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**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

PRO PUBLICA, INC.,

Plaintiff,

v.

REAR ADMIRAL LIA REYNOLDS; CARLOS DEL TORO; CAROLINE D. KRASS; and LLOYD J. AUSTIN, III

Defendants.

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

**PLAINTIFF PRO PUBLICA, INC.'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Judge: Hon. Barry Ted Moskowitz
Hearing: Feb. 21, 2025 at 11:00 a.m.

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

Complaint Filed: September 27, 2022

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# I. INTRODUCTION

This case is simple. First, ProPublica's claims seeking public access to military judicial proceedings and records are justiciable. Second, the First Amendment and common-law rights of public access apply to military judicial proceedings and records. Third, unsubstantiated invocations of "national security," "privacy," and "burden" cannot override the presumptive right of public access and Congress's legislative directive that the military facilitate it.

The Supreme Court held conclusively in *Ortiz v. United States* that "[t]he military justice system's essential character" is "in a word, judicial." 585 U.S. 427, 437 (2018). Courts-martial operate "as instruments of military justice, not . . . mere military command," and their jurisdiction "overlaps significantly with the criminal jurisdiction of federal and state courts." *Id.* at 438, 439 (quotation omitted). The judicial nature of military justice proceedings, as confirmed by *Ortiz*—which Defendants do not cite once in their forty-page brief—makes clear that ProPublica's claims are justiciable here. Whether or not judicial proceedings are properly closed and judicial records properly sealed is not a "military matter." DMSJ at 17.[1] It involves questions of constitutional law, common law, and statutory interpretation plainly within this Court's purview.

The substantive law is clear: "Under the First Amendment, the press and the public have a presumed right of access to court proceedings and documents." *Civ. Beat. L. Ctr. for Pub. Interest, Inc. v. Maile*, 117 F.4th 1200, 1204 (9th Cir. 2024) (quotation omitted). The highest military court has applied this constitutional right of access to courts-martial and Article 32 preliminary hearings, and Defendants do not dispute that those hearings and courts-martial in general are open to the public (even if they refuse

[1] The following abbreviations are used for the filings: (1) Plaintiff's Memorandum in Support of Motion for Summary Judgment ("PMSJ"), Dkt. 88-1; (2) Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment and Response in Opposition to PMSJ ("DMSJ"), Dkt. 99; (3) Supplemental Declaration of Sarah Matthews ("Matthews Suppl. Decl."), filed concurrently herewith; (4) Supplemental Declaration of Megan Rose ("Rose Suppl. Decl."), filed concurrently herewith.

1 to provide adequate notice of some of those proceedings). The core point of dispute here
2 thus appears to relate to access to records of military judicial proceedings.
3 The Supreme Court and Ninth Circuit have explicitly held that the public has a
4 presumptive right of access to criminal court records. Military courts have implicitly
5 adopted the same approach. Defendants offer no legitimate legal or evidentiary basis to
6 justify uniform *sealing* of broad swaths of records that relate to presumptively *open*
7 hearings and courts-martial. Arguments about national security and privacy melt away
8 when the public could sit in open court and hear the same information that the
9 government says the public should not be able to read. In any event, Defendants'
10 proffered concerns are unfounded. Nothing prevents the Navy from attempting to make
11 the requisite showing of a compelling interest to support denying public access to a
12 portion of a specific proceeding or record. If the Navy can make that (difficult) showing,
13 then in that instance a denial of public access could be warranted.
14 But Defendants here seek to turn the presumption of public access on its head.
15 They ask this Court to perpetuate the military's unconstitutional practice of cloaking
16 entire categories of records in secrecy—withholding the vast majority of records in every
17 court-martial for months, if not years, and permanently withholding all records where
18 there is an acquittal—while leaving it to the press and public to justify access. Beyond
19 conflicting with binding precedent, Defendants' position violates Congress's clear
20 dictate that the military provide for the "[f]acilitation of public access" to docket
21 information, filings, and records "at all stages" of proceedings. 10 U.S.C § 940a(a)(4).
22 Rather than offer evidence showing that these wholesale restrictions are "appropriate
23 to . . . military records," *id.*, Defendants offer the *ipse dixit* opinion of a claimed expert
24 that is nothing more than a post-hoc rationalization for their unconstitutional decisions.
25 ProPublica's case is not an overreach into military policy—it merely seeks a
26 straightforward application of well-established law. Defendants' motion to dismiss
27 should be denied, and because no reasonable factfinder could find in Defendants' favor,
28 ProPublica should be granted summary judgment.

## II. ARGUMENT

### A. Defendants' Belated "Motion to Dismiss" Based on the Political Question Doctrine Must Fail

More than two years into this litigation, Defendants are attempting for the first time to dismiss ProPublica's claims as "nonjusticiable" under the political question doctrine. The issues here are fundamentally judicial, and this Court should decide them.

"In general, the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012) (quotation omitted). The "political question" doctrine is "a narrow exception to that rule." *Id.* at 195. It applies in the limited circumstances identified in *Baker v. Carr*, only three of which Defendants argue here: (1) where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) where there is "a lack of judicially discoverable and manageable standards for resolving it"; or (3) where there is "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." 369 U.S. 186, 217 (1962).

