No. 15-1606

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiff-Appellees,

v.

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

Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (No. 04cv4151-AKH)

BRIEF OF PLAINTIFF - APPELLEES

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Defendants.

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PRELIMINARY STATEMENT

For over a decade, Plaintiffs have sought access under the Freedom of Information Act ("FOIA") to materials regarding the treatment of detainees in U.S. custody, a matter of great public interest. In particular, Plaintiffs have sought photographs which are known to exist, but which the government has sought to suppress; when initial efforts to invoke inapplicable provisions failed in this Court, Congress enacted the Protected National Security Documents Act ("PNSDA"), which specifically permitted the Secretary of Defense to prevent the disclosure of the photographs here at issue by issuing a certification "that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."

This case presents the question of whether and to what extent the Secretary's determination is reviewable by the Court. The Department of Defense ("DOD") contends that Congress silently stripped courts of any authority to question the Secretary's refusal to release the photographs, or in the alternative, that any review should be limited to whether or not he in fact issued a certification, regardless of what it says or what process was used to derive it. Plaintiffs and the district court disagreed.

This Court should now reject DOD's extreme argument, which fundamentally misunderstands the role of the judiciary in FOIA cases. While the PNSDA allows DOD to withhold certain photographs under Exemption 3 to FOIA, it nowhere seeks to eliminate, limit or even alter the power of Courts to exercise the power of judicial review that is explicit in FOIA; certainly, it did not do so expressly, as would be required to amend FOIA, as this and other Courts have made clear

Nor, as the district court correctly held, may judicial review be rendered meaningless by being limited, as DOD would have it, to the fact of certification alone. FOIA requires that an agency have complied with the conditions set forth in any withholding statute, and it is the obligation of the Courts to assure that this has occurred before the presumption of openness which is embodied in the law may be rebutted. Here, that requires, by the plain language of the PNSDA, that the Secretary of Defense make an individualized determination of the risk to American lives posed by the potential release of each photograph: only if that process occurs, and only if the Secretary's determination satisfies the standards of FOIA may the photograph by withheld. Undisputedly, that did not occur here, even after the district court provided DOD with numerous opportunities to follow the

required process and to adequately justify its decision. Accordingly, the district court properly granted summary judgment in favor of Plaintiffs.

Finally, DOD seeks to revive an argument that this Court has already rejected, that these documents fit under an exemption to FOIA for law enforcement documents. But nothing in the PNSDA, in the record or in recent precedents has eroded the foundations of this Court's prior decision, and this Court should decline the invitation to reverse itself.

In sum, and for the reasons set forth below, DOD has failed to justify its continued withholding of the photographs at issue. Accordingly, the Court should affirm the judgment of the district court decision and order the agency to release these documents to the public.

QUESTIONS PRESENTED

(1) Whether the District Court correctly held that the PNSDA did not silently displace FOIA's judicial review provision, which mandates *de novo* review of any claimed substantive exemption to the Act's broad disclosure requirements.

(2) Whether the District Court correctly held that the Secretary must establish more than the fact of his certification and instead must demonstrate that he complied with the statutory criteria enunciated in the PNSDA.

(3) Whether this Court should reject its prior decision holding that the photos sought in this lawsuit were not exempt from disclosure under FOIA Exemption 7(f).

STATEMENT OF FACTS

On October 7, 2003, Plaintiffs filed a FOIA request with DOD seeking all records relating to the treatment, death, or rendition of detainees held in U.S. custody abroad. In August 2004, the district court ordered DOD to process Plaintiffs' request and directed Plaintiffs to supply a priority list in an effort to streamline the proceedings. *ACLU v. Dep't of Def.*, 339 F. Supp. 2d 501, 502-05 (S.D.N.Y. 2004). On that priority list, Plaintiffs identified, among other records, a set of photographs and videos that Army Specialist Joseph Darby had provided to Army investigators; later, Plaintiffs learned of the existence of other photographs. It is these latter photographs that are the subject of this appeal.

A. The District Court's Orders to Release and this Court's Affirmance of the District Court's Decision.

Since the start of this litigation, the Government has resisted disclosing numerous documents integral to the ongoing public debate over U.S. treatment of detainees. Thus, in 2005, DOD initially withheld the photographs here at issue on the basis of FOIA Exemptions 6 and 7(C), 5 U.S.C. § 552(b)(6), (7)(C), arguing that their disclosure would infringe the privacy interests of the prisoners depicted even if the photographs were redacted to obscure identifying features. Dkt. no. 80 (March 30, 2005). After oral argument on the parties' cross-motions for summary judgment,

DOD offered a new justification for withholding the photographs: that they were exempt from disclosure under Exemption 7(F), 5 U.S.C. § 552(b)(7)(F), because they were "compiled for law enforcement purposes" and because disclosure "could reasonably be expected to endanger the life or physical safety of any individual." Dkt. No. 114 (July 22, 2005).

The district court rejected these arguments, holding that the prisoners' privacy interests could be protected by the redaction of identifying features and that any residual privacy interest would be outweighed by the public interest in disclosure. *ACLU v. DOD*, 389 F. Supp. 2d 547, 571-74 (S.D.N.Y. 2014). The court also rejected DOD's additional argument relating to Exemption 7(F). *Id.* at 574 - 79. It acknowledged the "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." *Id.* at 578. But it rejected that speculative harm as a basis for withholding the images: "The terrorists in Iraq and Afghanistan do not need pretexts for their barbarism; they have proven to be aggressive and pernicious in their choice of targets and tactics." *Id.* at 576. The court held that the public interest in the photographs was significant, that disclosure would foster "education and debate," and that the "core values of FOIA [were] very much implicated." *Id.* at 578.

DOD appealed from the district court's judgment ordering release of the images, but withdrew the appeal after a third-party published the Darby images on the internet. Later, however, DOD admitted that it had twenty-nine additional photographs, but maintained that release of those images would endanger Americans serving in Iraq and Afghanistan. The district court ordered the Government to provide copies of the photos for *ex parte*, *in camera* review, *ACLU v. Dep't of Def.*, No. 1:04-cv-4151, 2006 WL 1722574, at *1 (S.D.N.Y. June 21, 2006), after which it held that it would hew to the reasoning of its 2005 decision and ordered twenty one of the photographs released, all but one in redacted form. *Id*. The remaining eight photographs, the court held, were not responsive to Plaintiffs' FOIA request.[1] *Id.*

DOD appealed the District Court's decision, relying on its prior claim to withholding under Exemptions 6, 7(C), and 7(F). A unanimous panel of this Court affirmed the district court's decision. *ACLU v. Dep't of Def.*, 543

[1] On June 29, 2006, DOD informed Plaintiffs that it possessed twenty-three more images responsive to Plaintiffs' request, *ACLU v. DOD*, 543 F.3d at 65 n.2, and on May 28, 2009, acknowledged the existence of an unspecified but "substantial number" of additional responsive images, Decl. of Gen. David H. Petraeus ¶ 2. Mot. to Recall the Mandate, *Am. Civil Liberties Union v. Dep't of Def.*, No. 06-3140 (2d Cir. May 28, 2009). The parties agreed that the analysis pertinent to the court's determination with regard to the original 29 photographs would apply to these new images as well. *ACLU v. Dep't of Defense*, 40 F. Supp. 3d 377, 380 (S.D.N.Y. 2014).

F.3d 59 (2d Cir. 2008). Specifically, the Court rejected DOD's claimed exemption under 7(F), which it described as an "afterthought." *id.* at 66, holding that the phrase "'any individual' in exemption 7(F) may be flexible, but is not vacuous." *Id.* at 67. Thus, the Court ruled, "the legislature's choice to condition the exemption's availability on danger to an *individual*, rather than danger in general, indicates a requirement that the subject of the danger be identified with at least reasonable specificity." *Id.* at 68 (emphasis in original). Because DOD had not offered any basis to believe that any particular person would suffer if redacted photos were released, the Court concluded that the Government had not met its burden to prove that the images were exempt from disclosure. *Id.* at 71. As the Court explained, "it is plainly insufficient to claim that releasing documents could reasonably be expected to endanger some unspecified member of a group so vast as to encompass all United States troops, coalition forces, and civilians in Iraq and Afghanistan." *Id.* The Court further held that the documents did not fall under FOIA exemptions 6 or 7(C).

B. The Government Seeks Certiorari and Congress Intervenes.

On August 7, 2009, the Government petitioned the Supreme Court for a writ of certiorari. While the petition was pending decision, Congress passed and the President signed the PNSDA. The Act authorized the

Secretary of Defense to withhold an image from release if certain conditions were met. Thus, under section (c) of the statute, a document may qualify for withholding if (1) "the Secretary has issued a certification" for it; (2) it "was taken during the period beginning on September 11, 2001 and January 22, 2009;" and (3) it "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." Section (d) of the statute dictates that the Secretary follow a mandated process when choosing to certify a photo for withholding: "For any photograph described under subsection (c). . . the Secretary of Defense shall issue a certification if the Secretary of Defense determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." *See* Department of Homeland of Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142, § 565 (2009).

