THEODORE J. BOUTROUS, JR. (No. 132099)
tboutrous@gibsondunn.com
MICHAEL H. DORE (No. 227442)
mdore@gibsondunn.com
JILLIAN LONDON (No. 319924)
jlondon@gibsondunn.com
MARISSA MULLIGAN (No. 319734)
mmulligan@gibsondunn.com
SASHA DUDDING (*pro hac vice*)
sdudding@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7000

SARAH MATTHEWS, SBN 294864
sarah.matthews@propublica.org
PRO PUBLICA, INC.
115 Avenue of the Americas, 13th Fl.
New York, NY 10013
Telephone: (212) 514-5250

TENAYA M. RODEWALD (No. 248563)
trodewald@sheppardmullin.com
MATTHEW G. HALGREN (No. 305918)
mhalgren@sheppardmullin.com
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
501 West Broadway, 18th Fl.
San Diego, CA 92101
Telephone: (619) 338-6500

Attorneys for PRO PUBLICA, INC

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PRO PUBLICA, INC.,

Plaintiff,

v.

VICE ADMIRAL CHRISTOPHER C. FRENCH; CARLOS DEL TORO; CAROLINE D. KRASS; and LLOYD J. AUSTIN, III

Defendants.

Case No. 3:22-cv-1455-BTM-KSC

PLAINTIFF PRO PUBLICA INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Judge: Hon. Barry Ted Moskowitz
Hearing: Feb. 14, 2025 at 11:00 a.m.

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

Complaint Filed: September 27, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The First Amendment and common law rights of access are hallmarks of the United States criminal justice system. The Supreme Court and Ninth Circuit have repeatedly upheld these rights as the critical backbone of public confidence and oversight in the courts. They allow the public to ensure power remains in check and justice is properly served. The Navy, however, has refused to observe these fundamental rights.

ProPublica, other reporters, and the public have been met with delays and denials of access to military court proceedings and records that are arbitrary and lack basic common sense. Some days the Navy claims it cannot release records because they are subject to a Freedom of Information Act ("FOIA") exemption; other days it says the FOIA exemption does not apply. The Navy says it needs to delay the release of records to redact witness names under the Privacy Act, but acknowledges those same witnesses testified in open court; even then, sometimes the Navy releases records with third-party names redacted, and sometimes it doesn't. The Navy refuses to permit the release of transcripts of all proceedings, even when any member of the public could have watched those same proceedings from the courtroom gallery. And while certain redacted court records are eventually (months or years later) released for courts-martial ending with guilty verdicts, these records represent a small fraction of the entire court record in any given case. The Navy also releases zero records from courts-martial ending in acquittals, except for bare-bones charge sheets, which it often delays releasing until after cases are closed. It is a haphazard approach that undermines the military justice system's legitimacy and prevents meaningful oversight.

The Navy's selective and delayed disclosure has real consequences. As just one example, the Navy often allows servicemembers charged with serious crimes, like rape, to simply "administratively separate" from the Navy prior to a court-martial. Since the Navy does not disclose that a servicemember is charged or provide public notice of preliminary hearings that occur before a case is referred to court-martial—such as

probable cause hearings, known in the military as Article 32 hearings—the public has no record of a criminal proceeding at all in these cases. The entire prosecution occurs in secret, like a modern-day Star Chamber. Victims are denied the opportunity to see the defendant put on trial, and the community has no idea what crime the servicemember was accused of committing or what evidence existed to support the charges.

Over two years ago, the Navy refused to disclose any court records in a court-martial involving controversial charges of arson against a young recruit for the destruction of the USS Bonhomme Richard, even though the charge sheet and search warrant materials had already been released. ProPublica filed this lawsuit to vindicate its and the public's First Amendment and common law rights of access. In the years since, the Navy has continued to deny ProPublica access to a wide range of court proceedings and records spanning three homicide cases, 91 cases of rape, sexual assault, and other sexual misconduct charges, and an unknown number of additional sexual assault cases the Navy never publicly disclosed.

Congress made clear in a law passed in 2016 that these rights of access apply to the armed services, including in all "pretrial, trial, post-trial, and appellate processes." 10 U.S.C. § 940a. This law—Article 140a of the Uniform Code of Military Justice—requires the Secretary of Defense to "prescribe uniform standards and criteria" for the "[f]acilitation of public access to docket information, filings, and records." *Id.* But Defendants have bent over backwards to justify violating this mandate. And their reasons for continuing to withhold court access also fall far short of meeting the stringent requirements imposed by the First Amendment and common law.

First, ProPublica is entitled to declaratory relief in connection with Defendants' violation of its First Amendment and common law rights. There is no reasonable dispute these rights of access apply here under Supreme Court, Ninth Circuit, and even military court precedent. The only question is whether Defendants' arbitrary refusal to provide notice and timely access—namely, (1) keeping the preliminary phase of its criminal cases entirely secret, refusing to even provide notice when charges are filed or before

Article 32 hearings are held, (2) denying contemporaneous access to all records in courts-martial, (3) permanently withholding the vast majority of the court record, such as hearing transcripts and exhibits, for cases ending in convictions, and (4) permanently withholding all court records for prosecutions ending in acquittals—is somehow justified under the First Amendment and common law's compelling interest standards. It is not.

Second, because Defendants continue to violate ProPublica's and the public's rights of access to this day, the Court should issue a permanent injunction to enjoin this irreparable injury. Withholding records from the public while they are timely and newsworthy amounts to deliberate, government-imposed "censorship." *Courthouse News Serv. v. Planet* ("*Planet III*"), 947 F.3d 581, 594 (9th Cir. 2020). Indeed, courts have routinely found that the effect of delay is a "total restraint on the public's first amendment right of access" even when restraints are "limited in time." *Associated Press v. U.S. Dist. Ct. Cent. Dist. of Cal.*, 705 F.2d 1143, 1145, 1147 (9th Cir. 1983). The Navy's actions are thwarting the ability of ProPublica and the press more broadly to timely report on legal matters of substantial public interest. ProPublica's only recourse is to ask the Court to order Defendants to (1) immediately release all court records in the *Mays* case, and (2) provide adequate hearing notice and contemporaneous records access consistent with the First Amendment and common law rights of public access.

Finally, a writ of mandate should issue requiring the Secretary of Defense to prescribe uniform standards and criteria that comply with Article 140a. Congress enacted Article 140a in 2016 to promote transparency in the military court system by ensuring public access to military proceedings and records, using the "best practices of Federal and State courts." 10 U.S.C. § 940a(a). This Court previously held that ProPublica plausibly alleged "the Secretary [] clearly failed to issue sufficient standards under [Article 140a]." Dkt. 47 at 5. Nothing has changed in the interim—there is no evidence showing the Secretary has complied with his obligations. ProPublica is entitled to relief.

* * *

Ultimately, this case is simple. "The free press is the guardian of the public interest," particularly when "reporting about the government." *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012). But Defendants are ignoring the public's rights of access and abandoning the duties that Congress imposed on them under Article 140a. The public, and the military itself, are suffering irreparable harm as a result because while "[p]eople in an open society do not demand infallibility from their institutions, . . . it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). There is no genuine dispute of material fact, and no reasonable trier of fact could find for Defendants. Summary judgment should issue in ProPublica's favor.

II. FACTUAL BACKGROUND

A. Congress Requires Public Access to Military Legal Proceedings and Records, but Defendants Do Not Comply

Despite Congress's clear mandate that the Secretary of Defense ensure public access to military legal proceedings and records, time and again the Department of Defense ("DoD") and Navy have failed to comply.

1. In 2015, a DoD-Appointed Group Proposes Article 140a to Facilitate Uniform Public Access to Military Legal Proceedings and Records

In October 2013, then-Secretary of Defense Chuck Hagel directed the Department of Defense General Counsel "to conduct a comprehensive review of the UCMJ [Uniform Code of Military Justice] and the military justice system."[1] In response to this directive, the Department of Defense General Counsel established the Military Justice Review Group ("MJRG"), which conducted a review of the military justice system and made several reform proposals in a 2015 report. *See* MJRG Report at 5–6.

Among other things, the MJRG concluded that each military service was making different "disclosure decisions" regarding court-martial case information and documents, and that some information was being released only upon a request that

[1] https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf ("MJRG Report") at 5.

complied with the requirements of the Freedom of Information Act, which the MJRG called "time-consuming." MJRG Report at 1011. To address this, the MJRG proposed to "increase transparency and independent review of the military justice system by . . . creating a statute requiring uniform public access to courts-martial documents and pleadings similar to that available in federal courts." MJRG Report at 8 (cleaned up).

Specifically, the proposal by the MJRG was to "establish a new statute, Article 140a (Case management; data collection and accessibility), that would require the Secretary of Defense to develop uniform case management standards and criteria that also would allow public access to court-martial dockets, pleadings, and records in a manner similar to that available in the federal civilian courts." *Id.* at 36. This reform would "enhance efficiency and oversight, as well as . . . increase transparency in the system and foster public access to releasable information." *Id.* at 139.

2. In December 2016, Congress Enacts Article 140a

In December 2016, amidst reports that the Department of Defense misled Congress about sexual assault in the military and claims that the military justice system was marred by variable sentences, conflicts of interest, and questionable decisions not to pursue courts-martial,[2] Congress enacted Article 140a. *See* 10 U.S.C. § 940a(a)(4).

