No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF DEFENSE, ET AL., PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Exemption 7(F) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(F), exempts from mandatory disclosure photographic records concerning allegations of abuse and mistreatment of detainees in United States custody when the government has demonstrated that the disclosure of those photographs could reasonably be expected to endanger the lives or physical safety of United States military and civilian personnel in Iraq and Afghanistan.

PARTIES TO THE PROCEEDING

The petitioners are the Department of Defense and the Department of the Army.

The respondents are the American Civil Liberties Union; Center for Constitutional Rights, Inc.; Physicians for Human Rights; Veterans for Common Sense; and Veterans for Peace.

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The Solicitor General, on behalf of the Department of Defense and the Department of the Army, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 543 F.3d 59. The orders of the district court (Pet. App. 61a-62a, 63a-64a) are not published in the *Federal Supplement* but are available at 2006 WL 1722574 and 2006 WL 1638025. A prior order (Pet. App. 65a-70a) is unreported, and a prior opinion (Pet. App. 71a-133a) is reported at 389 F. Supp. 2d 547.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2008. A petition for rehearing was denied on March 11, 2009 (Pet. App. 134a-135a). On May 29, 2009, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 9, 2009. On June 29, 2009, Justice Ginsburg further extended the time to August 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Exemption 7(F) of the Freedom of Information Act (FOIA), 5 U.S.C. 552, exempts from mandatory disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (F) could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. 552(b)(7)(F).

STATEMENT

The court of appeals in this FOIA case has ordered the disclosure of photographs related to allegations of abuse and mistreatment of detainees in United States custody, notwithstanding the professional judgment of the Nation's top military officers—confirmed by the President of the United States—that disclosure could reasonably be expected to endanger the lives and safety of United States and Coalition forces and civilian personnel in Iraq and Afghanistan. Review by this Court is necessary to prevent that danger.

1. a. In 2003 and 2004, respondents submitted FOIA requests to the Departments of Defense, Homeland Security, Justice, and State, several components of those Departments, and the Central Intelligence

Agency seeking records concerning the "treatment of Detainees" held overseas in United States custody after September 11, 2001, "deaths of [such] Detainees," and the "rendition of Detainees and other individuals" to countries known to employ torture. C.A. App. 44, 52; see Pet. App. 71a. In particular, respondents sought records regarding the abuse and mistreatment of detainees in United States custody. C.A. App. 43-44, 51-52, 58.

Respondents submitted a priority list (C.A. App. 65-81) at the direction of the district court to facilitate the search for, and processing of, responsive records. Pet. App. 72a. Respondents' list included a request for the release of a series of photographs and digital videos that Army Specialist Joseph Darby had provided to Army investigators (the "Darby photographs"). C.A. App. 81. Those photographs, a few of which had been published by the news media, included images that depicted the abuse and mistreatment of detainees at the Abu Ghraib prison in Iraq. Many of the responsive Darby photographs showed detainees without clothing or in sexually humiliating positions.

In its initial productions, the government disclosed thousands of documents, but withheld the Darby photographs. Pet. App. 72a, 110a-112a. To support that withholding, the Department of Defense and Department of the Army (collectively, petitioners) submitted the declaration of General Richard Myers (*id.* at 136a-157a), then the Chairman of the Joint Chiefs of Staff and the Nation's highest ranking military officer. *Id.* at 137a.[1]

[1] Although respondents filed suit against several governmental defendants, the Darby photographs and the photographs of detainees now at issue are records of the Department of Defense and the Department of the Army.

General Myers had consulted with the commanding generals of U.S. Central Command (then General John Abizaid) and the Multi-National Force–Iraq (then General George Casey), and each agreed with his conclusion that the government's public disclosure of the photographs would pose a "grave risk of inciting violence and riots" against American and allied military personnel and would expose innocent civilians to harm. *Id.* at 150a, 156a; see *id.* at 140a-141a, 149a. General Myers' judgment that disclosing the Darby photographs "could reasonably be expected" to "endanger the lives and physical safety" of those individuals, *id.* at 137a-138a, 156a, was based on his extensive military experience, assessments by his combat commanders, intelligence reports from subject-matter experts, the violent response to the release of photographs of detainees in British custody, and the widespread and deadly rioting following the publication of a false story alleging the desecration of detainees' copies of the Koran at Guantanamo Bay, Cuba. *Id.* at 138a-141a, 144a-145a, 147a-149a.

b. On September 29, 2005, the district court ordered the production of the responsive Darby photographs with redactions to conceal identifying characteristics of individuals depicted in the images. Pet. App. 71a, 124a, 133a; cf. C.A. App. 318. As relevant here, the court held that the photographs were not records exempt from mandatory disclosure under FOIA Exemption 7(F), which permits withholding of records compiled for law-enforcement purposes if their production "could reasonably be expected to endanger the life or physical safety

of any individual," 5 U.S.C. 552(b)(7)(F). Pet. App. 110a-112a, 124a-133a.[2]

The district court recognized that "American soldiers are fighting and dying daily in Afghanistan and Iraq," Pet. App. 75a, and indicated "great respect to the concerns expressed by General Myers," *id.* at 127a. But the court stated that FOIA required it to "[b]alanc[e]" core FOIA values favoring disclosure against the Exemption 7(F) values favoring withholding, and the court held that the balance favored disclosure. *Id.* at 131a-133a; see *id.* at 5a. Opining that "[o]ur struggle to prevail [in Iraq and Afghanistan] must be without sacrificing the transparency and accountability of government," the court concluded that publicly disclosing the Darby photographs would advance the "purposes of FOIA" by revealing improper conduct by military personnel. *Id.* at 131a-133a. The court expressly acknowledged "the risk that the enemy will seize upon" the release to justify "violent acts," *id.* at 132a, but declared that "[o]ur nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command." *Id.* at 126a.

c. In March 2006, while petitioners' appeal of the district court's ruling was pending, all but one of the relevant photographs and videos were published online by a private organization (Salon.com). See Pet. App. 66a. In light of that publication, petitioners withdrew their appeal and responded to respondents' FOIA request for the Darby photographs by authenticating the online material and producing the one additional photograph.