***First Baker Factor.*** Defendants have not—and cannot—identify anything in the Constitution that relegates questions concerning the public's First Amendment right of access to the political branches. None of the language they cite explicitly commits such decision-making to another branch of government, nor in any way suggests that courts should abdicate responsibilities "within the traditional scope of Art. III power." *United States v. Nixon*, 418 U.S. 683, 697 (1974) (holding dispute over subpoena to President Nixon justiciable); *see also Powell v. McCormack*, 395 U.S. 486, 518–48 (1969) (narrowly construing first *Baker* factor and finding it did not preclude judicial review).

Moreover, ProPublica is not asking the Court to take charge of, or to "provide and maintain" the Navy. DMSJ at 17 (quoting U.S. Const. art. I, § 8, cl. 13). ProPublica is asking this Court to enforce its constitutional rights. Particularly when it comes to

ProPublica's First Amendment right of access *to court records*, there is no branch better suited to resolve this than the judiciary.

The Supreme Court held in *Ortiz* that it has jurisdiction to review decisions by the military's highest court. In doing so, the Court made clear that the court-martial system "closely resembles civilian structures of justice." 585 U.S. at 432. The Court further noted the "judicial character and constitutional pedigree of the court-martial system." *Id.* at 435. It added that the jurisdiction of courts-martial "overlaps significantly with the criminal jurisdiction of federal and state courts." *Id.* at 438. Article III courts like this one thus are well-positioned to rule on legal questions related to the constitutional right of public access to military judicial proceedings and records. *See id.* at 440 n.5 ("It is in fact one of the glories of this country that the military justice system is so deeply rooted in the rule of law.").

In fact, declining to address ProPublica's claim here would leave it without a forum to assert constitutional violations. The military's appellate courts *lack* jurisdiction over claims by third parties seeking court access.[2] Indeed, the military court in *United States v. Mays* held it lacked authority to decide ProPublica's claims and stated that "[t]he proper avenue to pursue the release of these records is . . . potentially in an Article III court." Dkt. 89-1 at 133 (Ex. F).

Courts have rejected similar attempts by DoD to evade judicial review in cases involving First Amendment challenges to denials of press access. In *Nation Magazine v. Department of Defense*, a federal district court held that the political question doctrine did not prevent the court from reviewing the military's regulations governing press

[2] The Navy's intermediate appellate court has limited jurisdiction that does not permit ProPublica to appeal the denial of its motion in the *Mays* case. *See* 10 U.S.C. § 866(b) (jurisdiction limited to review of appeals by accused, cases referred by Judge Advocate General, and automatic appeals of certain sentences). The military's highest appellate court has similarly narrow jurisdiction. *See* 10 U.S.C. § 867. The Court of Appeals for the Armed Forces has specifically held it lacks jurisdiction to consider writ petitions from third parties, including the press, seeking to compel a military judge to grant court access. *Ctr. for Const. Rts. v. United States*, 72 M.J. 126, 129–30 (C.A.A.F. 2013).

1 coverage. 762 F. Supp. 1558, 1567–68 (S.D.N.Y. 1991). The *Nation* court stressed
2 that—as is the case here—"there is no challenge to this country's military establishment,
3 its goals, directives or tactics." *Id.* at 1567; *see also Flynt v. LFP, Inc.*, 245 F. Supp. 2d
4 94, 106–07 (D.D.C. 2003) (rejecting argument that adjudicating publisher's
5 constitutional challenge to DoD's press guidelines would require court "to delve into
6 tactical decisions"), *aff'd on other grounds*, 355 F.3d 697 (D.C. Cir. 2004).

7 In Defendants' view, because Congress "developed a process of periodic review
8 of the Uniform Code of Military Justice ("UCMJ") to address, among other things, the
9 issues raised by Plaintiff," DMSJ at 18, this Court has no role to play in ensuring that
10 the military complies with its most basic obligations under the First Amendment. Doing
11 so, in their words, would "disrupt this inter-branch decision-making process." *Id.* at 3.
12 As a threshold matter, even DoD's Military Justice Review Panel ("MJRP") has
13 concluded that DoD is not facilitating public access as Article 140a requires.[3] But
14 MJRP's (damning) conclusion that Defendants have not facilitated public access to
15 docket information and court records does not *require* DoD to do anything, *see* 10 U.S.C.
16 § 946(f)(5); nor does it nullify ProPublica's constitutional and other rights or make them
17 non-justiciable.

