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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

PRO PUBLICA, INC.,

Plaintiff,

v.

COMMANDER DEREK D. BUTLER; VICE ADMIRAL DARSE E. CRANDALL JR.; CARLOS DEL TORO; CAROLINE D. KRASS; and LLOYD J. AUSTIN, III

Defendants.

Civil Action No. 22-1455-BTM-KSC

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PARTIAL MOTION TO DISMISS**

*[Declarations of Sarah Matthews and Megan Rose filed concurrently herewith]*

Date: August 11, 2023
Time: 11:00 A.M.
Judge: Hon. Barry Ted Moskowitz
*Per Chambers, no oral argument unless requested by the Court*

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# MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Plaintiff Pro Publica, Inc. ("ProPublica") submits this memorandum of points and authorities in opposition to Defendants' partial motion to dismiss the First Amended Complaint. ProPublica is a nonprofit news organization that publishes investigative journalism in the public interest. It brings this case on behalf of the public and press to obtain an injunction preventing the Navy from continuing its practice of denying the public meaningful and timely access to its criminal justice system in violation of the First Amendment, common law, and congressional mandates. Specifically, ProPublica challenges the following policies by the Navy:

1. Its complete denial of access to the preliminary phase of all criminal cases, refusing to list these cases on its "docket" or even provide public notice of probable cause hearings[1];
2. Its denial of timely access to *all* court records in every case, although the Navy sometimes publishes select records that support the prosecution;
3. Its policy of arbitrarily and permanently withholding broad portions of the court record, such as all transcripts and any evidence or exhibits submitted before a judge; and
4. Its policy of permanently withholding *all* court records in cases that end in a full acquittal, even when the case has been litigated in open court.

First Amended Complaint ¶ 1 ("FAC").

To date, the Navy has denied ProPublica access to the court proceedings and records of 70 rape and sexual assault cases, as well as an untold number of cases omitted from the Navy's "docket," and these numbers continue to grow. Collectively, these policies significantly hamper ProPublica's ability to inform the public about a matter of the utmost concern—how the Navy adjudicates allegations of criminal conduct in its ranks, and particularly how it handles sexual assault cases. These policies also reflect the military's failure to comply with a clear congressional mandate

[1] This not only violates the First Amendment and common law, but the military's own rules. *ABC. Inc. v. Powell*, 47 M.J. 363, 364, 366 (C.A.A.F. 1997); Rules for Courts-Martial ("RCM") 405(j)(3), https://perma.cc/5SUD-MXQN.

from 2016 that the Secretary of Defense prescribe "uniform standards and criteria" facilitating public access to military court records at "all stages of the military justice system." Article 140a, UCMJ, 10 U.S.C. § 940a(4) ("Art. 140a").

Tellingly, *Defendants have not sought dismissal of ProPublica's First Amendment and common law claims* (Counts 1 and 2)—indeed, the Navy's policies are indefensible. Even a white paper recently produced by the professional staff of the Military Justice Review Panel ("MJRP")—a group tasked with assessing the military's compliance with Art. 140a, *see* 10 U.S.C. § 946(a)—found that "a blanket restriction on releasing court-martial filings and records would not be narrowly tailored" as required by the First Amendment. Matthews Decl., Ex. A at 8 (White Paper: *Impact of the Privacy Act on Disclosure of Court-Martial Filings and Records in Accordance with Article 140a, UCMJ* (Prepared by the Professional Staff)) ("White Paper"). The White Paper concluded that "contemporaneous release of properly redacted court-martial information is both *required* and *necessary* under the law, with appropriate restrictions for protective orders as well as classified and sealed materials." *Id.* at 2 (emphasis added).

Instead of focusing on ensuring compliance with the law, Defendants continue to unnecessarily prolong this litigation—now by filing a partial motion to dismiss that is as scattershot as it is meritless. First, Defendants seek to dismiss ProPublica's request for a writ of mandamus (Count 3) compelling Defense Secretary Lloyd Austin, III to finally issue the "uniform standards" required by Art. 140a because, they say, this law is "discretionary" and they have already performed it. But neither Defendant Austin nor his predecessor has ever issued *any* standards, and the guidance issued by Defendant Caroline Krass, the Defense Department's General Counsel, do not establish *uniform* standards; nor do they facilitate public access "at all stages of the military justice system," as Art. 140a requires. To the contrary, they authorize the Navy's existing policies and practices of broadly denying court access.

Second, Defendants argue that ProPublica challenges "outdated" written policies that are no longer in effect and regulations that have not yet been issued. This plainly mischaracterizes both ProPublica's claims and the factual record. The Navy has now denied ProPublica access to at least 74 cases (70 sexual assault cases as well as four additional cases), and it continues to do so.