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[2] The district court also held that the redacted photographs were not exempt under FOIA Exemptions 6 and 7(C), 5 U.S.C. 552(b)(6) and (7)(C). See Pet. App. 112a-124a.

2. a. While the appeal was still pending, petitioners completed processing 29 additional photographs of detainees that were potentially responsive to respondents' FOIA requests. Pet. App. 67a, 159a. The 21 photographs now at issue are a subset of that group. All 29 photographs are contained within files relating to six investigations conducted by the Army's Criminal Investigation Command (CID)[3] into allegations of abuse or mistreatment of detainees in Iraq and Afghanistan. *Id.* at 6a, 160a, 167a-170a.[4] Petitioners previously had released all six CID Reports of Investigation to respondents without the photographs and with other redactions to protect personal privacy. See *id.* at 159a-160a; cf. *id.* at 162a, 169a-170a (discussing investigations). Each of those reports (*CID Reports A-F*) contains descriptions of the relevant detainee-abuse allegations and the CID's investigative findings, and each has been publicly posted on the internet by respondent ACLU, along with the ACLU's summary of its contents. Cf. *id.* at 46a, 51a.[5]

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[3] That Command retains the acronym of its predecessor, the Criminal Investigation Division.

[4] Although petitioners identified potentially responsive photographs in files relating to a seventh investigation, Pet. App. 160a, the district court concluded that those photographs were not responsive to respondents' FOIA requests. *Id.* at 64a, 168a, 170a (discussing Tab G and photographs G-1 and G-2); C.A. App. 504.

[5] Those reports and the ACLU's summaries of their contents are available at <http://www.aclu.org/torturefoia/released/122104.html> (listing *CID Report A* as record for "Incident date: 11/7/02"); <http://www.aclu.org/torturefoia/released/012405.html> (listing *CID Reports B*, *C*, and *D* as records dated "12/19/2003", "7/21/2004", and "7/16/1934" [7/16/2004]); <http://www.aclu.org/torturefoia/released/021605.html> (listing *CID Report E* as record dated "8/25/04"); <http://www.aclu.org/torturefoia/released/030705/> (listing *CID Report F* as record for inci-

The responsive photographs that petitioners withheld from the publicly released CID reports depict detainees in Iraq and Afghanistan while in United States custody. Several of those images are described in the CID reports themselves. The reports, for instance, explain that the photographs include an image showing several soldiers posing near standing detainees who are handcuffed to bars with "sandbags covering their heads" while a soldier holds a broom as if "sticking [its] end * * * into the rectum of a restrained detainee," *CID Report D* 4782; see Pet. App. 169a-170a (discussing Report D); an image of a solider who appears to be in the process of striking "an Iraqi detainee with [the butt of] a rifle," *CID Report F* 8653; and several other images that show soldiers pointing pistols or rifles at the heads of hooded and handcuffed detainees. See, *e.g.*, *CID Report E* 6178-6182, 6191, 6203, 6214-6216, 6250-6253, 6267, 6271, 6361, 6458, 6470; see Pet. App. 169a-170a (discussing Reports C and E). Three of the six investigations led to criminal charges and, in two of those cases, the accused were found guilty and punished pursuant to the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq*. See Pet. App. 169a-170a.

To support withholding the responsive photographs, petitioners submitted the declaration of Brigadier General Carter Ham. Pet. App. 171a-183a. General Ham, who served on the Pentagon's Joint Staff and had been the senior Commander in Mosul responsible for all Unit-

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dent date "6/13/03–6/13/04"). The district court ultimately ordered the release of three photographs (A-6 to A-8) from Report A; two photographs (B-1 and B-2) from Report B; one photograph from each of Reports C, D, and F (photographs C-1, D-1, and F-1); and 13 photographs (E-1 to E-13) from Report E. See Pet. App. 62a, 64a; cf. *id.* at 167a-170a (listing photographs and investigations).

ed States and Coalition operations in Iraq's northern provinces, concluded that the government's disclosure of those photographs would "pose a clear and grave risk of inciting violence and riots against American troops and coalition forces" and "could reasonably be expected" to "[e]ndanger the lives and physical safety" of United States and Coalition military and civilian personnel and Iraqi and Afghan security forces and civilians. *Id.* at 172a-174a, 181a. General Ham's judgment was based on his extensive military experience, operations and intelligence briefings and reports, the considerations reflected in General Myers' declaration, and updated information, including the deadly responses to a video depicting British soldiers beating Iraqi youths and to the publication of a Danish cartoon of the Prophet Mohammad. *Id.* at 174a-175a, 177a-182a. General Ham stated that he had reviewed General Myers' declaration and had consulted with General Abizaid, General Casey, and Lieutenant General Karl Eikenberry (who commanded all Coalition forces in Afghanistan), each of whom agreed with his risk assessment and with the need to "withh[o]ld [the images] in order to protect the lives of" Americans and others. *Id.* at 175a-176a, 183a.

b. Before ruling on the photographs now at issue, the district court entered a stipulated order indicating that it would rely on the parties' previous briefing "[t]o the extent" that the images before it raised the "same legal issues" as the Darby photographs. Pet. App. 68a. The court also declared that to the extent that the Department of Defense has any additional "responsive images" that have been or will be withheld under, *inter alia*, Exemption 7(F), the question whether such images should be disclosed will be governed by "the final ruling

on appeal" of the district court's ruling on the photographs at issue here. *Id.* at 69a.

In June 2006, the district court reviewed the 29 potentially responsive photographs *in camera* and ordered the release of 21 images (with the faces of detainees and some soldiers redacted). See Pet. App. 62a, 64a; see C.A. App. 466-503.[6] The district court did not issue a written opinion, instead adopting the reasoning of its September 2005 opinion regarding the Darby photographs. Pet. App. 62a, 64a.

