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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. 22-cv-1455-BTM-KSC **DEFENDANTS' MOTION TO DISMISS AND CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Date: February 14, 2025 Time: 11:00 a.m. Judge: Hon. Barry Ted Moskowitz PER CHAMBERS, NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

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MOTIONS

Defendants move for an order dismissing the complaint under Federal Rules of Civil Procedure 12(c), (h)(2)(B), (h)(3), and/or for judgment in their favor pursuant to Rule 56(c). Defendants' motion is based on this Notice, the Memorandum of Points and Authorities, all pleadings and filings in this action, and exhibits, and upon any such other matters or argument the Court may permit.

MEMORANDUM OF POINTS AND AUTHORITIES

As the Court noted in its March 4, 2024 Order, Plaintiff challenges whether the Secretary of Defense has issued sufficient guidelines implementing Article 140a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 940a(a), and seeks a writ of mandamus. ECF No. 47 at 4; Second Amended Complaint (SAC) at 33-34, ECF No. 49. Plaintiff also claims that Defendants' policies implementing Article 140a violate its First Amendment and common law rights of access to judicial and records and seeks: (1) an order declaring the Secretary's guidelines do not comport with the First Amendment and common law right of access to judicial records; (2) the immediate release of all records from the court-martial of former Seaman Recruit (SR) Ryan Mays and a declaration that Mays may release his court-martial records to Pro Publica; (3) an order requiring the Department of the Navy (DoN) to provide advance notice of Article 32 hearings; and (4) contemporaneous public access to all "court proceedings and related records," including exhibits and transcripts (*i.e.*, akin to a PACER-like system). *Id*. at 31-34.

The political question doctrine precludes judicial interference with a congressional process that entails inter-branch coordination and decision making. The Court should not interfere with efforts of the Department of Defense (DoD), DoN, and House and Senate Committees on Armed Services to continue to refine policies implementing Article 140a that balance DoN's essential mission, national security concerns, and public access to court-martial records. Plaintiff's case should be dismissed as nonjusticiable.

In the alternative, the Court should enter summary judgment for Defendants. Plaintiff has no First Amendment right to unfettered and contemporaneous access to court-martial records, and its proposed systemic changes to the current policies are not feasible. Plaintiff also has no private right of action to demand Article 140a's enforcement, the provision has no mandatory language to enforce, and Defendants are nevertheless in compliance.

Plaintiff's two other claims are moot. It asserts that DoN does not publicly disclose information about Article 32 hearings, Pl.'s Mot. Summ. J. (MSJ) at 1-2, ECF No. 88-1, but Article 32 hearings have always been disclosed through public information officers and, in September 2024, the Navy began publishing notice of these hearings on its public website. *See* https://www.jag.navy.mil/military-justice/preliminary-hearing-schedule; Captain Chad Temple Dep. ("Temple Dep.") at 55:3-9 (Oct. 8, 2024), ECF No. 89-1, Ex. R. It also asserts that DoN has not adequately released records in the *Mays* case, but DoN has released thousands of pages of those records and has not prevented SR Mays from providing his case documents to Plaintiff. Temple Dep. 185:19-21.

I. SUMMARY OF ARGUMENT

This case is nonjusticiable under the political question doctrine: the military functions at issue are constitutionally committed to the Executive and Legislative branches. Congress has given DoD and DoN exclusive authority to manage access to documents associated with court-martial proceedings as "appropriate to judicial proceedings and military records." 10 U.S.C. § 940a(a)(4). With congressional oversight, the agencies routinely issue and refine policies for managing records in a manner that promotes public access while also protecting vital national security and privacy interests, including statutorily recognized privacy interests of crime victims and minors. The sweeping changes Plaintiff seeks implicate national security and privacy concerns, would disrupt military operations, and are not feasible.

In 2016, based on DoD's 2015 legislative proposal, Congress amended the UCMJ to require, among other things, the Secretary of Defense to prescribe uniform standards for case management, data collection, and access to certain military justice records. *See* 10 U.S.C. § 940a. The amendments also established the Military Justice Review Panel (MJRP) to conduct periodic reviews of the UCMJ, of which Article 140a is a part, and report its findings and recommendations to the Committees on Armed Services, including recommendations for further amendment. *See* 10 U.S.C. § 946.[1] The MJRP is statutorily required to submit the report by December 31, 2024.

Plaintiff moves the Court to disrupt this inter-branch decision-making process that is designed to routinely assess the operation of the UCMJ, weighing considerations of law, policy, funding, privacy interests, military good order and discipline, and, crucially, national security. In its MSJ, however, Plaintiff never addresses national security and the DoD's and DoN's essential mission of protecting and defending the United States of America. It never addresses the differences between Article III civilian courts and Article I's independent system of military justice. And, except for the Privacy Act, it never addresses DoD's and DoN's statutory and mission-essential duties to review all docket information, filings, and records for classified and other sensitive information. As for the Privacy Act, Plaintiff erroneously suggests that the routine use exception defined in DoD's System of Records Notice (SORN), *see* 5 U.S.C. § 552a(b)(3), completely exempts court proceedings and records from the protections of the Act. The Act authorizes agencies to establish exemptions for national security, law enforcement, and other reasons, but it does not authorize exemption from the Act as a whole or from the non-disclosure provisions in subsection (b) in particular. *See* 5 U.S.C. § 552a(j), (k).

[1] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114–328, div. E, title LXI, § 5504(a) (Case management; data collection and accessibility), 130 Stat. 2000, 2961 (2016) (codified as 10 U.S.C. § 940a); *id*., § 5521, 130 Stat. 2962 (Military Justice Review Panel) (codified as 10 U.S.C. § 946).

Apart from the Privacy Act, DoN also balances public access to court documents with the privacy interests of military personnel facing court martial, who are presumed innocent, for the sake of unit cohesion. Divisiveness during a court-martial proceeding can undermine morale, unity, and the good order and discipline of DoN's Service members and their units, which is essential to military safety and effectiveness. Courts lack the expertise to second-guess DoN policy that promotes military readiness. That should be left to the DoD and Congress in their oversight of the UCMJ, including Article 140a.

Plaintiff argues that, because certain military justice hearings and trials are open to the public, all related filings, exhibits, transcripts, and other associated documents must be published immediately on the internet. Pl. MSJ at 29-34. Again, Plaintiff disregards national security considerations. Publishing military justice information on the internet is vastly more dangerous than presenting it in court on a secure military installation, where observers must show identification and receive advance authorization to attend. Anyone, including foreign intelligence organizations, may access information posted on the internet. Analysts and artificial intelligence rapidly aggregate limitless amounts of open-source information about personnel, munitions, ship movements, sensitive job assignments, and other military matters to assess our military strengths and vulnerabilities and predict military operations. Contemporaneous access to military justice information would create unacceptable risks to our forces.

Apart from the nonjusticiability of Plaintiff's case, Plaintiff has no private right to enforce § 940a(a)(4). None of the language of Article 140a suggests that Congress intended to create a private cause of action. Rather, the intent of Article 140a is to make the Secretary of Defense responsible solely to Congress, which will appropriate funds as needed to replace existing infrastructures. That is not a relationship that Plaintiff or this Court is meant to enforce.

Also, given the discretionary language in § 940a(a)(4), no unambiguous and clear duty exists for the Court to enforce though mandamus. *See Barron v. Reich*, 13 F.3d

1370, 1374 (9th Cir. 1994). The qualifying language of § 940a(a)(4) requires that the Secretary of Defense (or his designee) prescribe uniform standards "insofar as practicable," using the "best practices" of federal and state courts, and facilitate public access considering "restrictions appropriate to judicial proceedings and military records." The statute is silent as to timing, and nowhere does it suggest contemporaneous disclosure. Congress maintained the military departments' autonomy to implement their own systems as they deemed fit.

Plaintiff incorrectly asserts that there is, in effect, an absolute First Amendment right of contemporaneous access to all filings in court-martial proceedings. There is no precedent that supports that assertion. There is no tradition of unfettered, contemporaneous access to documents in courts-martial, which is a threshold requirement under the applicable constitutional test. And as explained above, Defendants have a compelling national security interest that necessarily outweighs Plaintiff's interest in contemporaneous access.

Finally, apart from the lack of a private right of action and of a clear statutory duty under Article 140a, and apart from the lack of a First Amendment right to contemporaneous access to all filings in court-martial proceedings, the current policy of limiting access to Article 32 and court-martial documents is consistent with the "best practices" of comparable federal and state court proceedings. Article 32 proceedings, like grand jury proceedings and certain states' show cause hearings, are pre-complaint proceedings that share a constitutional best practice: a member of the public may request that the records of a particular hearing be made publicly available, and the proper authority shall grant the request where the interests of justice so require. *See, e.g.*, *Bos. Globe Media Partners, LLC v. Chief Just. of Trial Ct*., 130 N.E.3d 742, 749 (Mass. 2019).

DoN also has discretion to delay access to court-martial filings until a finding of guilty is reached. Such a practice is "appropriate to judicial proceedings and military records," because it protects both the privacy of the individual, and it protects the

morale, unity, and good order and discipline of service members, which is essential to military readiness and national security. Plaintiff, which entirely ignores military and national security considerations, never addresses the "appropriate to military records" language in § 940a(a).

The Court should dismiss this case as nonjusticiable under the political question doctrine or, in the alternative, enter judgment on the merits in favor of Defendants.