Third, Defendants claim ProPublica lacks standing to seek a declaratory judgment that Seaman Apprentice Ryan Mays, the criminal defendant in the original court-martial that prompted this lawsuit last September, may exercise his First and Sixth Amendment rights to release his own court records to ProPublica, despite the Navy's efforts to restrict him from doing so. But ProPublica does not seek to assert *Mr. Mays'* rights—as Defendants contend—but ProPublica's *own* First Amendment right to receive "information and ideas," which the U.S. Supreme Court has long recognized. *See, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 756 (1976).

Finally, Defendants argue that ProPublica lacks standing to sue the military judge in Mr. Mays' case, Defendant Derek Butler, who denied ProPublica's motion for access to the court records. This ignores the well-settled rule that standing is appropriate in court access cases such as this, where a denial of access is likely to recur but evade review due to the transitory nature of the underlying proceedings. Likewise, the claim that ProPublica lacks standing to sue Defendants Austin and Krass, even though they have authorized the Navy to continue its unconstitutional policies that continue to harm ProPublica, is meritless.

Accordingly, the Court should deny Defendants' motion entirely.

## II. BACKGROUND

### A. Congress enacted Art. 140a to promote transparency and access to military courts at "all stages" of proceedings.

Congress adopted Art. 140a in 2016 to promote transparency in the military court system. FAC ¶ 63. Congress passed the law following years of public outcry

concerning reports of widespread sex crimes in the military and calls from members of Congress and the public for greater transparency. ¶ 64. The law requires the Secretary of Defense to "prescribe uniform standards and criteria . . . using, insofar as practicable, the best practices of Federal and State courts" to facilitate "public access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records." 10 U.S.C. § 940a(a)(4). The standards and criteria must facilitate public access "at all stages of the military justice system . . . including pretrial, trial, post-trial, and appellate processes." *Id.* The legislative history makes clear that Art. 140a aimed to ensure "timely" access at each stage of a case. FAC ¶¶ 66-67.

**B. Defendants improperly use Art. 140a to withhold court access.**

ProPublica initiated this action on September 27, 2022, after months of unsuccessful efforts to obtain court-martial records in the high-profile trial of Seaman Apprentice Ryan Mays, which was then ongoing at the San Diego Naval Base. ECF No. 1. The Navy was prosecuting Mr. Mays for arson in connection with the fire that destroyed the U.S.S. Bonhomme Richard in July 2020. FAC ¶ 4. Between July and August 2022, the Navy's Office of the Judge Advocate General ("OJAG") repeatedly refused to release any court records or transcripts in the case to ProPublica's Pulitzer Prize-winning reporter Megan Rose. ¶ 23. OJAG relied on shifting reasons—first an exemption under the federal Freedom of Information Act for law enforcement records. *Id.* When counsel for ProPublica explained that this exemption did not apply to court records, OJAG pointed to the Privacy Act. ¶ 24. But after Mr. Mays' counsel offered to produce a Privacy Act waiver, OJAG then claimed that Art. 140a (and the Navy's JAG Instruction 5813.2 ("JAG Instruction") and a memo by the former Defense Department General Counsel interpreting that article) required secrecy. ¶ 24. The government did, however, release two documents that supported the prosecution—the charge sheet and search warrant materials. ¶ 25.

On August 15, 2022, ProPublica filed a letter seeking access to the court records in the military court, citing the First Amendment and common law rights of access.[2] ¶ 26. The next day, Mr. Mays filed a motion seeking release of his court records, citing his Sixth Amendment right to a public trial. *Id*. The government opposed both motions but did not deny that the First Amendment and common law applied. ¶ 27. On August 30, the military judge, Defendant Butler, denied both motions, claiming he lacked authority to release the records under Art. 140a. ¶ 28.

On September 13, 2022, ProPublica sent a letter with the Reporters Committee for Freedom of the Press and 38 other press organizations to Defendant Krass, asking her to correct the Art. 140a guidance issued in 2018 by her predecessor. ¶ 31. On September 19, the National Institute of Military Justice sent its own letter to Ms. Krass endorsing ProPublica's letter, but she did not respond to either. ¶ 32.

### C. ProPublica sued, and Defendants released some *Mays* records but continue to withhold large portions of them, improperly citing FOIA and the Privacy Act.

ProPublica filed suit while the Mays trial was ongoing and sought a temporary restraining order and preliminary injunction enjoining the Navy's policies of denying court access. ¶ 34. Defendants quickly agreed to release some of the *Mays* records, with a Privacy Act waiver from Mr. Mays, which he provided. ¶ 35. On October 6, 2022, the Court granted a joint request by the parties to stay briefing on ProPublica's motion while the government produced the records. ¶ 36. Between October 2022 and March 2023, Defendants produced 154 documents from the *Mays* case. ¶ 37, 45. But, despite taking months to review and "correct" their original over-redactions, they still ultimately withheld or redacted at least 128 records, including at least 20 that were never released. ¶¶ 40-48.