3. The court of appeals affirmed. Pet. App. 1a-60a. As relevant here, the court held that Exemption 7(F) did not authorize withholding the 21 photographs as law-enforcement records the disclosure of which "could reasonably be expected to endanger the life or physical safety of any individual," 5 U.S.C. 552(b)(7)(F). Pet. App. 8a-43a.[7] The court of appeals rejected the district court's balancing approach, explaining that Exemption

[6] Shortly after the district court's orders regarding the 21 images currently at issue, petitioners advised respondents that petitioners had processed and withheld 23 other images of detainees. Pet. App. 6a n.2. Petitioners have now identified a "substantial number" of additional detainee photographs in other CID reports (*id.* at 185a), in addition to the 23 other photographs, which likely will be found responsive to respondents' FOIA requests. Many of the additional photographs raise privacy-based issues distinct from those resolved by the district court and court of appeals in their rulings on Exemptions 6 and 7(C) (see p. 5 note 2, *supra*; p. 9 note 7, *infra*). But, as indicated by the district court's stipulated order (Pet. App. 69a), the government's ability to withhold a significant number of the additional images under Exemption 7(F) would be governed by the court of appeals' decision at issue in this petition.

[7] The court of appeals also held that the photographs are not exempt from mandatory disclosure under FOIA's privacy exemptions (Exemptions 6 and 7(C)). Pet. App. 43a-59a. The government does not seek review of that aspect of the court of appeals' decision.

7(F) does not authorize courts to balance the "risk [of harm to individuals] against the public interest" in disclosure. Pet. App. 5a, 40a. The court of appeals also assumed for purposes of its decision that disclosing the photographs "could reasonably be expected to incite violence against United States troops, other Coalition forces, and civilians in Iraq and Afghanistan." *Id.* at 10a n.3; see *id.* at 18a. The court nevertheless held that Exemption 7(F) did not exempt the photographs from mandatory disclosure because, in its view, Exemption 7(F) requires that the government "identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual." *Ibid.* Concluding that the government failed to "identify a single person and say that the release * * * could reasonably be expected to endanger that person's life or physical safety," the court found Exemption 7(F) inapplicable. *Id.* at 18a-19a.

The court of appeals acknowledged that Exemption 7(F) refers to danger to "any individual," but held that this language did not permit withholding based on a danger to United States and Coalition forces in Iraq and Afghanistan generally. Pet. App. 10a-17a. The court reasoned that its interpretation of "any" was "prefer-[able]" on the ground that FOIA exemptions should be "narrowly construed." *Id.* at 14a-15a (citation omitted). The court also concluded that its interpretation comported with Congress's focus on risk "to an individual" and avoided reading the term "individual" out of the statute. *Id.* at 16a-17a (emphasis omitted). In the court's view, that term demonstrated that "risks that are speculative with respect to any [particular] individual" are not cognizable. *Id.* at 17a.

The court of appeals further reasoned that a more expansive reading of Exemption 7(F) would be "inconsistent" with FOIA's treatment of national security information in Exemption 1, Pet. App. 19a-24a; read Exemption 7(F)'s legislative history to suggest that Congress intended the exemption to protect only individuals "whose personal safety is of central importance to the law enforcement process," *id.* at 32a (citation omitted); see *id.* at 24a-36a; and distinguished lower court decisions interpreting Exemption 7(F) more broadly, *id.* at 37a-43a.

In light of its requirement that the government identify an at-risk individual with reasonable specificity, the court deemed it "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." Pet. App. 19a.

The court of appeals subsequently denied rehearing en banc, Pet. App. 134a-135a, and, after the government made an initial determination not to seek certiorari, issued its mandate on April 27, 2009.

4. The President, after consulting his military and national security advisors, subsequently determined that the photographs at issue here should not be disclosed. The Solicitor General accordingly authorized the filing of a petition for a writ of certiorari in the absence of legislation resolving the issue.[8]

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[8] Legislation is pending that would specifically authorize the Secretary of Defense to prevent the disclosure of photographs relating to the treatment of detainees held abroad by United States forces after September 11, 2001 (including the photographs in this case) by certifying his determination that the disclosure of the photographs would endanger United States citizens or members of the Armed Forces or United

The President stated that his decision was based on his determination that "the most direct consequence of releasing [the photographs] * * * would be to further inflame anti-American opinion and to put our troops in greater danger." *Remarks Prior to Departure for Tempe, Ariz.*, Daily Comp. Pres. Docs., 2009 DCPD No. 00359, at 2 (May 13, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900359.pdf>. The President explained that "it was [his] judgment, informed by [his] national security team, that releasing these photos would * * * endanger[] [our troops] in theaters of war," and that "the lives of our young men and women serving in harm's way" provide "a clear and

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States government employees deployed abroad. See 155 Cong. Rec. S6742 (daily ed. June 17, 2009).

On May 21, 2009, the Senate passed by unanimous consent the Detainee Photographic Records Protection Act of 2009 as an amendment to the Supplemental Appropriations Act, 2009 (H.R. 2346), 155 Cong. Rec. at S5798-S5799 (Amendment 1157), but the subsequent conference report on H.R. 2346 did not include that amendment. H.R. Conf. Rep. No. 151, 111th Cong., 1st Sess. (2009).

The Senate subsequently has twice passed the Detainee Photographic Records Protection Act of 2009 without substantive change. First, on June 17, 2009, the Senate passed the Act by unanimous consent as a freestanding bill (S. 1285). 155 Cong. Rec. at S6742. The House of Representatives has referred S. 1285 to two House committees, *id.* at H7019 (June 18, 2009), where it remains pending. Second, on July 9, 2009, the Senate passed the Act by unanimous consent as an amendment to the Department of Homeland Security Appropriations Act, 2010 (H.R. 2892). *Id.* at S7303-S7304, S7370 (H.R. 2892 § 567(a)). The Senate passed the appropriation act, has requested a conference with the House, and has appointed conferees for H.R. 2892. *Id.* at S7311-S7312 (July 9, 2009); see *id.* at H8012 (July 13, 2009). The President recently informed the sponsors of the pending detainee-photograph legislation that he "support[s] this legislation" and "will work with Congress to get it passed." Letter from Pres. Obama to Sen. Lieberman & Sen. Graham (July 29, 2009).

compelling reason to not release these particular photos." *Remarks at the Nat'l Archives & Records Admin.*, Daily Comp. Pres. Docs., 2009 DCPD No. 00388, at 7-8 (May 21, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900388.pdf>.