According to the Act's sponsor, this new procedure would allow the President to "fight the release of the photographs" that DOD would otherwise have to disclose under the Second Circuit's decision. 155 Cong Rec S5650, 5672 (statement by Sen. Lieberman). As Senator Graham explained, the Act "struck a reasonable compromise," in that it "d[id]n't

change FOIA, in its basic construct," but still "provide[d] congressional support to the President's decision" to seek to prevent release. After passage of the PNSDA, the Supreme Court granted the Government's petition, vacated the Second Circuit's judgment, and remanded for further proceedings.[2]

C. The 2009 Certification

In the immediate wake of the PNSDA's passage, Secretary of Defense Gates issued a brief certification indicating that he intended to withhold the photographs sought by Plaintiffs from release. The Secretary identified "a collection of photographs . . . assembled by the Department of Defense," that "include but are not limited to the 44 photographs referred to in the decision of the United States Court of Appeals for the Second Circuit." JA 196. The Secretary stated that he had "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." *Id.*

Plaintiffs moved for summary judgment, arguing that the Secretary had not provided a basis to conclude that disclosure would cause the harm

[2] At the time of the bill's passage, Senator Lieberman suggested that DOD had over 2,000 images in its possession. *See* 155 Cong. Rec. S5987 (statement by Sen. Lieberman).

that the statute was meant to prevent, and certainly not with respect to each withheld photograph. See Dkt no. 444 (Dec. 17, 2010). The district court denied Plaintiffs' motion from the bench. JA 230-39. The court recognized that FOIA required it do something more than verify the fact of the certification. JA 224-225, 238. Nevertheless, noting that the President had called for legislation in response to a specific warning from the Prime Minister of Iraq that the release of photos would lead to attacks, JA 235, the Court concluded that DOD had "satisfied its burden to support the claimed Exemption 3 from disclosure." JA 238.

D. The 2012 Recertification

On November 9, 2012, just days before the 2009 certification expired, Secretary of Defense Panetta issued a renewal certification for the photographs. This Recertification is as spare as was the 2006 certification and contains nearly identical language. Thus, it also pertains to "a collection of photographs . . . assembled by the Department of Defense" that "includes but are not limited to 44 photographs referred to in the decision of the United States Court of Appeals for the Second Circuit." JA 240. Like the original, the Recertification concludes that the Secretary had "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." *Id.*

Plaintiffs moved for summary judgment, arguing that, as the district court had previously held, the Secretary's certification was subject to judicial review, but arguing that even if the court had been right to accept the certification in 2009, when the President had pointed to a recent, specific, concrete threat delivered by the Prime Minister of Iraq, it should not do so now that America was no longer at war in Iraq. Despite this change, the recertification parroted the language from that prior period, when the United States was embroiled in conflicts on two fronts. Given the dissonance between the changed circumstances on the ground and the recycled text in the certification, Plaintiffs urged the district court to review the Secretary's determination. DOD countered, as it does here, that the Secretary's categorical and conclusory certification was sufficient and that any review should be limited to a determination of whether he had issued a certification at all. Dkt no. 496 (Feb. 11, 2014).

The district court agreed with Plaintiffs and held that the Secretary's Recertification was deficient, for two reasons. First, the court held that FOIA's judicial review provision, 5 U.S.C. § 552(a)(4)(B), applied to the PNSDA; that is, FOIA still dictated the process by which courts would act as

a check on an agency's decision to withhold documents, even though the PNSDA granted that agency an additional substantive ground to resist disclosure. Congress, the district court reasoned, must have been "aware that [c]ourt[s] had construed FOIA as creating a background norm of broad disclosure of Government records, and [had] provided *de novo* judicial review of agency invocations of FOIA exception." *ACLU*, 40 F. Supp. at 377. Without some textual hint that Congress meant to alter or amend that provision, the district court declined to hold that federal courts had been silently stripped of their long-established power to review the executive's invocation of statutory exemptions to FOIA. The court further held that for its *de novo* review to be meaningful, DOD was required to provide some evidence that "support[ed] the factual basis for its assertion that these photographs should be withheld." *Id*. at 389. In sum, DOD had to explain "why, on November 9, 2012, the release of pictures taken years earlier would continue to 'endanger [Americans abroad].'" *Id.*

Second, the district court held that "[the 2012 Recertification] suggests that the Secretary of Defense has reviewed the photographs as a collection, not individually," as mandated by the statute. *Id*. at 390 (quotation marks omitted). The court reasoned that the plain text of the PNSDA "refers to the photographs individually—'that photograph'—and

therefore requires that the Secretary of Defense consider each photograph individually, not collectively." *Id*. at 389. The court further explained that "[e]ven if some of the photographs could prompt a backlash that would harm Americans, it may be the case that the innocuous documents could be disclosed without endangering the citizens, armed forces or employees of the United States. Considering the photographs individually, rather than collectively, may allow for more photographs to be released, furthering FOIA's 'policy of full disclosure.'" *Id*. (quoting *Halpern v. F.B.I.*, 181 F.3d 279, 284-85 (2d Cir. 1999)). Given that the 2012 Recertification only referred to the photos in the aggregate (*i.e.*, as "these photographs"), the court held that "the 2012 Recertification is insufficient to meet the government's burden of showing that the photographs were individually considered by the Secretary of Defense." *Id.* at 390.

The district court, however, provided DOD an "opportunity to create a record to justify its invocation of the PNSDA." *Id*. As the court explained in a later status conference, "[W]hat is necessary, is that the submission to me show an accountability, by the Secretary of Defense, of having considered and having made a finding with regard to each and every photograph, individually and in relation to the others." JA 274. "[The government's] burden," the court elaborated, "is to be specific, photograph

by photograph," JA 276, and to provide evidence "[r]egarding the harms that underlie the certification of 2012, . . . that prompted th[e] certification . . . that harm would result from the release of the photographs." JA 269.

E. DOD's Basis for Withholding

In response to the district court's invitation to create a record, DOD submitted a set of affidavits, declarations, and memos that purported to describe the basis for the Secretary's Recertification. That filing demonstrated that the Secretary had certified all of the photos for withholding even though the military experts who assessed the harm of possible release had reviewed only a subset of images. The required evaluation of "each and every photograph," JA 274, had, DOD conceded, never occurred.

Specifically, according to DOD's submission, Associate Deputy General Counsel Megan M. Weis had spearheaded the certification process. JA 282 ¶7. Weis "gathered all of the photographs subject to 2009 certification and reviewed all of them." *Id.* ¶8. Weis did not, however, evaluate whether release of any of the images might endanger Americans abroad. Rather, she "placed the photographs into three categories, and created a representative sample of five to ten photographs in each category to provide to senior military commanders for their review and judgment of

the risk from public disclosure of each category." *Id.* Weis used three criteria to create these three categories: "the extent of any injury suffered by the detainee;" "whether U.S. service members were depicted;," and "the location of the detainee in the photograph." *Id.* Weis's declaration did not explain how these criteria were relevant to assessing a potential threat to Americans, nor even describe the three groups of photographs that resulted. Nonetheless, Weis asserted that, with the help of "leadership in the DoD Office of the General Counsel," she "ensure[d] that the representative sample accurately characterized all of the photographs." *Id.*

Weis then sent the sample of 15 to 30 photographs to senior lawyers for the three military leaders tasked with assessing whether disclosure of the images might endanger American lives. *Id.* ¶9. She asked that "each attorney provide the representative sample to his commander and seek a written recommendation regarding whether the Secretary of Defense should renew the certification of the photographs." *Id.* Weis did not provide the attorneys with all the images, though she did provide the Department's General Counsel with a compact disk that contained all of the photographs. JA 284 ¶13.

After the three generals reviewed the small sample, they each recommended that the Secretary withhold all photographs from the public.

JA 283 ¶¶10-12. Based upon those recommendations, Weis prepared a draft certification for the Secretary's review and signature. JA 284 ¶13. She provided the General Counsel of DOD with the draft, the representative sample, the generals' recommendations, and the aforementioned disk. *Id*. Whether the General Counsel or the Secretary ever reviewed the sample, let alone all the images on the disk, is not mentioned in by Weis's declaration, or otherwise established; indeed, she did not attend the meeting between the General Counsel and the Secretary, but merely "received the signed renewal of the certification with respect to all of the photographs" at a later date. *Id*.