A "Vaughn index" produced by Defendants purported to list each document in the case but appeared to be missing records. ¶ 48. It provided only one or two-word

[2] The military judge denied the letter request at a hearing on August 17, but permitted ProPublica to submit a formal motion, which it did a week later. FAC ¶ 27.

phrases, such as "personal privacy" and "law enforcement," to justify the vast sealing of records. ¶ 49. It included a "key" to explain these "justifications" for sealing, which invoked FOIA exemptions and case law, even though Defendants had conceded that FOIA does not justify restrictions on court access. ¶¶ 50-51.

With the Court's permission, ProPublica withdrew its motion and filed an amended complaint on May 19, 2023. ECF No. 38.

**D. The Navy continues to deny ProPublica timely access to its court proceedings and records, including to more than 70 sexual assault cases.**

Since November 2022, Ms. Rose has repeatedly sought access to court records and docket information for other cases, in addition to the *Mays* case. These include three high-profile cases involving members of the Marine Corps, as well as 70 cases involving charges of rape and sexual assault, rape and sexual assault of a minor, and other sexual misconduct. FAC ¶¶ 52-58, Rose Decl. ¶¶ 3-4. Ms. Rose also requested the court records and docket information for cases involving the same charges that were not listed on the Navy's "docket," including when the probable cause hearings, known as "Article 32 hearings," would occur. FAC ¶ 55; Rose Decl. ¶ 4. The Navy improperly requires Ms. Rose to submit a "justification" for each disclosure, while withholding any information about the case, including even the full name of the defendant. FAC ¶ 56. To date, the Navy has refused to provide prior notice of *any* of these Article 32 hearings and refused to disclose *any* court files while a case is ongoing. FAC ¶ 61; Rose Decl. ¶ 6. Of the 70 sexual assault cases specifically requested, the Navy has only produced records for 4 cases, all of which had already ended (in a guilty verdict, consistent with the Navy's policy), and the records excluded key documents such as transcripts, exhibits, and evidence. FAC ¶ 61; Rose Decl. ¶ 6.

**E. Ms. Krass issued new Art. 140a guidance, but it does not establish "uniform standards" that facilitate public access and instead authorizes the Navy's continuing and unconstitutional denials of court access.**

On December 17, 2018, Ms. Krass's predecessor issued a memo that purported to implement Art. 140a, but it failed to take a definitive position on whether the

Privacy Act even applied to military court records, noting that *if* it did, such records would be published only *after* the case ended and the record of trial was "certified." FAC ¶ 69. Two years later, the Navy issued its own Art. 140a instructions, but they largely served to deny access to court records—prohibiting release of any records ever, *unless* the accused is convicted and then *only* after the case has ended and the record has been "certified." ¶ 70 (citing JAG Instr. 5813.2 at 2-3, https://stjececmsdusgva001.blob.core.usgovcloudapi.net/public/documents/JAGINST_5813.2.pdf). Even then, the Navy can wait 45 days following "certification." *Id.* The 2020 JAG Instruction also prohibited the Navy from including Article 32 preliminary hearings on its "docket." JAG Instr. 5813.2 at 3. Even where the accused was convicted, key portions of the record are never released—such as any exhibits, evidence, transcripts, and the preliminary hearing officer's report as to whether a case should proceed to trial following the Article 32 hearing. *Id.* at Encl. 3 at 1-3.

After ProPublica filed this lawsuit, on January 17, 2023, Ms. Krass issued revised guidance regarding Art. 140a, this time stating that the Privacy Act does apply to court-martial records. FAC ¶ 73. Consistent with the JAG Instruction, the new rules say the military services do not have to make any records public until 45 days after the record is "certified" following trial, and then only if the accused is found guilty. *See* Military Justice Case Management, Data Collection, and Accessibility Standards § IV(E)(2) ("2023 Guidance"), https://perma.cc/UYW2-XNW3. Even then, like the JAG Instruction, the rules say the services are *only* required to release limited parts of the record, excluding critical portions, such as any exhibits or evidence submitted to the court, any transcripts of the proceedings, or the Article 32 report. § IV(C)(2)-(3). The revised rules also allow the services to exclude Article 32 hearings from their dockets. § IV(C)(1)(a). They also give the military services discretion to decide whether to release "additional" records, but only in "specific cases" and after balancing various factors. § IV(F). Whether charges involve rape, sexual assault, or other violent crimes not resulting in death, is not listed as a factor warranting

access. The revised rules gave the military departments 240 days—or by September 14, 2023—to issue revised regulations and until December 27, 2023, to "reach full compliance," although Congress required compliance with Art. 140a by December 2020. FAC ¶ 79.