18 As for ProPublica's mandamus claim, the Constitution does not say questions
19 regarding whether the Secretary of Defense has complied with a clear and ministerial
20 duty set forth in federal law must be resolved by the political branches. Courts routinely
21 resolve whether officials have complied with federal law. *See, e.g.*, *Patel v. Reno*, 134
22 F.3d 929, 932–33 (9th Cir. 1997) (writ of mandamus appropriate where officer failed to
23 act on visa application as required by federal law); *Biodiv. Legal Found. v. Badgley*, 309

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25 [3] *See* MJRP: 2024 Comprehensive Review and Assessment of the UCMJ at 15, https://mjrp.osd.mil/sites/default/files/MJRP%202024%20Comprehensive%20Review
26 %20and%20Assessment%20of%20the%20UCMJ.pdf ("MJRP Report") (finding DoD's policies of withholding court-martial records have resulted in a "lack of
27 transparency [that] contributes to distrust and disinformation about the military justice system, and makes it difficult for the MJRP, Congress, DoD, and the public to assess the
28 functioning of the military justice system").

F.3d 1166, 1176–79 (9th Cir. 2002) (court must grant injunctive relief when agency fails to act within deadline prescribed by federal law). This is unquestionably the proper forum.

***Second and Third Baker Factors.*** These factors are often considered together and focus on whether there is some "manageable and cognizable standard within the competence of the Judiciary to ascertain and employ to the facts of a concrete case." *Zivotofsky*, 566 U.S. at 204 (Sotomayor, J., concurring). This Court clearly has the expertise and competence to resolve ProPublica's claims. As the *Nation* court held, "[t]he historic competence of the federal judiciary to address questions of First Amendment freedoms . . . is clear." 762 F. Supp. at 1567. In *Flynt*, the plaintiffs asked the court "only to consider whether a First Amendment right of media access to the battlefield exists"—something within "the limits of normal judicial competence"—and, "if so, to direct defendants to enact guidelines that comport with such First Amendment protections." 245 F. Supp. 2d. at 107. Similarly, ProPublica asks only that the Court consider whether the First Amendment and common law rights of access to military courts and records exist and, if so, to direct the Navy to comply with them and to require the Secretary of Defense to issue the standards prescribed by Article 140a.[4]

ProPublica's claims are properly resolved by this Court, and Defendants' belated motion to dismiss should be denied.

**B. Defendants Are Denying ProPublica and the Public Contemporaneous Court Access in Violation of the First Amendment and Common Law**

Defendants oppose ProPublica's motion for summary judgment and move for their own affirmative relief, arguing they are not violating ProPublica's First

[4] *Gilligan v. Morgan*, 413 U.S. 1 (1973), is inapposite. The *Gilligan* plaintiffs asked the district court to "assume continuing regulatory jurisdiction over the activities of the Ohio National Guard," including a "judicial evaluation of the appropriateness of [its] 'training, weaponry and orders.'" *Id.* at 5–6. The Supreme Court's finding that the claim was nonjusticiable turned on the extraordinary nature of that relief. *See Dillard v. Brown*, 652 F.2d 316, 321 (3d Cir. 1981) (noting that the plaintiffs in *Gilligan* "sought to vest virtual control of the Ohio National Guard in a federal court").

Amendment or common law rights.[5] Specifically, Defendants claim ProPublica is asking for an "unfettered" or "absolute" right of access. DMSJ at 5, 24. Not so. ProPublica is not demanding that it be granted access to all proceedings and records no matter what. Rather, ProPublica merely asks this Court to follow clear Supreme Court precedent establishing a *presumptive* right of access, and to hold Defendants to their burden of showing—on a case-by-case, document-by-document basis—why that presumption does not apply. Defendants do not even attempt to provide evidence sufficient to make such a showing here. Nor could they, as all of their arguments are hypothetical and generalized—not one is tailored to a single specific document.

Instead, Defendants lean heavily on conclusory claims of "burden," "privacy," and "national security" to justify denying access to military court proceedings, transcripts, and records for months or sometimes years—and, in cases ending in acquittal, permanently. *See* DMSJ at 24–31. But the record makes clear that (i) experience and logic dictate the presumptive right of access attaches to military court proceedings (including Article 32 hearings) and records, (ii) Defendants continue to violate that right by denying meaningful public access to those proceedings and records, and (iii) Defendants' grounds for doing so fall far short of the compelling-interest standard.

[5] Defendants rely primarily on *Center for National Security Studies v. Department of Justice*, 331 F.3d 918, (D.C. Cir. 2003) to argue the common law right of access is "preempted by the statutory scheme set by Congress through [A]rticle 140a." DMSJ at 24 n.17. But that case "involved a FOIA request to the Department of Justice for records in the Department's possession; it did not involve a conflict between FOIA and the common-law right of access to judicial records." *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 673 n.14 (D.C. Cir. 2017). Article 140a does not "speak[] directly to and conflict[] with significant aspects of the common law right of access" as is required for preemption. *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d 417, 431 (9th Cir. 2011). Rather, Article 140a is expressly written to "[f]acilitat[e] . . . public access" in a way aligned with the "best practices of Federal and State courts." 10 U.S.C. § 940a(a), (a)(4).

### 1. The Question of Article 32 Hearing Notice Is Not Moot

After more than two years of litigating this case, Defendants now argue in a footnote that the Court should find ProPublica's claim concerning advance notice of Article 32 proceedings moot. *See* DMSJ at 11 n.12. Yet they have refused to *commit* to providing such advance notice, and they have withheld such information for years.