Article 140a 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." *Id.* The standards and criteria are required to facilitate public access "at all stages of the military justice system . . . including [the] pretrial, trial, post-trial, and appellate

[2] *See, e.g.*, Emily Crockett, *The war in Congress over rape in the military, explained*, Vox (June 8, 2016), https://www.vox.com/2016/6/8/11874908/mjia-military-sexual-assault-gillibrand-mccaskill. The Court may take judicial notice of this news article because its accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); *see also Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) ("Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time . . . .'" (citation omitted)).

processes." 10 U.S.C. § 940a. According to a congressional report, the system developed for implementation of Article 140a should, "[a]t a minimum . . . permit *timely* and *appropriate* access to filings, objections, instructions, and judicial rulings at the trial and appellate level." 162 Cong. Rec. H6376-03, H6884 (daily ed. Nov. 30, 2016) (emphases added).

3. In December 2018, DoD's General Counsel Issues the Ney Memo, Which Fails to Provide Transparency and Uniform Public Access to Military Legal Proceedings and Records

The Secretary of Defense has never issued the standards and criteria that Congress mandated in Article 140a. Instead, two years after the law was enacted, Defendant Caroline Krass's predecessor as General Counsel of DoD, Paul C. Ney, Jr., issued a short memorandum on December 17, 2018 (the "2018 Ney Memo").[3] Rather than prescribe "uniform standards and criteria" to ensure meaningful and timely access to military courts, the 2018 Ney Memo failed to take a definitive position on whether the Privacy Act of 1974 (5 U.S.C. § 552a) applied to military court records, and said that if the Privacy Act *did* apply, such records would be published "as soon as practicable after the certification of the record of trial[.]" *Id.* at 6.[4]

4. In December 2020, the Navy's Office of the Judge Advocate General Issues JAG Instruction 5813.2, Which Substantially Limits Transparency and Public Access to Military Legal Proceedings and Records

Yet another two years later, on December 16, 2020, the Navy's Office of the Judge Advocate General ("OJAG") issued an "instruction" pursuant to the 2018 Ney Memo, JAG Instruction 5813.2. The Instruction purported to implement Article 140a and

[3] It appears the Ney Memo, which was attached to JAG Instruction 5813.2, is no longer available on the Navy's website. The parties submitted this instruction in a joint filing. *See* Dkt. 45, Ex. 2, Encl. 1 at 45 (Ney Memo. at 2, 5 (Dec. 17, 2018). ProPublica also published it online. *See* https://www.documentcloud.org/documents/23927269jag_instruction_58132.

[4] The Privacy Act restricts, subject to more than a dozen exceptions, an agency's ability to disclose a record contained in a "system of records" (a group of records from which information is retrieved by the individual's name or other "identifying particular assigned to the individual") to any person without the prior written consent of the individual to whom the record pertains. 5 U.S.C. § 552a(a)(5), (b).

assumed, without any analysis, that the Privacy Act applies to all military court records.[5] Contrary to the plain language of Article 140a, the JAG instruction *prohibited* the release of any court records ending in acquittal, which necessarily prohibited release of any records from an ongoing court-martial. JAG Instruction 5813.2 at Sec. 4(a)(3)(b). It only permitted the release of records if an accused was convicted and, even then, only after the case had ended and within 45 days following "certification" of the record. *Id.* at Sec. 4(a)(3)(g).

The Instruction required that numerous court records never be made public, even in cases ending in conviction—such as attachments and "supporting evidence" submitted in connection with filings, trial exhibits, transcripts of "any proceedings," preliminary hearing officers' reports, "[p]re-trial matters" (including, among other things, witness lists, requests for instructions, and proposed voir dire), plea agreements, and even several types of court orders, such as protective orders, sealing orders, and contempt orders. *Id.* at Encl. 3 at 1–3. The Instruction also prohibited the Navy from providing notice on its docket of "any pre-referral hearings," meaning any preliminary hearings before the case is referred to a court-martial for trial. This includes pre-trial confinement hearings and probable cause hearings under Articles 30 and 32 of the UCMJ. *Id*. at Sec. 4(a)(3)(a).

5. In May 2021, DoD Publishes a System of Records Notice Saying the Privacy Act Does *Not* Restrict Access to Military Court Records

On May 25, 2021, the DoD backtracked from the Ney Memo and JAG Instruction 5813.2 in a published System of Records Notice ("SORN") that provided notice of a new system applicable to military court records called "Military Justice and Civilian Criminal Case Records."[6] The SORN stated that the Privacy Act's exemption permitting the disclosure of records as a matter of "routine use" includes disclosure "[t]o the general public in order to provide access to docket information, filings, and records in

[5] *See* Dkt. 45, Ex. 2 (JAG Instr. 5813.2), https://www.documentcloud.org/documents/23927269-jag_instruction_58132.

[6] Privacy Act of 1974; System of Records, 86 Fed. Reg. 28,086, 28,089 (May 25, 2021), https://www.federalregister.gov/documents/2021/05/25/2021-10367/privacy-act-of-1974-system-of-records.

compliance with Article 140a, UCMJ or other Federal statutes, and corresponding DoD or Service implementing guidance, regulations, or policies." 86 Fed. Reg. at 28089. The SORN listed pleadings, motions, exhibits, evidence, trial transcripts and records, filings, and other documents as examples of records to which the public would have access. *Id.* at 28088. In other words, the SORN made clear that military court proceedings and records were *exempt* from the Privacy Act. The DoD issued a final rule implementing the SORN on May 11, 2022.[7]

6. In January 2023, DoD's General Counsel Issues the Krass Guidance, Concluding the Privacy Act *Does* Apply to Military Court Records

Less than a year later, the Navy reversed course again. On January 17, 2023, about four months after ProPublica filed this action, Defendant Krass issued revised rules regarding Article 140a ("Krass Guidance"). The Krass Guidance technically overrode the 2018 Ney Memo, but affirmed the Navy's existing policy of withholding timely access to military court records.[8] Despite the SORN, which made clear that military court records were exempt from the Privacy Act, the Krass Guidance backpedaled to reinvoke the Privacy Act and again advise the military services that they did not have to make any record public until 45 days after the "certification" of the record following trial and, even then, only if the accused was found guilty. *Id.* § IV(E)(2), F(1)(b) (permitting release of records in acquittals only in "specific cases"). The Krass Guidance also said the services need only release limited parts of the record, excluding key portions, such as exhibits, evidence submitted to the court, transcripts, and the Article 32 report. *Id.* § IV(C)(2)–(3). The Krass Guidance also allowed the services to exclude notice of Article 32 hearings from their dockets. § IV(C)(1)(a).

[7] *See* Privacy Act of 1974; Implementation, 87 Fed. Reg. 28,774 (May 11, 2022), https://www.federalregister.gov/documents/2022/05/11/2022-10127/privacy-act-of-1974-implementation.

[8] Dkt. 45, Ex. 1, Encl. 1. Because the military did not make this guidance public at the time it was issued, ProPublica published it. *See* Military Justice Case Management, Data Collection, and Accessibility Standards § IV(E)(2), https://www.documentcloud.org/documents/23886686-revised_article_140a_guidance_with_attachments.

The Krass Guidance gave the services discretion to decide in "specific cases" whether to release "[a]dditional" records beyond those required, whether to release them in a timely manner, and whether to release them in cases where there were no findings of guilt. *Id*. § IV(F). The Guidance gave the military departments until December 27, 2023, to "reach full compliance." *Id.* This is despite the fact that Congress already required "full compliance" with Article 140a three years earlier, in December 2020. Pub. L. 114-328, Div. E, Title LXI, § 5504(a)(b)(2) (Dec. 23, 2016).

7. In August 2023, the Navy's Judge Advocate General Issues JAG Instruction 5813.2A Imposing Restrictions on the Public's Access to Military Case Records

On August 9, 2023, Vice Admiral Darse E. Crandall issued JAG Instruction 5813.2A to "establish [the] Department of the Navy policies and procedures for providing public access to court dockets, court filings, court records, and appellate documents" pursuant to Article 140a and the Krass Guidance.[9] This instruction cancelled the previous instruction, JAG Instruction 5813.2, but did not substantively change the Navy's policies of broadly withholding court access. Like the old instruction, the new instruction stated that dockets will not include notice of any pre-referral hearings, such as pre-trial confinement or probable cause hearings under Articles 30 and 32. *Compare* JAG Instr. 5813.2A at Sec. 5(a)(3)(a)*, with* JAG Instr. 5813.2 at Sec. 4(a)(3)(a). Both the old and new instructions created a default system of public access to certain "trial court records and filings" that occur only after trial—within 45 days after the certification of the record of trial—and only in cases ending in convictions. *Compare* JAG Instr. 5813.2A at Sec. 5(a)(3)(f), 5(c)(1)(b), *with* JAG Instr. 5813.2 at Sec. 4(a)(3)(b), (g). Further, like the old instruction, the new instruction also required the names of third parties, including witnesses who testified in open court, to be redacted or replaced with initials or pseudonyms. *Compare* Encl. 2 at Sec. 1(p) in JAG Instr.

[9] JAG Instr. 5813.2A, https://perma.cc/MF2T-GYFR. The Navy separately published each of the enclosures attached to this instruction. *See* Encl. 1, https://perma.cc/26DL-GH8S; Encl. 2, https://perma.cc/J5WC-HB4S; Encl. 3, https://perma.cc/4582-ZBU7; Encl. 4, https://perma.cc/2VRF-7GPH.

5813.2A and 5813.2. And both instructions require redaction of broad categories of information based on FOIA's privacy exemptions. *Id.*, Encl. 2 at Sec. 1(v-w).