## III. LEGAL STANDARDS

"[W]here a 12(b)(1) motion to dismiss is based on lack of standing, the Court must defer to the plaintiff's factual allegations and must 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Doe #1 v. City of San Diego*, 363 F. Supp. 3d 1104, 1109 (S.D. Cal. 2019) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id*. (quoting *Lujan*, 504 U.S. at 560). "In short, a 12(b)(1) motion to dismiss for lack of standing can only succeed if the plaintiff has failed to make 'general factual allegations of injury resulting from the defendant's conduct.'" *Id*. (quoting *Lujan*, 504 U.S. at 560).

To survive a motion to dismiss under Rule 12(b)(6), "detailed factual allegations are not required"; complaints need only state "a plausible claim for relief" that rises "above the speculative level.'" *Id.* (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

## IV. ARGUMENT

### A. Defendant Austin has failed to prescribe "uniform standards" that facilitate public access to court-martial records, as required by Art. 140a, so a writ of mandamus is appropriate.

ProPublica seeks a writ of mandamus that requires Defendant Austin to finally issue the "uniform standards and criteria" that Art. 140a clearly demands. FAC at p.39. Defendants argue, incorrectly, that this claim must be dismissed for lack of subject matter jurisdiction and failure to state a claim because: (1) Secretary Austin's

duty under Art. 140a is discretionary, (2) Ms. Krass has already performed it, and (3) this claim is not "clear and certain." Partial Motion to Dismiss ("Motion") at 4-6.

Where "the Secretary is commanded to do a particular act" and fails to do so, mandamus may be proper, even if the statute at issue requires some "construction by the administrator . . . to determine what duties it creates." *Knuckles v. Weinberger*, 511 F.2d 1221, 1222 (9th Cir. 1975). In such cases, "the court is not telling the defendant how to exercise his discretion" but compelling the officer to perform the required duty. *Id.*; *see also Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 990 (9th Cir. 2002) (requiring district court to grant writ of mandamus ordering parole commission to hold statutorily-required hearing); *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986) (federal agency had "ministerial duty" to remove wild horses from private property, where law said its agent "shall arrange to have [them] removed").

That is the case here. Art. 140a creates a clear, non-discretionary duty that Secretary Austin has not fulfilled: he "*shall* prescribe uniform standards and criteria" that facilitate "public access to docket information, filings, and records." 10 U.S.C. § 940a(4) (emphasis added). Even if he has some level of discretion in determining the contents of those standards and criteria, the requirement that he *prescribe* uniform standards is ministerial and permits no room for discretion. *Knuckles*, 511 F.2d at 1222; *Com. of Pa. v. Nat'l Ass'n of Flood Ins.*, 520 F.2d 11, 26 (3d Cir. 1975), *overruled on other grounds*, *Com. of Pa. v. Porter*, 659 F.2d 306 (3d Cir. 1981) (agency secretary's failure to perform duty to "take such action as may be necessary" would, if proved, warrant mandamus relief). Defendants cannot dispute that neither Secretary Austin, nor his predecessor, ever issued any such standards.

In addition, "even in an area generally left to agency discretion, there may well exist statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised." *Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419 v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981) (citation omitted); *see also Nat'l Ass'n of Flood Ins.*, 520 F.2d at 26. In such cases, "mandamus will lie when the

standards have been ignored or violated"—as they were here. *Brown*, 656 F.2d at 566. And where, like here, a statute requires compliance with certain standards to the extent "practicable," the government must follow such standards or have "a reasonable basis" for concluding that doing so would be "impracticable." *Haeuser v. Dep't of L.*, 97 F.3d 1152, 1154 (9th Cir. 1996) (mandamus was proper where law required U.S. territory to make employment decisions based on merit "as far as practicable" but territory failed to do so).

Art. 140a creates certain non-discretionary parameters—the standards must be "uniform," facilitate public access "at all stages of the military justice system," and follow "the best practices" of civilian courts "insofar as practicable." § 940a(a)(4). Even if Defendant Krass could satisfy Secretary Austin's duty to prescribe the requisite standards and criteria, her new guidance does none of these things. FAC ¶ 73. Like the 2018 rules, hers fail to prescribe "*uniform* standards and criteria."[3] As the MJRP White Paper noted, "this policy guidance is silent as to the specific relevance of the Privacy Act," Matthews Decl., Ex. A at 3, and instead gives *carte blanche* to the military services to create their own standards, only requiring the release of certain parts of the record *post-trial*, as set forth below, and only contemplating additional access in "specific cases" at their discretion. 2023 Guidance § IV(E)(2). Thus, the new rules also fail to facilitate public access at "*all* stages of the military justice system."