For their part, the generals submitted their recommendations in short, conclusory memoranda which, in some cases, relied upon statutorily irrelevant considerations. General Dempsey wrote only that "[b]ased on my familiarity with these photos, the fragile situation in the USCENTCOM Theater of Operations, particularly in Afghanistan and Pakistan, and the factual description provided by the memos, it is my view that public disclosure of these photos would endanger [Americans]," JA291. The majority of Generals Allen's and Mattis's recommendations discuss not potential danger to Americans, as the statute requires, but the political fallout that might result from disclosure. General Allen, for example, worried that disclosure might lead the "U.S. [to] suffer more generally from negative

publicity as media outlets allow the story to proliferate throughout the U.S. and abroad," and that "releasing such photographs would almost certainly exacerbate our current impasse with the Government of the Islamic Republic of Afghanistan . . . over the issue of transferring detainees to Afghan Custody." JA 287. General Mattis echoed these political and diplomatic anxieties, noting that "[t]his is an extraordinarily sensitive time in Afghanistan, . . . the negotiations for the Bilateral Security Agreement will soon begin." JA 290. The only part of the memoranda that touched upon the harm to Americans described in the PNSDA cited episodes of violence that followed the public airing of three prior instances of extreme disrespect towards Muslims. JA 286, 290. But none of the memoranda at any point made the case that any (let alone all) of the withheld pictures would be similarly inflammatory if released, or that political conditions are the same now as they were when those earlier episodes of violence took place.

Faced with DOD's admission that it had failed to comply with the PNSDA because the officials who assessed the potential threat of release did not in fact review each photograph, let alone making the findings that Americans would be endangered, the district court maintained its earlier position. Thus, the court stated that "it's the obligation of the Secretary of Defense to certify each picture in terms of its likelihood or not to endanger

American lives," JA 325, and that he had not done so. Specifically,, the court found, an "item by item certification was not performed." JA 308. Indeed, the court made clear that DOD had failed to provide the information that would allow it to undertake the meaningful judicial review that FOIA commands. *See* JA 318-19 (listing examples of information the District Court lacked in order to conduct any evaluation, including that "[w]e don't know the magnitude," "we don't know the numerator," "[i]n terms of detention in a prison camp, detention on the front lines, whether the picture was taken on the capture, whether the picture was taken in detention, what is the relationship between the location of the person and whatever was involved in the picture[,] we don't know"). The court having concluded that it was "not changing [its] view," JA 320, DOD requested additional time to consider whether it wished to provide that information, and otherwise comply with the court's decision. JA 320. The court agreed though it noted that DOD was exploiting a "sophisticated ability to obtain a very substantial delay." JA 323.

Nonetheless, rather than supplying a proper certification, DOD sought further clarification of the thrice settled issue of what the PNSDA required. In response, the district court again explained that the Secretary must evaluate each photo individually, JA 328, and must provide enough

information for the court to understand the basis for the Secretary's decision to withhold the documents. JA 329. The court made clear that it would issue no further clarifications, but again allowed DOD additional time to file a proper certification, or to release the photographs to Plaintiffs. JA 329. Finally, on the last possible day, DOD informed the court that it chose not to comply with the court's order and requested sixty days within which to seek an appeal. JA 331. The court granted that request, noting that DOD had achieved the very delay it had predicted. *Id.*

This appeal followed.

SUMMARY OF THE ARGUMENT

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Co.*, 437 U.S. 215, 242 (1978). "Although Congress enumerated nine exemptions from [FOIA's] disclosure requirement, 'these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Pub. Citizen v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir. 2008) (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (internal quotation marks omitted). "Accordingly, FOIA's exemptions are to be narrowly

construed." *Id.* And "[t]he burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been improperly withheld.'" *U.S. Dep't of Justice v. Tax Analysis*, 492 U.S. 136, 142 n.3 (1989).

Here, the district court held that DOD did not sustain this burden, even though the court gave it multiple opportunities to do so. On appeal, the Government does not argue that the record it marshaled below met the standard enunciated by the district court; rather, it attacks that standard, contending that the court either had no authority to review DOD's reasons for withholding, or, at most, that its authority was limited to verifying that DOD had in fact issued a certification, regardless of the content of that certification or the process which yielded it. In the alternative, DOD argues that this Court should revisit and abandon its 2008 decision that FOIA exemption 7(F) did not justify withholding these photographs. For the reasons set forth below, this Court should reject these extreme positions and affirm the District Court.

First, DOD argues that Congress silently stripped courts of the authority to review agency action taken under the PNSDA. But this position conflates the substantive authority to withhold authorized by FOIA Exemption 3, by which agencies may refuse to disclose information

specifically exempted from disclosure by other statutes, *see* 5 U.S.C. § 552(b)(3), with judicial review of an agency's attempt to withhold under FOIA. That is, even where an agency is statutorily entitled to withhold information pursuant to a statute that falls within the scope of Exemption 3, FOIA nonetheless mandates that courts conduct a *de novo* review of any invocation of that Exemption. *See* 5 U.S.C. § 552(a)(4)(B) (requiring *de novo* review of any agency attempt to withhold documents). Moreover, as courts have made clear, Congress may abrogate that judicial review provision only if it does so expressly. But here, nothing in the text, structure, or legislative history of the PNSDA indicates that Congress meant to limit or alter courts' authority to review the Secretary's substantive power to withhold under that statute, as incorporated into FOIA by Exemption 3.

Second, DOD argues that if there is any judicial review of the certification, that review is limited to determining whether the Secretary of Defense in fact executed the required certification. But this argument ignores the clear language of the PNSDA, which allows the Secretary to certify a photograph only if certain conditions are met, namely that "disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States" PNSDA § (d)(1).

Adopting DOD's argument would require that courts simply ignore those statutory criteria, turning them into rubber stamps for the executive. Unsurprisingly, other courts interpreting a statute nearly identical to the PNSDA have soundly rejected the very argument that DOD advances here, holding that FOIA requires courts to review the *basis* for the determination of harm upon which the statute premises the authority to withhold.

Finally, DOD seeks to revive an argument that this court squarely and unanimously rejected in *ACLU v. Department of Defense*, 543 F.3d 59 (2d Cir. 2008). Exemption 7(F), 5 U.S.C. § 552(b)(7)(F), allows for the withholding of "information compiled for law enforcement purposes" where release "could reasonably expected to endanger the life or physical safety of any individual." And DOD's argument to the contrary notwithstanding, this Court has already held that the text, structure, and legislative history of 7(F) require that "in order to justify withholding documents under exemption 7(F), an agency must identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual." *Id.* at 71. DOD does satisfy this standard or offer any basis to revisit this settled question, and the Court ought not do so.

ARGUMENT

I. THE PNSDA IS AN EXEMPTION 3 STATUTE, AND, ATTEMPTS TO WITHHOLD DOCUMENTS UNDER THAT PROVISION ARE SUBJECT TO *DE NOVO* REVIEW.

A. The PNSDA created a narrow substantive exemption to FOIA, but it did not alter or preclude judicial review under the Act.

FOIA Exemption 3 specifically authorizes an agency to "withhold a record otherwise subject to disclosure" if the record "is specifically exempted from disclosure by statute," 5 U.S.C. § 552(b)(3), so long as "the statute . . . establishes particular criteria for withholding," 5 U.S.C. § 552(b)(3)(A)(ii). Of course, any proposed withholdings, under any of FOIA's statutory exemptions, are subject to plenary judicial review, including withholdings based on Exemption 3, and the independent withholding statute upon which that exemption depends. *See* 5 U.S.C. § 552(a)(4)(B). As this Court explained in *A. Michaels Piano v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994), addressing Exemption 3, "[i]t is the responsibility of the federal courts to conduct *de novo* review when a member of the public challenges an agency's assertion that a record being sought is exempt from disclosure."

The PNSDA does not alter that long established rule of judicial review. The statute sets forth those conditions that define a "protected document," *see* PNSDA § (c), and the process by which the Secretary can

properly certify those documents for withholding, *see* PNSDA § (d). Together, these criteria result in a standard that changes the substance of the Secretary's authority to withhold: where FOIA once mandated that he release documents, *see ACLU*, 543 F.3d at 59 , the PNSDA now provides grounds upon which he may resist disclosure. But the statute says nothing about judicial review; indeed, it does not mention courts at all. And, as one of the bill's principle sponsors assured his colleagues prior to the bill's passage, the PNSDA "doesn't change FOIA, in its basic construct." 155 Cong Rec S5650, 5672 (statement of Sen. Graham); it merely "provides congressional support to the President's decision" to continue seek to prevent release. *Id.*

In this silence, DOD hears a congressional call to preclude judicial review and urges this Court to treat the PNSDA as a unique super-exemption that sweeps away a court's authority under FOIA. Gov't Brief at 21. The Court should reject this radical position for at least three reasons.