Defendants misleadingly argue that Article 32 hearing notice has "always been disclosed through public information officers." DMSJ at 2. But that only matters if members of the public know someone is charged and know to ask an officer at a specific base when a specific Article 32 hearing is occurring. The reality is, for years, Defendants have failed to provide any public notice when they charge someone,[6] rendering their alleged disclosure system entirely useless. *See* Deposition Transcript of Chad Temple ("Temple Tr."), Dkt. 89-1, Ex. R at 56:5–11. Defendants force the public to continually ask when Article 32 hearings might be occurring at every base in the country. And even when a member of the public asks for the Navy to provide this information—as ProPublica reporter Megan Rose repeatedly has since March 2023—it has continually refused to do so. *See* PMSJ at 11–12.

Defendants also claim the question is moot because Defendants allegedly "began posting advance scheduling information on a publicly accessible website" in September 2024, although they only identified this new website to ProPublica in their motion in December. DMSJ at 2, 11 n.12. But even if Defendants actually *had* started providing this information (it does not appear they have provided advance notice beyond a single hearing, and they seem to more frequently post hearings the day they occur or thereafter, *see* Matthews Suppl. Decl. ¶ 2), that would not moot ProPublica's claims, as nothing would prevent Defendants from reverting to their previous policy of withholding such information.

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[6] *See* Rose Decl. ¶¶ 18, 24, 36, 43, Dkt. 90; Prine Decl. ¶¶ 4, 10, Dkt. 97; Ziezulewicz Decl. ¶ 4, Dkt. 96; Fryer-Biggs Decl. ¶ 3(i), Dkt. 95; Philipps Decl. ¶¶ 4, 6-7, Dkt. 92; Christensen Decl. ¶ 11, Dkt. 93.

Further, while Defendants issued new Article 140a guidance on January 9, 2025, requiring the services to begin publicly posting Article 32 hearings by July 8, 2025, it only requires three days' advance notice. *See* Matthews Suppl. Decl. Ex. 2 ("New Krass Guidance"). Even if the Navy complied with this new requirement, this notice is not sufficient, as it takes at least a week, sometimes two weeks or more, to secure access to a base and travel there. *See* Rose Suppl. Decl. ¶ 7. And since Defendants withhold the charge sheet and provide almost no other information about a case—not even the defendant's full name or any factual allegations[7]—the press has no meaningful ability to assess whether a hearing will be newsworthy and warrant the significant time and resources that traveling to a base entails. *See* Rose Suppl. Decl. ¶ 8; *cf. Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (notice "must afford a *reasonable time* for those interested to make their appearance" (emphasis added)). There is no reason Defendants could not undertake the "minor effort" to provide this notice when the hearing is scheduled. *See* Expert Report of Robert Crow ("Crow Rept."), Dkt. 89-1 Ex. S ¶ 33.

In any event, Defendants' mere "voluntary cessation of challenged conduct" does not moot ProPublica's claim because Defendants could "resume[] . . . the challenged conduct as soon as the case is dismissed." *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1152 (9th Cir. 2019) (quotation omitted). Indeed, Defendants have revised their "guidance" twice already since ProPublica filed suit and could revert to their practice of providing no notice at any time. Defendants' unsubstantiated assertion that it would be "illogical" for Defendants to "change course," DMSJ at 11 n.12, is a far cry from meeting the "heavy burden" imposed on a government defendant to "show[] that the challenged conduct cannot reasonably be expected to start up again," *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014). ProPublica's claims thus remain live.

[7] *See* https://www.jag.navy.mil/military-justice/filings-records/preliminary-hearing-schedule.

**2. The First Amendment's Right of Access Applies to Transcripts and Other Records from Article 32 Hearings and Courts-Martial**

Defendants acknowledge the qualified right of access attaches to a particular type of proceeding when (1) its "place and process have historically been open to the press and general public," and (2) "public access plays a significant positive role in the functioning of the particular process in question." DMSJ at 25 (quoting *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 8–9 (1986) ("*Press-Enterprise II*")). Because both prongs are clearly met with respect to Article 32 hearings and courts-martial, the qualified right of access attaches to those proceedings. Defendants fail to offer any legitimate reason why that presumptive right of access does not extend to records in those proceedings.

**a. Right of Access Applies to Courts-Martial and Related Records**

Defendants concede there is "a qualified First Amendment right to attend court-martial proceedings," which have historically been "open to the public." DMSJ at 27; *see 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."). Despite acknowledging this, Defendants attempt to argue the right of access somehow does not extend to court records from those same open proceedings, claiming there is no historical right of access to *records*. DMSJ at 27. But the Ninth Circuit has rejected this approach, holding that when determining whether the right attaches to records, courts must evaluate "whether there was a history of public access to [the applicable] *proceedings* and whether public access would support the functioning of those proceedings." *Maile*, 117 F.4th at 1209 (emphasis in original). Because Defendants concede the qualified right of access attaches to courts-martial, the presumption also attaches to related court records, which similarly promote public accountability and confidence in the system. *See id.*; *see also* PMSJ at 18, 21–22. "There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them." *AP v. U.S. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983).

