at risk from disclosure, and to do so would be to 'take a red pen' to the words chosen by Congress that are to be understood to have their ordinary meaning, absent indication to the contrary." *EPIC*, 777 F.3d at 525 (quoting *Milner v. Dep't of the Navy*, 562 U.S. 562, 573 (2011); alterations omitted). When the government shows that disclosure "poses a concrete and non-speculative danger to numerous albeit unspecified individuals, and . . . thereby assert[s] a direct nexus between disclosure and a reasonable possibility of personal harm," exemption 7(F) is satisfied. *Id.*

And the national security context again requires deference to the government's predictive judgments. In matters of national security, "before-the-fact individual identification is unlikely to be practical." *Id.* "'The confluence of Exemption 7(F)'s expansive text and the court's generally deferential posture when it must assess national security harms'" means that the government may satisfy exemption 7(F)'s "risk threshold" by showing an expectation of harm to unspecified individuals. *Id.* (quoting *Public Employees for Environmental Responsibility v. U.S. Section, International Boundary and Water Comm'n*, 740 F.3d 195, 205 (D.C. Cir. 2014)). More generally, in FOIA cases, courts "have expressly recognized the propriety

of deference to the executive" with respect to "claims which implicate national security." *Center for National Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926-27 (D.C. Cir. 2003). Thus, a court "may rely on government affidavits to support the withholding of documents under FOIA exemptions," and it is "equally well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview." *Id.* (citation omitted); *accord Gardels v. CIA*, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982).

Nor does FOIA's exemption 1—which exempts from disclosure records properly classified in the interests of national security—mean that exemption 7(F) cannot cover records whose disclosure would endanger unspecified members of large populations. "[A]dhering to the plain text of Exemption 7(F) [does not] eviscerate Exemption 1, which applies even to records *not* compiled for law enforcement purposes." *EPIC*, 777 F.3d at 526. Exemptions may, and often do, overlap with respect to a particular record, and there is no reason to read them as mutually exclusive. While this Court deemed it "inexplicabl[e]" that in some cases one exemption may create a lower threshold of protection from disclosure than another, 543 F.3d at 74, that may well be the case whenever more than one exemption applies to a document. Nor is there anything anomalous about Congress's decision to recognize the acute need for protection where disclosure would threaten the lives or safety of actual people, while setting a different standard for protecting other types of information.

The statutory history of exemption 7(F) confirms the D.C. Circuit's understanding. In its original form, exemption 7(F) applied only to documents whose disclosure would "endanger the life or physical safety of any law enforcement officer." 5 U.S.C. § 552(b)(7) (1982). In 1986, however, Congress expanded the exemption to encompass the life and physical safety "of any individual." The Court must give meaningful effect to that significant expansion of the exemption's coverage. *Stone v. INS*, 514 U.S. 386, 397 (1995). "[U]nderstood in context, the phrase 'any individual' makes clear that Exemption 7(F) now shields the life or physical safety of *any* person, not only the law enforcement personnel protected under the pre-1986 version of the statute." *EPIC*, 777 F.3d at 525. This Court's prior opinion suggested that Congress intended to extend exemption 7(F) only to those who were not law enforcement officers but were "involved in [law enforcement] investigations . . . [and] faced similarly specific threats of violence," relying on statements of members of Congress and a Deputy Assistant Attorney General. *ACLU v. DoD*, 543 F.3d at 77-80. But as the D.C. Circuit pointed out, other legislators' comments "viewed the amendment to Exemption 7(F) as relatively broad,"[8] and the Deputy

---

[8] In particular, the "principal author" and sponsor of the exemption 7 amendments emphasized that "[t]here should be no misunderstanding" that the relevant amendments "are intended to broaden the reach of this exemption" and "ease considerably [the government's] burden in invoking it." 132 Cong. Rec. 31,423-31,424 (1986).

Assistant Attorney General also expressed concerns that the prior version of the exemption did not protect "'the life of any other person.'" *EPIC*, 777 F.3d at 527. In any event, none of these pieces of legislative history are sufficient to overcome the clear meaning of the broad statutory text that was actually enacted. *Id.*

This Court previously rejected the view that exemption 7(F) applies here, holding that the phrase "any individual" should not be read "to 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." 543 F.3d at 67. That holding was vacated by the Supreme Court, and therefore is not binding on this Court now. *O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect . . . ."); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (vacatur by Supreme Court "clears the path for future relitigation of the issues between the parties"); *Brown v. Kelly*, 609 F.3d 467, 476-77 (2d Cir. 2010) (vacated decision "is not technically binding on us" but may be treated as "persuasive authority"); *Russman v. Board of Education of City of Watervliet*, 260 F.3d 114, 122 n.2 (2d Cir. 2001) ("When imposed by the Supreme Court, vacatur eliminates an appellate precedent that would otherwise control decision on a contested question throughout the circuit."). In addition, as discussed above, the Court of Appeals for the District of Columbia Circuit has recently disagreed with this Court's analysis; to

follow the *ACLU v. DoD* decision would therefore create a division of authority.

In any event, for the reasons explained above, this Court's now-vacated holding 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," 543 F.3d at 71, was erroneous. Under such an interpretation, the document in *EPIC*—a Department of Homeland Security protocol for preventing the use of wireless networks to detonate explosive devices in the manner such networks were used to bomb the London subway in 2005—would not have been protected from disclosure by exemption 7(F). In that case, the government similarly was unable to identify a specific individual, as the population at risk was "anyone in the United States," 777 F.3d at 524—there was no way to know in advance which Americans might fall victim to an improvised explosive. The need to prevent disclosure—and the resulting circumvention—of such a life-saving protocol is obvious, and the D.C. Circuit correctly held that exemption 7(F) applies. Yet under the *ACLU v. DoD* rule, such "risks that are speculative with respect to any individual" but are "certain" if a large population is implicated—as is the case here, and as was the case in *EPIC*—would not trigger that exemption's protection. That result makes little sense: as the government stated to the D.C. Circuit, "it would be anomalous if it could withhold [a record] if disclosure poses a danger to a small group of specifically identifiable people but not where many or most people

would be endangered by production." 777 F.3d at 524. This Court should therefore follow the D.C. Circuit's holding that the government need not identify specific individuals at risk to invoke exemption 7(F).