First, courts have long held that Congress may not supersede any provision of FOIA unless it does so expressly. As the district court noted, courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *ACLU*, 40 F. Supp. 3d at 387 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988)).

And as then Judge Scalia explained in *Church of Scientology v. IRS*, 792 F.2d 146 (D.C. Cir. 1986):

> FOIA is a structural statute, designed to apply across-the-board to many substantive programs . . . it is subject to the provision, governing all of the Administrative Procedure Act of which it is a part, that a 'subsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly.

Id. at 149 (quoting 5 U.S.C. § 559). In that case, the court rejected the government's claim that a statute allowing the IRS commissioner to withhold certain return information precluded judicial review. *Id.* Judge Scalia wrote, "We find it impossible to conclude that such a statute"—a provision of FOIA—"was *sub silentio* repealed by [the tax statute]." *Id.* To be sure, the court acknowledged, the new exemption set forth extensive criteria for withholding. But the statute's baroque structure did not prove that Congress had meant to preclude judicial review. Rather, "[t]he two statutes seem to us entirely harmonious; indeed, they seem to be quite literally made for each other": the tax statute provided a substantive prohibition on disclosure, and FOIA provided the means for a court to ensure that the agency had correctly invoked it.[3] *Id.*

[3] For this reason, DOD's critique of the *in para materia* canon misses the mark. Gov't Brief at 21 n. 1. The district court alluded to the canon not to

Just as in *Church of Scientology*, Congress's silence on the subject in the PNSDA indicates that it intended to preserve judicial review not destroy it.[4] The district court thus correctly held that Congress "was aware that . . .FOIA . . . provided for *de novo* judicial review of agency invocations of FOIA exceptions," but that nothing in the PNSDA "indicat[ed] that Congress intended for the PNSDA to depart from those norms."[5] *ACLU*, 40 F. Supp. at 387.

Second, although DOD argues that FOIA, and its judicial review provision, do not apply to the PNSDA because that statute begins with the phrase "Notwithstanding any other provision of law to the contrary …," *see*

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resolve an ambiguity, but merely to underscore that FOIA and the PNSDA work hand-in-hand.

[4] Five other circuits have agreed. *See e.g. Long v. U.S. Internal Revenue Service*, 742 F.2d 1173, 1182 (9th Cir. 1984); *Currie v. Internal Revenue Serv.*, 704 F.2d 523, 527 (11th Cir. 1983); *Linsteadt v. Internal Revenue Serv.*, 729 F.2d 998, 999 (5th Cir. 1984); *Grasso v. Internal Revenue Serv.*, 785 F.2d 80, 74-75 (3rd Cir. 1986); *DeSalvo v. Internal Revenue Serv.*, 861 F.2d 1217, 1221 (10th Cir. 1988).

[5] As the district court also explained, "in our legal system[,] [t]here is a 'strong presumption that Congress intends judicial review." *ACLU*, F. Supp. 3d at 387 (quoting *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670 (1986)). And where a statutory scheme is arguably ambiguous—which FOIA is not—courts should "adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review and that mechanical judgments are not the kind federal courts are set up to render." *Id.* (quoting *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995).

Gov't Brief at 21, had Congress intended to render FOIA inapplicable, or displace its judicial review provision, it would have employed a far clearer indication than this. Indeed, in the FOIA context, courts have routinely held that the same phrase—"notwithstanding any other provision of law"—indicates that Congress intended to create a substantive exemption to FOIA, not to eliminate judicial review. Thus, the tax statute in *Church of Scientology* opened with precisely that phrase. *See* 26 U.S.C. § 6103. Likewise, in *Newport Aeronautical Sales v. Dep't of the Air Force*, 684 F.3d 160 (D.C. Cir. 2012), the court allowed DOD to withhold documents under a statute that began with the same clause, but did so only after concluding that the language created a statutory exemption to FOIA, and then scrutinizing the grounds for withholding *de novo*. *Id.* at 165 (explaining that the provision beginning with the word "notwithstanding" "readily qualifies as an Exemption 3 statute"). And in *Public Citizen, Inc. v. FAA*, 988 F.2d 186 (D.C. Cir. 1993), the court concluded that the insertion of the phrase "notwithstanding any other provision of law" made clear, when it otherwise was not, that the statute at issue fell under Exemption 3. *Id.* at 195. Thus, DOD is simply incorrect when it argues that the phrase "notwithstanding any other provision of law to the contrary" in the PNSDA suggests that Congress meant to sweep all of FOIA away. Far from it—as other courts have held,

the words signal that Congress specifically intended to invoke Exemption 3, with the FOIA review that follows.[6]

Third, both the text and legislative context of the PNDSA reflect Congress's concern with substance rather than with judicial process. As this Court explained in *A. Michaels Piano*, the scope of "withholding statutes, [should be construed by] looking to the plain language of the statute and its legislative history, in order to determine legislative purpose." 18 F.3d at 144. Here, this Court had held that DOD could not withhold images under Exemption 7(F) without a basis to believe that a specific individual would be harmed by release of the photos in question. *ACLU*, 543 F.3d 59. In response, Congress passed a statute that expanded the range of harms that would support an agency decision to withhold, to threats to groups,

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[6] DOD supports its argument by relying on cases that have no connection to FOIA. Gov't Brief at 21. Both *Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993), and *Lockhart v. United States*, 546 U.S. 142 (2005), dealt with provisions that changed a substantive standard in a prior statute: in *Cisneros*, a new Housing and Urban Development Agency rule altered a rent formula by using the word "notwithstanding," 508 U.S. at 18; in *Lockhart*, Congress relied on the word "notwithstanding" to repeal a law that had barred the government from garnishing wages and benefits to satisfy outstanding student loans, 546 U.S. at 145. Neither challenge to those provisions arose under FOIA. Moreover, both involved a substantive conflict between old and new law. But here, no such conflict exists here because, although the PNSDA may have created new substantive authority to withhold the photographs sought, it did not affect the process by which a court reviews any attempt to do so.

specifically "citizens of the United States, members of the United States Armed Forces, [and] employees of the United States Government deployed outside the United States." PNSDA § (c)(1)(A). But although it was the Court that had prevented DOD from withholding the photos in question — but for this Court's decision, the PNSDA would have been unnecessary — Congress chose to say nothing about judicial review. To the contrary, Congress renounced any intent to "change FOIA, in its basic construct." 155 Cong Rec S5650, 5672 (statement of Sen. Graham). This Court should, then, interpret the PNSDA as Congress intended it–as adding substantive grounds upon which the Secretary could withhold photographs, subject to the judicial review that may occur in all Exemption 3 cases.

DOD argues that Congress's intent to preclude judicial review under FOIA can be inferred from its insistence that the Secretary of Defense periodically report to the legislature. Gov't Brief at 32. But FOIA itself demonstrates that congressional oversight and judicial review may coexist, side-by-side. Indeed, FOIA itself provides not only for judicial review, 5 U.S.C. § 552(a)(4)(B), but also for executive and congressional oversight of improper withholdings, *id*. § 552(a)(4)(F). More generally, the government's argument sweeps far too broadly, for it is simply not the law that a requirement of congressional oversight alone, absent any textual

command, automatically displaces statutorily provided judicial review. Were that the case, then numerous statutory provisions establishing judicial review would be nullified based simply upon the existence of congressional oversight. *See, e.g.*, 50 U.S.C. §§ 1807–1808 (imposing congressional reporting requirements on the executive for surveillance under the Foreign Intelligence Surveillance Act), *id.* § 1810 (providing for judicial review of allegedly unlawful surveillance); *see also* 18 U.S.C. § 2519(3) (mandating that Administrative Office of the United States Courts send annual report to Congress regarding wiretap applications), *id* §§ 2511, 2518 (conditioning availability of any wiretap on a court order); 18 U.S.C. § 2709 (mandating that Federal Bureau of Investigation report to Congress regarding requests for electronic communications), *id.* § 2703 (requiring agency to obtain court approval for any request for electronic communications) *and* § 2704 (allowing recipient to challenge subpoena for electronic communications in federal court).

DOD may wish that this case arose under a different statutory scheme,[7] one less "vital to the functioning of a democratic society," one that does not serve to "hold the governors accountable to the governed," one in which the Government may keep information secret without reason or

[7] *See infra* § B.3 (noting the Government's reliance on cases under the Administrative Procedure Act).

justification. *Nat'l Labor Relations Bd.*, 437 U.S. at 242. But this is a FOIA action. And under FOIA, federal courts must conduct a *de novo* review of the agency's refusal to release documents integral to a public debate. *See* 5 U.S.C. § 552(a)(4)(B). That is the case under the PNSDA, just as it is under other withholding statutes that fall within Exemption 3.

