

1 JEAN-PAUL JASSY (SBN #205513)
2 JASSY VICK CAROLAN LLP
3 355 S Grand Ave, Ste 2450
4 Los Angeles, CA 90071
5 Telephone: 310-870-7048
6 Facsimile: 310-870-7010
7 jpjassy@jassyvick.com

8 *Counsel for Amicus Curiae*
9 THE REPORTERS COMMITTEE FOR
10 FREEDOM OF THE PRESS

11 KATIE TOWNSEND (SBN #254321)*
12 SHANNON A. JANKOWSKI*
13 SASHA DUDDING*
14 THE REPORTERS COMMITTEE FOR
15 FREEDOM OF THE PRESS
16 1156 15th Street NW, Suite 1020
17 Washington, D.C. 20005
18 Telephone: 202-795-9300
19 Facsimile: 202-795-9310
20 ktownsend@rcfp.org

21 **Of Counsel*

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

24 **PRO PUBLICA INC.,**

25 *Plaintiff,*

26 v.

27 **COMMANDER DEREK D.**
28 **BUTLER, et al.,**

Defendants.

Case No. 3:22-CV-1455-BTM-KSC
**AMICUS CURIAE BRIEF OF THE
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS IN
SUPPORT OF PLAINTIFF PRO
PUBLICA, INC.**

IDENTITY AND INTEREST OF AMICUS CURIAE

1
2 Amicus curiae is the Reporters Committee for Freedom of the Press (“Reporters
3 Committee” or “RCFP”), an unincorporated nonprofit association founded by leading
4 journalists and media lawyers in 1970 when the nation’s news media faced an
5 unprecedented wave of government subpoenas forcing reporters to name confidential
6 sources. Today, its attorneys provide pro bono legal representation, amicus curiae
7 support, and other legal resources to protect First Amendment freedoms and the
8 newsgathering rights of journalists.

9 The Reporters Committee files this brief in support of Plaintiff Pro Publica, Inc.
10 (“ProPublica”)’s Motion for a Temporary Restraining Order and Preliminary Injunction.
11 ECF No. 2. As an organization that advocates for the First Amendment and
12 newsgathering rights of members of the news media, the Reporters Committee has a
13 strong interest in safeguarding the public’s presumptive right to access court documents,
14 including records of court-martial proceedings. Prompt access to judicial records is
15 essential for members of the press, who act as “surrogates for the public,” to gather and
16 disseminate information about court cases of public interest. *Richmond Newspapers, Inc.*
17 *v. Virginia*, 448 U.S. 555, 573 (1980). It is from this perspective that the Reporters
18 Committee writes to emphasize the public interest at stake in this case and the importance
19 of timely access to court-martial records, such as the records at issue here, to journalists
20 and the public.

INTRODUCTION

21
22 Currently, the press and public are being denied access to nearly all records in the
23 court-martial of Seaman Apprentice Ryan Mays, USN, who was charged with setting the
24 July 2020 fire that destroyed the USS *Bonhomme Richard*. The public interest in this
25 case is significant, as it involves one of the worst non-combat warship disasters in recent
26 memory. The record includes written court orders and documents discussed in open
27 court that are not classified, sealed, or privileged. Such documents would be
28

1 contemporaneously available to the press and public in a civilian criminal case and have
2 been released in other high-profile courts-martial within two days. The access denials in
3 the *Mays* case are all the more concerning given Congress’s enactment of Article 140a of
4 the Uniform Code of Military Justice, which was intended to ensure the public “*timely*
5 access to dockets, filings, and rulings” at all stages of court-martial proceedings, but upon
6 which the Navy has relied as the basis to deny public access here. *Report of the Military*
7 *Justice Review Group, Part I: UCMJ Recommendations* (“Report”) at 1012, Mil. Just.
8 Rev. Grp. (Dec. 22, 2015), <https://perma.cc/M5ZF-JLZH> (emphasis added); 10 U.S.C. §
9 940a(a)(4).

10 Although Mays’ trial has concluded, and Mays found not guilty, injunctive relief
11 is still needed, as Section 4(a)(3)(b) of the Navy’s instructions concerning public access
12 to court-martial dockets, filings, and records makes clear that the Navy will “not publish
13 any court filings or records in cases that result in a full acquittal.” See JAG Instr. 5813.2
14 at 3, Dep’t of Navy (Dec. 16, 2020), <https://perma.cc/Q2XA-4WEV>. Without access to
15 these records, members of the news media, including, but not limited to ProPublica, will
16 be unable to report on key elements of the *Mays* proceedings. Access to these records is
17 essential to aid the public in assessing the Navy’s decision to proceed with Mays’ trial—
18 despite its preliminary hearing officer’s recommendation to the contrary—and to
19 determine whether the trial was fairly conducted, and whether justice was served.
20 *Prompt* access to these records is particularly important, so the media can report on the
21 outcome of Mays’ trial while public interest in the court-martial’s recent decision, and the
22 reasons underlying that decision, is at its height.

23 ARGUMENT

24 I. Access to court-martial records benefits the public and the military 25 justice system.

26 Openness plays an essential role in the effective functioning of the military justice
27 system. Indeed, “public confidence in matters of military justice would quickly erode if
28

1 courts-martial were arbitrarily closed to the public.” *United States v. Travers*, 25 M.J. 61,
 2 62 (C.M.A. 1987). Openness also promotes public accountability and oversight, helping
 3 to ensure that proceedings are fair and that servicemembers are not wrongfully deprived
 4 of their liberty. For these reasons, the First Amendment and common law create a
 5 presumptive right of public access to judicial records and proceedings, including court-
 6 martial records and proceedings. *See, e.g., Press-Enter. Co. v. Superior Court*, 478 U.S.
 7 1, 13 (1986); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–98 (1978); *Travers*, 25
 8 M.J. at 62; *United States v. Scott*, 48 M.J. 663, 665–66 (A.C.C.A. 1998). Once the
 9 constitutional access right attaches, access may be denied only to the extent required by
 10 “an overriding [governmental] interest.” *Press-Enter. Co.*, 478 U.S. at 9 (citation
 11 omitted).