Petitioners subsequently moved the court of appeals to recall its mandate, explaining that the President and his top national security advisors had determined that release of the photographs would create an unacceptable risk of danger to United States military and civilian personnel. That motion was supported by the public and classified declarations of General David Petraeus, the Commander of U.S. Central Command (Pet. App. 184a-196a), and General Raymond Odierno, the Commander of the Multi-National Force–Iraq (*id.* at 197a-211a).[9]

Based on his insurgency expertise, "extensive experience in Iraq," and information obtained as Commander of U.S. Central Command, General Petraeus concluded that producing the photographs would "endanger the lives of" United States military and civilian personnel by "fueling civil unrest" that would "caus[e] increased targeting of U.S. and Coalition forces." Pet. App. 185a-188a. He explained that the disclosure of "images depicting U.S. servicemen mistreating detainees in Iraq and Afghanistan, or that could be construed as depicting mistreatment, would likely deal a particularly hard

[9] The public declarations (Pet. App. 184a-211a) are redacted, unclassified versions of the classified declarations of Generals Petraeus and Odierno. The classified declarations were submitted to the court of appeals and contain further information regarding the danger to military and civilian personnel and the bases for the Generals' conclusions. Unredacted copies of the classified declarations will be submitted to this Court in connection with this petition under appropriate security measures.

blow" to counterinsurgency efforts in Iraq, Afghanistan, and Pakistan and have a "destabilizing effect on our partner nations" at a particularly critical time, "further endanger[ing] the lives of U.S. [personnel] presently serving there." *Id.* at 185a-186a; see *id.* at 189a-196a.

General Odierno similarly expressed his professional judgment (based on years of command experience in Iraq and discussions with senior Iraqi leaders) that "the release of these photos will endanger the lives" of United States military and civilian personnel and our Iraqi partners, and that the Multi-National Force–Iraq "will likely experience an increase in attacks" in retaliation. Pet. App. 200a, 206a; see *id.* at 197a-199a, 203a-204a, 206a-210a. General Odierno added that "[c]ertain operating units are at particular risk of harm from release of the photos," including members of certain 15- to 30-soldier training teams who execute small-unit patrols that are more vulnerable to insurgent attacks and who live in Iraqi-controlled installations without the protections available to many soldiers. *Id*. at 200a.

On June 10, 2009, the court of appeals recalled its mandate pending the disposition of this petition for a writ of certiorari. The court's two-sentence order stated that "[a]n opinion will follow." That opinion has not yet been issued.

REASONS FOR GRANTING THE PETITION

The President of the United States and the Nation's highest-ranking military officers responsible for ongoing combat operations in Iraq and Afghanistan have determined that disclosure by the government of the photographs at issue in this case would pose a significant risk to the lives and physical safety of American military and civilian personnel by inciting violence targeting those

personnel. The court of appeals did not question the gravity or probability of that risk, nor did it doubt the professional military judgments underlying that assessment. The court nevertheless concluded as a matter of law that FOIA mandates the public disclosure of such photographs—regardless of the risk to American lives—because FOIA Exemption 7(F) requires the government to "identify at least one individual with reasonable specificity" and show that disclosure "could reasonably be expected to endanger that individual." Pet. App. 18a.

The court of appeals' holding is inconsistent with the text of Exemption 7(F), which broadly encompasses danger to "any individual," with no suggestion of the court's extra-textual requirement of victim specificity. The exemption's drafting history underscores that conclusion. The court of appeals' view that Congress intended to require disclosure when a death or multiple deaths could reasonably be expected to result if the particular victims could not be sufficiently identified in advance disregards Exemption 7(F)'s fundamental concern with human life and safety and misapprehends the practical balance that Congress struck in that exemption. Congress did not mean for public disclosure of agency records to trump the life and physical safety of individuals—particularly in a case such as this, in which the government has already made public the underlying investigative reports revealing all relevant allegations of wrongdoing and the associated investigative conclusions.

The court of appeals' decision marks a significant break from prior decisions applying Exemption 7(F), which have eschewed extra-textual requirements and focused on the practical considerations appropriate when the lives and physical safety of individuals are at risk. Those decisions have been by district courts, and

other courts of appeals have yet to address the scope of Exemption 7(F). But the importance of the question presented—and the need for this Court to review the decision below—is demonstrated by the President's determination, supported by the judgment of the Nation's highest-ranking military officers, that the disclosure of the photographs in this case would jeopardize the lives of American and allied troops and personnel.

The President and the United States military fully recognize that certain photographs at issue depict reprehensible conduct by American personnel and warranted disciplinary action. There are neither justifications nor excuses for such conduct by members of the military. But the fact remains that public disclosure of the photographs could reasonably be expected to endanger the lives and physical safety of individuals engaged in the Nation's military operations in Iraq and Afghanistan. The photographs therefore are exempt from mandatory disclosure under FOIA. Review by this Court is warranted to give effect to Exemption 7(F) and the protection it affords to the personnel whose lives and physical safety would be placed at risk by disclosure.

A. The Court Of Appeals Erred In Holding That Exemption 7(F) Does Not Apply To The Photographs In This Case

The court of appeals held that, in order to invoke the protections of FOIA Exemption 7(F), an agency must "identify at least one individual with reasonable specificity" and show that disclosure could reasonably be expected to endanger "that individual." Pet. App. 18a. The extra-textual requirement of victim-specific identification is inconsistent with the text of Exemption 7(F), as well as its purpose and history. Notably, the court of appeals' interpretation of Exemption 7(F) would require

a disclosure that is shown to be certain to cause the deaths of numerous individuals when an agency is unable to identify those individuals *ex ante* with sufficient specificity. No reasonable legislator would have placed such a low value on human life in this context in order to advance FOIA's interest in public disclosure.