B. The District Court correctly held that the Secretary must establish compliance with the conditions for withholding in the PNSDA.

The district court held that DOD had a modest but important burden: the Secretary must establish that his certification complied with the conditions dictated by Congress in the PNSDA in order to withhold otherwise publicly available materials. As the district court put it, DOD must present "evidence that the Secretary of Defense considered whether each photograph could be safely released," and "evidence supporting the Secretary of Defense's determination that there is a risk of harm." *ACLU*, 40 F. Supp. 3d at 385. Here, DOD did not bear this burden.

1. A court must verify more than the fact of certification alone.

As discussed above, when Congress authorizes an agency to withhold records pursuant to statutory criteria, the determination as to whether the records actually meet the statutory criteria is subject to *de novo* review under FOIA. As the Supreme Court has explained, under Exemption 3, an agency

bears the burden to establish that withheld records fall within a statute's protection. *Cent. Intelligence Agency v. Sims*, 471 U.S. 159, 167 (1985); *accord A. Michael's Piano*, 18 F.3d at 143. To ensure that an agency has fulfilled its duty, a court must identify any conditions that must be satisfied in order to withhold, and then verify that the agency has satisfied those conditions.

The PNSDA places two limits on DOD's power to withhold. First, under subsection (c) of the statute, the Secretary may withhold only a "protected document," defined as a photograph taken from September 11, 2001 to January 22, 2009, that relates to the treatment of individuals engaged, captured, or detained by the Armed Forces, for which the Secretary has issued a certification. PNSDA § (c). And second, subsection (d) explains when a Secretary may certify a photograph for withholding: he may do so if and only if he determines that release of "that photograph" would "endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." PNSDA § (d)(1).

The first set of criteria is largely irrelevant to this appeal — plaintiffs do not dispute that the withheld documents are photographs from the prescribed time period that relate to detention. But DOD would have the

inquiry end there, rendering the remaining criteria meaningless. That is, according to DOD, the PNSDA requires only that the Secretary have issued some certification, no matter what the process that led to the certification and regardless of whether there was or was not a basis for the conclusion set forth in his certification. Gov't Brief at 28 (arguing that "[t]he PNSDA demonstrates that judicial review is limited to the fact of the certification"). Under this view, once the Secretary produces a document entitled "certification," the court's inquiry ends. Such a cramped reading of the PNSDA would nullify §(d) of the statute and contradicts existing precedent.

First, if DOD were correct, then courts would be powerless to verify that the Secretary had complied in any regard with § (d) of the statute. That is, a court could not review a decision to withhold even where the Secretary did not in examine the photographs or "determine" anything regarding the effect of disclosure. Courts would be powerless to act even where the Secretary chose to withhold the photograph based on some irrelevant concern, rather than on an assessment of the threat to "citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." The courts would, then, be rendered rubber stamps for executive decisions. Had Congress wanted to grant the Secretary such unfettered discretion (and

wanted to so drastically limit the power of the courts), it could have simply omitted §(d) of the statute. But it did not, and much as the government may want that sort of absolute authority, DOD cannot simply erase the limits that Congress set in place. To the contrary, it has, since the beginning of the Republic been "the duty of the court give effect, if possible, to every clause and word of a statute." *Montclair v. Ramsdall*, 107 U.S. 147, 152 (1882); *see also Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 ("[W]e begin by analyzing the statutory language, assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose.").

Moreover, in a nearly identical context, courts have held that judicial review under Exemption 3 goes beyond establishing merely that an agency made *some* determination before deciding to withhold documents. Section 6103(b)(2) of the Internal Revenue Code (the provision at issue in *Church of Scientology*) allows the IRS to withhold certain tax-related information under conditions that mirror those in the PNSDA: the IRS may withhold documents "if the Secretary [of the Treasury] determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws." 26 U.S.C. § 6103(b)(2)). Four circuits have confronted and rejected the argument that review of withholding under §

6103 should be limited to the fact that the Secretary claimed to have assessed the relevant harm.

Like the PNSDA, Congress enacted Section 6103 in response to having lost a case in courts: a FOIA requester had previously sought certain tax-related information from the IRS, but the Ninth Circuit had ordered its release. *Long*, 742 F.2d at 1175-76. During the pendency of Supreme Court review, Congress passed the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172, which, in relevant part, is nearly indistinguishable from the PNSDA: both authorize the head of an agency to withhold documents after conducting a risk assessment. On remand, the government argued, just as it does here, that review under FOIA should be limited "merely to establishing the factual existence of the . . . finding that disclosure would seriously impair tax collection." *Long,* 742 F.2d at 1177. The Ninth Circuit soundly rejected this argument:

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

Id. at 1181. Rather, the Court concluded that the Secretary's "determination that disclosure of [the requested records] would seriously impair the

assessment, collection, or enforcement of the tax laws is subject to *de novo* review by the district court." *Id*. at 1182.[8] The Court remanded the case to the district court with instructions to assess the Secretary's determination that disclosure would cause the harm that the statute was designed to prevent.

Here, the District Court came to the same conclusion and made a similar and reasonable demand — that DOD had to show more than the existence of a certification and instead demonstrate that the Secretary of Defense had hewed to the criteria prescribed by the statute, namely that he had reviewed each photograph and had a reasonable basis to believe that its release would pose a threat to American lives. *ACLU*, 40 F. Supp. at 385. DOD argues that this was error and offers three principle arguments supporting its position, none of which render its reading of the statute plausible.

First, DOD argues that had Congress intended courts to review the Secretary's decision to certify, it would have required that the Secretary provide a written explanation for his decision. Gov't Brief at 28. It points to three funding provisions that contain such a requirement. *Id.* But those

[8] The majority of other courts of appeal to have addressed the issue – those for the Third, Fifth, and Tenth Circuits—have agreed with the Ninth Circuit. *See Currie*, 704 F.2d at 527, *Linsteadt*, 729 F.2d at 1001-02, *Grasso*, 785 F.2d at 77, *De Salvo*, 861 F.2d at 1221-22.

statutes, which do not require judicial review, have no relationship to FOIA, which already does and accordingly, these statutes—concerning decisions to close Air Force bases, *see* 128 Stat. 3292, 3504-04, cost assessments of an air defense system, *see* 124 Stat. 4137, and personal protection for low ranking military officers and civilians, *see* 122 Stat. 3—shed no light on Congress's intent in passing an Exemption 3 statute like the PNSDA. Indeed, DOD's reliance on cases far afield from FOIA only serves to highlight that, unlike the statutes upon which the DOD relies, FOIA already requires the Secretary to explain himself to a court.

Second, DOD argues that the Court cannot review the Secretary's certification because it relates to national security. Gov't Brief at 29. Of course, as the district court acknowledged, courts can and should accord deference to the Executive's comparative expertise in national security and foreign relation matters. *ACLU*, 40 F. Supp. 3d at 389. But the requirement that courts accord deference to certain Executive branch decisions does not negate the requirement that there be judicial review at all. Rather, the executive must provide the courts with something to defer *to*. Indeed, courts, including this one, frequently grapple with national security issues in the FOIA context, debating not whether any review is appropriate but only

the extent of the deference that will be accorded to the Executive's decisions in this particular arena.

DOD's position is far more extreme. It does not seek deference, but complete relief from FOIA. Thus, it argues that it should not have show that it exercised a judgment to which the Court might defer, instead it contends that the court should be satisfied with a boilerplate certification that states no more than that a decision was made. And even the cases it cites do not support its argument. In *ACLU v. DOJ*, this Court accepted DOJ's reasons for withholding a classified memo only after its own "*ex parte* and *in camera* review of the unredacted [document] and the Government's classified explanations," and after verifying that the redacted information indeed related to the relevant classification criteria. 681 F.3d 61, 70 (2d Cir. 2012). And in *Wilner v. NSA*, this Court accepted a *Glomar* response only after it reviewed affidavits that explained in a "detailed, nonconclusory" fashion why withholding was appropriate. 592 F.3d 60, 73 (2d Cir. 2009). *See also CIA v. Sims*, 471 U.S. 159, 174, 177 (1985) (holding that Director of the Central Intelligence Agency had power to withhold records only after examining the "record developed" below and concluding that it "establishes that . . . researchers did in fact provide Agency with information related to the Agency's intelligence function). Had DOD submitted affidavits that at

least sought to demonstrate that the elements of the PNSDA were satisfied, the Court might have accorded a degree of deference to the judgments embodied therein. Until such a showing is made, however, neither the district court nor this Court has anything to which it can defer.[9] As the D.C. Circuit explained in *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 2003), deference is appropriate only if a court is "satisfied that the proper procedures have been followed and that the information logically falls into the exemption claimed." *Id.*at 1104.[10]

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[9] For this reason, this Court need not entertain DOD's specious and unfair contention that the district court "substituted its own judgments for that of the Secretary." Gov't Brief at 27. In fact, the District Court never reached the question of whether the Secretary had correctly concluded that release of any photograph would trigger an attack on Americans, although it assured DOD that were it to do so it would adopt a "workable standard" that accorded substantial weight to the submissions of military and intelligence officers." *ACLU*, 40 F. Supp. at 389. But because the Secretary's submission did not allow for meaningful judicial review, the district court never had occasion to apply the deferential, "workable standard" that it described. *See* JA 318-19.