**b. Right of Access Applies to Article 32 Hearings and Records**

Defendants concede that "Article 32 hearings are typically open to the public." DMSJ at 26 n.18. They even recognize that the highest military appellate court has held that Article 32 "preliminary hearing[s]" must "remain open" unless the government can show a "'compelling' need for secrecy." *Id.* (quoting *ABC, Inc. v. Powell*, 47 M.J. 363, 364, 366 (C.A.A.F. 1997)). Defendants nevertheless claim "[t]here is no First Amendment right to attend an Article 32 hearing." DMSJ at 26. That is simply wrong.

In *ABC, Inc.*, the military's highest court quoted the Supreme Court in holding that "absent 'cause shown that outweighs the value of openness,' the military accused is . . . entitled to a public Article 32 investigative hearing." 47 M.J. at 365 (quoting *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 509 (1984) ("*Press-Enterprise I*")). The Court of Appeals for the Armed Forces ("CAAF") added that "when an accused is entitled to a public hearing, the press enjoys the same right." *Id.*

The issue, then, is what "cause" must be "shown" to justify overriding the presumptive right of access to an Article 32 hearing. But the answer is clear. In the very next paragraph of *Press-Enterprise I* after the language quoted by *ABC, Inc.*, the Supreme Court defined the required "cause" to be "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." 464 U.S. at 510. *That is the First Amendment standard*. Indeed, the Rule for Courts-Martial 405(k)(3) quotes this same standard, stating that "[a]ny restriction or closure" of an Article 32 hearing "must be narrowly tailored to protect [an] overriding interest," and the hearing officer must first consider "any reasonable alternatives." *See also ABC, Inc.*, 47 M.J. at 366 (ordering that the press and public be granted access to an Article 32 proceeding and criticizing an approach using "an ax in place of the *constitutionally required* scalpel" (quotation omitted) (emphasis added)).

Even absent the CAAF's clear application of the presumptive First Amendment right of public access to Article 32 hearings, the experience and logic test arrives at the same result. For the experience prong, the correct analysis is whether the "*type* or *kind*"

of proceeding—not the exact proceeding—has historically been open. *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (quotation omitted). Article 32 hearings are expressly characterized as "preliminary hearings" held before "an impartial judge advocate." R.C.M. 405(e); *see* DMSJ at 11, 13. They are thus akin to preliminary probable cause hearings in civilian courts. *See* Crow Rept. ¶ 28. And as the Supreme Court has explained, both state and federal court preliminary hearings have long been "presumptively open to the public." *Press-Enterprise II*, 478 U.S. 1 at 10–11 ("[P]reliminary hearings conducted before neutral and detached magistrates have been open to the public."); *El Vocero de P.R.*, 508 U.S. at 150 (probable cause hearing).[8]

For the logic prong, an Article 32 proceeding is "an integral part of the court-martial proceedings," *San Antonio Express-News v. Morrow*, 44 M.J. 706, 710 (A.F. Ct. Crim. App. 1996) (quotation omitted), and "stands as a bulwark against baseless charges," *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004) (quotation omitted). As the Air Force Court of Criminal Appeals noted in *Morrow*, "the American public is best served by pretrial investigations that, like courts-martial, are open to public scrutiny." 44 M.J. at 710.[9]

Because the First Amendment right of access applies to Article 32 hearings, it also applies to related records, *see supra* Section II.B.2.a, including the transcript and hearing officer's detailed report that includes their "reasoning and conclusions" as to probable cause and "recommendation as to the disposition . . . of the case." *See* 10

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[8] Article 32 hearings are distinguishable from the Massachusetts "show cause hearings" Defendants identify. *See* DMSJ at 32–34. Such pre-arrest hearings, like grand jury proceedings, occur in secret. *Boston Globe Media Partners, LLC v. Chief Justice of Trial Court*, 130 N.E.3d 742, 751–52, 758 (Mass. 2019). And there is no right to counsel or to cross-examine witnesses. *Id.* In contrast, both rights are expressly provided to the accused at Article 32 hearings. R.C.M. 405(g).

[9] The right of public access to an Article 32 proceeding is even more clear since Congress converted the Article 32 proceeding from an "investigation" to a "hearing." *See* DMSJ at 32; *compare* 10 U.S.C. § 832 (2012) (requiring an investigation), *with* 10 U.S.C. § 832(a) (2019) (requiring a hearing). The cases on which Defendants rely to liken today's Article 32 hearings to grand jury proceedings, *see* DMSJ at 32, either were decided or rely on cases that were decided prior to that change.

U.S.C. § 832(a)(2), (c). These records are crucial elements of the court-martial proceeding—indeed, the report is submitted to the "convening authority"—and of the public's understanding of and faith in the military judicial process. *See Press-Enterprise I*, 464 U.S. at 508 (Public access "enhances both the basic fairness of the [proceeding] and the appearance of fairness so essential to public confidence in the system."); Crow Rept. ¶ 31 ("Art. 32 hearings are often the first time the public has an opportunity to learn the facts of the case, the allegations with any level of detail, or the evidence available."). That the hearing officer's report is non-binding—like a magistrate's report and recommendation—does not exempt it from the presumption of access, and Defendants cite no authority saying it does. *See* DMSJ at 11 n.11.