12 **II. The right of access is a right of timely access, which facilitates accurate**
 13 **and complete news reporting.**

14 The benefits of open proceedings are significantly undermined when timely access
 15 to the records and dockets associated with those proceedings is denied. Indeed, “a
 16 necessary corollary of the right to access is a right to *timely* access.” *Courthouse News*
 17 *Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) (emphasis added); *see also Neb. Press*
 18 *Ass’n v. Stuart*, 427 U.S. 539, 561 (1976) (“[T]he element of time is not unimportant if
 19 press coverage is to fulfill its traditional function of bringing news to the public
 20 promptly.”). “The peculiar value of news is in the spreading of it while it is fresh.” *Int’l*
 21 *News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918). As one journalism scholar
 22 stated succinctly: “It is, after all, called the ‘news’ business and not the ‘olds’ business.”
 23 Janet Kolodzy, *Convergence Journalism* 59 (2006).

24 Today, with the public’s ever-growing reliance on obtaining news through digital
 25 and social media platforms, the timeframe for what is considered “fresh” is shorter than
 26 ever. As the Ninth Circuit has recognized, “the need for immediacy of reporting news is
 27 even more vital in the digital age, where timeliness is measured in terms of minutes or
 28

1 seconds.” *Planet*, 947 F.3d at 594 (internal quotation marks omitted). The websites of
2 the *Los Angeles Times* and *The New York Times*, for example, measure the timeliness of
3 news updates in minutes. Other news services, such as Dow Jones Newswires, and social
4 media platforms like Twitter, mark new posts by the second. See Toni Locy, *Covering*
5 *America’s Courts: A Clash of Rights* 13 (2d ed. 2013) (“In the Internet age, a deadline
6 passes every second.”). And the public’s voracious appetite for timely news has kept
7 pace with technology. “By a large majority, nearly two-thirds of adults now say they
8 look at news at least several times a day. We are now a nation of serial news
9 consumers.” *How Americans Describe Their News Consumption Behaviors*, Am. Press
10 Inst. (June 11, 2018), <https://perma.cc/M3L2-84PB>.

11 For reporters who cover the civilian and military justice systems, delivering the
12 news requires prompt access to court documents, including records of courts-martial.
13 Indeed, journalists and news organizations—including those covering the military justice
14 system—routinely rely on contemporaneous access to judicial records to disseminate
15 breaking news about matters of public concern. See, e.g., Kyle Rempfer, *Bowe Bergdahl*
16 *Loses Unlawful Command Influence Appeal Based on Trump Tweets*, *Mil. Times* (July
17 17, 2019), <https://perma.cc/5YA4-AKW3> (reporting on, and linking to, new appeals court
18 ruling on Bowe Bergdahl court-martial); Adam Klasfeld, *Manning Did Not ‘Aid the*
19 *Enemy’ by Spilling Secrets to WikiLeaks*, *Courthouse News Serv.* (July 30, 2013),
20 <https://perma.cc/LUM5-G5HQ> (reporting on, and linking to, verdict in Chelsea Manning
21 court-martial announced that day).

22 Because “old news is not worthy of, and does not receive, much public attention,”
23 denying access “just at the time [the] audience would be most receptive would be
24 effectively equivalent to a deliberate statutory scheme of censorship.” *Planet*, 947 F.3d
25 at 594 (citation and internal quotation marks omitted); see also *Grove Fresh Distribs.,*
26 *Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (“To delay or postpone
27 disclosure undermines the benefit of public scrutiny and may have the same result as
28

1 complete suppression.”). Prompt access to judicial records ensures that the public learns
2 about important cases while they are still newsworthy, promotes accuracy in reporting,
3 and informs public debate about those cases.

4 **III. Timely access to judicial records benefits the public by promoting**
5 **understanding about judicial processes and matters occupying courts’**
6 **dockets.**

7 The public can engage in meaningful discussion and debate about pending legal
8 proceedings and can observe the operation of the judicial system only when it knows
9 what is happening in those cases and can review court filings. *See Associated Press v.*
10 *U.S. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (court records are “important to
11 a full understanding of the way in which the judicial process and the government as a
12 whole are functioning” (internal quotation marks omitted)); *see also Hartford Courant*
13 *Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) (access rights “would be merely
14 theoretical if the information provided by docket sheets were inaccessible”).
15 Accordingly, courts have found even short delays in access to court filings
16 unconstitutional. *See, e.g., Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 329 (4th Cir.
17 2021) (requiring courts to provide access to new civil complaints on same day as filed);
18 *Associated Press*, 705 F.2d at 1147 (vacating order imposing 48-hour sealing period on
19 criminal case records as “a total restraint on the public’s first amendment right of access
20 even though the restraint is limited in time”); *United States v. Brooklier*, 685 F.2d 1162,
21 1172–73 (9th Cir. 1982) (delaying release of transcript of closed suppression hearing
22 until end of trial violates right of access).

23 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For these reasons, RCFP respectfully requests that the Court grant ProPublica’s Motion for a Temporary Restraining Order and Preliminary Injunction.

Dated: October 5, 2022

Respectfully submitted,

/s/ Jean-Paul Jassy

Jean-Paul Jassy
Counsel for Amicus Curiae
The Reporters Committee for Freedom of
the Press