[10] In furtherance of this argument, DOD also cites to a line of cases, *see* Gov't Brief at 30, in which the Supreme Court counseled that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs" because interference might raise constitutional concerns. *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (U.S. 1988); *accord Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2093-84 (2015) (explaining that Congress may not intrude on President's constitutional power to recognize nations). But FOIA is one such specific authorization; as this and many other courts have made clear, FOIA calls for courts to conduct *de novo* review of executive determinations even in the field of national security.

Finally, DOD argues that the legislative history of the PNSDA indicates that Congress intended for the courts to do no more than verify the fact of a certification. Gov't Brief at 33. But nothing in the legislative record supports this argument; indeed, to the extent that the sponsors addressed the question of judicial review at all, they assured their colleagues that FOIA's well-established rules would remain in place: Senator Graham explained that the PNSDA "establish[ed] a procedure to prevent the detainee photographs form being released," but that it would not "change FOIA, in its basic construct." 155 Cong Rec S5650, 5672 (statement of Sen. Graham). Other than that promise, the record is entirely silent regarding the role of courts in reviewing a certification. Just as this silence does not indicate that Congress meant to preclude review entirely, it also does not suggest that Congress meant to narrow review under the FOIA to the fact of certification alone.

Indeed, the Government exaggerates the burden that the District Court placed on it. As the District Court repeatedly made clear, DOD had to show no more than that the Secretary adhered to the PNSDA's commands when

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See e.g. Sims, 471 U.S. at 177 (reviewing agency's withholding of CIA's director secrecy determination *de novo*), *ACLU*, 681 F.3d at 61 (reviewing agency's withholding of classified documents *de novo*), *Wilner*, 592 F.3d at 73 (reviewing *Glomar* response *de novo*), *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (same).

he issued the certification. Otherwise, as the District Court noted, *de novo* review would degenerate into a "'rubberstamp[]' [of] executive branch decisions." *ACLU*, 40 F. Supp. at 388. Thus, the Secretary had to demonstrate that he "determin[ed] that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." PNSDA §(d). This meant two things: first, that "the Secretary . . . considered and . . . made a finding with regard to each and every photograph," JA 274, and second, that the Secretary had a basis for his determination that disclosure posed a risk to American lives. *Id*. at 389 ("[T]he PNSDA should be read as providing for judicial review of the basis for the Secretary of Defense's certification."). As explained more fully below, and as the District Court correctly found, the showing here failed on both counts.

2. The PNSDA requires that the Secretary make an individualized determination regarding the harm posed by release of each photograph

Courts must interpret the meaning of a statute by looking first to its text. *See A. Michaels Piano*, 18 F.3d at 144; *see also Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption

that the ordinary meaning of that language accurately expresses the legislative purpose."), *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) ("As in all cases involving statutory construction, our starting point must be the language employed by Congress"). Here, the text of the PNSDA speaks, repeatedly, in terms of the singular photograph: section (d) explains that "[f]or *any* photograph" to be withheld "the Secretary of Defense shall issue a certification." That certification is valid on the condition that disclosure of "*that photograph*" would endanger American lives. PNSDA § (d) (emphasis added). Thus, as the District Court correctly held, 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." *ACLU*, 40 F. Supp. at 389 (emphasis in original).

Even if the text of the PNSDA were ambiguous, the legislative history and context of the Act demonstrate that Congress intended to permit the government to withhold only those photographs the release of which would cause harm. As DOD notes, the PNSDA was passed in response to a specific lawsuit, at a point when courts had already opined about the range of photos at issue. At the time the PNSDA was enacted, the district court had noted that "many of these photographs are relatively innocuous," *ACLU*,

40 F. Supp. 3d at 389 (reviewing prior conclusions regarding withholding), and this Court had explained that the withheld photos depicted a wider range of locations and activities than photos already released to the public, as well as much less graphic images of the detainees' conditions of confinement, *ACLU*, 543 F.3d at 65. Neither Court regarded the photos, then, as an undifferentiated mass. And Congress, thus, did not simply bar release of all the withheld photos, but instead "established a procedure" that would prevent release of only those particular photos the Secretary determined posed a serious threat of harm. 155 Cong Rec S5650, 5672 (statement of Sen. Graham).

Moreover, as the sponsors recognized, "disclosure and transparency are values our country, our Government, holds high." 155 Cong. Rec. S5672 (Statement of Sen. Joseph Lieberman). These values would be undermined by allowing the suppression of photographs that happen to be in the collection but which would not cause the harm anticipated by the PNSDA. Indeed, allowing for collective withholding would introduce a nonsensical arbitrariness into the PNSDA, hinging the withholding of any particular photograph on the accident of the collection in which it was found, rather than on its content.

DOD, however, contends that this Court should ignore the text and statutory history of the PNSDA, and read the singular word "photograph" to encompass the plural word "photographs." It relies for the first time on § 1 of the Dictionary Act, *see* 1 U.S.C. § 1, which states that "words importing the singular include and apply to several persons, parties, or things" unless "the context indicates otherwise." Gov't Brief at 40. But as the Supreme Court has explained, the Dictionary Act creates soft default rules of last resort where a statute is ambiguous; the rules "should not be applied except where it is necessary to carry out the evident intent of the statute." *First Nat'l Bank v. Missouri*, 263 U.S. 640, 657 (1924) (rejecting argument that §1 of the Dictionary Act requires courts to read singular words as plural in every instance); *see also CTS Corp. v. Waldberger*, 134 S.Ct. 2175, 2187 (2014) (declining to apply § 1 where Congress's intent was clear from text and context); *United States v. Hayes*, 555 U.S. 415, 422 n.5 (2009) (noting that court turns to § 1 only on "rare occasions" when text and context of statute are unclear).[11] As described above, both the text and statutory history of the PNSDA could not be clearer — Congress required the Secretary to

[11] As DOD itself notes, if Congress had intended for the Secretary to evaluate the photographs as a collection, it could have simply have said that "[f]or any photographs"—plural—"the Secretary shall issue a certification." Gov't Brief at 41.

make an individualized determination of the risk posed by each withheld photograph.

To be clear, Plaintiffs do not contend that the Secretary is barred from recording his certification on a single document for efficiency's sake. But, however presented, the certification must, at a minimum, attest that the Secretary reviewed each photograph, determined that the release of that photograph would endanger American lives, and explain the basis for that risk assessment.[12] That is what the PNSDA requires; DOD failed to meet this requirement.

3. DOD has waived its other arguments regarding limited judicial review under the APA.

DOD makes two new claims in favor of limited review, neither of which were preserved for appeal. Below, DOD argued that the court's review under Exemption 3 should be limited to the fact of certification alone, see Dkt. No. 496 (Feb. 11, 2014), and that the PNSDA operated independently of FOIA. *Id.* at 22. Its other arguments in favor of limited

[12] This is especially true in a case where the record demonstrates that many of the photos are "relatively innocuous," *ACLU*, 40 F. Supp. 3d at 389, particularly given FOIA's command that "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). That command requires *de novo* review of the decision to certify each photograph for withholding because "segregability is completely dependent on the actual content of the documents themselves." *Id.*

review have now been waived. *Universal Church v. Geltzer*, 463 F.3d 218, 228 (2d Cir. 2006) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal" (citations and quotation marks omitted)).

Thus, for the first time, DOD now relies on cases interpreting the scope of review under § 706 of the Administrative Procedure Act ("APA"), which allows courts to "hold unlawful and set aside agency action . . . found to be . . . arbitrary and capricious." 5 U.S.C. § 706. *See* Gov't Brief at 37. But the Government did not advance this argument below. And even if it had, the court would have rejected the claim: this is a FOIA action, and FOIA's judicial review provision demands a greater showing then the deferential provision in the APA. *See Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010) (noting that under FOIA's *de novo* review, agency's decision that the information is exempt from disclosure receives little deference). As this Court has explained, "FOIA was enacted as an antidote to the perceived loopholes" in the APA, *ACLU*, 543 F.3d at 74, and *de novo* review ensured that agencies would not withhold documents without sufficient cause. *See United States DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) ("Unlike the review of other agency action that must be withheld if supported by

substantial evidence and not arbitrary and capricious, the FOIA expressly places the burden on the agency to sustain its action and directs the district courts to determine the matter *de novo*.").