II. PERTINENT FACTS

Plaintiff's complaint arises from its dissatisfaction with its access to court-martial records in the *Mays* court-martial.[2] On September 30, 2022, SR Mays was found not guilty on all charges.[3] A few days before the court-martial ended, on September 27, 2022, Plaintiff commenced this case, seeking equitable relief to change DoN policy so that, in future cases, it will have immediate and unfettered access to court-martial filings, exhibits, and transcripts. *See* SAC. Plaintiff's professed focus is "newsworthiness." Pl. MSJ at 14, 22, 26, 33.

The authority and framework under which the DoD and DoN operate regarding public access to court-martial records is recent. In 2015, the DoD "forwarded to Congress a legislative proposal outlining a number of reforms[,]" which were based on recommendations of the Military Justice Review Group (MJRG) as part of its comprehensive review of the UCMJ and the Manual for Courts-Martial.[4] The proposal

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[2] Plaintiff seeks immediate release of "all court records in the *Mays* case." Pl. MSJ at 43. Plaintiff, however, did not bring a claim for APA relief regarding DoN's decisions about what could be released in the *Mays* case. CAPT Temple testified that Mr. Mays could have released his own records to Plaintiff, 185:19-21. Defendants therefore regard this request for relief to be a subset of Plaintiff's broader request for access to all such records in all DoN courts-martial.

[3] *See, e.g.*, Times of San Diego, *Military Judge Acquits Sailor Accused of Arson in USS Bonhomme Richard Fire*, Sept. 30, 2022, https://timesofsandiego.com/military/2022/09/30/military-judge-acquits-sailor-accused-of-arson-in-uss-bonhomme-richard-fire/.

[4] Press Release, U.S. Dep't of Def., *Defense Department Proposes UCMJ Changes*, Dec. 28, 2015, https://www.defense.gov/News/News-Stories/Article/Article/638108/. *See also* MJRG Report, https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf, at 15 (stating that the DoD adopted the MJRG's legislative proposals).

included "providing for public access to court documents and pleadings" to "[e]nhance fairness and efficiency in pretrial and trial procedures." *Id*.

The proposal also included amending Article 146 of the UCMJ to establish the MJRP, an independent panel tasked to conduct periodic reviews and assessments of the operation of the military justice system, which would "enhanc[e] the efficiency and effectiveness of the UCMJ and the Code's implementing regulations." MJRG Report at 1025, 1030-31. The proposal cautioned that the MJRP's "periodic review needs to be scheduled on a regular basis, but that it should not be so frequent that the constant process of review and change becomes more disruptive than helpful to judges and lawyers who must have a degree of stability in order to engage in effective practice." *Id*. at 1031.

The National Defense Authorization Act (NDAA) for Fiscal Year 2017 adopted nearly all of the DoD's legislative proposal, including the proposed Article 140a and proposed amendment to Article 146. *Compare, e.g., id*. at 1197-1202 (Secs. 1104 and 1201 of the DoD proposal) *with* 10 U.S.C. §§ 940a and 946.

Article 140a directs the Secretary of Defense to prescribe uniform standards to, among other things, facilitate public access to court-martial dockets, filings, and records, using the best practices of federal and state courts, insofar as practicable and appropriate to court-martial records:

> (a) In General.—The Secretary of Defense, in consultation with the Secretary of Homeland Security, shall prescribe uniform standards and criteria for conduct of each of the following functions at all stages of the military justice system (including with respect to the Coast Guard), including pretrial, trial, post-trial, and appellate processes, *using, insofar as practicable, the best practices of Federal and State courts*:
>
> (1) Collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision making within the military justice system, and that enhances the quality of periodic reviews under section 946 of this title (article 146).
>
> (2) Case processing and management.
>
> (3) Timely, efficient, and accurate production and distribution of records of trial within the military justice system.

> *(4) Facilitation of public access to docket information, filings, and records,* ***taking into consideration restrictions appropriate to judicial proceedings and military records****.*

10 U.S.C. § 940a(a) (emphasis added).

The General Counsel of the Department of Defense is a statutorily established position whose incumbent is appointed by the President with the advice and consent of the Senate, and who performs such functions as the Secretary of Defense may prescribe. 10 U.S.C. § 140(a)-(b); 10 U.S.C. § 113(d) (the Secretary may "perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate"). The General Counsel has been delegated the Secretary's authority to "[e]stablish[] DoD policy on general legal issues . . . ." DoD Directive 5145.01, "General Counsel of the Department of Defense (GC DoD)," ¶ 3.j (Dec. 2, 2013, as amended). Acting as the Secretary's designee and following consultation with the Department of Homeland Security, on December 17, 2018, then-DoD General Counsel Paul Ney issued "Uniform Standards and Criteria Required by Article 140a, [UCMJ]." Exs. 2-25.[5]

These standards have evolved as the result of periodic reviews in consultation with the Joint Service Committee on Military Justice.[6] On January 19, 2021, General Counsel Ney amended the Article 140a Uniform Standards and Criteria. Ex. 64. On January 17, 2023, acting as the Secretary's designee and following consultation with the Department of Homeland Security, DoD General Counsel Caroline Krass issued "Revised Uniform Standards and Criteria Required by Article 140a, Uniform Code of Military Justice." Exs. 65-87 (2023 General Counsel Guidance).

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[5] Defendants have included exhibits that were originally designated as "Confidential-Subject to Protective Order," but since then, they have de-designated such exhibits as confidential.

[6] The JSC is an inter-agency, joint body of judge advocates and advisors, dedicated to ensuring the Manual for Courts-Martial (MCM) and UCMJ constitute a comprehensive body of criminal law and procedure. The JSC is governed by DoDI 5500.17, "Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice" and "The Standard Operating Procedures of the Joint Service Committee on Military Justice." https://jsc.defense.gov/ (last visited Dec. 17, 2024).

As part of the evolving process between DoD and Congress, DoD has submitted two legislative proposals to Congress for FY 2020 and FY 2021 to amend Article 140a to expressly limit the applicability of the Privacy Act of 1974, 5 U.S.C. § 552a. Exs. 26-28 (FY 2020) (proposing new subsection stating that "Section 552a of title 5 shall not apply to records of trial . . . made publicly accessible in accordance with the uniform standards and criteria for conduct established by the Secretary under subsection (a)."); Exs. 29-30 (FY 2021). Congress has thus far declined to adopt either proposal. Congress did, however, amend Article 140a to reinforce the Secretary of Defense's duty to "restrict access to personally identifiable information of minors and victims of crime . . . ." 10 U.S.C. § 940a(b) (2019).

Congress also directed the Secretary to submit, in 2020, a report assessing the feasibility and advisability of establishing and maintaining a single system to provide access to military justice information. *See* Sec. 540G, NDAA for Fiscal Year 2020, Pub. L. No. 116-92; June 2020 DoD Report on Military Justice Data Management Systems, Exs. 31-63. Congress later directed the Secretary to submit another report by April 2024, addressing the following:

> (1) The feasibility of creating a digital database of records of trial and non-judicial punishment proceedings, that would be publicly available.
> (2) The financial cost and resources required to create a digital database of records of trial and non-judicial punishment proceedings, that would be publicly available.
> (3) The risks and benefits associated with making such documents publicly available.
> (4) A description of any current online Military Justice Database with public and no public access.

NDAA for Fiscal Year 2024, H.R. REP. 118-125, pp. 143-44, 118th Cong., 1st Sess. 2023, 2023 WL 4314344 (Leg. Hist.); *see also* Exs. 88-96 (April 2024 DoD Report on Military Trials and Non-Judicial Punishment Public Records) (April 2024 DoD Feasibility Report)].[7]

[7] As noted in the report, "[a] rough estimate of the costs to create a publicly accessible digital database of records of trial and non-judicial punishment proceedings

Congress also directed the Secretary to establish the MJRP, which is comprised of members from, or recommended by, all three branches of government. *See* 10 U.S.C. § 946.[8] The MJRP is charged with conducting a comprehensive assessment of the operation of the UCMJ in 2024 and every eight years thereafter. *Id.* § 946(f)(3). The MJRP must then submit a report to the Committees on Armed Services of the House of Representatives and the Senate, setting forth its findings and recommendations no later than December 31 of the calendar year in which the assessment is concluded. *See id.* § 946(f)(5).[9]

III. COURT-MARTIAL PROCEDURE AND CASE MANAGEMENT

The military departments separately operate legal systems to ensure order, discipline, and enforce laws unique to each department. DoN's court-martial system does not mirror civilian criminal justice proceedings in substance or process.[10] Many UCMJ articles do not have a civilian corollary, and commanders are often responsible for disciplinary decisions. After DoN has conducted an investigation of an incident and identified a suspect who is subject to the UCMJ, a report of investigation is provided to the suspect's commander and that commander's supporting staff judge advocate (or, if the alleged offense is a "covered offense," *see* 10 U.S.C. § 801(17), to a special trial counsel). *See* Temple Dep. 14:23-16:14. The staff judge advocate advises the commander, and the commander may decide whether to proceed with a *preferral* of charges (Anyone subject to the UCMJ may prefer charges; preferral is not exclusively a command function, *see* Rules for Courts-Martial (R.C.M.) 307(a)). The charges and

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is: $60 million in contract funding, $15 million in non-labor costs, and 53 years of full-time equivalent staffing." Ex. 94.