As for differences, while the old instruction prohibited the release of various court records—like transcripts, Article 32 preliminary hearing reports, prosecution and defense exhibits, certain types of rulings, and pre-trial records—the new instruction suggested these materials are *secret by default*, but that this presumption can be overcome by "a proper and timely request for public access demonstrating public interest in the disclosure that balances the fair administration of justice with the privacy interests of the accused, minors, and victims of crimes." JAG Instr. 5813.2A, Encl. 3 at Sec. 3. Echoing the Krass Guidance, the new instruction provided OJAG with discretion to provide "[a]dditional" public access in "specific cases," including earlier than 45 days after certification of trial, in cases ending in acquittal, and with respect to case documents "not required to be made publicly accessible." *Id.*, Sec. 5(c)(1).

8. On October 7, 2024, the Navy Claims it is Now Providing Public Notice of Article 32 Hearings

On October 7, 2024, on the eve of Defendants' expert witness' deposition, Defendants purported to change course again, informing ProPublica that they began providing public notice of Article 32 hearings on the Navy Marine-Corps Trial Docket ("Docket"). Matthews Decl., Ex. P. Defendants have not, however, committed to providing advance notice of these hearings on a permanent basis, or to updating JAG Instruction 5813.2A to require such notice on a going-forward basis. *See id.*, Ex. R, Deposition Transcript of Chad Temple ("Temple Tr.") at 59:4–60:17. Nor has the Docket included advance notice of any Article 32 hearings since at least October 17, 2024. Matthews Decl. ¶ 35, Ex. Q.

B. ProPublica's Efforts to Access Court Records in *United States v. Mays*

ProPublica's efforts to access military court proceedings and records since Congress passed Article 140a show the flaws in and harm created by Defendants' inconsistent and improper procedures and guidance, all of which have fallen short of

Congress's clear mandate.

In 2019, ProPublica reporter Megan Rose and two colleagues wrote a series that examined how Navy and Marine Corps leadership failed to heed warnings and implement reforms leading up to several fatal Navy accidents. *See* Rose Decl. ¶ 2. Ms. Rose's investigative reporting on the Navy continues to this day. *See id.* In connection with that reporting, on July 7, 2022, Ms. Rose contacted Patricia Babb in OJAG to seek all records in the prosecution of Seaman Recruit Ryan Mays. *See id.* ¶ 5. Mays was charged with arson in connection with a fire that destroyed a Navy warship, the USS Bonhomme Richard, in July 2020.[10]

Ms. Rose was generally aware of the existence of certain court documents: a report from preliminary hearing officer Captain Angela Tang recommending that the case *not* proceed to trial due to lack of evidence; the transcript of the Article 32 preliminary hearing where evidence was proffered and witnesses testified; multiple motions by Mr. Mays's defense team challenging the prosecution; and a motion by the government to exclude from evidence a Navy report documenting widespread safety failures leading up to the fire. *See id.* ¶ 4. Much was newsworthy about the case, but Ms. Rose could not access any of the necessary documents to actually report on it.

For a month, between July 13 and August 13, 2022, OJAG repeatedly denied Ms. Rose's further requests for records. First, OJAG cited FOIA Exemption 7(A) (5 U.S.C. § 522(b)(7)(A))—which permits agencies to withhold "records or information compiled for law enforcement purposes" if it "could reasonably be expected to interfere with enforcement proceedings"—even though many of the materials Ms. Rose sought were discussed in proceedings open to the public. OJAG also cited the Privacy Act, but when ProPublica stated that Mr. Mays was willing to sign a Privacy Act waiver (while maintaining its position that no waiver should be required), OJAG shifted to different

[10] *Sailor facing court martial in fire that destroyed Navy ship*, Associated Press & Fox5 San Diego (Feb. 25, 2022), https://fox5sandiego.com/news/local-news/sailor-facing-court-martial-in-fire-that-destroyed-navy-ship. The Court may take judicial notice of this article under Federal Rule of Evidence 201(b). *See supra* note 2.

explanations for its continued withholding of publicly discussed records. Matthews Decl. ¶ 3, Ex. A.

On August 15, 2022, ProPublica submitted a letter to the military judge assigned to the *Mays* case, Commander Derek D. Butler, requesting the immediate release of all records and contemporaneous access to future court filings in the case or, alternatively, a clarification that Mr. Mays could exercise his First and Sixth Amendment rights to a public trial and disclose those records himself. *Id.*, Ex. B. Mr. Mays filed his own companion motion requesting the release of the records. *Id.*, Ex. C.

Commander Butler denied ProPublica's letter request but permitted it to submit a formal motion seeking the same relief. *Id.* ¶ 6. ProPublica did so. *Id.* ¶ 8, Ex. D. On August 30, Commander Butler denied ProPublica and Mr. Mays's motions, finding the military court lacked authority to grant the requested relief because Article 140a "control[led] this process." *Id.*, Ex. F. Commander Butler held that the "proper avenue to pursue the release of these records" may be in an Article III court. *Id.*

On September 13, ProPublica and a press freedom nonprofit, the Reporters Committee for Freedom of the Press, sent a letter on behalf of themselves and a media coalition of 38 press organizations to Defendant Krass, the DoD General Counsel, requesting that she issue corrected guidance as soon as possible making clear that Article 140a, along with the First Amendment and common law, *require* contemporaneous access to court martial records. *Id.*, Ex. G. The National Institute of Military Justice ("NIMJ")[11] also wrote to Defendant Krass and endorsed the media coalition's letter. *Id.*, Ex. H. NIMJ's letter concluded that the military's implementation of transparency initiatives like Article 140a "in ways that are contrary to the intent behind them . . . is contributing to a burgeoning military justice legitimacy crisis." *Id.*, Ex. H.

[11] NIMJ is the country's oldest non-governmental organization dedicated solely to the study and improvement of the military's justice system. *See* https://www.nimj.org/about.html#.

Defendant Krass did not acknowledge ProPublica's or NIMJ's letters until ProPublica contacted her office on September 23, 2022, to give notice of this suit. *Id.* ¶ 14. At that point, a lawyer in her office stated the letter had been "overlooked." *Id.*

C. ProPublica Sues to Enforce Its Constitutional and Common Law Rights

1. This Lawsuit Prompts the Navy to Disclose Some Records from *United States v. Mays*, Although They Are Heavily Redacted

Left with no choice, ProPublica filed the instant action on September 27, 2022, while the *Mays* trial was ongoing. *See* Dkt. 1. This Court then granted a joint motion by the parties to stay briefing on ProPublica's motion for a preliminary injunction and temporary restraining order while the parties worked to reach an informal resolution. *See* Dkt. 16. Between October 28 and November 7, 2022, nearly a month after the *Mays* trial had concluded on September 30, Defendants produced 132 records from the *Mays* case on a rolling basis. *See* Matthews Decl. ¶ 16. ProPublica published them online and linked to them in its reporting about this case.[12] More than two-thirds contained redactions. *Id.* ¶ 16. Many were heavily or even entirely redacted without explanation. *Id.* OJAG had generally—but not always—blacked out the names of third parties, even when they were witnesses at trial and/or named in judicial orders. *Id.* ¶¶ 19–20. Signature blocks were frequently redacted, even for the parties' attorneys and the military judge, making it impossible to know whether the filings were in final form and signed. *Id.* ¶ 20. Numerous key records also appeared to be missing, and Defendants refused to disclose the Article 32 hearing transcript and report in full. *Id.* ¶ 17.

Upon receiving these heavily redacted records, ProPublica's counsel sent multiple emails to Defendants' counsel, objecting to the excessive and improper redactions, and asking that Defendants reconsider. *See id.* ¶ 21, Ex. I. Defense counsel initially cited the Privacy Act and FOIA as the bases for these redactions, although subsequently conceded they were "not going to rely on FOIA as a basis for withholding." *Id.* ¶ 22.

[12] *See* https://www.documentcloud.org/app?q=%2Bproject%3Abonhomme-fire-208721%20.

2. Continued and Arbitrary Denials of Access in *United States v. Mays*

On March 6, 2023, armed with the (still deficient) Krass Guidance, Defendants produced another batch of 22 records from the *Mays* case. *Id.* ¶ 23. They claimed this new production corrected all previous over-redactions. *Id.* In reality, most of these records were trial exhibits that had already been produced months earlier. *Id.*

Defendants conceded they did not have a docket for the *Mays* case but agreed instead to provide a "Vaughn index" listing the records filed in the *Mays* case and justifying their withholding. *Id.* ¶ 25. On April 14, 2023, Defendants produced this index along with a "justifications notation key," which stated: "Under Article 140a, UCMJ, filings and court records are redacted in accordance with the Privacy Act, FOIA, JAGINST 5813.2 and DoD policy." *Id.* ¶ 26. Beyond the Defendants' conclusory assertions, no detailed explanations were provided.

3. Improper Withholding of Records in Homicide, Rape, and Child Sexual Assault Cases and a Blanket Denial of Access in All Cases

In addition to the requests for records from the *Mays* case, in November 2022, Ms. Rose requested, through counsel, access to records and case information in certain high-profile homicide cases that were not listed on the Docket and all cases involving sexual assault and related charges since Article 140a had gone into effect in December 23, 2020. Rose Decl. ¶¶ 11–12; Matthews Decl. ¶ 29. Defendants initially provided some status information about the homicide cases but refused to provide any case files. Matthews Decl. ¶¶ 30–31. Between March 30, 2023, and March 6, 2024, Ms. Rose submitted five requests directly to OJAG, seeking access to court records and docket information in 3 homicide cases and 91 sexual assault cases pending on the Docket at the time of each request. Rose Decl. ¶¶ 16–17. She also requested the court records and case information for sexual assault cases that were *not* listed on the Docket.[13] *Id.* Turning the constitutional and common law rights of access on their collective head, in response to

[13] Because they are not listed on the Docket, ProPublica does not know how many cases were covered by these requests.