### B. The Government Established That Release of the Photographs Could Endanger the Lives or Physical Safety of U.S. Servicemembers and Civilians

The standards of exemption 7(F) are satisfied here. The declarations and certifications submitted by the government establish the dangers posed by release of the photographs, a determination to which this Court should defer.

The Department of Defense has repeatedly affirmed its predictive judgment regarding the risks to the lives and safety of individuals. The Secretary of Defense certified that release of the photographs would cause such a risk in 2009 and 2012. (JA 196, 240). As explained above, both of those certifications were based on the expert opinions of high-ranking generals, including the Chairmen of the Joint Chiefs of Staff, the Commanders of U.S. Central Command, and the commanding generals in Iraq and Afghanistan at the respective times. (JA 196, 240).

In 2012, General Allen, the Commander of U.S. forces in Afghanistan, concluded that release of the photographs "will endanger the lives" of U.S. and coalition military personnel, as it would cause a strong public outcry, much like recent public reactions to similar disclosures that led to violent and deadly protests. (JA 286). General Allen also determined, based

on his experience, that the release will exacerbate the risk of "insider threats" by Afghan security forces incited to violence by extremists, and will assist those extremists in recruitment and fundraising. (JA 286-87). General Mattis, Commander of the U.S. Central Command, agreed that release of the photographs would "fuel[ ] civil unrest" and cause the targeting of U.S. and coalition forces, and provide violent extremists with a recruiting tool. (JA 289). Indeed, General Mattis considered the 2012 threat even greater than the threat in 2009, due to the increased "insider threat." (JA 290; *contra* JA 249-51). General Dempsey, the Chairman of the Joint Chiefs of Staff, "strongly concur[red]" in his generals' recommendations, concluding that "public disclosure of these photos at this time would endanger citizens of the United States, members of the U.S. Armed Forces, or employees of the U.S. Government deployed outside the United States." (JA 291).[9]

---

[9] Similarly, in the litigation in 2005 and 2006, the government presented the district court with declarations from Brigadier General Carter Ham—then the Deputy Director for Regional Operations and a commander with extensive military experience, particularly in Iraq—and General Richard B. Myers, then the Chairman of the Joint Chiefs of Staff. The generals stated that release of these photographs "will pose a clear and grave risk of inciting violence and riots" against U.S. servicemembers, other U.S. personnel, and civilians in Iraq and Afghanistan. (JA 76, 108, 179). Their conclusion was based on the

Under settled FOIA and national security law, these statements are entitled to considerable deference. Exemption 7(F) turns on whether disclosure "could reasonably be expected" to endanger the life or physical safety of any individual, 5 U.S.C. § 552(b)(7)(F), thus necessitating a predictive judgment. The government "need only demonstrate that it reasonably estimated that sensitive information could be misused for nefarious ends." *Public Employees for Environmental Responsibility*, 740 F.3d at 206. Here, that judgment involves both military and national security expertise—areas in which deference is particularly appropriate. *See, e.g.*, *Zadvydas v. Davis*,

---

military experience of these two high-level military officers, the assessments of combat commanders in Iraq and Afghanistan, and intelligence reports from experts on the Middle East, Arab culture, and Islam. (JA 64-67, 174). Indeed, Brigadier General Ham solicited and received the opinions of the combatant commanders in Iraq and Afghanistan, all of whom agreed with his conclusion about the risks of release. The generals' analysis took into consideration the sensitivity to allegations of detainee mistreatment within Iraq and Afghanistan, the specific content of these photographs, the increased violence following the unauthorized release of Abu Ghraib photographs in 2004, the attacks on British interests following the release of photographs of detainees in British custody, and the sophisticated propaganda and recruiting undertakings of insurgent and terrorist organizations. (JA 64-83, 97-113, 172-81).

533 U.S. 678, 696 (2001) (noting that "terrorism or other special circumstances" warrant "heightened deference to the judgments of the political branches with respect to matters of national security"); *Egan*, 484 U.S. at 530 ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); *Center for National Security Studies*, 331 F.3d at 926-27 (courts in FOIA cases "have expressly recognized the propriety of deference to the executive" with respect to "claims which implicate national security"); *Gardels*, 689 F.2d at 1104-05.

Accordingly, exemption 7(F) applies, and protects the photographs at issue here from disclosure.

## CONCLUSION

**The judgment of the district court should be reversed.**

Dated: New York, New York
July 2, 2015

Respectfully submitted,

PREET BHARARA,
*United States Attorney for the Southern District of New York, Attorney for Defendants-Appellants.*

BENJAMIN H. TORRANCE,
TARA M. LA MORTE,
SARAH S. NORMAND,
*Assistant United States Attorneys, Of Counsel.*

BENJAMIN C. MIZER,
*Principal Deputy Assistant Attorney General*

DOUGLAS N. LETTER,
MATTHEW M. COLLETTE,
CATHERINE H. DORSEY,
*Attorneys, Appellate Staff*
*Civil Division, Department of Justice*

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 13,939 words in this brief.

PREET BHARARA,
*United States Attorney for the Southern District of New York*

By: BENJAMIN H. TORRANCE,
*Assistant United States Attorney*