[8] *See also* Military Justice Review Panel, Members, https://mjrp.osd.mil/?q=node/4.

[9] The MJRP invites public comment, *See* MJRP, *Providing Written or Oral Public Comment*, https://mjrp.osd.mil/?q=node/20.As Plaintiff's counsel informed the Court, it invited her to speak at one of its meetings. *See* ECF No. 41-1 at 2. ¶ 2.

[10] Although they have many similarities, "the military and civilian justice systems are separate as a matter of law" and changes to the latter do not directly affect the former. *United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000)

specifications against the suspect will appear on the charge sheet. Temple Dep. 16:15-17:11, 174:2-10.

Unless the accused waives the Article 32 hearing and that waiver is accepted, an Article 32 hearing is required before charges and specifications may be referred for trial by a general court-martial. *See* 10 U.S.C. § 832; R.C.M. 405. An Article 32 hearing therefore *precedes* the *referral* of charges to commence a general court-martial.[11]

"Whenever practicable," the Article 32 hearing is conducted by a judge advocate. 10 U.S.C. § 832(b). The Article 32 hearing officer is therefore not necessarily a military judge or a judge advocate. Temple Dep. 85:18-86:2.

DoN provides advance notice of Article 32 hearings on a publicly accessible website, and contrary to Ms. Matthews' averments, has posted information concerning several Article 32 hearings since October 2024. *See* Navy JAG Corps, Navy-Marine Corps Preliminary Hearing Schedule, https://www.jag.navy.mil/military-justice/preliminary-hearing-schedule/ ("The preliminary hearing, or 'Article 32', is a non-judicial proceeding designed to aid an authorized official in determining how to dispose of alleged misconduct.").[12] Scheduling information may also be obtained by contacting a DoN public affairs office. Temple Dep. 59:8-22.

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[11] Article 32 hearings are not judicial; they *precede* the referral of charges to a general court-martial, and the preliminary hearing officer's report is merely advisory. The qualified First Amendment right of access to documents applies to *judicial* documents. "The First Amendment right of access to information recognized in *Richmond Newspapers* does not extend to non-judicial documents that are not part of a criminal trial . . . ." *Center for Nat. Sec. Studies v. U.S. Dept. of Justice*, 331 F.3d 918, 934 (D.C. Cir. 2003). No presumption of a right to access documents arises unless it is established that the documents are "judicial documents." *In re Midland Nat. Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115 (9th Cir. 2012).

[12] Plaintiff has complained that DoN does not provide adequate notice of upcoming Article 32 hearings. SAC, ¶¶ 85, 93, 100, Request for Relief. This part of Plaintiff's case was rendered moot in September 2024, when DoN began posting advance scheduling information on a publicly accessible website. Plaintiff asserts that its "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." Pl. MSJ at 47. But DoN has long provided this information to members of the public through its public affairs offices, and it began posting the information on its website after it determined it was feasible to do so. Temple Dep. 55:19-56:7, 59:10-60:3. It is illogical to suggest that DoN would change course. There is no basis to suggest that the DoD, which was the

The hearing officer conducts a presumptively open hearing, usually in a courtroom, typically on a military installation, ship, or deployed location, at which the accused, defense counsel, the alleged victim, and the public are permitted to attend. 10 U.S.C. § 832(d); 10 U.S.C. § 806b(a)(2)(B), (a)(3); R.C.M. 405(k)(3), Manual for Courts-Martial, United States (2024 ed.). There is a right to counsel and to cross-examine witnesses. Temple Dep. 85:3-21; 10 U.S.C. § 832(d). One purpose of an Article 32 hearing is to determine "[w]hether or not there is probable cause to believe that the accused committed the offense charged." 10 U.S.C. § 832(a)(2)(B).

Article 32 hearings are recorded, but DoN does not, as a matter of course, automatically prepare transcripts of Article 32 hearings. Temple Dep. 85:9-10, 87:19-21, 88:4-19.

Upon completion of the hearing, the hearing officer makes a recommendation in a report, including "a statement of the reasoning and conclusions of the hearing officer with respect to determinations under subsection (a)(2), . . ." and "[r]ecommendations for any necessary modifications to the form of the charges or specifications;" the report is sent to the convening authority or special trial counsel. 10 U.S.C. § 832(c). The recommendations are non-binding. *See* 10 U.S.C. § 832(a)(2)(D); R.C.M. 405(m)(2)(J). The decision to proceed to a general court-martial is then made at the discretion of a referral authority. Depending on the charges, the referral authority will be a convening authority or special trial counsel. *See* 10 U.S.C. § 834.[13]

DoN generally does not, as a matter of course, publicly release Article 32 hearing transcripts, if any are prepared. Temple Dep. 89:3-24. DoN considers requests for public

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originator of Article 140a and the periodic review and recommendation process set forth in amended Article 146, is now trying to resist that process. On the contrary, Congress and the DoD are engaged in an ongoing review process, distinct and apart from this litigation and, as a result, the DoD's standards are evolving with congressional oversight.

[13] Six specified civilian officials, including the President and Secretary of Defense, may also refer charges for trial by court-martial provided that the charges do not fall under the authority of a special trial counsel. *See* UCMJ arts. 22, 23, 24, 24a, 10 U.S.C. §§ 822, 823, 824, 824a(a)(3).

release of specific Article 32 hearing transcripts or other information associated with preliminary hearings. *Id*. 90:14-25.

If a referral authority decides to proceed with a court-martial, the remainder of the charge sheet is filled out and the charges are referred to a court-martial. *See generally* UCMJ arts. 24a, 34, 10 U.S.C. §§ 824a, 834; R.C.M. 601; Temple Dep. 18:8-17. Article 32 hearings and courts-martial are generally open to the public; however, observers must gain access to the base. Temple Dep. 82:18-22, 203:8-204:9.

The Navy Judge Advocate General's Corps public online database of Navy-Marine Corps Court Filings and Records is located at https://www.jag.navy.mil/military-justice/filings-records/. The Navy-Marine Corps public docket is located at: https://www.jag.navy.mil/military-justice/docket/. This trial docket lists the last name and first initial of each accused individual, their rank, service (Navy or Marine Corps), charges, forum (such as general or special court-martial), the type of the next upcoming hearing (such as trial, Art. 39(a) arraignment, or motion hearing), date and location, the assigned judge, trial counsel, defense counsel, and the appropriate base or region for public affairs.

DoN does not, as a matter of course, provide public access to filings and trial-level court-martial documents unless and until there is a finding of guilty. Temple Dep. 179:3-8; R.C.M. 1114. DoN responds to public requests for access to filings and trial-level court-martial documents in ongoing court-martial cases on a case-by-case basis. JAG Instruction 5813.2A(5)(3)(f); Exs. 69-70 (Sec. IV(F)); Temple Dep. 191:4-193:1. DoN also considers providing filings and trial-level court documents for courts-martial that result in findings of not guilty, on a case-by-case basis. JAG Instruction 5813.2A(5)(c); Temple Dep. 97:24-100:9.

For courts-martial ending in a finding of guilty, absent extraordinary circumstances, DoN provides public access to filings and trial-level court-martial documents within 45 days after the record has been certified. Before DoN provides such public access, it makes appropriate redactions to the record, including the names of third

parties and witnesses, consistent with JAG Instruction 5813.2A.[14] Temple Dep. 101:9-102:16, 204:5-20, 211:7-212:9. In the military justice system, preparation of a verbatim transcript of the record of trial is required only if there is a finding of guilty. *See* R.C.M. 1114(a).[15]

Before providing public access to court-martial documents, DoN conducts a review to redact personally identifying, classified, confidential, and sensitive information. Temple Dep. 101:9-102:16, 204:5-20, 211:7-212:9. The following is a non-exhaustive list of statutory authority and requirements that inform the review:

- Article 140a, 10 U.S.C. § 940a (Requirement to restrict access to the personally identifying information of victims and minors; public access provisions inapplicable to records that are classified, subject to judicial protective order, or ordered sealed)
- 5 USC § 552a (Privacy Act)
- 5 USC § 552 (Freedom of Information Act) (Authority to withhold from public disclosure privileged and certain law enforcement information)
- 10 U.S.C. § 128 (Control and physical protection of special nuclear material: limitation on dissemination of unclassified information)
- 10 U.S.C. § 130 (Authority to withhold from public disclosure certain technical data)
- 10 U.S.C. § 130b (Personnel in overseas, sensitive, or routinely deployable units: nondisclosure of personally identifying information)
- 10 U.S.C. § 130c (Nondisclosure of information: certain sensitive information of foreign governments and international organizations)

[14] https://stjececmsdusgva001.blob.core.usgovcloudapi.net/public/documents/JAGINST_5813.2A_of_9_Aug_23.pdf

[15] "(a) Transcription of complete record. A certified verbatim transcript of the record of trial shall be prepared—(1) When the judgment entered into the record includes a sentence of death, dismissal of a commissioned officer, cadet, or midshipman, a dishonorable or bad-conduct discharge, or confinement for more than six months; or (2) As otherwise required by court rule, court order, or under regulations prescribed by the Secretary concerned." R.C.M. 1114(a)

- 10 U.S.C. § 130d (Treatment under Freedom of Information Act of certain confidential information shared with State and local personnel)
- 10 U.S.C. § 130e (Treatment under Freedom of Information Act of certain critical infrastructure security information)
- 10 U.S.C. § 424 (Disclosure of organizational and personnel information: exemption for specified intelligence agencies)
- 10 U.S.C. § 455 (Maps, charts, and geomatics data: public availability; exceptions)

In addition, five DoN reviewers redact non-classified information, not otherwise covered by statute, that, when aggregated with other non-classified information, would reveal sensitive information that could compromise national security, including classified information. Temple Dep. 154:1-155:3, 198:2-16; 203:19-23.