Likewise, DOD has never before argued that this is a case where, under § 701(a)(2) of the APA, an agency action is "committed to agency discretion by law." DOD now cites *Webster v. Doe*, 486 U.S. 592 (1988), for the proposition that review is precluded in this case because the PNSDA committed a national security judgment to the executive branch. Gov't Brief at 29. But again, this argument rests on the faulty assumption that FOIA does not apply to a case brought under FOIA. As the Supreme Court explained in *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), § 701(a)(2) of the APA only applies where "a court would have no meaningful standard against which to judge the agency's exercise of discretion." Here, as explained above, the Court has a well-established standard to apply—FOIA's judicial review provision expressly demands *de novo* review, 5 U.S.C. § 552(a)(4)(B), a wealth of precedent dictates the scope of that review under Exemption 3, and the PNSDA details the conditions for withholding the relevant documents. This is not one of "those rare instances where statutes are drawn in such broad terms that in a given case there is no

law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

Thus, yet again, DOD exposes the flaw running through all of its arguments on appeal. The agency simply cannot prevail unless FOIA does not govern this action. But FOIA does govern this action unless and until Congress repeals or modifies it. And until then, DOD must comply with its mandates. *Nat'l Council of La Raza v. DOJ*, 411 F.3d at 356. Where it does not do so, judgment should be entered against it, as occurred here.

C. The District Court correctly held that DOD did not sustain its burden.

Tellingly, DOD does not argue on appeal that it actually bore its burden under the standard enunciated by the District Court, namely that it demonstrated that the Secretary conducted an individualized review, and that it adequately explained "why, on November 9, 2012, the release of pictures taken years earlier would continue to" endanger American lives, *ACLU*, 40 Supp. 3d at 389. *See* Gov't Brief at 37 (arguing that the Secretary's decision to certify was not arbitrary and capricious). That is because DOD's own affidavits made clear that the Secretary did *not* meet the standard enunciated in the statute, and even after it was given two additional opportunities to do so, chose instead to appeal.

1. The Secretary did not conduct an individualized determination of the risk posed by release of "each and every photograph."

The District Court many times explained to DOD how it could show that the Secretary's recertification was sufficient: "[W]hat is necessary," the Court stated, "is that the submission to me show an accountability, by the Secretary of Defense, of having considered and having made a finding with regard to each and every photograph, individually and in relation to the others." JA 274. Nonetheless, Associate Counsel Deputy General Counsel Megan Weis's declaration, upon which DOD relied, far from satisfying this requirement, made clear that no such "item by item" evaluation ever occurred. JA 275.

The Secretary's recertification, spare as it is, demonstrated that he relied upon the recommendations of three people in making his determination: "the Chairman of the Joint Chiefs of Staff [General Martin E. Dempsey], the Commander of the U.S. Central Command [General James N. Mattis], and the Commander, International Security Assistance Force/United States Force-Afghanistan [General John R. Allen]." JA 240. According to Weis, however, she never provided any of these three generals or their staffs with copies of every photograph, electing instead to send only a sample of 15-30 photographs for review. JA 282 ¶9. This was not done

out of necessity, since the military leaders could easily have been provided with every photograph—Weis attests that the photos fit on one compact disk. JA 284 at ¶13. Thus, the generals' blanket recommendation that release of *any* photographs would endanger American lives could not and did not follow upon an evaluation of the risks posed by "each separate photograph" because, quite simply, the generals did not have the opportunity to review most of them, and did not do so. *ACLU*, 40 Supp. 3d at 389.

Indeed, DOD never asserts that anyone but Weis reviewed every photograph.[13] But Weis admits that her review was only for the purposes of creating "a representative sample," JA 282 ¶8, and not to conduct the analysis required by the PNSDA. That is, she was not tasked to and did not review each image to determine whether "disclosure of that photograph would endanger [Americans]." PNSDA § (d)(1). Only the "senior military commanders" were asked to evaluate images to render a "judgment of the

[13] Indeed, nothing in the Department's declarations establishes that the Secretary or his General Counsel looked at *any* of the photographs, let alone all of them. Nor does the Department argue that the Secretary did so. *See* Gov't Brief at 44. Instead, the Department argues that the Secretary can be deemed to have reviewed the photos because he delegated the task to a subordinate, in this case, Weis. *Id*. But even assuming the propriety of such delegation under 10 U.S.C. § 113(d), it is undisputed that the Secretary did not deputize Weis to conduct the risk assessment mandated by the PNSDA; she merely prepared the photographs for review by others. Thus, neither the Generals, the Secretary, nor any of their subordinates, ever "considered whether each photograph could be safely released." *ACLU*, 40 F. Supp. at 390.

risk from public disclosure." JA 282 ¶8. But, as discussed above, they did not review all of the images.

Nor did DOD rectify its failure to review the photos individually after the Court's concluded that this was required. Rather, DOD's recommendation, four months later, was still based on an assessment of a subset of them. Rear Admiral Sinclair M. Harris declared that he "reviewed a representative sample of the photographs." JA 295. And even after the Court gave DOD two more opportunities to comply with its Order, DOD still refused to have anyone in the Department look at each photograph and assess the risk of release.

For this reason alone, the recertification does not meet the demands of the PNSDA. As the district court held, "[t]he condition provided by the PNSDA for withholding disclosure is that each individual photograph, if disclosed, alone or with others '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.'" *ACLU*, 40 Supp. 3d at 390. A certification that follows the review of a sample of the photos, rather than assessing each photo "individually . . . is insufficient to meet the government's burden." *Id*. The photos must therefore be released.

2. A "representative sample" was an inappropriate and unnecessary shortcut where individualized review would take at most a few days.

Throughout the course of this litigation, DOD has refused to disclose the number of photographs responsive to Plaintiffs' request. JA 269 ("Your Honor, the Department of Defense has never acknowledged a number of photos that are at issue."). Nor has it ever cited any basis for its refusal to supply that information. Despite this reticence, DOD contends that the number of responsive images is so voluminous that it was reasonable for Weis to winnow the group to a representative sample before senior military leaders could conduct their review. Gov't Brief at 44. This contention defies what little record evidence DOD has submitted to this Court, as well as common sense.

In FOIA litigation, "[s]ampling procedures have been held to be 'appropriately employed, where . . . the number of documents is excessive and it would not realistically be possible to review each and every one.'" *Meeropol v. Meese*, 790 F.2d 942, 958 (D.C. Cir. 1986) (quoting *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1490 (D.C. Cir. 1984)). In *Meeropol*, the D.C. Circuit upheld a lower court decision allowing the government to produce only a sample of documents for *in camera* review. *Id*. at 959. But in *Meeropol*, the universe of relevant documents was vast:

the agency withheld over 20,000 responsive documents, some of which ran for over one hundred pages, *id.* at 948, 959; at one point, review of the FOIA request required the work of "sixty-five full-time and twenty-one part-time FBI employees," *id*. at 951. The "scope of the request was therefore enormous," and in the interest of efficiency, the district court agreed to review only a random sample of the withheld documents. *Id*. at 945. Thus, as *Meeropol* demonstrates, the purpose of sampling in FOIA cases is to "reduce a voluminous FOIA exemption case to a manageable number of items." *Bonner v. United States Dep't of State*, 928 F.2d 1148, 1151 (D.C. Cir. 1991).

But the need for sampling is absent in this case, where the record shows that one person, Ms. Weis, could and did review every withheld document within a relatively short period; it follows that an individual assessment of each document was readily accomplished. JA 282 ¶8. Weis commenced her analysis sometime in August and the Secretary issued his final certification in early November. Within that time period—and there is no evidence that Weis worked anywhere near full time on the project—Weis was able to view each image, develop criteria for grouping the photographs into three categories, sort the photos, choose the sample, check with "leadership in the DoD Office of the General Counsel" to ensure that the

sample "accurately characterized all of the photos," load all the photos onto a single compact disk, "raise the issue" with the senior staff for Generals Allen, Mattis, and Dempsey, transmit the photos to those staff members, await the generals' recommendations, meet with the General Counsel to review the generals' memoranda, and await the results of a conference between the Secretary and General Counsel with regard to the certification. JA 281 ¶¶7–13. Under these circumstances, it simply cannot be that review of each image took an inordinate amount of time. Indeed, the largest estimate of the number of photos withheld is just over 2,000, *see* Dkt. No. 493 (Jan. 1, 2014), and at the generous rate of one photograph a minute, review would take at most a few days.