Ms. Rose's requests, OJAG made a series of increasingly onerous demands that Ms. Rose justify obtaining the case information and records she sought. *Id.* ¶¶ 20–23.

On April 11, 2024—more than a year after Ms. Rose's original request—the Navy responded and largely denied her requests for public access from the previous spring, without explanation. Rose Decl. ¶¶ 33–36. On May 8, 2024, Ms. Rose appealed the denial of her requests. Now, over six months later, she has not received a decision. *Id.* ¶ 37. On May 30, 2024, OJAG denied a request Ms. Rose made on March 6, 2024 for access to sexual assault case files and information. Ms. Rose appealed that decision on July 3 and has still not received a decision. *Id.* ¶ 38.

OJAG never provided Ms. Rose advance notice of any Article 32 hearings in the sexual assault cases she was investigating. Rose Decl. ¶ 18. Nor did it ever provide contemporaneous access to any court records. *Id.* Instead, it only released the "certified record of trial" in 35 cases that had ended in convictions, and it did so only months—and sometimes *years*—after the fact, when the information was far less newsworthy. *Id.* OJAG never provided any exhibits, transcripts, or Article 32 reports, among other things, and routinely redacted portions of the record, including names of third parties and signatures of counsel and the judge. *Id.* OJAG also never provided records for cases ending in acquittals, other than the charge sheet months after the cases were over. *Id.*

A review of 50 certified records of trial recently published by the Navy indicated that these records were released an average of 9 months after the court-martial ended and included *less than one percent* of the entire case files.[14]

III. LEGAL STANDARD

Summary judgment is proper when there is "no genuine issue as to any material fact." Fed. R. Civ. P. 56(a). No genuine issue of material fact exists with respect to a claim or claims "[w]here the record taken as a whole could not lead a rational trier of

[14] Defendants claim that "a certified trial record typically contains approximately 300 documents and averages at more than 8000 pages." Matthews Decl. Ex. T. at 13. ProPublica's review of 50 certified records of trial published by the Navy suggests that the average certified record of trial is only 61 pages. *Id.* ¶ 33, Ex. O.

fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotations omitted).

Where the moving party demonstrates the absence of genuine issues of material fact, the opposing party "must produce *specific evidence*, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991) (emphasis added). Only "rational or reasonable" inferences are drawn in favor of the non-moving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987) (internal quotations omitted).

IV. ARGUMENT

A. Defendants Have Violated ProPublica's First Amendment and Common Law Rights of Access—ProPublica is Entitled to Declaratory Relief

Declaratory relief is appropriate where, as here, there is an "actual controversy," and an interested party seeks a "declar[ation] of [its] rights." 28 U.S.C. § 2201. ProPublica is entitled to a declaration that its First Amendment and common law rights of access apply to the at-issue military proceedings and records, and that Defendants have continually violated those rights through their various abridgments and outright denials of access. No reasonable jury could find for Defendants on this record.

The Supreme Court has long recognized that the press and public have a First Amendment right to attend criminal proceedings. *See Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"). According to the Court, there is "a First Amendment right of access to a particular criminal proceeding" if (a) it has "historically been open to the press and general public," and (b) if "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8–9. Courts nationwide have used this two-part "experience and logic" test to hold the constitutional right of access applies widely to criminal proceedings and records, as well as military proceedings and records, citing the history and benefits of such access. This is true of binding Ninth Circuit precedent, as well as

precedent from the highest military court. *See Civ. Beat L. Ctr. for Pub. Int., Inc. v. Maile*, 117 F.4th 1200, 1208 (9th Cir. 2024); *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985). The press and public also have a common law right "to inspect and copy . . . judicial records and documents," *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978), in civilian and military court proceedings.

1. The First Amendment Right of Access Applies to Criminal Proceedings

The constitutional right of access to criminal proceedings is both deeply rooted in the nation's history and plays an essential role in our system of justice. Openness "is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial," predating the nation's founding. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). Openness "plays as important a role in the administration of justice today," giving "people not actually attending trials [the] confidence that standards of fairness are being observed . . . and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*").

The press, including ProPublica, functions as a "surrogate[] for the public" in its reporting. *Richmond Newspapers*, 448 U.S. at 573. "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490–91 (1975); *see also Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012) ("The free press is the guardian of the public interest," particularly when "reporting about the government."). There is no question press access has a significant positive role.

Courts nationwide have applied the two-part "experience and logic" test to find the constitutional right of access applies to a wide range of criminal proceedings, including probable cause hearings and many other pre- and post-trial hearings. *See, e.g.*, *Globe Newspaper v. Super. Ct.*, 457 U.S. 596, 602 (1982) (criminal trials); *Press-*

Enterprise I, 464 U.S. at 505-10 (voir dire), *Press-Enterprise II*, 478 U.S. at 13 (pre-trial hearings); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 149 (1993) (probable cause hearings); *Maile*, 117 F.4th at 1208 (9th Cir. 2024) (collecting cases regarding suppression hearings, post-conviction proceedings, and others). "These rights of access are categorical and do not depend on the circumstances of any particular case." *Maile*, 117 F.4th at 1208 (citation omitted).

2. The First Amendment Right of Access Applies to Records Associated with Criminal Proceedings

The Ninth Circuit, and courts nationally, "ha[ve] long presumed a First Amendment right of access" not only to court proceedings, but also to related "documents." *Planet III*, 947 F.3d at 589. Court records "historically ha[ve] been open," and access to them is "important to a full understanding of the way in which the judicial process and the government as a whole are functioning." *Associated Press*, 705 F.2d at 1145. Access to records also "facilitates the openness of the proceeding itself by assuring the broadest dissemination," including through the press. *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994).

Accordingly, courts have held the First Amendment right of access attaches broadly to records filed in criminal proceedings. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 13 (transcript of pretrial hearing); *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1085 (9th Cir. 2014) (dockets and documents related to contempt hearings and sealing motions); *Oregonian Pub. Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1465 (9th Cir. 1990) (plea agreements, related documents); *CBS, Inc. v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985) (post-conviction records); *Associated Press*, 705 F.2d at 1145 (pretrial records).

3. The First Amendment Right of Access Applies to Military Legal Proceedings

The highest military appellate court has repeatedly recognized that the constitutional right of access "extends to courts-martial." *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (citing *Hershey*, 20 M.J. 433); *see also United States v.*

Hasan, 84 M.J. 181, 204 (C.A.A.F. 2024) (discussing courts-martial and confirming that "[c]onducting criminal trials in public is of paramount constitutional concern"); *United States v. Grunden*, 2 M.J. 116, 121 (C.M.A. 1977) (noting the public "shall be permitted to attend" courts-martial "[a]s a general rule"). This conclusion is supported by the Supreme Court's "experience and logic" test.

Courts-martial satisfy the first, "experience" prong of the test. Although courts-martial are not Article III courts, *see Ortiz v. United States*, 585 U.S. 427, 443 (2018), this prong looks "'to the experience in that *type* or *kind* of hearing throughout the United States.'" *El Vocero*, 508 U.S. at 150 (emphasis in original, citation omitted); *see also N.Y. Civ. Liberties Union v. New York City Transit Authority*, 684 F.3d 286, 301 (2d Cir. 2012) (same). A court-martial resembles a criminal trial and has "long been understood to exercise 'judicial' power, of the same kind wielded by civilian courts." *Ortiz*, 585 U.S. at 439.

Courts-martial also have historically been open. Matthews Decl. Ex. S, Expert Report of Robert Crow ("Crow Rept.") ¶ 16. "The court-martial is in fact older than the Constitution." *Ortiz*, 585 U.S. at 439 (citation omitted). Centuries ago, "courts-martial . . . were held in the open air, and . . . were required to be tried 'under the blue skies.'" W. Winthrop, Military Law and Precedents 161–62 (2d ed. 1920 Reprint)). "[T]he early practice" was that "reporters [were] freely admitted, and sometimes even special acco[m]modation [was] provided for them." *United States v. Brown*, 22 C.M.R. 41, 48 (1956) (quoting *id.* at 162), *overruled in part on other grounds by Grunden*, 2 M.J. 116; *see also Ortiz*, 585 U.S. at 440 (describing Winthrop as "the 'Blackstone of Military Law'"). This is consistent with the Rules of Court-Martial, which have long provided that "courts-martial shall be open to the public." Rules for Courts-Martial ("R.C.M.") 806.[15] Openness is also consistent with longstanding Congressional intent "that, to the

[15] The Rules for Courts-Martial are available at https://jsc.defense.gov/Portals/99/2024%20MCM%20files/MCM%20(2024%20ed)%20(2024_01_02)%20(adjusted%20bookmarks).pdf.

extent 'practicable,' trial by court-martial should resemble a criminal trial in a federal district court." *United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2000).

Public access has significant benefits to the proper functioning of courts-martial, satisfying part two of the Supreme Court's "experience and logic" test. Courts-martial, like civilian courts, have a "duty to adjudicate cases without partiality, favor, or affection." *Ortiz*, 585 U.S. at 440. As in civilian courts, access furthers that goal. "[P]ublic confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public." *Travers*, 25 M.J. at 62 (holding that sentencing proceedings are "important" and "should be kept open"); *see also* R.C.M. 806(b)(4), Discussion (stating access "enhances public confidence in the court-martial process"). During the proceeding, access helps by "ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury." *Hershey*, 20 M.J. at 436; *see also* Crow Rept. ¶ 16. Access also helps ensure fair outcomes: that members of the Armed Forces are not wrongfully deprived of their liberty, and society's worst offenders are held accountable. As the Rules of Courts-Martial themselves make clear, "[o]pening trials to public scrutiny reduces the chance of arbitrary and capricious decisions." R.C.M. 806(b)(4), Discussion. Congress, too, recognized the value of openness in its adoption of Article 140a. *See supra* Section II.A.2. Indeed, the stakes are significant. Courts-martial adjudicate some of the most serious crimes punishable by law—rape, sexual assault, and homicide—and can hand down a sentence of life in prison or even death. Crow Rept. ¶ 18; U.C.M.J. § 816.