IV. MOTION TO DISMISS FOR NONJUSTICIABILITY UNDER THE POLITICAL QUESTION DOCTRINE

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the Court's subject matter jurisdiction. A lack of jurisdiction is presumed unless the party asserting jurisdiction establishes that it exists. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

Plaintiff's claims are nonjusticiable under the political question doctrine. As the Supreme Court ruled in *Baker v. Carr*, 369 U.S. 186 (1962), this Court should not intervene in military affairs, especially when they affect military policies that implicate national security, and especially here where Congress is already addressing the very same relief that Plaintiff is seeking.

What's more, Plaintiff asks the Court to dictate the DoD's and DoN's policies regarding public access to court-martial docket information, filings, and records. The Court's adoption of Plaintiff's position would have costly, disruptive implications, both within the Military Departments and across the DoD, as well as within the Department

of Homeland Security and the Coast Guard, regarding matters that are constitutionally committed to the executive and legislative branches. Moreover, Plaintiff's claims involve military matters that have national security implications. Congress has already evaluated public access to court-martial records and assigned implementation of policies and procedures to the DoD with close congressional oversight.

In *Baker v. Carr*, the Supreme Court held that federal courts should not hear cases in which the Constitution has committed sole responsibility to the executive branch and/or the legislative branch. 369 U.S. at 217. The Court listed six factors that courts should consider in determining whether a claim raises a nonjusticiable political question: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id*.

"The inquiry requires a 'case-by-case' analysis' in which the various [] factors 'often collaps[e] into one another.'" *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1200 (9th Cir. 2017) (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 544-45 (9th Cir. 2005)). Nevertheless, "[t]o find a political question, [courts] need only conclude that one factor is present, not all." *Republic of Marshall Islands*, 865 F.3d at 1200 (quoting *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005)). Here, application of each of the first three factors by itself demonstrates that Plaintiff's claims present a nonjusticiable political question.

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A. TEXTUALLY DEMONSTRABLE CONSTITUTIONAL COMMITMENT OF THE ISSUE TO A COORDINATE POLITICAL DEPARTMENT

The Constitution commits military matters to both the executive and legislative branches of government. Article II, Section 2, Clause 1 provides: "The President shall be Commander in Chief of the Army and Navy of the United States." The President executes this power in large part through the Department of Defense, a cabinet-level executive agency. 10 U.S.C. § 111(b). Article I, Section 8, Clauses 1, 12, and 13 provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . . To raise and support Armies…; [and] To provide and maintain a Navy."

The Constitution further confers on Congress the power "[t]o make rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I., § 8, cl. 14. Pursuant to its plenary constitutional authority, Congress "has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure." *Chappell v. Wallace*, 462 U.S. 296, 302 (1983). Military jurisprudence has evolved largely within the confines of this structure, "separate and apart" from the law that governs the federal judicial establishment. *See Parker v. Levy*, 417 U.S. 733, 744 (1974) (citing *Burns v. Wilson*, 346 U.S. 137, 140 (1953)). Congress has reinforced the independence of the military justice system, having, until 1989 and only in limited circumstances, "never deemed it appropriate to confer on the [Supreme Court] 'appellate jurisdiction to supervise the administration of criminal justice in the military.'" *See Schlesinger v. Councilman*, 420 U.S. 738, 746 (1975) (quoting *Noyd v. Bond*, 395 U.S. 683, 694 (1969)).

The first major post-*Baker* case was *Gilligan v. Morgan*, 413 U.S. 1 (1973), in which the Supreme Court declined to consider a claim that defective training of the Ohio National Guard led to violence at Kent State University. The Court ruled that, although military decisions are not entirely exempt from judicial review, "[t]he

complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Id*. at 10 (emphasis in original). "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence." *Id*.; *see also Chappell*, 462 U.S. at 305 (holding that civil courts are "ill equipped" to establish policies regarding matters of military concern). Policy decisions concerning the proper management of the military justice system fall squarely within those requiring professional military judgment.

The policies and procedures at issue in this case also implicate national security, which is not within the province of the courts. *See Ziglar v. Abbasi*, 582 U.S. 120, 142 (2017) ("Judicial inquiry into the national-security realm raises 'concerns for the separation of powers.'") (quoting *Christopher v. Harbury*, 536 U.S. 403, 417 (2002)). "National-security policy is the prerogative of the Congress and President." *Abbasi*, 582 U.S. at 142; *see also Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (stating that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"). Furthermore, Congress has developed a process of periodic review of the UCMJ to address, among other things, the issues raised by Plaintiff, and that process involves close coordination between the executive and legislative branches, particularly between the DoD (in consultation with the Department of Homeland Security) and the House and Senate Committees on Armed Services. The Court should rule that Plaintiff is asking it to decide a political question.

B. LACK OF JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS; THE IMPOSSIBILITY OF DECIDING WITHOUT AN INITIAL POLICY DETERMINATION OF A KIND CLEARLY FOR NONJUDICIAL DISCRETION

The second and third factors also apply here. Article 140a(a)(4) provides that the Secretary of Defense (or his designee) will determine what public access limitations are "appropriate to judicial proceedings and military records." Plaintiff fails to address this

crucial language in Article 140a(a)(4). Plaintiff would have this Court ignore this language and make policy determinations for which the Court would have to invent its own standards.

As Chief Justice Warren wrote, the "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon the military might have." Chief Justice Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 187 (1962), *cited in Khalsa v. Weinberger*, 779 F.2d 1393, 1395 n.1 (9th Cir. 1985); *see also North Dakota v. United States*, 495 U.S. 423, 443 (1990) ("When the Court is confronted with questions relating to ... military operations, we properly defer to the judgment of those who must lead our Armed Forces in battle."); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 58 (2006) ("[A]s we recognized in Rostker, 'judicial deference . . . [i]s at its apogee' when Congress legislates under its authority to raise and support armies.") (quoting *Rostker v. Goldberg*, 453 U.S. at 70); *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) ("[J]udges are not given the task of running the Army."); *Gonzalez v. Dep't of the Army*, 718 F.2d 926, 930 (9th Cir. 1983) ("This inquiry would involve the court in a very sensitive area of military expertise and discretion"); *Murphy v. United States*, 993 F.2d 871, 872 (Fed. Cir. 1993) ("Justiciability is a particularly apt inquiry when one seeks review of military activities."); *Voge v. United States*, 844 F.2d 776, 779 (Fed. Cir. 1986) ("Judicial deference must be 'at its apogee' in matters pertaining to the military and national defense.").

Plaintiff's demand that the court require public access to court-martial records contemporaneously with their filing could compromise national security, a matter that is not within the province of the courts. It would weaken the ability to screen documents for sensitive and classified information, and it would supplant DoN's policy of limiting disclosure of documents during the pendency of a court-martial to protect the privacy of victims, witnesses, and the accused, who is presumed innocent, and to safeguard the good order and discipline of military units.

Courts-martial involve information that must be screened before public access because it could include unclassified information that, when aggregated with other unclassified information, would reveal classified or other sensitive information, or that would reveal the identities of victims, minors, or personnel in overseas, sensitive, or routinely deployable units. In addition, providing contemporaneous public access to Article 32 hearing transcripts and reports, and court-martial filings and records, would allow publicity of details that could adversely affect unit cohesion and thereby jeopardize DoN's national security interest in maintaining military effectiveness.

Given the lack of judicial standards for managing national security and given the DoD's statutory obligation to develop policies that protect the privacy of minors, victims, witnesses, and the accused, as well as unit cohesion, the Court should find that Plaintiff's claims are nonjusticiable under the political question doctrine. *Cf. Wallace v. Chappell*, 661 F.2d 729, 732 (9th Cir. 1981) (adopting the *Mindes* test), *rev'd on other grounds*, 462 U.S. 296 (1983).[16]

V. MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

A motion for summary judgment may be granted when the moving party demonstrates there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Upon a showing that there is no genuine issue of material fact as to a particular claim, the court may grant summary judgment in a party's favor

[16] In *Wallace v. Chappell*, the Ninth Circuit applied the Fifth Circuit's test in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), because "the doctrine of limited reviewability of certain military regulations and decisions is a matter of justiciability, analogous to the political questions doctrine." *Id.* at 1395. The Ninth Circuit has, however, limited application of that test to internal military decisions, *Id.* at 1395 n.1 (noting "the difficulty of finding judicially manageable standards to justify intervention into *internal* decisions grounded in military expertise and experience.") (emphasis added) (citing *Baker v. Carr*, 369 U.S. at 217 (1962); *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring)). This case involves inter-branch decision-making, not a specific internal military decision. It was the DoD that proposed the current legislative process that Congress adopted, and both branches are engaged in decision making going forward.

"upon all or any part thereof." Fed. R. Civ. P. 56(a), (b). A plaintiff may carry its burden to show a genuine issue of material fact only by offering "significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). "A mere scintilla of evidence will not do . . . ." *British Airways Bd. v. Boeing Co*., 585 F.2d 946, 952 (9th Cir. 1978). Therefore, to avoid summary judgment, Plaintiff must offer "concrete evidence from which [the trier of fact] could return a verdict" in their favor. *Anderson*, 477 U.S. at 256.