Nor does the new guidance follow "the best practices" of federal and state courts, although doing so would be practicable. *Haeuser*, 97 F.3d at 1154. The MJRP's White Paper flagged the "apparent discrepancy between the statutory

[3] As Defendants concede, the 2018 Art. 140a "guidance" issued by Defendant Krass's predecessor has been "superseded" by Ms. Krass's 2023 guidance. Motion at 7. In any event, it also failed to satisfy the requirements of Art. 140a for the same reasons as the 2023 guidance discussed above. Moreover, it failed to even take a position on whether the Privacy Act applied to military court records and instead proposed two possible scenarios for the release of court records. FAC ¶ 69.

requirements of Article 140a and DoD's policy guidance," noting that Ms. Krass's guidance "does not require contemporaneous release of properly redacted trial filings and records *as is standard in federal courts* and instead allows withholding until 45 days after the certification of the record of trial," and then *only* requires release of certain portions of the record (excluding, for example, any transcripts, exhibits, or evidence) and *only* in cases ending in conviction. Ex. A at 2; 2023 Guidance § IV(E)(2). Thus, the default rule, per this new guidance, is that the public is denied access to *any* court records at *any* stage of the military justice system, except post-trial, and then only in certain cases and with respect to certain records.

Contemporaneous public access to criminal court records is more than a "best practice" in civilian courts—it is required by the First Amendment and common law for the vast majority of records. *See, e.g.*, *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1145, 1147 (9th Cir. 1983) (recognizing First Amendment right of access to "pretrial documents in general" in criminal cases and finding 48-hour delay in access improper); *Oregonian Pub. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1466 (9th Cir. 1990) (First Amendment generally prohibits closure of "criminal proceedings and documents"). And the First Amendment prohibits the new rules' categorical denials of access to criminal proceedings and documents—the law requires "specific factual findings" to justify closure in each case. *Oregonian Pub.*, 920 F.2d at 1466 (citing *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 13-14 (1986) ("*Press-Enterprise II*")); *see also Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 602 (1982) (statute mandating closure of criminal trial during testimony of minor victim violated First Amendment). Any closure must be necessary to serve a "compelling interest," "narrowly tailored" to that interest, and there must be no less restrictive alternative. *Oregonian*, 920 F.2d at 1465-66 (citing *Press-Enterprise II*, 478 U.S. at 13-14).

The new rules also state that the services do not need to provide notice of Article 32 hearings on their "dockets." § IV(C)(1)(a). The lack of such notice would render

these critical preliminary hearings effectively closed to the public—as the Navy's current policy demonstrates. This rule flouts the military's own rules, RCM 405(j)(3), and the First Amendment requirement that these hearings be open to the public and press, as the military's highest court has recognized. *ABC. Inc. v. Powell*, 47 M.J. 363, 364, 366 (C.A.A.F. 1997). And it violates the rule that courts may not close hearings without giving the public advance notice and an opportunity to be heard. *Globe Newspaper*, 457 U.S. at 609 n.25; *Oregonian Pub.*, 920 F.2d at 1466.

Defendants cannot hide behind the Privacy Act to justify their noncompliance with Art. 140a. Significantly, the MJRP's White Paper rejected the military's claim that the Privacy Act requires the new rules to depart from court access norms. It explained that the Act's "routine use exception," which "allows agencies to disclose records in accordance with 'routine use,'" "ought to apply to the release of properly redacted court-martial filings and records[.]" Ex. A at 5-6 (citing 5 U.S.C. § 552a(b)). In fact, the Office of Management and Budget has specifically "advised agencies to rely on the routine use exception" where—like here—"a statute other than FOIA mandates release of records otherwise covered by the Privacy Act." *Id.* at 5 (citing OMB Guidelines 1975, 40 Fed. Reg. 28,948, 28,954 (July 9, 1975), https://perma.cc/9QPF-NNNU). And the Department of Defense *already* published a System of Record Notice ("SORN") in the Federal Register in May 2021, stating that military court records may be released to the public pursuant to Art. 140a as a routine use exception to the Privacy Act. *Id.* at 5-6 (citing 86 Fed. Reg. 28,086, 28,089 (May 25, 2021)). Notably, the SORN specifically *permits* the release of "several documents" that Ms. Krass's rules "explicitly *exclude* from the Article 140a publication requirement"—such as exhibits, transcripts, and "evidentiary data in any form." *Id*. (emphasis added). Accordingly, there is no basis for Ms. Krass's broad and arbitrary exclusions, which would be improper in civilian courts.