1. FOIA Exemption 7(F) exempts from mandatory disclosure records or information compiled for law-enforcement purposes if their production under FOIA "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. 552(b)(7)(F). The ordinary meaning of "any individual" is broad and all-encompassing, and that meaning is not restricted by any other text in Exemption 7(F) limiting its reach. The court of appeals erred in imposing its own, extra-textual limitation.

Congress defined the scope of Exemption 7(F) in 1986 by reference solely to the life or physical safety of "any individual." "[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)); see *Norfolk S. Ry.* v. *James N. Kirby, Pty Ltd.*, 543 U.S. 14, 31 (2004) (citing *Gonzales*). In the absence of "language limiting the breadth of the word," the term "any" should be given this normal, expansive meaning. *Gonzales*, 520 U.S. at 5 (citing cases); see *Boyle* v. *United States*, 129 S. Ct. 2237, 2243 (2009) ("The term 'any' [in a definitional provision] ensures that the definition has a wide reach."); *Ali*, 128 S. Ct. at 836 n.4.

Exemption 7(F) contains no limiting language of any kind. In authorizing agencies to withhold law-enforcement records whenever their production "could reason-

ably be expected to endanger the life and physical safety of any individual," 5 U.S.C. 552(b)(7)(F), Congress avoided statutory language that might restrict the class of individuals entitled to the exemption's protection. Congress, for instance, did not limit Exemption 7(F) to individuals associated directly or indirectly with either "law enforcement" or a "law-enforcement investigation." To the contrary, the 1986 amendments to Exemption 7(F) intentionally broadened its earlier text, which had been limited to the protection of "law enforcement personnel." 5 U.S.C. 552(b)(7)(F) (1982). Likewise, Congress enacted no language that might have restricted Exemption 7(F)'s protections to those at-risk individuals whom an agency can identify with specificity in advance. Significantly, in FOIA's companion statute, the Privacy Act, 5 U.S.C. 552a, Congress accorded special treatment to criminal law-enforcement records associated with an "identifiable individual," 5 U.S.C. 552a(j)(2)(B); cf. 5 U.S.C. 552a(a)(6), (*l*)(2) and (3). But Congress enacted no analogous text limiting the scope of FOIA Exemption 7(F) to harms faced only by an "identifiable individual"—or, as the court of appeals put it, an "individual" "identif[ied] * * * with reasonable specificity" (Pet. App. 18a).

Instead of imposing limits on the applicability of Exemption 7(F) by requiring an identifiable victim, Congress defined the boundaries of Exemption 7(F) in terms of the harm that would ensue: whether disclosure "could reasonably be expected" to endanger the life or physical safety of any individual. That restriction ensures that an "objective test" of "reasonableness" will govern an agency's "predict[ion of] harm," and thus regulates the assessment of probability required to trigger Exemption 7(F). See S. Rep. No. 221, 98th Cong., 1st

Sess. 24 (1983); 132 Cong. Rec. 29,619 (1986) (reproducing S. Rep. No. 211 in pertinent part as explanation of Exemption 7(F)'s "intended effect"); cf. Pet. App. 33a n.10. The objective standard ensures that Exemption 7(F)'s broad protection will kick in only when the potential for danger is sufficiently realistic. But once that express textual condition has been satisfied, the Exemption applies. The government need not disclose records causing danger to human life and safety merely because the particular victims cannot be identified in advance with a reasonable degree of specificity.

There is no reason to believe that Congress, in enacting Exemption 7(F), placed such a low value on human life and safety as the court of appeals' decision would indicate in order to promote FOIA's interest in public disclosure of agency records. Other provisions in Exemption 7 permit the withholding of records to advance interests that, while important, are significantly less so than human life and safety. Congress recognized that protecting personal privacy, avoiding interference with civil or criminal enforcement proceedings, ensuring impartial adjudications, and preventing circumvention of the law all warrant withholding under Exemption 7. See 5 U.S.C. 552(b)(7)(A)-(C) and (E). Indeed, this Court has explained that the personal-privacy protections of Exemption 7(C) provide even "more protect[ion] of privacy than Exemption 6," which authorizes withholding of such matters as the names and home addresses of government employees to protect such individuals from being "disturbed at home." *Department of Def.* v. *FLRA*, 510 U.S. 487, 497 n.6, 501-502 (1994). The Congress that amended both Exemption 7(C) and Exemption 7(F) in 1986 would not have countenanced any requirement that FOIA's general interest in public dis-

closure trump the reasonable protection of an individual's life and physical safety.

As this case comes to the Court, however, that is precisely the result directed by the court of appeals. That court accepted (for the purposes of its decision) the judgment of some of the Nation's highest-ranking military officers that disclosing the photographs at issue could reasonably be expected to result in violence against United States and Coalition personnel and other individuals. Pet. App. 10a n.3. Indeed, the court accepted that that disclosure could reasonably be expected to endanger the life or safety of not one individual, but many. See *ibid.*; pp. 3-4, 7-8, 13-14, *supra.* The court of appeals' willingness to accept that serious risk to the lives of our troops and other individuals in harm's way through its imposition of an extra-textual requirement of *ex ante* identification (Pet. App. 18a) underscores the extent of its departure from basic principles of statutory construction.

2. None of the considerations on which the court of appeals based its decision justifies its restrictive interpretation of Exemption 7(F).

a. The court observed that Congress could have drafted Exemption 7(F) to exempt disclosures that "endanger life or physical safety" and reasoned that Congress's decision to add the phrase "of any individual" "connotes" some "degree of specificity" in the identification of the individual. Pet. App. 11a. The court also found that its interpretation avoided "read[ing] 'individual' out of the exemption" and concluded that Congress'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 reasonably specificity." *Id.* at

11a, 16a. The court of appeals' reasoning does not follow from FOIA's text.

The phrase "of any individual" serves an important function, especially when considered in light of the provision's pre-existing language. That phrase makes clear that Exemption 7(F)'s reference to "life or physical safety" concerns the life or physical safety of any natural person, and is not limited only to certain categories of people. That understanding is evident from Congress's 1986 amendment to the Exemption, which substituted "any individual" for "law enforcement personnel." See 5 U.S.C. 552(b)(7)(F) (1982). Nothing in that amendment suggests a requirement that an agency identify a particular at-risk individual with a reasonable degree of specificity.