The public and "press enjoy[] the same right" of access to Article 32 preliminary hearings. *ABC, Inc. v. Powell*, 47 M.J. 363, 364, 366 (C.A.A.F. 1997); *see also United States v. Davis*, 64 M.J. 445, 447 (C.A.A.F. 2007). Both parts of the history-and-logic test are satisfied for these hearings. First, openness is embedded in the military rules, which have long provided that "[p]reliminary hearings are public proceedings and should remain open to the public whenever possible." R.C.M. 405(k)(3); *see also San Antonio Express-News v. Morrow*, 44 M.J. 706, 709 (A.F. Ct. Crim. App. 1996) (noting

that "Article 32 investigations are presumptively public hearings," consistent with the Manual for Courts-Martial and earlier "cases publicized in national news media").

Second, Article 32 hearings are "judicial proceeding[s]," access to which serves essential values. *Morrow*, 44 M.J. at 710. These hearings are "an integral part of the court-martial proceedings." *Id.* (quoting *United States v. Nichols*, 8 U.S.C.M.A. 119 (1957)). They "stand[] as a bulwark against baseless charges." *United States v. Samuels*, 27 C.M.R. 280, 286 (1959). At the hearing, like with probable cause hearings in civilian court, a hearing officer determines whether there is probable cause and jurisdiction to proceed to a court-martial. *See* R.C.M. 405; U.C.M.J. § 832; Crow Rept. ¶ 27. Underscoring their judicial nature, "[t]he procedures for an Article 32 hearing include representation of the accused by counsel, the right to present evidence, and the right to call and cross-examine witnesses." *Davis*, 64 M.J. at 446–47. "[A]n impartial pretrial hearing is a substantial right," and public access bolsters that impartiality, helping ensure that the "system of justice functions fairly, not just in the eyes of all the parties, but also in the eyes of the American public [that the armed services] serve." *Morrow*, 44 M.J. at 709.

4. The First Amendment Right of Access Applies to Military Case Records

As in the civilian courts, the First Amendment right of access to military legal *proceedings* necessarily includes the right to access related *records*, which are critical to understanding the proceedings. *See, e.g.*, *United States v. Scott*, 48 M.J. 663, 666 (A.C.C.A 1998) (noting that access rights extend "to exhibits that were presented in public at a trial by court-martial" and finding that military judge abused discretion by sealing stipulation of fact); *United States v. Pulver*, 2023 WL 4564834, at *2–3 (A.C.C.A. July 13, 2023) (same, as to sealed expert testimony in court-martial record of trial); *United States v. Lewis*, 2023 WL 2253415, at *3 (A.C.C.A. Feb. 24, 2023) (same,

as to sealed exhibit).[16] The Rules for Courts-Martial only underscore this fact—making clear that courts-martial records are presumptively unsealed. *See* R.C.M. 1113(a). As with records of criminal proceedings and courts-martial, the constitutional right of access attaches to records of Article 32 proceedings.[17]

5. The Right of Access Requires Timely Access

"[A] necessary corollary of the right to access is a right to *timely* access." *Planet III*, 947 F.3d at 594 (emphasis added). "The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Id.* (reporting "must be timely to be newsworthy and to allow for ample and meaningful public discussion regarding the functioning of our nation's court systems" (citing *Globe Newspaper*, 457 U.S. at 604–05)); *see also Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.").

Courts have routinely found that "the effect of [delay] is a total restraint on the public's First Amendment right of access even though the restraint is limited in time." *Associated Press*, 705 F.2d at 1145, 1147. Indeed, the Ninth Circuit has found that delays of even two days violate the First Amendment. *See id.*; *Planet III*, 947 F.3d at 597, 600. And military courts ordering the public release of improperly withheld records have required the government to provide such access "promptly," noting that release

[16] In recognition of this right, the military adopted regulations in 2011 to ensure public access to court filings and rulings in Guantanamo military commissions. *See* Dep't of Def., Regulation for Trial by Military Commission, ch. 19, https://www.mc.mil/portals/0/2011%20regulation.pdf. And, Articles 36, 140a and, by implication, 146, UCMJ, "each call for the development of military practices and procedures" consistent with civilian courts. Matthews Decl. Ex. H.

[17] The press and public also hold a broad "common law right 'to inspect and copy public records and documents, including judicial records and documents.'" *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1192 (9th Cir. 2011) (quoting *Nixon*, 435 U.S. at 597). "[I]t is obvious that many or even most of the documents filed in a court-martial or other criminal proceeding are likely to be judicial records" subject to a common law right of access. *Ctr. For Const. Rts. v. Lind*, 954 F. Supp. 2d 389, 401 (D. Md. 2013).

delayed by months or years "would be an inadequate remedy to preserve the public interest." *Denver Post Corp. v. United States*, 2005 WL 6519929, at *1 (A.C.C.A Feb. 23, 2005) (so holding as to transcript of Article 32 hearing); *Abdul-Aziz Ali v. United States*, 398 F. Supp. 3d 1200, 1212 (USCMCR 2019) (finding "public confidence in the fairness of the prosecution will be tried and likely erode" during a "years' long delay" in access to military commission proceeding). Vindicating the public and ProPublica's access rights requires contemporaneous access.

6. Defendants Must—But Cannot—Show Their Refusals to Provide Access Are Justified by the Applicable Compelling Interest Standard

Notwithstanding the clear right of access applicable to military proceedings and records here—a right Defendants cannot seriously dispute—Defendants have baldly and repeatedly denied ProPublica, and thereby the public, the access it seeks.

Once a party establishes the right of access applies, the burden shifts to the government to demonstrate the complained of restrictions are justified. *See Planet III*, 947 F.3d at 594–95; *United States v. Sleugh*, 318 F.R.D. 370, 374 (N.D. Cal. 2016), *aff'd*, 896 F.3d 1007 (9th Cir. 2018). Specifically, Defendants must demonstrate (1) their denials of access further a compelling government interest, (2) are narrowly tailored to further that interest, and (3) there are no less restrictive means available to serve that interest. *See Press-Enterprise I*, 464 U.S. at 510.[18]

"[S]pecific factual findings" to support the denial of access are required on a case-by-case and document-by-document basis, and "conclusory assertions alone" do not suffice. *Oregonian Pub.*, 920 F.2d at 1466; *see also Maile*, 117 F.4th at 1211 ("Because the privacy interest implicated by a particular . . . record can be protected just as well by a case-by-case determination of whether closure is truly necessary to protect the asserted

[18] Likewise under the common law, "a strong presumption in favor of access is the starting point," after which "[a] party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by articulating compelling reasons that outweigh the general history of access and the public policies favoring disclosure." *Bus. of Custer Battlefield*, 658 F.3d at 1194–95 (cleaned up) (quoting *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006)).

interest, mandatory sealing is not the least restrictive means to protect that interest."); *Shane Group, Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305–06 (6th Cir. 2016) ("The proponent of sealing . . . must analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." (citations and quotations omitted)). Accordingly, if the government fails to provide "articulable facts demonstrating an administrative burden sufficient to deny access" in each case, the plaintiff is entitled to summary judgment. *Valley Broad. Co. v. U.S. Dist. Court*, 798 F.2d 1289, 1295 (9th Cir. 1986); *see, e.g.*, *Planet III*, 947 F.3d at 597–98 (affirming award of summary judgment to plaintiff where record demonstrated that delays in providing access were unrelated to asserted privacy and other governmental interests and less restrictive alternatives existed).[19]

Defendants have not even attempted to meet their burden and instead have tried to shift the burden *to ProPublica* to justify access. *See supra* Section II.C.3. They routinely withhold access to hearings and entire case files without any explanation, Rose Decl. ¶¶ 34, 38, or, in the *Mays* case, with one or two-word phrases to justify the vast sealing, Matthews Decl. ¶¶ 16, 26. Their scattershot attempts to invoke the Privacy Act, FOIA, and vague claims of "burden," do not come close to justifying their unconstitutional practices.

a. The Privacy Act Is Not a Compelling Interest, Nor Are Defendants' Blanket Denials of Access Narrowly Tailored

Defendants attempt to justify their denials of access by seeking refuge in the Privacy Act, arguing they need to temporarily withhold records to redact names and

[19] The military incorporates the same "constitutional standard" in its rules governing access to live court-martial proceedings. R.C.M. 806(b)(4), Discussion. Specifically, the Rules of Court-Martial provide: "Courts-martial shall be open to the public unless (A) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (B) closure is no broader than necessary to protect the overriding interest; (C) reasonable alternatives to closure were considered and found inadequate; and (D) the military judge makes case-specific findings on the record justifying closure." R.C.M. 806(b)(4); *see also* R.C.M. 405(k)(3) (same requirements apply to preliminary hearings); *Travers*, 25 M.J. at 62 (holding constitutional right of access "extends to courts-martial").

other information about people who appear in them. In practice, this leads to delays of an estimated nine months or longer in some cases, and, ultimately, the permanent withholding of likely more than 99% of the military court record without a proper legal basis—and that's when the Navy releases records at all. *See supra* Section II.C.3. In acquittals, it releases no records other than the charge sheet, often long after the case has concluded. *Id.*

The Privacy Act is not a compelling interest justifying Defendants' wholesale restrictions on access. As an initial matter, compliance with the Privacy Act is not a compelling interest that justifies the denial of access. Nothing in the Privacy Act requires or permits Defendants to refuse to provide notice and timely access to military court proceedings and records. The Privacy Act was enacted to prevent the "potential misuse of personally identifiable information stored in computers." *Baker v. Dep't of Navy*, 814 F.2d 1381, 1384 (9th Cir. 1987). The Privacy Act was "*not* designed to interfere with access to information by the courts." 120 Cong. Rec. 36,967 (1974) (emphasis added), reprinted in Source Book at 958–59, https://www.justice.gov/opcl/PAOverview_SourceBook/download. The text of the Privacy Act makes this clear. Particularly as to notice of Article 32 hearings, the Privacy Act is altogether inapplicable. The Privacy Act only prohibits disclosure of a "*record* which is contained in a system of records." 5 U.S.C. § 552a(b) (emphasis added). It has nothing to do with court *proceedings* and provides no basis for depriving the public of notice of them as the First Amendment requires.