In Count III of its Complaint, Plaintiff seeks mandamus relief, contending that Article 140a(a) requires DoD to grant contemporaneous, unfettered access to all transcripts and reports of DoN Article 32 hearings and to all court-martial transcripts, filings, and exhibits. *See* SAC, ¶¶7, 65, 104-07, 125-27. Plaintiff asserts that Congress has mandated the "contemporaneous release of properly redacted trial filings and records," to include "transcripts, exhibits, [and] evidence," and required that "dockets [] 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." Pl. MSJ at 39. Plaintiff argues that "[a] writ of mandate [sic] is needed to require the Secretary [of Defense] to issue the uniform standards and criteria mandated by Congress." *Id*. at 40.

If the Court reaches consideration of Plaintiff's claims, it should enter judgment for Defendants under Fed. R. Civ. P. 56(c), because Plaintiff has no private right to enforce Article 140a(a)(4), there is no clear duty in Article 140a to prescribe Plaintiff's preferred standards, and as set forth above. Defendants' policies regarding public access to docket information, filings, and records reflect the "best practices" "in so far as practicable" in the military context. *See also* Fed. R. Civ. P. 12(b)(6), 12(c), 12(h)(2)(B); *Bradley Mem'l Hosp. v. Leavitt*, 599 F. Supp. 2d 6, 11 (D.D.C. 2009) ("if this Court finds that Plaintiffs have failed to state a claim under 28 U.S.C. § 1361, the case must be dismissed pursuant to Rule 12(b)(6).").

The Court should enter judgment for Defendants as to Plaintiff's constitutional claims for relief, because Plaintiff has not demonstrated a constitutional violation, as set forth below.

A. NO PRIVATE RIGHT OF ACTION

Plaintiff seeks a writ of mandamus under Article 140a directing the Secretary to prescribe uniform standards that ensure public access to all records related to military court proceedings, including "transcripts, exhibits, and evidence" "contemporaneously with their filing." SAC, ¶¶ 126-27; Prayer for Relief (3)-(5). Plaintiff does not explain, however, how it has a private right of action to sue for violation of Article 140a(a)(4). Nor can it, because Article 140a does not confer a private right of action, and Plaintiff chose not to seek relief under the Administrative Procedure Act.

Private rights of action to enforce federal law must be created by Congress. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979). "Statutory intent is determinative. . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). In *Alexander*, the Court examined section 602 of Title VI of Civil Rights Act of 1964 and held that, since it was "phrased as a directive to federal agencies engaged in the distribution of public funds, . . . [t]here [is] far less reason to infer a private remedy in favor of individual persons." *Id*. at 289 (quoting *Universities Research Assn., Inc. v. Coutu*, 450 U.S. 754, 772 (1981), and *Cannon v. University of Chicago*, 441 U.S. 677, 690-91 (1979)). The Court therefore began its search for Congress's intent with the text and structure of the statute. *Id*. at 288. Here, the language in Article 140a(a)(4) is expressly directed the DoD to "prescribe uniform standards," so inferring a private remedy in favor of Plaintiff would be improper. Neither the statutory language nor legislative history of Article 140a(a) suggest that it is intended to create rights upon which individuals or Plaintiff could sue. Congress gave the Secretary of Defense the responsibility for and discretion

to implement Article 140a(a) as that official deems appropriate, given the Department's expertise in matters of military justice and national security.

B. NO CLEAR DUTY STATED IN THE STATUTE

Plaintiff acknowledges that mandamus may be granted only where "(1) the plaintiff's claim is clear and certain; (2) the duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986). Pl. MSJ at 37. "[I]f there is no clear and compelling duty under the statute as interpreted, the district court must dismiss the action." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005); *Citizens for Responsibility and Ethics in Wash. v. Trump*, 302 F. Supp. 3d 127, 137 (D.D.C. 2018) (finding that plaintiff could point "to no duty that is sufficiently clear and compelling to meet the stringent requirements for mandamus relief").

Plaintiff asserts that "the standards required under Article 140a are unambiguous," Pl. MSJ at 48, glossing over the fact that the operative language is conditional: the DoD is directed to use undefined "best practices" of federal and state courts, but only "insofar as practicable" and most importantly, according to what the Department deems "appropriate to judicial proceedings and military records." 10 U.S.C. § 940a(a)(4). Indeed, Plaintiff does not *at all* address the crucial language "appropriate to judicial proceedings and military records." Screening documents for sensitive, classified, and statutorily protected information is appropriate to military records to protect national security. In addition, DoN's practice of not providing records prior to a guilty verdict is "appropriate to judicial proceedings and military records" because it protects the morale, unity, and good order and discipline of its Service members, which is an essential element of military readiness, as Captain Temple explained throughout his deposition.

The DoD is also statutorily required to "restrict access to personally identifiable information of minors and victims of crime (including victims of sexual assault and

domestic violence), as practicable to the extent such information is restricted in electronic filing systems of Federal and State courts." 10 U.S.C. § 940a(b).

Nowhere in Article 140a does Congress mandate contemporaneous access to case information or limit the Secretary of Defense's discretion to implement policies to facilitate public access. Plaintiff has therefore failed to state a mandamus claim. *See Weaver's Cove Energy, LLC v. Allen*, 587 F. Supp. 2d 103, 108 (D.D.C. 2008) (dismissing a mandamus complaint against the Coast Guard because there were no unfulfilled nondiscretionary duties). "[J]udicial review is only appropriate where the Secretary's discretion is limited, and Congress has established 'tests and standards' against which the court can measure his conduct." *Murphy*, 993 F.2d at 873.

C. NO FIRST AMENDMENT RIGHT TO CONTEMPORANEOUS, UNFETTERED ACCESS TO COURT-MARTIAL DOCUMENTS

In Counts I and II of its SAC, Plaintiff contends that the First Amendment and common law require DoD to grant contemporaneous public access to all Article 32 hearings, courts-martial, and related records. There is, however, no absolute First Amendment right to such records.[17] *See Nixon v. Warner Commc'n, Inc.*, 435 U.S. 589, 598 (1978) ("the right to inspect and copy judicial records is not absolute"). Courts consistently reject challenges to the entirety of an agency policy when based on rights that are qualified. *See, e.g., Forbes Media LLC v. United States*, 61 F.4th 1072, 1077

[17] While Plaintiff's arguments also seek to rely on a common law right of access, here a common law right of access is preempted by the statutory scheme set by Congress through article 140a. *See Center for Nat. Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d at 936-37 (analyzing Supreme Court precedent and concluding that the common law right of access is preempted by a statutory disclosure scheme); *see also Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) ("federal common law is subject to the paramount authority of Congress"); *Native Village of Kivalina v. Exxon Mobil Corp.*, 696 F.3d 849 (9th Cir. 2012) ("If Congress has addressed a federal issue by statute, then there is no gap for federal common law to fill."). Regardless, "[t]he First Amendment is generally understood to provide a stronger right of access than the common law." *United States v. Bus. Of Custer Battlefield Museum*, 658 F.3d 1188, 1197 n.7 (9th Cir. 2011). Moreover, "the common law, like the First Amendment, turns on roughly similar considerations of historical tradition and the risks and benefits of public disclosure." *Forbes Media*, 61 F.4th at 1082. Thus, even if the common law right of access were applicable, Plaintiff's arguments fail for the same reasons as those applied below under the First Amendment.

(9th Cir. 2023) ("[T]he First Amendment is not an all-access pass to any court proceeding or court record."); *Phoenix Newspapers, Inc. v. U.S. Dist. Court for the Dist. of Ariz.*, 156 F.3d 940, 946 (9th Cir. 1998) ("[T]here is no right of access which attaches to all judicial proceedings, even all criminal proceedings.").

The First Amendment right is especially qualified in the military context, and there is no "deeply rooted" right of access in *this* context, contrary to Plaintiff's assertions. The Supreme Court has acknowledged that military discipline requirements can justify otherwise impermissible restrictions on speech. *Brown v. Glines*, 444 U.S. 348, 352 (1980). Indeed, in the military context, where Congress has already legislated pursuant to its Article I powers, "judicial deference . . . is at its apogee[.]" *Solorio v. United States*, 483 U.S. 435, 447-48 (1987) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986), and *Rostker v. Goldberg*, 453 U.S. at 70).

As a qualified right, several factors must be satisfied for the right to attach. The Supreme Court has specified two prongs that should be considered when deciding whether a First Amendment right of access applies to a particular proceeding or a particular type of judicial document. *See Oregonian Publ'g Co. v. U.S. Dist. Court for Dist. of Oregon*, 920 F.2d 1462, 1465 (9th Cir. 1990) (applying *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 13-14 (1986)). The first prong is "whether the place and process have historically been open to the press and general public." *Press-Enterprise II*, 478 U.S. at 8. The second prong is "whether public access plays a significant positive role in the functioning of the particular process in question." *Id*.