Such a requirement would have narrowed, not expanded, Exemption 7(F)'s protection in a critical respect. Before 1986, the requirement that disclosure would endanger the "life or physical safety of law enforcement personnel" did not require the government to identify particular at-risk officials. No court ever read such a requirement into the provision, nor would such a requirement have been consistent with its terms. See, *e.g.*, *LaRouche* v. *Webster*, No. 75 Civ. 6010, 1984 WL 1061, at *8 (S.D.N.Y. Oct. 23, 1984) (applying Exemption 7(F) to block public disclosure of an FBI report describing a home-made machine gun, in order to protect "law enforcement personnel" generally). Given that the 1986 amendment to Exemption 7(F) was intended to "ease considerably" an "agency's burden in invoking" its protections, 132 Cong. Rec. 31,424 (1986) (statement of Sen. Hatch) (principal sponsor of amendment); cf. S. Rep. No. 221, *supra*, at 24, there is no reason to believe Congress intended to impose a novel requirement

that an agency "identify * * * with reasonable specificity" (Pet. App. 18a) a particular individual at risk of harm.

b. The court of appeals' reliance on situations in which a statute containing the word "any" has been given a restrictive scope (Pet. App. 11a-17a) is equally unavailing. The Court has read limits into statutes containing the term "any" in certain narrow contexts such as where a statute included a term of art that "compelled that result," where another statutory term "made sense only under [such] a narrow reading," and where the "clear statement rule" required for waivers of sovereign immunity made a more limited reading appropriate. *Ali*, 128 S. Ct. at 836 n.4. But the Court has not restricted the ordinarily expansive meaning of the term where, as here, no considerations such as those are present.[10]

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[10] The authority cited by the court of appeals (Pet. App. 13a-15a) does not alter that conclusion. The Court's decision in *Cline* v. *General Dynamics Land Systems, Inc.*, 540 U.S. 581 (2004), for instance, neither turned on the meaning of "any individual" nor questioned the breadth of the word "any" in that phrase. See *id.* at 586-591, 596, 600 (holding that the term "age" in the Age Discrimination in Employment Act "means 'old age' when teamed with 'discrimination'" in the act). The Court in *Small* v. *United States*, 544 U.S. 385 (2005), expressly recognized that the "word 'any' demands a broad interpretation" in most instances, but held that Congress's reference in 18 U.S.C. 922(g)(1) to convictions in "any court" would not have been intended to include foreign courts in light of the Court's assumption that Congress normally legislates with domestic concerns in mind. 544 U.S. at 388-391. Similarly, *Nixon* v. *Missouri Municipal League*, 541 U.S. 125, 132-133 (2004), merely held that the phrase "any entity" in a preemption statute did not extend to subdivisions of a State because of the "strange and indeterminate results of using federal preemption to free public entities from state and local limitations."

c. The contextual factors identified by the court of appeals in support of its ruling (Pet. App. 15a-24a) also fall short of overcoming Exemption 7(F)'s textual breadth. Most notably, the court concluded that the general principle that FOIA exemptions should be "narrowly construed" was of "central importance" in this case—and, by itself, compelled an interpretation "requiring a FOIA defendant to identify an individual with reasonable specificity." *Id.* at 15a-16a (stating that that reading "is a narrower construction, and is to be preferred on that ground alone"). But that approach to FOIA is fundamentally misguided. Any number of artificial limits can yield a "narrower construction." But a proper interpretation of FOIA's Exemptions must derive such limits from the statute itself. Nothing in the precept that FOIA should be construed in light of the statute's general policy of disclosure justifies novel, extra-textual restraints on the scope of its exemptions.

To the contrary, this Court has made clear that its "pronouncements of liberal congressional purpose" be understood consistently with Congress's intention to give FOIA's exemptions "meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). Congress established in FOIA a "basic policy" favoring disclosure, but it simultaneously recognized that "important interests [are] served by the exemptions." *FBI* v. *Abramson*, 456 U.S. 615, 630-631 (1982). Those exemptions embody Congress's commonsense determination that "public disclosure is not always in the public interest." *CIA* v. *Sims*, 471 U.S. 159, 166-167 (1985). For that reason, the "Court consistently has taken a practical approach" in interpreting FOIA's exemptions, in order to strike a "workable balance" between the public's general interest in disclosure and

"the needs of Government to protect certain kinds of information from disclosure." *John Doe Agency*, 493 U.S. at 157; *Weinberger* v. *Catholic Action*, 454 U.S. 139, 144 (1981) (Congress "balance[d] the public's need for access to official information with the Government's need for confidentiality.").

The court of appeals' approach erroneously places a thumb on the side of disclosure, regardless of the situation or circumstances. The purpose of Exemption 7(F), like all FOIA exemptions, is to protect "legitimate governmental and private interests [that] could be harmed by release" of agency records. *Abramson*, 456 U.S. at 621. The particular interest at issue in the exemption—the "life" and "physical safety" of individuals—is one of the most important addressed in the statute. The practical balance contemplated by this Court's decisions requires that judicial interpretation of that provision give full weight to the broad language enacted by Congress and the purpose it sought to accomplish.

The court also erroneously relied on FOIA Exemption 1 (Pet. App. 20a-24a) to provide a basis for its artificial limitation of Exemption 7(F). Exemption 1 applies to records properly classified under an Executive Order of the President. 5 U.S.C. 552(b)(1). Classification depends, among other things, on a finding that the information concerns certain subject-matter categories (such as intelligence activities, military plans, weapons systems, or operations) and a determination that the unauthorized disclosure of that information "reasonably could be expected to result in damage to the national security," *i.e.*, damage to "the national defense or foreign relations of the United States." See Exec. Order No. 12,958, §§ 1.1(a)(3) and (4), 1.4 , 6.1(y) (as amended by Exec. Order No. 13,292, 68 Fed. Reg. 15,315, 15,317,

15,332 (2003)). Those standards require a different inquiry, involving different considerations, from Exemption 7(F)'s requisite determination that disclosure could reasonably be expected to "endanger the life or physical safety of any individual," 5 U.S.C. 552(b)(7)(F). Exemption 1 thus cannot provide a basis for reading Exemption 7(F) restrictively, much less for making up a requirement that the government "identify" particular at-risk individuals with "reasonable specificity."