Moreover, the Privacy Act provides no basis for Defendants' practices of redacting the names of third parties in all court records—including even the names of counsel, judges, and third parties who testified in open court. The Privacy Act does not apply to third parties whose names are referenced in court records, where the records are not retrievable by the third party's name or identifier. *See* 5 U.S.C. § 552a(a)(5); *Baker*, 814 F.2d at 1384. (The Navy's published court records are only retrievable by the accused's last name. *See* https://www.jag.navy.mil/military-justice/filings-records.)

Nor does the Privacy Act apply to documents unless they reflect "some quality or characteristic" about an individual who is the direct "subject" of the document. *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1449 (9th Cir. 1985).

Even putting those issues aside, the military proceedings and records at issue here all fall under the Privacy Act's express "routine use" exemption, which permits the disclosure of records "for a purpose which is compatible with the purpose for which [the information] was collected." 5 U.S.C. §§ 552a(a)(7), (b)(3). The military itself has acknowledged as much. In 2021, the DoD published the SORN in the Federal Register confirming the routine use exemption authorizes the military to release records "[t]o the general public in order to provide access to docket information, filings, and records in compliance with Article 140a." 86 Fed. Reg. 28086, 28089 (May 25, 2021); *see supra* Section II.A.5. In fact, the SORN lists pleadings, motions, exhibits, evidence, trial transcripts and records, and filings—in other words, the very documents ProPublica seeks in this case—as the types of documents that "may specifically be disclosed outside the DoD." 86 Fed. Reg. at 28088. Despite these express authorizations, Defendants continue to act as though they cannot release the records ProPublica seeks.

But the professional staff of the Military Justice Review Panel—an independent taskforce established by Congress to assess the military's compliance with Article 140a, *see* 10 U.S.C. § 946(a)—concluded in a White Paper that the routine use exemption "allows agencies to disclose records in accordance with 'routine use,'" and it "ought to apply to the release of properly redacted court-martial filings and records." *See* Matthews Decl. Ex. N at 5–6. The White Paper further notes that the Office of Management and Budget has specifically "advised agencies to rely on the routine use exception" where "a statute other than FOIA mandates release of records otherwise covered by the Privacy Act." *Id.* at 4 (citing OMB Guidelines 1975, 40 Fed. Reg. 28,948, 28,954 (July 9, 1975), https://perma.cc/9QPF-NNNU). Article 140a does just that.

Congress enacted Article 140a in 2016 specifically to promote transparency with respect to military proceedings and records, to "enhance efficiency and oversight," and

to "foster public access to releasable information." MJRG Report at 139; *see supra* Section II.A.1. By contrast, the 1974 Privacy Act generally addresses the collection and dissemination of personal information by federal agencies. It contains no provisions purporting to limit public access to courts; in fact, the legislative history indicates just the opposite. *See* 120 Cong. Rec. 36,967 (noting the Privacy Act was "not designed to interfere with access to information by the courts"). Thus, Defendants' argument that they cannot comply with the clear dictates of Article 140a due to the Privacy Act is entirely without merit. Even if there were conflict between the two statutes—which there is not—such conflict would be resolved "by carving out an exception from the more general enactment [the Privacy Act] for the more specific statute [Article 140a]," paying special attention to "evidence that Congress intended to address a specific situation through special legislation." *Stewart v. Smith*, 673 F.2d 485, 492 (D.C. Cir. 1982). The Privacy Act has no application here.

Even if the Privacy Act purported to restrict the release of military court records (again, it does not), this statute alone is not a compelling basis for broadly sealing records or restricting access.[20] Rather, the First Amendment standards must be separately met regardless of whether the material is covered by the Privacy Act.[21]

[20] *See, e.g.*, *Hanan v. U.S. Citizenship & Immigr. Servs.*, 2024 WL 4293917, at *18 (N.D. Cal. Sept. 25, 2024) (rejecting parties' attempt to seal administrative record due to Privacy Act); *Rivera-Lopez v. Gen. Elec. Co.*, 2022 WL 3108556, at *2 n.3 (S.D. Ga. Aug. 4, 2022) ("Courts have held that parties justifying seal requests under the Privacy Act must provide more than a conclusory statement that documents must be sealed pursuant the statute."); *Laber v. Dep't of Def.*, 2022 WL 1773307, at *2 (D. Kan. June 1, 2022) (rejecting request to seal documents subject to Privacy Act absent showing "a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making process"); *Jordan v. Nielsen*, 2019 WL 2209399, at *5 (S.D. Cal. May 22, 2019) (Whelan, J.) (finding conclusory argument that Privacy Act applied was insufficient to justify sealing); *Drummond v. Mabus*, 2016 WL 4007583, at *2 (E.D.N.C. July 26, 2016) (rejecting motion to seal investigative file due to Privacy Act without "sufficient argument under the First Amendment to support sealing the entire file").

[21] It is axiomatic that an act of Congress cannot override the rights guaranteed under the Constitution. *See Marbury v. Madison*, 5 U.S. 137, 177–78 (1803) ("[T]he [C]onstitution, and not [an ordinary act of Congress], must govern the case to which they both apply.").

Defendants' denials of access are not narrowly tailored or the least restrictive means available. Even if the Privacy Act supplied a compelling interest, Defendants' denials of access would still require narrow tailoring and a showing that there are no less restrictive means available. To justify the wholesale denial of access to records in cases ending in acquittal, Defendants claim they have a "special responsibility" to protect the identity of any accused whose criminal justice proceeding results in acquittal, citing a single decision in *American Civil Liberties Union v. U.S. Department of Justice* ("*ACLU*"), 750 F.3d 927, 935 (D.C. Cir. 2014). Defendants have also vaguely referenced the Privacy Act as their excuse for delays and even outright denials of access to hearing transcripts and exhibits, or redactions of other court records. *See* Matthews Decl. ¶ 3, Ex. A, Ex. T at 8. None of these contentions has any merit.

First, the *ACLU* decision that supposedly justifies closure of the entire case record in courts-martial ending in acquittal is wholly inapposite. That case concerned a FOIA request made by the ACLU seeking docket information for cases in which federal law enforcement had obtained cell phone data without a warrant. *Id.* at 929. The sole question posed was whether the agencies could deny the ACLU's request *under a particular FOIA exemption* for disclosures "reasonably . . . expected to constitute an unwarranted invasion of personal privacy." *Id.* (quoting § 552(b)(7)). While the court found that the docket information for cases ending in acquittal fell within this statutory exemption, the decision did not involve the First Amendment or common law rights of access, let alone the *Press-Enterprise* test. Thus, the court did not express any view as to whether the privacy interests at stake constituted a compelling governmental interest, nor did it have any occasion to address narrow tailoring. In fact, the docket information at issue was *already public* in the court record. *See id.* at 932.

But even accepting at face value that Defendants' responsibility to safeguard the privacy rights of the acquitted constitutes a compelling interest, that interest in no way supports Defendants' automatic and blanket denials of access to an entire court record ending in acquittal. Those practices undoubtedly fail narrow tailoring, as the Ninth

Circuit recently confirmed. *Maile*, 117 F.4th at 1211 ("Because the privacy interest implicated by a . . . record can be protected just as well by a case-by-case determination of whether closure is truly necessary to protect the asserted interest, mandatory sealing is not the least restrictive means to protect that interest."). Further, Defendants' refusal to make these court records available at all defies logic given that the underlying proceedings were open to the public.

The same goes for Defendants' arguments that they are entitled to withhold hearing transcripts and exhibits or redact entire portions of other court records. Even if adherence to the Privacy Act were a compelling interest, Defendants cannot withhold entire records in a purported attempt to comply with the Privacy Act. When the government has attempted elsewhere to invoke the Privacy Act as a basis for the wholesale withholding of documents, courts have consistently rejected these efforts for failure to demonstrate a compelling interest and/or narrow tailoring. *See supra* note 20. No reasonable juror could find that Defendants' blanket withholding satisfies the compelling interest test.