The Supreme Court has further clarified that a right of access will not exist if "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id*.; *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 (9th Cir. 1989); *see also United States v. Carpenter*, 923 F.3d 1172, 1189 (9th Cir. 2019) (the court considers whether the right of access can "be overcome by an overriding interest" and whether the denial of access "is narrowly tailored to serve that interest"). Time, place, and manner restrictions on public access to court documents are constitutional where

they are "content-neutral, narrowly tailored, and necessary to preserve the court's important interest in the fair and orderly administration of justice." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 585 (9th Cir. 2020). The Ninth Circuit has also recently recognized that "the heavy burden of providing access" is a factor to consider. *Twitter, Inc. v. Garland*, 61 F.4th 686, 722 (9th Cir. 2023), *cert. denied sub nom. X Corp. v. Garland*, 144 S. Ct. 556 (2024); *see also Hillery v. Procunier*, 364 F. Supp. 196, 202 (N.D. Cal. 1973), *vacated sub nom. Pell v. Procunier*, 417 U.S. 817 (1974) ("By holding that the State has made an insufficient factual showing of administrative burden, the court does not imply that reasonable limitations as to the time, place, and manner of such interviews cannot be imposed.").

1. *First prong: No historical public access to Article 32 hearing and court-martial filings and records*

Public access to Article 32 hearing and court-martial filings and records has historically been restricted.[18] That is why Plaintiff brought this case, but Plaintiff completely ignores this threshold prong.

Instead, Plaintiff asserts that "the First Amendment right of access to military legal proceedings necessarily includes the right to access related records . . . ." Pl. MSJ at 32. However, the Article 32 hearing officer or convening authority may close Article 32 hearings to the public. *See* R.C.M. 405(j). There is no First Amendment right to attend an Article 32 hearing. Further, a court "has supervisory power over its own records and files, and access [may be] denied where court files might have become a vehicle for improper purposes." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. at 598; *see also Matter of Sealed Affidavit(s)*, 600 F.2d 1256, 1257 (9th Cir. 1979) ("courts have

[18] Plaintiff makes the grossly inaccurate and inflammatory accusation that Article 32 hearings occur "in secret, like a modern-day Star Chamber." Pl. MSJ at 13. It is undisputed that Article 32 hearings are typically open to the public. *See, e.g., ABC, Inc. v. Powell*, 47 M.J. 363,364, 366 (C.A.A.F. 1997) (holding that preliminary hearing had to remain open unless Army could show "compelling" need for secrecy.).

Likewise, Plaintiff makes the inaccurate statement that "[v]ictims are denied the opportunity to see the defendant put on trial . . . ." Pl. MSJ at 13. Victims have a statutory right to attend court-martial proceedings. *See* 10 U.S.C. § 806b(a)(3).

inherent power, as an incident of their constitutional function, to control papers filed with the courts within certain constitutional and other limitations").

Military courts have recognized a qualified First Amendment right to attend court-martial proceedings,[19] but court-martial filings and records have not been historically contemporaneously available to the public; they have been subject to agency rules, the Privacy Act, and the FOIA, which was enacted in 1966. *See* 5 U.S.C. §§ 551(1)(F) (APA applies to "courts martial and military commissions" to the extent of 5 U.S.C. § 552, which is the FOIA statute). There is always an overriding interest in ensuring that public access to court-martial filings and records does not compromise national security. Unlike civilian courts, the DoD and DoN are charged with ensuring an effective national defense, which requires the morale, unity, and good order and discipline of its Service members.

Court-martial proceedings are open to the public, but access to Article 32 hearing documents and certain trial documents has historically been provided by request, on a case-by-case basis. Plaintiff has therefore failed to satisfy this first prong of the analysis.

2. *Second prong: whether public access plays a significant positive role in the functioning of the particular process in question*

Plaintiff exalts the importance of public access to Article 32 hearings and court-martial proceedings, Pl. MSJ at 29-32, but its argument for unfettered, contemporaneous access to all records related to such proceedings falls flat. Plaintiff generally asserts that access to such filings and records gives the public a better understanding of what is happening, *see id*. at 18, 21,34, but Plaintiff does not explain how the public's better understanding plays a positive role in the functioning of this process. On the contrary, unfettered, contemporaneous access to Article 32 hearing and court-martial filings and records could play a significant negative role by compromising privacy interests and national security, as explained immediately below.

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[19] *See, e.g., United States v. Anderson*, 46 M.J. 728, 731 (A. Ct. Crim. App. 1977) ("There can be no doubt that the general public has a qualified constitutional right under the First Amendment to access to . . . courts-martial.").

3. *Third prong: "Higher values" and competing interests*

a. *Compelling, competing national security interest*. Plaintiff does not address this competing interest at all, even though it is critical to the Court's analysis here, and Captain Temple repeatedly referred to it in his deposition testimony. *See* Temple Dep. 60:4-10, 99:11-100:3, 137:20-138:1, 168:16-169:5, 181:10-24. Providing contemporaneous access to Article 32 hearing and court-martial filings and records could compromise national security, because it could adversely affect unit cohesion and would impede adequate reviews for sensitive and classified information.

Courts-martial involve classified information and unclassified information that, when aggregated with other unclassified information, may reveal classified or other sensitive information, or that may reveal the identities of victims, minors, or personnel in overseas, sensitive, or routinely deployable units. *See* 10 U.S.C. §§ 128, 130, 130b-130e, 424, 455, 940a(b); *CIA v. Sims*, 471 U.S. 159, 178 (1985) ("Foreign intelligence services have both the capacity to gather and analyze any information that is in the public domain and the substantial expertise in deducing the identities of intelligence sources from seemingly unimportant details."); *Halperin v. Cent. Intel. Agency*, 629 F.2d 144, 150 (D.C. Cir. 1980) ("We must take into account, however, that each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.").

Providing contemporaneous access to Article 32 hearing and court-martial filings and records would also allow publicity of details that could adversely affect unit cohesion. This is especially true for the types of sensitive cases that Plaintiff finds especially "newsworthy," namely "cases of rape, sexual assault, and other sexual

misconduct . . . .” Pl. MSJ at 13; *see also id*. at 25-26, 31. Captain Temple[20] provided the following explanation:

> BY MS. KEENE:
> Q Can you describe what is cohesiveness in the context of a Navy unit?
>
> A [CAPT TEMPLE]: So our prior mission overall, we’re fighting readiness. And a part of war fighting readiness is [a] discipline[d] force, and that goes all the way down to the unit level. Unit cohesion is important because every unit is tasked with either supporting a mission that may result in the death of personnel or others, command personnel or others, and it’s important that every individual within that unit both follow the orders of those appointed over them and work in an environment that they know the person next to them, they’re all working together to accomplish the mission. And there can be detrimental impacts to that when or if information is inappropriately released.
>
> Q Okay. Could a contemporaneous release system affect that cohesiveness?
> [objection by opposing counsel]
>
> A Yes. One example: If you have an allegation of sexual assault and it’s between members of the same unit and not -- it’s not no longer rumors and conjecture that’s floating around, but rather, documents in hand by coworkers about what may or may not have occurred with the victim in that case. That has a huge impact upon that cohesiveness that we’re talking about, maintaining good order and discipline, focused on the mission. There’s a distinction between having the materials in hand and the other sailors having the materials in hand and the reporting that may or may not occur in the media separately.

Temple Dep. 206:6-207:14.

As the Ninth Circuit has acknowledged, morale is crucial to military operations. *See Khalsa*, 779 F.2d at 1400 (quoting *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981)). “[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.” *Goldman*, 475 U. S. at 507 (*Feres* doctrine). “The purposes of military law are to promote justice, to deter misconduct, to facilitate

[20] CAPT Temple is Director of the Criminal Law Division (Code 20) of the Office of the Judge Advocate General of the Navy. *See* Exs. 96-99 (resume). As Director, CAPT Temple is “responsible for providing advice on criminal law policy in the Department of the Navy and how criminal law policies may be originating elsewhere impact the Department of the Navy.” ECF No. 89-1 at 308 (Temple Dep. 39:20-23).

appropriate accountability, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Manual for Courts-Martial, Part I, ¶ 3; *see also* 10 U.S.C. § 654(a)(6) (repealed) ("Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion."), *cited in Richenberg v. Perry*, 909 F. Supp. 1303, 1311-12 (D. Neb. 1995), *aff'd*, 97 F.3d 256 (8th Cir. 1996); *Smith v. United States*, 196 F.3d 774, 778 (7th Cir. 1999) ("Tolerance of such behavior [sexual assault and sexual harassment] also results in a warping of military discipline, a lack of military readiness, and a weakening of national security.").

b. *Compelling, competing privacy interests*. Plaintiff also ignores the importance of the privacy of Service members in the military justice context; it argues incorrectly only that the Privacy Act does not apply. Notably, Congress has clarified that the Privacy Act does apply to information subject to Article 140a. *See* H.R. No. 116-333 at 1212 (2019). Even if Congress were to exclude court-martial records from the scope of the Privacy Act, the DoD and the Navy will continue to have a compelling interest in protecting the privacy of minors, crime victims, and the accused, who is presumed innocent, and safeguarding the good order and discipline of military units, by limiting access to records unless and until there has been a finding of guilty. Plaintiff does not address this competing interest at all except to attempt to distinguish the case of *ACLU v. U.S. Department of Justice* in which the D.C. Circuit concluded that releasing records of criminal proceedings that resulted in acquittals "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *ACLU v. U.S. DOJ*, 750 F.3d 927, 935 (D.C. Cir. 2014) (quoting 5 U.S.C. § 552(b)(7)(C)).