That Exemptions 1 and 7(F) may both be available in certain circumstances does not justify the court of appeals' conclusion. See *Abramson*, 456 U.S. at 629 (rejecting similar argument favoring restrictive reading of Exemption 7(C) because of overlapping privacy protections in Exemption 6). "[T]he legitimate interests in protecting information from disclosure under Exemption 7" are not "satisfied by other exemptions," including Exemption 1. *Ibid.* Most obviously, there are many potential cases in which Exemption 7(F)'s requirements would be met that have nothing to do with national defense or foreign relations. Conversely, the interests at issue in Exemption 1 are not satisfied by Exemption 7(F) and could not be restricted on that basis. That two exemptions may be graphically portrayed as a Venn diagram, with areas of overlap between them, cannot provide a basis for refusing to give one, the other, or both their most natural reading.

3. a. The legislative history of Exemption 7(F) confirms that the court of appeals' extra-textual gloss is inconsistent with the intent of Congress.

Exemption 7(F) took its present form in 1986 when Congress passed FOIA amendments based upon a 1980 legislative proposal by the Department of Justice. As then-Professor Scalia testified in 1981, the Justice De-

partment had come to believe that the initial version of the exemption enacted in 1974—which limited protection to the "life or physical safety of law enforcement personnel," 5 U.S.C. 552(b)(7)(F) (1982)—was "absurdly limited" and reflected an "inadequate" balance of the serious interests at stake. See 1 *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 960 (1981) (*1981 Hearings*); cf. *id.* at 953-954. Professor Scalia illustrated the "inadequacy, almost irrationality" of that limitation, by asking: "Why only law enforcement personnel? Why not their spouses and children? Come to think of it, why not *anyone*, even you and me?" *Id.* at 959 (emphasis added).

Attorney General Civiletti's 1980 FOIA proposal, which Justice Scalia's testimony addressed, directly resolved that precise shortcoming by recommending that the term "law enforcement personnel" be replaced with the term "any natural person." *1981 Hearings* 178, 182. That change was warranted, the Attorney General explained, because there was "no reason" for protecting "law enforcement personnel to the exclusion of all others"; FOIA should authorize the withholding of records whenever "the life or personal safety of *any person* would be endangered by their release." *Id.* at 189, 200. The protective scope of the proposed Exemption 7(F), the Department observed, would "include such persons as witnesses and potential witnesses whose personal safety is of critical importance to the law enforcement process." *Id.* at 638, 693. By identifying "such persons" as "include[d]" under its proposal, the Department did not thereby suggest any limitation on the facially *all*-inclusive term "any natural person." Rather, the Department presumably chose to focus on those persons

who would most often benefit from its proposal. The proposal itself cast the protective net broadly, to any person whose life or safety was endangered.

Several bills in the 97th Congress, including one introduced by Senator Hatch (S. 1730), incorporated the Justice Department's recommendation to extend Exemption 7(F)'s protections to "any natural person." *1981 Hearings* 8, 30, 50, 67. Those proposals were supported by open-government advocates, including the ACLU, whose representative testified that Exemption 7(F) was "too narrow and should be extended to protect the life and physical safety o[f] 'any natural person.'" *Id.* at 870, 917; see *id.* at 518 (Freedom of Information Clearinghouse witness observing that, if individuals' "privacy is worthy of protection, so are their lives").

In the 98th Congress, Senator Hatch introduced S. 774 based on his bill in the previous Congress, proposing again to extend Exemption 7(F)'s protections to "any natural person." S. Rep. No. 221, *supra*, at 3-6, 23 (emphasis omitted) (explaining that S. 774 "is virtually identical to S. 1730" and recounting S. 1730's history in the 97th Congress). Reflecting the Justice Department's earlier explanation of the bill, the Senator observed that "any natural person" would "include such persons as witnesses, potential witnesses, and family members whose personal safety is of central importance to the law enforcement process." 130 Cong. Rec. 3502 (1984). At the same time, Senator Hatch made clear that the groups of individuals he mentioned were exemplary only: Criticizing the existing Exemption 7(F)'s exclusive focus on the life and physical safety of "law enforcement personnel," Senator Hatch invoked "the [testimony] of Professor Scalia" and asked, "'why not anyone?'" *Ibid.*

S. 774 passed the Senate, 130 Cong. Rec. 3521 (1984), but it did not pass the House of Representatives before the end of the 98th Congress. The portion of S. 774 amending FOIA Exemption 7 was then reintroduced in the 99th Congress as part of a Senate bill (S. 2878), which the Senate adopted and passed as an amendment to the Anti-Drug Abuse Act of 1986 (H.R. 5484). See 132 Cong. Rec. 26,111 (1986) (S. 2878, § 1801(a)); *id.* at 26,473, 27,208, 27,251-27,252 (H.R. 5484, § 1801); *id.* at 27,189 (Sen. Leahy) (explaining that the FOIA amendments' text was "identical" to that in S. 774 and that the Senate Report on S. 774 explained the "meaning and intended effect of the amendments"). Senator Hatch reiterated that the amendment to Exemption 7(F) would extend "protection to the life of any natural person" to correct "an obvious and absurd limitation" in the existing law. *Id.* at 26,770. After a House amendment to the Senate's Exemption 7(F) proposal employed the phrase "any individual" rather than "any natural person," *id.* at 29,652, Senator Hatch clarified that the change in terminology did not effect any substantive change. See *id.* at 31,423-31,424 (revisions to Exemption 7 "derive precisely" from S. 774); see also *id.* at 29,619 (Rep. Kindness) (explaining that the Senate Report on S. 774 reflects the "meaning and intended effect of the [House] amendments"); cf. Pet. App. 33a n.10. Congress enacted H.R. 5484 into law. See Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. N, § 1802(a), 100 Stat. 3207-48 (amending Exemption 7(F)).

b. The court of appeals opined that Congress limited Exemption 7(F) to individuals whose "risk of harm [was] incident to a law enforcement investigation," believing that Congress focused on the problem of criminals "deter[ing] or hinder[ing] law enforcement investiga-

tions" by targeting "those involved in such investigations" and their "associates or relatives." Pet. App. 36a. The history recited above, however, reflects Congress's recognition that extending protection to "any individual" would—and should—sweep more broadly to cover anyone whose life or physical safety could be jeopardized. Congress no doubt thought that certain categories of persons would frequently receive protection by virtue of the new, broad language, but nothing in the legislative history suggests any attempt to confine the amended exemption to these "repeat players."