**3. Defendants' Justifications for Denying Access Are Baseless**

Once the presumption of access attaches, the burden shifts to the party resisting access. "[P]roceedings and documents may be closed to the public without violating the [F]irst [A]mendment only if three substantive requirements are satisfied: (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Oregonian Pub. Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1466 (9th Cir. 1990). "The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510.

ProPublica recognizes a qualified First Amendment right of access may yield to compelling interests if Defendants show "specific, on the record findings" of an overriding interest. *See Press-Enterprise II*, 478 U.S. at 13–14; PMSJ at 23. But Defendants have made *no* specific showing of *any* compelling interest. Nor could they—their arguments are purely hypothetical and do not relate to any particular documents with specificity. The First Amendment requires more. *See, e.g.*, *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305–06 (6th Cir. 2016) ("The proponent of sealing . . . must analyze in detail, document by document, the propriety of

secrecy, providing reasons and legal citations." (quotation omitted)). Even if mere hypothetical interests were enough (they are not), Defendants' conclusory references to security, privacy, burden, and "unit cohesion" do not meet *Press-Enterprise*'s strict standard. "Simply invoking a blanket claim, such as privacy or law enforcement, will not, without more, suffice to exempt a document from the public's right of access." *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1185 (9th Cir. 2006).

**a. Defendants' "Unit Cohesion" Arguments Lack Common Sense**

Defendants argue, without supporting evidence, that providing access to Article 32 hearings and court-martial records would "allow publicity of details that could adversely affect unit cohesion." DMSJ at 28–29. But Defendants concede these proceedings are "generally open to the public," DMSJ at 13, and the presence of spectators, including other unit members, means sensitive matters are already aired. If the public can attend these hearings, publishing records from the hearings would not release any "sensitive" details that were not already public.

The only "evidence" Defendants provide for their argument is Captain Temple's sheer speculation that publishing documents from a sexual assault hearing would convert allegations from "rumors and conjecture" to something somehow harmful to "morale." *See* DMSJ at 29 (quoting Temple Tr. at 206:6–207:14). Captain Temple doesn't explain how publishing such records could harm "cohesiveness," and he seems to suggest that *rumors* of sexual assault would be better for morale than published *facts*. This illogical and speculative conclusion is belied by the evidence. Don Christensen, a leading proponent of victims' rights in the military, specifically contradicted Temple's claims based on his decades of experience, which have included speaking with hundreds of victims and reviewing relevant surveys. Dkt. 93 at ¶ 17. MJRP similarly concluded that DoD's denial of court access has resulted in a "lack of transparency" that "contributes to distrust and disinformation about the military justice system." MJRP Report at 15; *see also* Crow Rept. ¶¶ 66, 69.

Defendants' arguments are especially meritless given that at least 40% of sexual assault cases are resolved by "administrative separation" before charges are tried. *See* PMSJ at 34. If Article 32 transcripts and records remain sealed, the public—and other servicemembers—will have no idea why such cases do not proceed. This may give the impression of a lack of accountability for abusers and, as Defendants recognize in their motion (at 30), the "[t]olerance of such behavior . . . results in a warping of military discipline, a lack of military readiness, and a weakening of national security." *Smith v. United States*, 196 F.3d 774, 778 (7th Cir. 1999). In any event, the "conclusory assertions" by Captain Temple—who has no qualifications to opine on what might affect "unit cohesion," *see* Crow Rept. ¶¶ 64–69—are not the "specific factual findings" necessary to overcome the presumption of access. *Oregonian*, 920 F.2d at 1466. Captain Temple's *ipse dixit* testimony should be disregarded.[10]

**b. National Security Issues Rarely Arise and Can Be Addressed on a Case-by-Case Basis**

Defendants argue that access to Article 32 hearing and court-martial records "could compromise national security." DMSJ at 28. They add that courts-martial "involve classified information and unclassified information" that might be "aggregated with other unclassified information" to "reveal classified or other sensitive information, or that may reveal the identities of victims, minors, or personnel in overseas, sensitive, or routinely deployable units." *Id.* Defendants cite no direct evidence to support this proposition, and they fail to explain why the military judicial system cannot address national security issues on a case-by-case basis as they may arise.