Moreover, even if sampling were necessary in this case, DOD has not produced a record sufficient for this Court to review the methodology employed. As Justice Ginsberg, then of the D.C. Circuit, has explained, only "[i]f the sample is well-chosen, [can] a court . . ., with some confidence, 'extrapolate its conclusions from the representative sample to the larger group of withheld materials.'" *Bonner*, 928 F.2d at 1151 (quoting *Fensterwald v. United States Central Intelligence Agency*, 443 F. Supp. 667, 669 (D.D.C. 1977)) (Ginsburg, J.). A "technique will yield satisfactory results only if the sample employed is sufficiently representative, and if the

documents in the sample are treated in a consistent manner." *Id*. For that reason, courts regularly review a sample's "reliability" to ensure that the sample accurately represents the gamut of withheld documents. *Id*. at 1152. The imperative to do so is all the more compelling where, as here, Congress has expressly mandated a photograph-by-photograph analysis, as set forth above.

Here, DOD's methodology was entirely opaque. Weis did not define the categories she chose, or detail the differences between them. She attests that she used three criteria to create the categories, but does not explain the relationship between these criteria and the three chosen groups. Moreover, she provides no explanation for why the criteria were even a relevant, appropriate measure of a photograph's likelihood to cause harm to Americans. Thus, this Court is left only with DOD's assurance that the photos differed along three lines, which differences had some connection to three criteria; but neither the three categories nor the three reasons were explained, even after the district court provided DOD with the opportunity to do so. At the end of the day, the court is left with no basis to assure that Weis's "technique" yielded a "sample [that was] sufficiently representative" of the range of conduct captured in the full complement of withheld images. *Bonner*, 928 F.2d at 1151.

DOD responds that generally, administrators may arrive at a decision employing whatever method they choose. Gov't Brief at 45. But, again, this is a FOIA action, and as *Meeropol* and *Bonner* attest, sampling is only appropriate where individual review is impossible. This is why, in a typical FOIA case, parties will confer and submit a proposed sampling method to the court for approval. Indeed, that has been the practice in this litigation. *See e.g.* Dkt. No. 277 (Jan. 1, 2008). But as it prepared the certification pursuant to which it would seek to continue to withhold photographs that have been sought for over ten years, DOD gave neither the court nor the Plaintiffs notice that it intended to analyze only a sample of the photographs in this case, instead unilaterally acting in a way that appears to have dictated the result it reached: the unlawful withholding of documents that should instead be released to the public.

II. THIS COURT SHOULD NOT REVISIT ITS PRIOR DECISION HOLDING THAT EXEMPTION 7(F) DOES NOT PROTECT THE PHOTOS FROM DISCLOSURE.

In the alternative, DOD recycles its already dismissed argument that Exemption 7(F) protects the photos from disclosure. But this Court has already rejected this argument in a lengthy, unanimous decision. *See ACLU*, 543 F.3d at 71. Indeed, DOD sought *en banc* review in an effort to overturn that judgment, but the motion was denied. *See ACLU v. Dep't of Def.*, No.

06-3140-cv (March 11, 2009). Just as this Court, sitting *en banc*, chose not to revisit the panel's decision then, so should this panel not question the persuasive and thorough logic of the Court's opinion now.

Exemption 7(F) allows agencies to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). DOD claimed in 2008 that "the plain meaning of the term 'any individual' is unlimited, and thus includes individuals identified solely as military and civilian personnel in Iraq and Afghanistan." *See ACLU*, 543 F.3d at 67. But this Court rejected that position, holding that the phrase "any individual" cannot be construed to cover a limitless group. The phrase "may be flexible but it is not vacuous," wrote the Court, *id.* at 67; it "connotes a degree of specificity above and beyond that conveyed by alternative phrases such as 'endanger life or physical safety.'" *Id.* Indeed, "[t]he legislature's choice to condition the exemption's availability on danger to an *individual*, rather than danger in general, indicates a requirement that the subject of the danger be identified with at least reasonable specificity." *Id.* at 68 (emphasis in original). Although the word "any" expanded the breadth of the word "individual," the

Court correctly observed that the Supreme Court and other courts of appeals had always construed "any" in light of the words that surround it, and have never allowed for a "wooden, uncritical capitulation to the word itself" such as the one urged by DOD. *Id.* at 69.

Given this plain meaning, the Court held that "in order to justify withholding documents under exemption 7(F), an agency must identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual." *Id.* at 71. But DOD had only made the speculative claim that release would endanger some American soldier somewhere in the world, and thus, this was "not a case where the defendants have shown exemption 7(F)'s required reasonable expectation of endangerment with respect to one or more individuals, but one where the defendants attempt to cobble together that required reasonable expectation of endangerment by aggregating miniscule and speculative individual risks over a vast group of individuals." *Id.*

The Court supported its textual interpretation with an exhaustive explanation of Exemption 7's structure and statutory history, noting specifically that FOIA Exemption 1 already provided an avenue for DOD to protect sensitive national security information. Under DOD's theory, Exemption 7 would be transformed into an "ersatz classification system,"

one that would allow "an agency that could not meet the requirements for classification of national security material, by characterizing the material as having been compiled for law enforcement purposes, evade the strictures and safeguards of classification and find shelter in exemption 7(F) simply by asserting that disclosure could reasonably be expected to endanger someone unidentified somewhere in the world." *Id.* at 73, 83. This would turn "exemption 7(F) as an all-purpose damper on global controversy," *id.* at 80, a result not intended by Congress. As the Court explained, Congress broadened Exemption 7(F) beyond law enforcement officers to address the "special problem" posed by "witnesses, potential witnesses, and family members whose personal safety is of central importance to the law enforcement process." *Id.* at 78. Although the exemption could extend beyond those groups, a covered group should mirror the categories Congress intended to protect such as "family members or coworkers of a named individual, or some similarly small and specific group." *Id.* at 67-68.

Of course, as a formal matter, this Court may certainly revisit its reasoning; after all, the Supreme Court vacated its judgment, albeit on very different grounds. But there is no reason for the Court to do so. In fact, DOD's position today is identical to the one it took in 2008; its theory of harm is equally diffuse and speculative. Indeed, categories at issue are far

broader than those identified in 2008, including "citizens of the United States," "members of the U.S. Armed Forces,"and "employees of the U.S. Government deployed outside the United States," *see* JA 290—the list delineated by the PNSDA. If the groups identified in 2008 were too broad to merit protection under 7(F), then the groups identified today are certainly not the sort of "individual" that Congress had in mind.

Nor has any recent decision of this or any other Court unsettled the foundations of this Court's 2008 decision. To be sure, in *EPIC v. United States Dep't of Homeland Sec.*, 777 F.3d 518 (D.C. Cir. 2015), the D.C. Circuit sustained an agency's refusal to release an emergency wireless protocol that codified the "process for the orderly shut-down and restoration of wireless services during critical emergencies." *Id.* at 520. But the D.C. Circuit took pains to explain that it was not disagreeing with this Court's opinion: The *EPIC* Court noted that the "context addressed by the Second Circuit involved vast populations," rather than a "discrete population." *Id.* at 524. The protocol, in contrast, limited its reach to a targeted population of people, those vulnerable to the "critical emergency" created by a terrorist attack conducted via a wireless system. As the Court explained, "[e]xactly who will be passing near an unexploded bomb when it is triggered somewhere in the United States may often be unknowable beyond a general

group or method of approach (on foot, by car, etc.) but the critical emergency itself provides a limit (e.g., a situs on the London transportation system)." *Id.* at 525.

In sum, exemption 7(F) protects people and interests not present in this case. Years ago, this Court correctly held that the provision targeted identifiable harms to discrete individuals. There is no reason to revisit that decision today.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

Respectfully submitted,

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Dated Aug. 3, 2015

CERTIFICATE OF COMPLIANCE

I, Lawrence S. Lustberg, Esquire, hereby certify that:

The attached brief complies with the 14,000-word limit prescribed in Federal Rule of Appellate Procedure 32(a)(7) in that it contains 13,972 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(A)(7)(B)(iii). The attached brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared using a proportionally spaced typeface, Times New Roman, using Microsoft Word with 14-point font. The text of the PDF copy of the attached brief is identical to the text in the paper copies, and a virus detection program, Sophos Endpoint Security and Control, version 9.5, has been run on the file, and no virus was detected.

/s/ Lawerence S. Lustberg
Lawrence S. Lustberg, Esq.
Dated: August 3, 2015

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 3, 2015, I caused the foregoing Brief to be electronically filed with the Clerk of the United States Court of Appeals for the Second Circuit through the Court's CM/ECF system, and will have paper copies delivered by sending ten paper copies of the Brief via FedEx.

I hereby certify that on August 3 2015, I caused the foregoing Brief to be served upon the following counsel of record for Appellants through the Notice of Docketing Activity issued by this Court's CM/ECF system:

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