4. *Administrative burden*

Plaintiff argues that contemporaneous access to court-martial filings and records is practicable by mentioning what has been done on an *ad hoc* basis by military commissions and by the Army and Navy only in very few specific cases. Pl. MSJ at 41-

43, 50-51. Such anecdotal evidence does not inform the Court of the special circumstances of those cases or the resources that were required. As an initial matter, Article 140a does not apply to the military commissions constituted under the Military Commissions Act of 2009, and military commissions involve noncitizen accused, to whom the Privacy Act does not apply. *See* Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801 *et seq*., 123 Stat. 2190, 2574 *et seq*. (Oct. 28, 2009); Presidential Military Order pertaining to Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001) ("The term 'individual subject to this order' shall mean any individual who is not a United States citizen"); 5 U.S.C. § 552a(a)(2) (Privacy Act definition of "individual" includes only U.S. citizens and lawful permanent residents).

Defendants object to the admissibility of such anecdotal evidence as irrelevant and immaterial. Additionally, what is "practicable" in a single court-martial is not a useful guide to what is practicable for the entire military justice system, where thousands of court-martial proceedings are conducted annually at worldwide locations.

Proper screening of filings and records for classified, sensitive, and private information requires expertise and centralization to ensure uniform application and oversight. Requiring units across the globe to undertake this responsibility not only would affect uniformity, but would force reallocation of military resources away from each unit's particular mission and requirements. This in turn would erode the effectiveness of our forces as a whole. In addition, establishing a PACER-like system would be very costly, requiring Congressional appropriation of funding. *See supra* note 6 (April 2024 DoD Feasibility Report). Given the lack of any tradition of providing unfettered, contemporaneous access to Article 32 hearing and court-martial filings and records and given compelling, competing privacy and national security interests, Plaintiff's constitutional claims are not viable.

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D. DoD HAS COMPLIED WITH ARTICLE 140a(a)

Plaintiff spends a considerable portion of its briefing on the evolution of DoN's policies while also implausibly contending that the DoD is resisting "compliance" with Article 140a, which it proposed to Congress to facilitate public access to court-martial documents. Plaintiff contends that DoD has failed to issue uniform standards because it has given "carte blanche" discretion to the Services to establish appropriate standards. Pl. MSJ at 38. This is a gross mischaracterization.

1. *Public access to documents of Article 32 hearings is consistent with "best practices"*

Article 140a provides, in general and qualified terms, that public access to court-martial docket information, filings, and records should borrow from the "best practices" of state and federal courts. Plaintiff argues that such "best practices" simply "require contemporaneous release of properly redacted trial filings and records," Pl. MSJ at 49-50, and seeks unfettered public access to all documents associated with the Article 32 hearing, including filings, exhibits, transcripts, and the hearing officer's report to the referral authority, *see* SAC, ¶¶ 93, 111, 117, Request for Relief. Plaintiff ignores that an Article 32 hearing is an advisory show cause hearing. DoN's policy regarding access to documents in an Article 32 hearing is consistent with the best practices of comparable "show cause" proceedings in federal and state courts.

The District Court for the District of Columbia has described Article 32 hearings as the "military counterpart of the civilian grand jury." *McKinney v. Caldera*, 141 F. Supp. 2d 25, 27 n. 3 (D.D.C. 2001) (citing *Morgan v. Perry*, 142 F.3d 670, 678 n. 13 (3rd Cir. 1999)); *see also Bergdahl v. United States*, No. 21-cv-418 (RBW), 2023 WL 4743707, at *8 n.6 (D.D.C. July 25, 2023). Military courts have also described the Article 32 hearing as the "military equivalent" of a civilian grand jury. *United States v. Bell*, 44 M.J. 403, 406 (C.A.A.F. 1996). Federal grand jury proceedings and associated documents are generally not accessible to the public for a number of policy reasons, including to ensure that "'persons who are accused but exonerated by the grand jury

will not be held up to public ridicule.'" *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1084 (9th Cir. 2014) (quoting *Douglas Oil Co. of California v. Petrol Stops Northwest, et al.*, 441 U.S. 211, 219 (1979)). Although the public may observe Article 32 hearings, "the fact that an event is not wholly private does not mean that" privacy interests of the accused have diminished. *See DOJ v. Reporters Comm. for Free Press*, 489 U.S. 749, 770 (1989).

"The public's common law right of access is not absolute and it does not extend to records that have 'traditionally been kept secret for important policy reasons.'" *U.S. v. Index Newspapers LLC*, 766 F.3d 1072, 1084 (9th Cir. 2014) (quoting *Times Mirror*, 873 F.2d at 1219). Among other reasons, limitations on access to grand jury documents assure "that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Press Oil Co.*, 441 U.S. at 219. The "experience and logic" test (*Press-Enterprise II* test) that applies to grand jury proceedings should also apply to Article 32 hearings to limit public access to documents. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. at 13; *see also Forbes Media LLC v. United States*, 61 F.4th at 1078.

A show cause hearing in Massachusetts, similar to an Article 32 hearing, is a pre-complaint opportunity for the accused to be heard by a neutral magistrate. *See* Mass. Gen. Laws Ann. ch. 218, § 35A (West). There is no automatic public access to the records of such hearings. In *Boston Globe Media Partners, LLC v. Chief Justice of Trial Court*, 130 N.E.3d 742, 748 (Mass. 2019), the Globe claimed that the public had a common-law and constitutional right to access the records of show cause hearings where the clerk-magistrate made a finding of probable cause, but declined, in the exercise of discretion, to issue a criminal complaint. The Massachusetts Supreme Court denied the Globe's request for declaratory relief, holding that "the requested show cause hearing records are not presumptively public under the common law [or] the First Amendment." *Id.* at 749. The Massachusetts Supreme Court held that members of the public may, however, "request records of a particular show cause hearing be made

publicly available" and such request shall be granted "where the interests of justice so require." *Id.* To the extent information regarding the show cause hearings is made public, the Massachusetts Supreme Court admonished that it shall "not . . . reveal the identities of the persons accused where no complaint issued." *Id.*

Like Article 32 hearings, Massachusetts show cause hearings are recorded and a member of the public "may request that the records of a particular show cause hearing be made publicly available, and a clerk-magistrate or a judge shall grant such a request where the interests of justice so require." *Id*. But where a clerk-magistrate declines to issue a criminal complaint, the application, together with any record of the facts presented to the magistrate, including any recordings, "shall be maintained separately from other records of such court." G. L. c. 218, § 35; *see* standard 5:01 of the Complaint Standards ("If a complaint is denied, the application form and any attachments must be kept separate from any criminal records"); *Bos. Globe Media Partners, LLC*, 130 N.E.3d at 753.

The Massachusetts Supreme Court ruled: "Our conclusion that the Globe has no common-law or constitutional presumptive right to access all of the requested records does not necessarily mean that it has no right to access some of them. It merely means that if the Globe (or any other person or entity) wishes to see the records of a particular show cause hearing or a particular subset of show cause hearings, it will have to specifically request those records." *Id*. at 763.

The Navy's policies regarding public access to documents in Article 32 hearings are consistent with best practices in comparable, show cause proceedings.

2. *DoN's public access to court-martial documents is consistent with "best practices" and is "appropriate to judicial proceedings and military records"*

The 2023 General Counsel Guidance instructs the Military Departments to provide for public access to court martial filings and records, emphasizing that they "must comply with the Privacy Act and other applicable laws and regulations related to the protection of personal, governmental, and classified information . . . ," including through

appropriate redaction. Exs. 68-69 (Sec. IV.D.1-2, E.1, F.2. Navy's JAG Instruction 5813.2A implements within DoN the policy established by the 2023 General Counsel Guidance by incorporating FOIA's withholding standard as a method of identifying personal, governmental, and classified information and records that justify protection. Sec. 4(f). Among other things, FOIA's analysis addresses records that are properly classified under an Executive Order, in the interest of national defense or foreign policy, under Exemption 1; records specifically exempted from disclosure by another statute, under Exemption 3; records whose disclosure would constitute a clearly unwarranted invasion of personal privacy, under Exemption 6, or with respect to records compiled for law enforcement purposes, an unwarranted invasion of personal privacy, under Exemption 7C.

a. *Protection of presumed innocence of Service members until there is a finding of guilty*

Captain Temple explained the purpose of DoN's policy to provide access to court-martial filings and records on a case-by-case basis during an ongoing court-martial: to protect the privacy of the accused, who is presumed to be innocent, unless and until there is a finding of guilty. *See* Temple Dep. 97:24-98:4 (discussing impact on privacy interests of person ultimately acquitted). DoN's policy also protects unit cohesion pending and during a court-martial. *Id*. at 206:13-207:14.

Plaintiff ignores the plain text of the statute.[21] It specifies that the uniform standards addressing the facilitation of public access to docket information, filings, and records should take into "consideration restrictions appropriate to judicial proceedings and military records." 10 U.S.C. § 940a(a)(4). DoN's policy is consistent with a policy upheld by the D.C. Circuit in the context of a FOIA case. The D.C. Circuit concluded that releasing records of criminal proceedings that resulted in acquittals "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

[21] Plaintiff addresses only the fact that DoN does not issue a record of trial where there has been no finding of guilty. Pl. MSJ at 15, 39.