Defendants' practices lack basic common sense. Finally, Defendants' own practices make clear that their Privacy Act argument is nothing more than a disingenuous post-hoc justification. As an initial matter, the government selectively releases *some* records, such as charge sheets, while withholding *others*, such as transcripts and exhibits. Rose Decl. ¶ 4. Similarly, the government inexplicably claims that the Privacy Act *prohibits* contemporaneous release of court records yet somehow *permits* release of the same records months later, and *occasionally* while a trial is ongoing.[22] Defendants should not be allowed to selectively invoke the Privacy Act and weaponize it to their

[22] *See, e.g.*, *Ctr. for Const. Rts.*, 954 F. Supp. 2d at 403 (noting that during court-martial, "the Army released to the public, on the internet, in readily downloadable form, the vast majority of the documents that had been filed"); Matthews Decl. ¶ 9, Ex. E (*United States v. Bergdahl*, Hearing Tr. 112–13 (Attachment A to Govt. Opposition) (ordering government to publish online unclassified court documents within 24–48 hours of filing in Army case)); Matthews Decl. Ex. R (Temple Tr. 110:06–15, 110:25–111:05) (acknowledging release of court records by OJAG in *United States v. Pedicini*).

benefit any longer. Christensen Decl. ¶ 14 ("In my decades of experience, the Privacy Act is inconsistently applied with institutional embarrassment apparently being a driving factor in the military's decision making.").

b. FOIA Is Not a Compelling Interest Sufficient to Justify Defendants' Refusal to Provide Access

Defendants' reliance on a FOIA exemption as a compelling interest to justify their denials of access fares no better. When Ms. Rose requested the *Mays* records, OJAG relied on Exemption 7(A) of FOIA as a basis to prevent disclosure. *See supra* Section II.B. Defendants continue to withhold vast portions of the Mays record based on vague references to FOIA. Matthews Decl. ¶ 26. But FOIA is an *access* statute, not a basis for withholding court records subject to the First Amendment and common law rights of access, as Defendants' counsel acknowledged. *See* Matthews Decl. ¶ 22; *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (FOIA's "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act").

The Ninth Circuit addressed this very issue in *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1184–85 (9th Cir. 2006). There, the government attempted to argue that "a document merits sealing because it would be exempt from disclosure under" FOIA. *Id.* at 1185. The court rejected that argument outright. *Id.* Instead, the court stated, "we will not import wholesale FOIA exemptions as new categories of documents 'traditionally kept secret' under *Times Mirror*" and excluded from the presumption of access to court records. *Id.* The court found that the government's vague assertions of law enforcement and ongoing investigation privileges—as Defendants have asserted here—did not constitute a compelling reason to justify sealing. *See id.* at 1183–84 ("Simply mentioning a general category of privilege, without any further elaboration or any specific linkage with the documents, does not satisfy the burden.").

c. Defendants' Amorphous Burden Arguments Are Not a Compelling Interest Sufficient to Justify Their Denials of Access

Defendants' final alleged justification for withholding access is that disclosing records is simply too burdensome. While the specifics of this alleged "burden" are

unclear, Defendants seem to be saying they do not have the resources to compile case-specific dockets, keep them updated when charges are filed and preliminary hearings occur, and otherwise release records while cases are ongoing—or that performing any of these tasks contemporaneously is too costly due to their "limited" personnel and fiscal resources. Matthews Decl., Ex. T at 9, 15. But this minimal and vague administrative burden does not come close to satisfying the compelling interest test.

As an initial matter, Defendants' conclusory assertions of the burden and cost associated with access do not qualify as a compelling interest. *Oregonian*, 920 F.2d at 1466 (in finding a compelling interest, a "court must not base its decision on conclusory assertions alone, but must make specific factual findings"). Instead, a defendant "must carefully state the articulable facts demonstrating an administrative burden sufficient to deny access" to judicial records. *Valley Broad. Co.*, 798 F.2d at 1295.

Defendants cannot make this showing because there is no legitimate burden nor serious cost to contend with. Civilian criminal courts across the country give the public advance notice of their proceedings and make court records publicly available on a timely basis. *See* Crow Rept. ¶ 43. And those courts oversee thousands of cases a year. The Navy's claim that they cannot provide the same access to the dozens of annual courts-martial, with a multi-billion-dollar budget and 1000+ person legal staff, defies credulity.[23]

It is also contrary to what Defendants have shown they could do in the past. For example, the Army posted court records during court-martial proceedings within 24 to 48 hours in *United States v. Bergdahl*. *See* Matthews Decl. Ex. E, Attachment A. The Guantanamo military commissions, which deal with far more classified materials than a typical Navy court-martial, release unclassified court records within one business day, publish case-specific public dockets, and provide court transcripts within 24–72 hours

[23] *See* Crow Rept. ¶ 62; Report of the JAG of the Navy, Art. 146a at 2 (2023) ("At the end of FY23, there were 90 pending Navy courts-martial . . . ."), *id.* at 12 (the JAG Corps was supported by 978 judge advocates in FY23, with 1,010 estimated to be employed by end of FY24 and was supported by 529 paralegals), https://perma.cc/4GJR-4BDS.

of a hearing. *See* Crow Rprt. ¶¶ 44, 56; 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 require a security review must generally be posted within 15 business days, absent "exceptional circumstances." *Id.* at 19-4(c)(2). There is no valid reason the Navy cannot provide this notice and contemporaneous access as well, as the Navy itself has claimed it would, with respect to docketing Article 32 hearings. Matthews Decl., Ex. P.

Even if Defendants had carried their burden to provide specific evidence establishing a compelling interest—they have not—any denials of access on this basis must be narrowly tailored, using the least restrictive means available. Defendants' wholesale withholding of records like transcripts and exhibits plainly fails this test.

Defendants have not articulated and cannot articulate a specific, compelling interest that justifies their denials of access, nor have they shown that the denials are narrowly tailored and the least restrictive means available. ProPublica is thus entitled to a declaration that Defendants' conduct has violated its First Amendment and common law rights.

B. A Permanent Injunction Should Issue Prohibiting Defendants from Their Continual Denials of Access

Defendants continue to violate ProPublica's First Amendment and common law rights of access to this day. ProPublica is entitled to the requisite injunctive relief to prevent further abridgements and wholesale denials of its rights. Specifically, ProPublica seeks an injunction requiring Defendants to (1) immediately release all court records in the *Mays* case, and (2) provide adequate Article 32 hearing notice and contemporaneous access to all military judicial proceedings and records in the future, consistent with the First Amendment and common law rights of access.

A permanent injunction is proper where, as here, the moving party can demonstrate: (1) actual success on the merits; (2) irreparable harm absent an injunction; (3) the balance of equities tips in the plaintiff's favor; and (4) injunctive relief is in the

public interest. *See Starbuzz Tobacco, Inc. v. Addison Specialty Servs.*, 2014 WL 12214313, at *10 (S.D. Cal. Aug. 7, 2014) (*citing Winter v. Natural Res. Def. Counsel*, 555 U.S. 7, 20 (2008)). The third and fourth factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

First, ProPublica has demonstrated it succeeds on the merits of its declaratory relief claim, as detailed above. *See supra* Section IV.A.

Second, ProPublica and the public will continue to suffer irreparable harm if Defendants' policies of withholding notice of court proceedings and contemporaneous access to records are not enjoined. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Defendants' policies of (a) denying access to the entire preliminary phase of the case, including notice of Article 32 preliminary hearings, (b) withholding contemporaneous records access, (c) permanently withholding the overwhelming majority of the court record, including any transcripts or exhibits in cases ending in conviction, and (d) permanently withholding any records in courts-martial ending in acquittal, inflicts direct irreparable injury.

Without advance notice of hearings, or contemporaneous access to records, ProPublica cannot report on the serious crimes being adjudicated—or not pursued at all—by the Navy. The time to report on these matters is while they are happening, not months or years after the fact when the public's oversight of these institutions is tremendously devalued. "[A] ban on reporting news just at the time the audience would be most receptive," is "effectively equivalent to a deliberate statutory scheme of censorship." *Planet III*, 947 F.3d at 594 (quoting *Bridges v. California*, 314 U.S. 252 (1941)) (cleaned up). And it is a harm imposed not only on ProPublica, but also the public at large. *See, e.g.*, *CNN v. Am. Broad. Cos.*, 518 F. Supp. 1238, 1245–46 (N.D. Ga. 1981) (finding that "[i]f television crews are totally excluded from White House pool coverage" it would irreparably harm the press and the public).

Absent relief from this Court, Defendants' policies will continue to frustrate the ability of ProPublica, and the press more broadly,[24] to report fully and accurately on military proceedings and to enable the public to assess whether justice is being done. For two years, Ms. Rose has been prevented from investigating and reporting on matters of significant public importance—the Navy's handling of sexual assault cases, as well as homicide cases that may have been politically motivated and involved unlawful command influence. Rose Decl. ¶¶ 13–14, 43; *see also* Dyer Decl. ¶ 4 (explaining how limitations on access can create a situation in which the public's understanding of a case is shaped by what is selectively leaked instead of the full record).

The consequences of this secrecy are real and ongoing. For example, in 2023, the Navy permitted nearly 40% of servicemembers who had been charged with sexual assault to either leave the service without being tried or have their charges dismissed.[25] Similarly, 41% of all sexual assault cases across the services ended with the accused either being allowed to leave or the charges dismissed. *Id.* App'x. B at 25, https://perma.cc/KKG8-QLH4. Because the Navy refuses to publicly file charge sheets when they are issued or provide notice of preliminary hearings before a case is "referred" to court-martial for trial,[26] these servicemembers are arrested in secret and then the matter is adjudicated in secret—without the public ever knowing what the allegations were, how much evidence existed, why the charges were dismissed, or why the defendants were allowed to leave. This practice can "increase the possibility of a serial rapist, a child molester, going back into the community and doing it again because there's no public record and no dissuasion."[27]

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[24] *See generally* Philipps Decl.; Prine Decl.; Ziezulewicz Decl.; Fryer-Biggs Decl.; Dyer Decl.; Walsh Decl.; Watson Decl.