MJRP's analysis concludes—correctly—that the Department of Defense "should consider revising its policy guidance to mandate contemporaneous release of

properly redacted court-martial filings and records in accordance with Article 140a," as this "is both required and necessary under the law." *Id.* at 2, 9. It is also "practicable." Military commissions, for example, require filings and orders "that do not require classification security review" to be publicly "posted within one business day of filing[.]" U.S. Dep't of Def., Regulation for Trial by Military Commission at 19-4(c)(1), https://www.mc.mil/portals/0/2011%20regulation.pdf. Even filings that do require a security review must generally be posted within 15 business days, absent "exceptional circumstances." *Id*. at 19-4(c)(2). The Army has also publicly posted court records during court-martial proceedings within 24-48 hours of filing.[4] There is no reason the Navy could not do the same. Ms. Krass's 2023 guidance is thus blatantly deficient and does not satisfy the bare minimum requirements of the law. The need for mandamus relief is "clear and certain," and dismissal of this claim would be improper.

**B. Defendants mischaracterize ProPublica's claims and appear to seek dismissal of only specific allegations within those claims, which is improper.**

Defendants seek to "dismiss" certain allegations supporting the FAC's claims, by contending that ProPublica challenges "regulations that the Navy has yet to issue" as well as "outdated policies" that are now moot. Motion at 6-7. Neither assertion is correct, and Defendants' motion is improper because it only challenges certain allegations within a claim. *Hightower v. JPMorgan Chase Bank, N. A*., No. CV 11-1802 PSG, 2012 WL 12878311, at *3 (C.D. Cal Sept. 12, 2012) (collecting authority). That part of the Motion must be denied on this basis alone.

Moreover, the actual claims at issue challenge the Navy's *continuing* policy and practice of denying meaningful and timely access to its criminal justice system. *See supra* Part II.D; FAC ¶¶ 1, 61-62, 100, 105. While Defendants claim their policies are now "outdated," the Navy's continuing practice of denying court access is entirely

[4] *See United States v. Bergdahl*, Hearing Tr. 112-13 (Attachment A to Govt. Response to Defense & ProPublica Motions, https://perma.cc/RVT7-QDF4); *see also Ctr. for Const. Rts. v. Lind,* 954 F. Supp. 2d 389, 403 (D. Md. 2013) (during court-martial Army released "vast majority" of court filings).

consistent with its prohibitions on access set forth in its 2020 JAG Instruction, and Defendants have never represented that this instruction has been rescinded. ¶¶ 70-72.

The Navy has denied ProPublica timely and meaningful access to more than 74 cases over the course of the last year, and this number continues to grow, as ProPublica continues to request access to new cases and the Navy continues to deny it. *See supra* Part II.D. The Navy also continues to keep cases entirely secret at the preliminary stage, refusing to even provide public notice of Article 32 probable cause hearings and transcripts in violation of the First Amendment and the military's own rules, and depriving ProPublica of any meaningful ability to report on these cases. *See supra* Part II.D; FAC ¶¶ 2, 59; Rose Decl. ¶ 2; RCM 405(j)(3); *Powell*, 47 M.J. at 364.[5]

Accordingly, this case presents a live controversy, and any claim that it is not ripe or is moot is baseless. *See, e.g.*, *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1407 n.5 (9th Cir. 1991) (rejecting ripeness challenge where disputed ordinance was in effect and injury was not "speculative"). ProPublica's claims of harm are not speculative but concrete and ongoing. Every day that passes, the Navy continues to deprive ProPublica of its First Amendment and common law rights to access and report on dozens of military cases, thereby causing irreparable harm not only to ProPublica, but to the public at large. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). This denial amounts to "a ban on reporting news just at the time the audience would be most receptive," and it is "effectively equivalent to a deliberate statutory scheme of censorship." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020)

[5] ProPublica would welcome the Navy's belated compliance with the First Amendment, common law, and Art. 140a when it issues new regulations. However, there is no basis to believe anything will change in September. The Navy has never indicated its new regulations will deviate in any significant way from its current policy; it continues to deny timely access in more than 74 cases; and the 2023 Guidance largely *affirms* its current practices.

(cleaned up). Courts have rejected ripeness challenges where, like here, claims were "premised on First Amendment violations" and involved restrictions on speech. *San Diego Minutemen v. Cal. Bus. Transp. & Hous. Agency's Dep't of Transp.*, 570 F. Supp. 2d 1229, 1238 (S.D. Cal. 2008) (citations omitted).[6]

**C. ProPublica has standing to challenge Defendants' restrictions on Ryan Mays' ability to release his court records to ProPublica.**

Defendants' claim that ProPublica lacks standing to challenge their restrictions on Mr. Mays' ability to release his court records is meritless. Defendants contend that ProPublica is asserting a claim on *Mr. Mays'* behalf, but that is inaccurate. ProPublica asserts its *own* First Amendment right to receive information from Mr. Mays, who is a "willing speaker" and has been prevented from sharing his court file with ProPublica by OJAG and Defendant Butler. FAC ¶ 98 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)). Accordingly, the cases cited by Defendants do not apply.