ACLU v. Dep't of Justice, 750 F.3d at 935 (the government "has a special responsibility ... to protect such individuals from further public scrutiny").

b. *Screening court-martial documents for national security information*

Plaintiff also does not address the fact that, unlike federal and state courts, DoN must first screen documents for classified and other sensitive information before it publicly releases them. *See* 5 USC § 552; 10 U.S.C. §§ 128, 130, 130b-130e, 424, 455, 940a(b)-(c). Captain Temple repeatedly explained the importance of this process. Temple Dep. 120:15-121:11, 135:4-12, 181:16-24, 184:2-9, 195:25-198:16, 202:9-203:23, 204:10-20.

c. *Screening court-martial documents for Privacy Act-protected information*

Plaintiff argues that the "routine use" exception in the DoD SORN[22] somehow compels the DoD and DoN to give unfettered public access to court-martial filings and records. Pl. MSJ at 37-38.[23] Plaintiff mischaracterizes the exception at issue here.

The Privacy Act prohibits disclosure of a record contained in a system of records unless the individual to whom the record pertains has provided written consent, or unless one of the enumerated exceptions applies. 5 U.S.C. § 552a(b). One of these is the Routine Use exception in 5 U.S.C. § 552a(b)(3), which permits agencies to identify and publish in the relevant SORN certain contemplated disclosures of the records.

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[22] Privacy Act of 1974; System of Records, 86 Fed. Reg. 28086 (May 25, 2021).

[23] Plaintiff supports its argument with an undated "White Paper," implying that the MJRP has issued recommendations that this Court may consider. Pl. MSJ at 37, 49-50. Defendants object to the admissibility of this "White Paper" as irrelevant. The MJRP's official report to the House and Senate Armed Service Committee is not statutorily required to issue until December 31, 2024 and will contain recommendations to Congress of which Congress is under no obligation to adopt. On the other hand, the undated and unsigned "White Paper" was written by an intern for the MJRP's support staff and does not in any way reflect the views of the MJRP itself. *See* MJRP Open Session Transcript, July 18, 2023, 137:15-22 ("Our fantastic intern, Yonah Berenson, was the primary researcher and writer for that white paper which is at Section D of Tab 8.") (comments of Ms. Vuono), https://mjrp.osd.mil/sites/default/files/MJRP_Meeting_20230718%20(Open)%20Transcript_Final.pdf.

The publication of a routine use does not independently authorize or compel disclosure but rather enables an agency to make otherwise-authorized disclosures without running afoul of the Privacy Act. The Office of Management and Budget (OMB) Privacy Act Implementation Guidelines are explicit on this point:

> Nothing in the privacy act [sic] should be interpreted to authorize or compel disclosures of records, not otherwise permitted or required, to anyone other than the individual to whom a record pertains pursuant to a request by the individual for access to it.
>
> Agencies shall not automatically disclose a record to someone other than the individual to whom it pertains simply because such a disclosure is permitted by this subsection. Agencies shall continue to abide by other constraints on their authority to disclose information to a third party including, where appropriate, the likely effect upon the individual of making that disclosure.[24]

As Plaintiff notes, OMB advises agencies to establish routine uses to implement statutes that require disclosure of Privacy Act records. Pl. MSJ at 37. This is a procedural instruction; the Privacy Act does not contain a self-executing exception from the general non-disclosure rule when another statute requires disclosure.[25] This lends further support, however, to the incontrovertible proposition that routine uses of this

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[24] OMB, Privacy Act Implementation: Guidelines and Responsibilities, 40 Fed. Reg. 28,948, 28.953 (July 9, 1975), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/OMB/inforeg/implementation_guidelines.pdf; *see also* OMB, Circular No. A-108, Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act, 11 (Dec. 2016), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A108/omb_circular_a-108.pdf ("Before establishing a routine use, an agency must determine that it has the necessary authority to make disclosures under the routine use and that the routine use is appropriate"). Pursuant to 5 U.S.C. § 552a(v)(1), OMB is charged with "develop[ing] and … prescrib[ing] guidelines and regulations for the use of agencies in implementing the provisions of [the Privacy Act] . . . ."

[25] OMB, Privacy Act Implementation: Guidelines and Responsibilities, 40 Fed. Reg. 28,948, 28,954 ("It should be noted that the conditions of disclosure language [in subsection (b)] makes no specific provision for disclosures expressly required by law other than 5 U.S.C. 552. Such disclosures… should still be established as 'routine uses' pursuant to [the Act's public notice and comment provisions].").

kind must be understood through reference to the underlying authorities they implement.

Plaintiff's argument implies that, given the SORN, neither the Privacy Act nor Article 140a provide any protection in the context of Article 32 hearing and court-martial proceedings. *See* Pl. MSJ at 18-19. Unlike the example provided in OMB's guidance, Article 140a nowhere describes "disclosures expressly required by law."[26] To the contrary, by its plain language, Article 140a clearly contemplates limitations on disclosure and charges the DoD with "prescrib[ing] uniform standards and criteria for … [f]acilitation of public access to" court martial records. 10 U.S.C. § 940a(a)(4). Notably, as discussed above, Congress expressly chose qualifying and restrictive language in Article 140a. *See id*. (directing to "us[e], *insofar as practicable*, the best practices of" civil courts and take "into consideration *restrictions appropriate to* judicial proceedings and military records") (emphasis added); *see* 10 U.S.C. § 940a(b) ("Protection of Certain Personally Identifiable Information" of minors and crime victims). DoD established the standards that Congress required through the 2018 Ney Guidance and the 2021 and 2023 revisions. The guidance was implemented within DoN through JAG Instruction 5813.2A, incorporating, in its judgement and proper role creating policy governing military operations, appropriate protections for various types of interests, including privacy. *See* sec. IV.D.3.b.

The DoD did not publish a routine use in compliance with Article 140a in an attempt to lift all disclosure restrictions on court-martial filings and records. Rather, this routine use enables DoD to comply with the Privacy Act and still carry out Article 140a's objective of facilitating public access to certain court-martial filings and records, which may be restricted as "appropriate to judicial proceedings and military records," 10 U.S.C. § 940a(a)(4). Indeed, the very terms of this routine use reflect an intent to condition disclosure on compliance with the same standards Congress directed the DoD to prescribe in this context: "To the general public in order to provide access to docket

[26] *See supra* note 25.

information, filings, and records in compliance with Article 140a, UCMJ or other Federal statutes, and corresponding DoD or Service implementing guidance, regulations, or policies." Privacy Act of 1974; System of Records, 86 Fed. Reg. 28086, 28089 (May 25, 2021).

JAG Instruction 5813.2A incorporates FOIA's withholding standard, which (among other things) applies to records whose disclosure would constitute a clearly unwarranted invasion of personal privacy under Exemption 6, or with respect to records compiled for law enforcement purposes, an unwarranted invasion of personal privacy under Exemptions 6 and 7C. And, as the D.C. Circuit has concluded in the FOIA context, releasing records of criminal proceedings that resulted in acquittals "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *ACLU*, 750 F.3d at 935 (adding that the government "has a special responsibility ... to protect such individuals from further public scrutiny"). Similarly, disclosure of "any transcript of the proceedings" is expressly restricted by paragraph IV.C.3. of the 2023 General Counsel Guidance. Ex. 68.

In sum, apart from the nonjusticiability of Plaintiff's case and the nonviability of its mandamus and First Amendment claims, DoN's policies and procedures regarding access to court-martial filings and records mirror the "best practices" of federal and state courts, and they are "appropriate to judicial proceedings and military records."

E. EVIDENTIARY OBJECTIONS

Defendants object to the admissibility of eight declarations filed in support of Plaintiff's Motion for Summary Judgment[27] as irrelevant and immaterial because the declarants are not parties to this action. *Shopper's Corner, Inc. v. Hussmann Corp.*, No. C 07-06437 (JW), 2008 WL 11417431, at *7 (N.D. Cal. Dec. 3, 2008) (striking language "on the ground that the stress suffered by [declarants] is immaterial, as they are not parties to this action").

[27] Christensen Decl.; Dyer Decl.; Fryer-Biggs Decl.; Philipps Decl.; Prine Decl.; Walsh Decl.; Watson Decl.; Ziezulewicz Decl.

Defendants also seek to exclude the Expert Report and Disclosure of Captain Robert Crow (Ret.), and any future testimony, pursuant to Federal Rule of Evidence 702 as neither reliable nor relevant, because Captain Crow's policy role as U.S. Navy, Office of the Judge Advocate General, Criminal Law Division Director from 2012 until 2015 predated passage of Article 140a in 2016. Matthews Decl., Ex. S (Crow Rep. ¶ 8, Ex. A Curriculum Vitae); Pub. L. No. 114-328, 130 Stat. 2961 (codified as amended at 10 U.S.C. § 940a). *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) ("under the Rules the trial judge must ensure that any and all scientific testimony or evidence is not only relevant, but reliable"); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (the trial judge's "basic gatekeeping obligation . . . applies to all expert testimony"). Captain Crow relies on his experience and observations, which largely predate enactment of Article 140a, and his report does not explain his methodologies. *United States v. Freeman*, 498 F.3d 893, 901 (9th Cir. 2007) ("As the advisory committee notes to Rule 702 explain, such expert testimony is admissible provided that 'the principles and methods [used by the expert] are reliable and applied reliably to the facts of the case.'") (citing Fed R. Evid. 702 advisory committee's notes (2000 amendments)).

VI. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion(s) to dismiss and/or for summary judgment and deny Plaintiff's motion for summary judgment.

DATED: December 17, 2024

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