[25] DOD Annual Report on Sexual Assault in the Military, FY 2023, Encl. 2 at. 64 (of 51 completed courts-martial, Fourteen subjects were allowed to resign or be discharged, and charges were dismissed in six more cases), https://perma.cc/88Z8-88DM.

[26] *See* Crow Rept. ¶¶ 22–23, 30, 46; Philipps Decl. ¶¶ 4, 7; Prine Decl. ¶¶ 7, 11; Ziezulewicz Decl. ¶ 4; Fryer-Biggs Decl. ¶ 3(i).

[27] Vianna Davila, et al., *The Army Increasingly Allows Soldiers Charged With Violent Crimes to Leave the Military Rather Than Face Trial*, ProPublica (Apr. 10, 2023)

This system also enables the Navy to throw servicemembers in the brig in secret without public knowledge or oversight. *See, e.g.*, Prine Decl. at 6 (Navy SEAL Eddie Gallagher held in pretrial confinement in secret for more than five weeks, until reporter learned of it from fellow SEALS and reported the story); Philipps Decl. ¶ 6. And it frustrates the press's reporting on the military more broadly on a daily basis—making it difficult (if not impossible) to track cases, understand what is happening in court proceedings or verify basic information. *See supra* note 24. Thus, the public's ability to understand and assess the Navy's military courts will be significantly impeded absent injunctive relief.

Third, a balancing of the equities and the public interest favor a permanent injunction here. On these factors, courts look at whether the plaintiff's harm, if injunctive relief were denied, is "more serious than the hardship" the non-moving parties "have shown they would endure if the injunction were granted," as well as the "impact on non-parties." *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002), *abrogated on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

The injury to ProPublica, the press, and public caused by Defendants' denials and delays of access significantly outweighs any minimal damage the Navy may experience if the Court grants an injunction. Indeed, the military itself has recognized that "[o]pening trials to public scrutiny reduces the chance of arbitrary and capricious decisions and enhances public confidence in the court-martial process." R.C.M. 806(b).

The public interest also heavily favors injunctive relief. As the Ninth Circuit explained, "transparency has made possible the vital work of . . . investigative journalists who have strengthened our government by exposing its flaws." *Leigh*, 677 F.3d at 897. Military proceedings resolve matters of extraordinary importance and concern to the public, adjudicating criminal charges against members of the armed services that can result in lengthy prison terms, including a possible sentence of life in prison or even

(quoting law professor Joshua Kastenberg), https://www.propublica.org/article/military-army-administrative-separation.

death. In other instances, while some of the most serious crimes might have been committed, the Navy might choose not to pursue prosecution at all, allowing servicemembers to administratively separate instead. *See supra* at 34.

The public is entitled to know these facts. Openness serves "to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness." *Planet III*, 947 F.3d at 592 (internal quotations and citation omitted). "[T]he news media's right of access to judicial proceedings is essential not only to its own free expression, but also to the public's," especially "where, as here, the impetus" for ProPublica's efforts to obtain court records "is its interest in timely reporting on their contents." *Id.* at 589–90 (cleaned up). Simply put, "enforcement of an unconstitutional law is always contrary to the public interest." *Karem v. Trump*, 960 F.3d 656, 668 (D.C. Cir. 2020) (citation omitted).

Finally, it is important to note that while the Navy has (just last month) claimed it will provide advance public notice of Article 32 hearings, ProPublica's request for an injunction on this topic is not moot because, without an injunction, Defendants could simply revert to their old policies at any time. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000).

Here, there are still live issues because the Navy has not changed its policy of *prohibiting* notice of Article 32 hearings. *See* JAG Instr. 5813.2A at Sec. 5(3)(a) (operative instruction *prohibits* dockets from including "any pre-referral hearings, such as Article 30a or Article 32 hearings"). Nor has the Navy committed to providing Article 32 hearing notice on a permanent basis. *See* Temple Tr. at 59:4–60:17. Indeed, not only does Defendant Krass's guidance still permit the services to withhold hearing information, but the Docket has apparently not listed advance notice of a single Article 32 hearing since at least October 17, 2024. *See* Matthews Decl. ¶ 35, Ex. Q.

Even if the Navy *did* officially change its policy and begin providing advance notice of Article 32 hearings, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Planet III*, 947 F.3d at 599 n.10 (citing *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1152 (9th Cir. 2019)). "In the case of a government defendant," courts "presume that a government entity is acting in good faith when it changes its policy, but when the Government asserts mootness based on such a change it still must bear the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again." *Id.* (citing *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014)). Here, without an injunction requiring Defendants to provide advance public notice of Article 32 hearings, the Navy could cease doing so at any time. *Id.* (First Amendment challenge not moot).

C. The Secretary of Defense Must Issue the Requisite "Uniform Standards" Mandated by Article 140a

ProPublica seeks a writ of mandamus that requires the Secretary of Defense to finally issue the "uniform standards and criteria" that Article 140a demanded he issue four years ago. SAC ¶ 126. Mandamus is appropriate where, as here, "(1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available." *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997). This Court previously recognized, correctly, that ProPublica plausibly alleged "the Secretary [] clearly failed to issue sufficient standards under [Article 140a]." Dkt. 47 at 5. The Secretary has still not issued such standards.

First, there is no question the claim is clear and certain. As detailed below, the standards required under Article 140a are unambiguous, and the Secretary's failure to observe them amounts to a clear violation as a matter of law. *See id.* at 4 (finding that ProPublica properly alleged that the "issued guidelines are clearly inconsistent with Congress' mandate in [Article 140a]").

Second, Article 140a creates a clear, non-discretionary duty that the Secretary 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). The requirement that he prescribe uniform standards is clear and ministerial and permits no room for discretion. *See Knuckles v. Weinberger*, 511 F.2d 1221, 1222 (9th Cir. 1975); *Com. of Pa. v. Nat'l Ass'n of Flood Ins.*, 520 F.2d 11, 26 (3d Cir. 1975) (agency secretary's failure to perform duty to "take such action as may be necessary" would, if proved, warrant mandamus relief), *overruled on other grounds*, *Com. of Pa. v. Porter*, 659 F.2d 306 (3d Cir. 1981).

Article 140a creates non-discretionary parameters that govern the requisite "standards and criteria"—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." 10 U.S.C. § 940a(a)(4). Where 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 proper where law required U.S. territory to make employment decisions based on merit "as far as practicable" but territory failed to do so).

Even if the Krass Guidance could satisfy the Secretary's general duty to prescribe standards, it does not meet any of the non-discretionary parameters imposed by the Article. Like the 2018 Ney Memo, the Krass Guidance fails to prescribe "*uniform* standards and criteria." Instead, it provides *carte blanche* to the military services to create their *own* standards—requiring the release of only a tiny fraction of the record and, even then, only post-trial. *See supra* Sections II.A.6, II.C.3. 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 entirely practicable. *Haeuser*, 97 F.3d at 1154; Crow Rept. ¶¶ 33, 46–47, 51–61. MJRP's White Paper flagged the "apparent discrepancy between

the statutory requirements of Article 140a and DoD's policy guidance," noting that the Krass 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 a conviction. Matthews Decl., Ex. N at 2; Krass 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 a tiny fraction of the records. *See supra* Section II.C.3. That is diametrically opposed to the federal court system.

Further, Article 140a makes clear that the Department of Defense must facilitate "public access to docket information." 10 U.S.C. § 940a(a)(4) (emphasis added). Given Congress's aim of ensuring meaningful public access at all stages of the proceedings, such dockets must include, at a minimum, information sufficient to follow the proceedings—*i.e.*, the full name of the accused, the motions, orders, and other documents filed, and when upcoming hearings or a trial will occur. The Navy JAG Corps purports to publish a "docket" for court-martial cases, but it omits this crucial information. Instead, it is more like a calendar that constantly changes, listing the charges, hearing location, general procedural stage of the case, date of the next court-martial proceeding, and omitting even the full name of the accused.[28]

MJRP's analysis concludes—correctly—that the DoD "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." Matthews Decl. Ex. N at 2, 9. It is also "practicable," as set forth above. *See* Crow Rept. ¶¶ 33, 46–47, 51–61. The military commissions already provide advance notice of hearings and contemporaneous access to court records, and

[28] *See* Navy JAG Corps Docket, https://www.jag.navy.mil/military-justice/docket.

the Army and Navy have both published court records while trials were ongoing and could easily do so in the future. *See supra* note 22; Section IV.A.6.c. The Krass Guidance is thus blatantly deficient in the face of nondiscretionary, ministerial, and plainly prescribed duties set forth in Article 140a that are "free of doubt."

Finally, absent mandamus relief, the Krass Guidance will likely never be corrected, and the Secretary may never issue the uniform standards and criteria that Congress required when it passed Article 140a more than eight years ago. No other remedy is adequate. While ProPublica's First Amendment and common law claims could succeed in forcing the Navy to release certain records and provide notice of Article 32 hearings, absent mandamus relief, the services will not have uniform standards and criteria that create a new infrastructure across all of the armed services, including the creation of actual case-specific dockets and a military-wide system for ensuring court access as contemplated by Congress. The government has rejected all of ProPublica's efforts to obtain uniform standards for public access. A writ of mandate is needed to require the Secretary to issue the uniform standards and criteria mandated by Congress.

V. CONCLUSION

ProPublica respectfully requests the Court enter summary judgment in its favor.

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Respectfully submitted,

By: */s/ Marissa Mulligan*
Marissa Mulligan

GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutrous, Jr.
Michael H. Dore

By: */s/ Sarah Matthews*
Sarah Matthews

PRO PUBLICA, INC.

Attorneys for Plaintiff