"[W]here a [willing] speaker exists," the First Amendment protects "the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy,* 425 U.S. at 756 (collecting cases). "[F]reedom of speech 'necessarily protects the right to receive [information and ideas].'" *Id.* (cleaned up, quoting *Kleindienst*, 408 U.S. at 762-63). Third parties therefore have standing to challenge restrictions on a willing speaker's right to share information, because those restrictions impair the third party's right to *receive* that information. *Id.* (consumers of prescription drugs had standing to challenge restrictions on advertisers). Courts have widely applied this principle to permit members of the press to challenge restrictions that prevent willing speakers from sharing information, noting that such restrictions harm the press by limiting their ability to gather the news. *See, e.g.*, *In re Dow Jones*, 842 F.2d 603, 607

[6] If the Court is reluctant to issue a ruling on Defendants' motion prior to the Navy's issuance of revised regulations, merely waiting until after September 14, 2023, to see how, if at all, the Navy updates its regulations, would resolve this concern.

(2d Cir. 1988); *Radio & Television News Ass'n of S. Cal. v. U.S. Dist. Ct.*, 781 F.2d 1443, 1446 (9th Cir. 1986); *CBS Inc. v. Young*, 522 F.2d 234, 237–38 (6th Cir. 1975).

Mr. Mays is a willing speaker, who has repeatedly sought to release his records to ProPublica, despite the Navy's unsupported claim that only the Judge Advocate General may release court records, *see* Motion at 11, and despite Defendants' continual efforts to prevent the release of the complete case file.[7] Unless Mr. Mays is finally permitted to release his records, ProPublica may never see them.

The public interest in enabling ProPublica to pursue its claim is particularly compelling, since it concerns records that would shed light on the Navy's controversial prosecution of Mr. Mays, despite its own military judge advising against it, *see* FAC ¶ 5. *See Dow Jones*, 842 F.2d at 607 (challenge by news agencies "must certainly be permitted when the restrained speech . . . concerns allegations of corruption by public officials"). "[M]aintaining public trust in the integrity of the judicial process" is particularly crucial when it involves a criminal trial that implicates the conduct of law enforcement. *Phoenix Newspapers v. U.S. Dist. Ct.*, 156 F.3d 940, 948 (9th Cir. 1998).

**D. ProPublica has standing to sue Defendants Butler, Krass, and Austin.**

Defendants claim ProPublica lacks standing to sue Defendant Butler because it has not alleged any injury-in-fact that is "traceable" to him or "redressable" by him. Motion at 9-11. But ProPublica's injury is unquestionably traceable to his blanket denial of access to the *Mays* court records. As a result, ProPublica was denied access to dozens of records in the case, frustrating its ability to meaningfully understand the proceedings as they unfolded and inform the public. FAC ¶ 5.

Second, the claim that Defendant Butler cannot redress Plaintiff's injury—due to (1) the "transitory nature of the court-martial," since the *Mays* case has now ended,

[7] First, Mr. Mays asked OJAG to release his records to ProPublica, but it refused to do so. FAC ¶ 24. He then filed a motion in the military court, seeking release of his records, but Defendant Butler denied this. ¶¶ 26-27. After his acquittal, he authorized the Navy to release his court file to ProPublica, but it only released limited portions of it, withholding at least 128 documents in full or in part. ¶¶ 35, 48.

and (2) his purported "lack of authority to provide any relief," Motion at 10-11—must be rejected. First, even if Defendant Butler lacks authority to order release of the *Mays* records now that the court-martial has concluded, Defendants have not disputed that he could vacate his own order, so it may not be cited by future courts. Nor do they dispute that he could be ordered to refrain from denying such access in future cases.

Further, the transitory nature of courts-martial does not enable military judges to forever evade judicial review for withholding court access. Even when the underlying proceedings have ended, this does not moot court access challenges, because the denial of access is capable of repetition, yet evading review.[8] This principle applies here as well. Defendant Butler continues to serve as a military judge in the Navy. If his denials of court access go uncorrected, they will continue and perpetually evade review. At least two of the sexual assault cases that ProPublica requested records for are assigned to him. *See* Rose Decl. ¶ 5. If the Navy continues to withhold these records, ProPublica would be forced to assert its rights before Defendant Butler, and he will likely withhold all court records again. In addition, since he is one of only 22 military judges listed on the Navy's "docket," *see* https://perma.cc/EXP9-69TR, and since ProPublica continues to seek access to court-martial proceedings, *see* Rose Decl. ¶ 2, it is highly likely that he will continue to deny court access to ProPublica.