As a threshold matter, "classified material and truly sensitive national security information rarely are at issue in military justice proceedings and can be easily redacted,

[10] Captain Temple lacks the requisite qualifications under Federal Rule of Evidence 702 to testify on matters pertaining to unit cohesion. *See* Crow Rept. ¶¶ 64–69. Furthermore, he cited no data or evidence of any kind in support of his testimony. The Court should thus exclude his unsubstantiated claims. *See Guidroz-Brault v. Missouri Pac. R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001) (expert testimony "does not include unsupported speculation and subjective beliefs").

sealed or placed under a protective order when necessary." Crow Rept. ¶ 56. Indeed, the Supreme Court has noted that "trial-level courts-martial hear cases involving a wide range of offenses, including crimes unconnected with military service." *Ortiz*, 585 U.S. at 431. Moreover, invocations of "security" have no "talisman[ic]" significance. *United States v. Grunden*, 2 M.J. 116, 121 (C.M.A. 1977). Civilian courts, military courts, and even military commissions already deal with these issues and apply the same familiar principles to determine if closure or sealing is necessary in each specific instance.[11] But Defendants offer nothing here—much less specific factual findings—to justify the broad denial of that right, particularly when "courts-martial today can try service members for . . . crimes unrelated to military service." *Ortiz*, 585 U.S. at 438.

**c. Defendants Cannot Justify Wholesale Denial of Access Based on the Privacy Act or FOIA**

As ProPublica detailed at length in its Motion, nothing in the Privacy Act requires or permits Defendants to refuse to provide notice of and timely access to all military court proceedings and records. *See* PMSJ at 25–30. DoD itself published in its 2021 SORN that the "routine use" exception enables Defendants "to provide access to docket information, filings, and records" to the "general public." *See* PMSJ at 25–27 (quoting 86 Fed. Reg. 28086, 28,089 (May 25, 2021)). In short, Defendants argue their hands are tied by the Privacy Act as to the very types of documents the 2021 SORN specifically says *may* "be disclosed outside the DoD as a routine use." 86 Fed. Reg. at 28088.

More generally, Defendants cannot use theoretical "privacy" interests to override the public's constitutional and common law rights of access to military judicial proceedings. Defendants concede that courts-martial "are open to the public." DMSJ at 27. If witness identities and other information already are being divulged in such open proceedings, any member of the public can already obtain this information *by simply*

[11] *See* PMSJ at 18-23; *Grunden*, 2 M.J. at 121 (holding that "in each instance the exclusion of the public" must be "narrowly and carefully drawn" and requires "a compelling showing" that closure is "necessary to prevent the disclosure of classified information").

*showing up*. Even if compelling privacy interests exist in certain records, "selective redaction" of those records can adequately protect them. *Maile*, 117 F.4th at 1211.

Defendants also argue that, even if the Privacy Act does not apply, Defendants have a compelling interest in protecting the presumption of innocence "by limiting access to records unless and until there has been a finding of guilty." DMSJ at 30, 35. But civilian courts, which also presume innocence, make court records publicly available on a timely basis and do not seal their entire court record upon a finding of acquittal. *See* PMSJ at 31.

Defendants' invocation of FOIA is similarly misplaced. The law is clear that FOIA is an *access* statute and cannot serve as a compelling interest to overcome the First Amendment. *See* PMSJ at 30. Defendants do not even attempt to engage with *Kamakana*'s holding that FOIA cannot justify sealing court records. 447 F.3d at 1185.

#### d. Defendants' Non-Specific Allegations of "Administrative Burden" Are Insufficient

Finally, Defendants argue that providing contemporaneous access to court-martial and Article 32 hearing records is "not feasible" because it would impose an "administrative burden" on Defendants. *See* DMSJ at 2, 30–31. Defendants turn the presumption on its head once again, arguing that *ProPublica's* "anecdotal evidence" does not show why access would be administratively feasible. *Id.* at 30–31. Defendants have it backwards—the burden rests on *Defendants* to "carefully state the articulable facts demonstrating an administrative burden sufficient to deny access." *Valley Broad. Co. v. U.S. Dist. Court*, 798 F.2d 1289, 1295 (9th Cir. 1986). But Defendants rely solely on conclusory assertions that providing access would be "very costly," "affect uniformity," and "erode the effectiveness of our forces as a whole." *See* DMSJ at 30–31. Defendants provide no specific evidence——beyond an inapposite report that Defendants themselves prepared on costs of access to "records of trial *and non-judicial punishment proceedings*"—to support these assertions. *Id.* And as ProPublica demonstrated in its Motion, federal and state courts across the country manage real-time

dockets for far larger caseloads. *See* PMSJ at 31–32. MJRP also apparently does not buy DoD's claims, as it recommended contemporaneous access to military court records and public dockets after lengthy study. MJRP Report at 1–3. Defendants thus have not articulated any "burden" sufficient to overcome the presumption of access.

### C. ProPublica Has Established Its Entitlement to a Writ of Mandamus

As set forth in ProPublica's Motion, *see* PMSJ at 48–51, it is entitled to a writ of mandamus because (1) the claim is "clear and certain" (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available." *Patel*, 134 F.3d at 931.