In any event, and more importantly, the language Congress enacted contains no such limit. "[S]tatutory provisions often go beyond the principal evil [targeted by Congress] to cover reasonably comparable evils," and "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); see, *e.g.*, *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 248 (1989); cf. *TVA* v. *Hill*, 437 U.S. 153, 185 (1978). The "whole value of a generally phrased [provision]" like Exemption 7(F) is that its text captures a spectrum of "matters not specifically contemplated" by Congress. *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2191 (2009). Thus, even if faithful application of Exemption 7(F)'s text would result in its application to "situations not expressly anticipated by Congress," that possibility "does not demonstrate ambiguity. It demonstrates breadth." *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 689 (2001) (quoting *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1988)).

c. The Department of Justice has long understood Exemption 7(F)'s sweep to be expansive. Shortly after FOIA's 1986 amendments were enacted, the Attorney

General issued guidance to federal agencies explaining the amendments' scope. See U.S. Dep't of Justice, *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* (1987). The Attorney General explained that Congress's expansion of Exemption 7(F) to "encompass 'any individual' is obviously designed to ensure that no law enforcement information that could endanger *anyone* if disclosed * * * should ever be required to be released" under FOIA. *Id.* at 18 (emphasis added). In light of that "clear authority" to withhold documents "endangering any person," the Attorney General instructed that "agencies should take pains to ensure that they withhold any information that, if disclosed under the FOIA, could reasonably be expected to endanger someone's life or physical safety." *Id.* at 12 n.20, 18. This Court has repeatedly cited the Attorney General's FOIA memoranda as a reliable interpretation of FOIA. See, *e.g.*, *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 169 (2004); *Abramson*, 456 U.S. at 622 n.5; *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 602 n.3 (1982); *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 151 (1980).

B. Review By This Court Is Warranted To Ensure The Protection Of Exemption 7(F) For Personnel Involved In Military Operations In Iraq And Afghanistan

The court of appeals' decision is the first to adopt an interpretation of Exemption 7(F) requiring disclosure of records that could reasonably be expected to endanger human lives and safety. Neither the district court in this case nor any of the few courts to have addressed similar questions have declined to apply Exemption 7(F) on the ground that the government failed to identify threat-

ened individuals with reasonable specificity. Indeed, before the court of appeals' decision, courts had consistently followed an approach recognizing the important interests at stake and confirming that Exemption 7(F)'s "plain language supports a broader reach." *Peter S. Herrick's Customs & Int'l Trade Newsletter* v. *United States Customs & Border Prot.*, No. 04-00377, 2006 WL 1826185, at *8-*9 (D.D.C. June 30, 2006) (withholding portions of internal asset-seizure handbook because disclosure would risk danger both to customs officials generally and "innocent third parties located in the vicinity of Customs' officials, activities, or seized contraband"); see also, *e.g.*, *Los Angeles Times Commc'ns, LLC* v. *Department of the Army*, 442 F. Supp. 2d 880, 898-900 (C.D. Cal. 2006) (withholding names of companies performing private security contracts in Iraq because of risk to unspecified "military personnel, [company] employees, and civilians"); *Living Rivers, Inc.* v. *United States Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1321-1322 (D. Utah 2003) (withholding agency maps showing areas subject to innundation from dam failures to protect individuals who could be at risk from terrorist-induced dam failures); p. 21, *supra* (discussing *LaRouche*).[11]

When only one court of appeals has addressed a particular issue, this Court usually will await developments in other courts of appeals before granting certiorari. But the Court should not do so here. The court of ap-

[11] The court of appeals' announcement of a novel Exemption 7(F) standard is particularly problematic because the court did not remand to provide the government an opportunity to satisfy it. As suggested by the declaration of General Odierno, the government may be able to satisfy the new standard in this case. See Pet. App. 200a (discussing small operating units at particular risk of harm).

peals has seriously erred in failing to give full effect to Exemption 7(F)'s manifest purpose to protect against danger to human life and safety. And this error may have grave consequences. FOIA allows "any person" to request agency records and to bring an action to compel disclosure if the request is denied. 5 U.S.C. 552(a)(3) and (4)(B). As a result, the court of appeals' decision would enable any member of the public in the Second Circuit to obtain records that pose a danger to human life and safety whenever potential victims cannot be identified with what a court deems sufficient specificity. The potential dangers of this decision sweep widely.

More acutely, the court of appeals' approach poses a significant risk of harm in this very case, to persons who already are confronting danger on a daily basis. In the judgment of the President and the Nation's highest-ranking military officers, disclosure of the photographs at issue here would pose a substantial risk to the lives and physical safety of United States and allied military and civilian personnel in Iraq and Afghanistan. See pp. 3-4, 7-8, 12-14, *supra*.[12] And it would do so at a particularly fragile time, when conditions in Iraq and Afghanistan are in transition and flux. Before those risks are borne by service members and other in harm's way, this Court should grant review of the court of appeals' decision.

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[12] The practical effect of the court of appeals' decision is magnified by the potential number of photographs to which it may apply. Although the court's opinion addressed only the 21 photographs before it and an acknowledged 23 others previously identified as responsive, many other photographs likely will be found responsive to respondents' FOIA requests. See p. 9 note 6, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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