Military courts unquestionably have authority to release court records and ensure meaningful public access to proceedings, just as civilian courts do. "When the position of the military judge was created, the intention was that the military judge would preside over a court-martial in the same manner as a federal district judge, with 'roughly equivalent powers and functions.'" *Ctr. for Const. Rts. v. United States*, 72 M.J. 126, 133 (C.A.A.F. 2013) (Cox, S.J., dissenting, joined by Baker, C.J.)[9]; *see also*

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[8] *See, e.g.*, *Globe Newspaper*, 457 U.S. at 603; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980); *Press-Enterprise II*, 478 U.S. at 6; *United States v. Brooklier*, 685 F.2d 1162, 1165 (9th Cir. 1982).

[9] The majority in *Center for Constitutional Rights* did not dispute the dissent's description of the military judge's role and authority.

*United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2000) ("Congress intended that, to the extent 'practicable,' trial by court-martial should resemble a [federal] criminal trial"). "[A] military judge has the jurisdiction, indeed the responsibility, to [e]nsure that a military court-martial is conducted so that the military accused and the public enjoy the same rights to a fair and public hearing as is envisioned in the Bill of Rights and embodied in the Rules for Courts–Martial." *Ctr. for Const. Rts.*, 72 M.J. at 132.

The RCM confirm that military courts control public access to court records. *Id.* Rule 801(a)(3) authorizes military judges to "exercise reasonable control over the proceedings to promote the purposes of these rules" and the Manual for Courts-Martial. Rule 806 "gives the military judge the responsibility to make sure the court-martial shall be open to the public" and authorizes the judge "to seal portions of the record." 72 M.J. at 134. Rule 405(j)(3) authorizes preliminary hearing officers to ensure public access and only restrict it where necessary. Rule 1113(a) makes clear that military judges may seal "materials" at their "discretion." Similarly, Rule 405(j)(8) says preliminary hearing officers have "authority to order exhibits, recordings of proceedings, or other matters sealed" as described in Rule 1113. Finally, Rule 801(e)(5) empowers military judges to dispose of all questions of law arising during trial, which necessarily include access questions. Implicit in these rules is the recognition that military courts may order the release of court records. 72 M.J. at 134.

Defendants cite one "instruction" issued by the Navy's own Judge Advocate General to support their position that only the JAG may release records. But this provision merely states that the JAG has "supervision" of trial records and "will maintain a certified record of trial until appellate review is complete." Motion at 11 (citing JAG Instr. 5800.7G). This does not supersede the RCM. Nor does Art. 140a limit the authority of military judges to ensure proper public access to proceedings and records. To the contrary, this statute and its legislative history make clear that it aimed

to *promote* transparency in the military court system and ensure timely public access at every stage of the proceedings, consistent with civilian courts.[10] *See supra* Part II.A.

Defendants also argue that if ProPublica's mandamus claim and "any challenges to the 2018 Guidance" are dismissed, ProPublica will not have alleged an injury "fairly traceable" to Defendants Krass and Austin. But, for the reasons set forth above, those claims should not be dismissed. Moreover, as General Counsel, Ms. Krass is the chief legal officer for the Department of Defense and principal legal advisor to Secretary Austin. FAC ¶ 18. Prior to this litigation, she refused to correct guidance implementing Art. 140a that enabled the Navy to broadly deny timely and meaningful access to court proceedings and records. ¶¶ 31-33. And her new rules inhibit access by affirming and enabling the Navy's existing policy. *See supra* Part II.E. ProPublica and the public continue to be irreparably harmed due to this failure, which has frustrated ProPublica's ability to report on matters of significant public interest. FAC ¶¶ 2-3, 105.

Likewise, ProPublica has standing to sue Defendant Austin, who is the Secretary of Defense, and the person designated by Congress to prescribe the "uniform standards and criteria" required by Art. 140a and to ensure that the military services comply with the Constitution and the law. ¶¶ 20, 65. He has failed to do so, and ProPublica has been injured as a result. ¶¶ 2-3, 105, 110.

[10] Defendants claim ProPublica "misread[s]" Art. 140a by characterizing it as imposing a requirement that public access be "timely," Motion at 6 n.1, but this is belied by the law's text, as MJRP's professional staff have noted, *see* Matthews Decl., Ex. B, and its legislative history, *see supra* Part I.A.

## V. CONCLUSION

For these reasons, ProPublica urges the Court to deny Defendants' motion.

Dated: July 28, 2023

Respectfully submitted,

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