#### 1. Defendants' Argument That Article 140a Does Not Contain a Private Right of Action Is Inapposite

Defendants claim ProPublica is trying to bring its mandamus claim as a private right of action under Article 140a. DMSJ at 32–33. But a private right of action in the underlying statute is not required for a writ of mandamus. *See Legal Aid Soc. of Alameda Cnty. v. Brennan*, 608 F.2d 1319, 1332 (9th Cir. 1979) (granting mandamus relief and rejecting argument that statute must have private right of action); *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 34 (D.D.C. 2011) ("[T]he mandamus statute may provide an avenue to remedy violations of statutory duties even when the statute that creates the duty does not contain a private cause of action." (quotation omitted)). Defendants also, without explanation, fault ProPublica for not suing under the Administrative Procedure Act, even though the APA does not apply to courts-martial. *See* 5 U.S.C. § 701(b)(1)(F).

As the pleadings make clear, ProPublica brings its mandamus claim under the Mandamus Act, which is the proper vehicle. SAC ¶¶ 13, 126; *see* 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."). Defendants do not mention the Mandamus Act, let alone cite one case interpreting it.

**2. The Secretary Has a Clear Duty to Issue Uniform Standards and Criteria That He Still Has Not Fulfilled**

Defendants do not dispute that Article 140a creates a clear, nondiscretionary duty to issue "uniform standards and criteria" in the first instance. Instead, they argue ProPublica is not entitled to a writ because Article 140a permits the Secretary discretion in drafting those standards, and the existing guidelines fulfill his duty by "appropriate[ly]" reflecting the "best practices" of civilian courts. DMSJ at 33–34. The Court denied Defendants' motion to dismiss based on that argument, finding ProPublica plausibly alleged "the Secretary . . . clearly failed to issue sufficient standards under [Article 140a]." Dkt. 47 at 5. Now on summary judgment, the record demonstrates that the existing guidelines fail to provide the required uniform access to military court records, as the MJRP Report recognizes (at 14–15). The new guidance issued in January 2025 does not change that fact—indeed, not a single policy ProPublica challenges here was updated to comply with the mandate of Article 140a. *See* Matthews Suppl. Decl. Ex. 2. Instead, the guidelines continue to permit extensive and arbitrary delays and denials of court access. *See* Dkt. 47 at 4; PMSJ at 48–51; *Knuckles v. Weinberger*, 511 F.2d 1221, 1222 (9th Cir. 1975) (mandamus proper where official "is commanded to do a particular act" even if statute requires "construction"). The Secretary's duty to issue uniform standards following the best practices of civilian courts—including the right of timely access to court records—is clear and certain. *Patel*, 134 F.3d at 931.

**D. Defendants' Evidentiary Objections Should Be Overruled**

Defendants' conclusory evidentiary objections are without merit and should be rejected. First, Defendants challenge eight declarations filed in support of ProPublica's motion for summary judgment on the ground that the declarants are not parties to this action. That is not a basis for objecting to a declaration on summary judgment. *See* Fed. R. Civ. P. 56(c)(4) (requiring only that declarant has personal knowledge, states facts that would be admissible in evidence, and shows that he or she is competent to testify). Defendants confusingly cite a single unpublished district court decision concerning third

1 party allegations *in a complaint*. *See* DMSJ at 39 (citing *Shopper's Corner, Inc. v.*
2 *Hussmann Corp.*, 2008 WL 11417431, at *7 (N.D. Cal. Dec. 3, 2008)). The declarations
3 submitted here are plainly relevant to the issues in this case, such as irreparable harm—
4 they include first-hand accounts of the press's difficulty accessing Navy court records.

5 Second, Defendants seek to exclude the Expert Report and Disclosure of Captain
6 Robert Crow on the ground that his role as Director of Code 20 predated the passage of
7 Article 140a in 2016. That argument also lacks merit. As the Director of Code 20,
8 Captain Crow gained valuable insight into the military justice system that informs his
9 report; the enactment of new legislation does not undermine that insight. Moreover,
10 Captain Crow's opinion is based not only on his role as Code 20 Director, but also on
11 his extensive experience extending beyond 2016—including over 24 years in other
12 positions in the Navy (such as circuit military judge) through 2019 and his decades of
13 experience as a practitioner in the military courts through the present. *See* Crow Rept.
14 ¶¶ 1–13.

15 Defendants further complain that Captain Crow "relies on his experience and
16 observations" and does not explain his methodologies. DMSJ at 40. But Captain Crow
17 is permitted to testify based on his "[p]ersonal knowledge," which "includes opinions
18 and inferences grounded in observation and experience." *United States v. Whittemore*,
19 776 F.3d 1074, 1082–83 (9th Cir. 2015). Defendants' own cited case makes this clear.
20 *See United States v. Freeman*, 498 F.3d 893, 904 (9th Cir. 2007) (noting that a case agent
21 may testify as both an expert and lay witness and that the distinction between the two
22 can "be revealed through direct or cross examination"). Defendants chose not to cross-
23 examine Captain Crow at a deposition, and they have not identified a single opinion they
24 believe is outside Captain Crow's competence or dependent on an unreliable
25 methodology. Their evidentiary objections should be overruled.

26 **III. CONCLUSION**

27 ProPublica respectfully requests the Court deny Defendants' Motion and enter
28 summary judgment in ProPublica's favor.

Dated: January 21, 2025

Respectfully submitted,

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