No. _____

IN THE

Supreme Court of the United States

DESHAUN L. WELLS, et al.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since 1775, the United States military has been subject to some version of today's Article 134, Uniform Code of Military Justice (UCMJ), known as the "general article." 10 U.S.C. § 934. However, before the 20th Century, the general article proscribed only two types of conduct: (1) conduct that is prejudicial to good order and discipline; and (2) conduct otherwise unlawful under federal law. In 1916, Congress proscribed a new type of offense under the general article: conduct of a nature to bring discredit upon the armed forces. This is known as "Clause 2."

For decades, military courts required the Government prove a "direct and palpable" connection between the charged conduct and the military mission for Article 134 offenses. It is for this reason that this Court upheld Article 134 as constitutional in *Parker v. Levy*, 417 U.S. 733 (1974). But, in the years since, military courts have moved away from the direct and palpable connection requirement for Clause 2 offenses. Now, the Government need not prove *any* fact to satisfy the service discrediting element of the general article. As petitioners' cases represent, this results in convictions for conduct which the Government did not—and cannot—prove discredited the service.

The question presented is:

Whether Clause 2 of Article 134, UCMJ, is unconstitutional.

PARTIES TO THE PROCEEDING

This Rule 12.4 petition consolidates direct appeals from two servicemembers convicted by courts-martial. Petitioners are Airman DeShaun L. Wells and Technical Sergeant Charles S. Nestor. Respondent in each of petitioners' cases is the United States.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

The following is a list of all proceedings related to this case within the meaning of Rule 14.1(b)(iii):

- *United States v. Wells*, No. 23-0219 (C.A.A.F.), decided September 24, 2024.
- *United States v. Wells*, No. ACM 40222 (A.F. Ct. Crim. App.), decided May 23, 2023.
- *United States v. Nestor*, No. 23-0224 (C.A.A.F.), decided October 24, 2024.
- *United States v. Nestor*, No. ACM 40250 (A.F. Ct. Crim. App.), decided June 30, 2023.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

INTRODUCTION

Since 1775, servicemembers have been prosecuted under the so-called "general article." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 720 (2d ed. 1920) [hereinafter WINTHROP]. The original general article proscribed conduct which was prejudicial to good order and discipline. *Id.* at 720, 723. The modern-day general article is Article 134, UCMJ, and largely mirrors the 1775 version. *Compare* 10 U.S.C. § 934, *with* WINTHROP at 720.

But today's general article has one notable difference. In 1916, Congress added "Clause 2." *Levy*, 417 U.S. at 746. Clause 2 criminalizes conduct "of a nature to bring discredit upon the armed forces." 10 U.S.C. § 934.

Because Article 134, and its general article predecessor, were created to regulate "every possible military offence," WINTHROP at 720 n.67, early military courts held that the proscribed conduct must have a direct and palpable connection to the military. *See Levy,* 417 U.S. at 778 n.13 (Stewart, J., dissenting). When this Court held Article 134 constitutional in *Levy*, this Court reasoned the direct and palpable connection requirement saved Article 134 from being unconstitutionally vague. *Id.* at 752-57.

But, in the years since *Levy*, military courts have done away with this requirement for Clause 2. *United States v. Phillips*, 70 M.J. 161, 163 (C.A.A.F. 2011). Instead, military courts now permit prosecution and conviction under Clause 2 for conduct with no direct or palpable connection to the military. *Id.* Despite this, the Court of Appeals for the Armed Forces (CAAF) continues to justify Clause 2's

constitutionality under *Levy*. Pet. 8a, 10a. This is an error that only this Court can fix.

Not only has the CAAF eliminated the direct and palpable requirement, it also permits convictions under Clause 2 even when the Government does not, and cannot, prove the conduct discredited the service. *Phillips*, 70 M.J. at 163. This is problematic because the second element of Clause 2 requires that the conduct be "of a nature to bring discredit upon the armed forces." *Manual for Courts-Martial, United States* [*MCM*], pt. IV, para. 91.b.(2) (2019 ed.). By affirming convictions with no proof of the second element, the CAAF has sanctioned significant due process violations in conflict with this Court's decision in *In re Winship*, 397 U.S. 358, 364 (1970).

Because of these due process problems, *Levy* cannot save Clause 2. Nevertheless, the CAAF has relied on *Levy* to deny constitutional challenges to Clause 2. If the CAAF is correct that *Levy* precludes these challenges, then *Levy* was wrongly decided and should be overturned.

PETITION FOR A WRIT OF CERTIORARI

Airman DeShaun L. Wells and Technical Sergeant Charles S. Nestor, United States Air Force, respectfully petition for a writ of certiorari to review the decision of the Court of Appeals for the Armed Forces.

OPINIONS BELOW

In Airman Wells's case, the decision of the Air Force Court of Criminal Appeals (Air Force Court) is unreported. It is available at 2023 CCA LEXIS 222 and is reproduced at pages 24a-52a. The CAAF's decision is pending publication in the military justice

reporter. It is available at 2024 CAAF LEXIS 552 and reproduced at pages 1a-23a.

In Technical Sergeant Nestor's case, the decision of the Air Force Court is unreported. It is available at 2023 CCA LEXIS 272 and is reproduced at pages 54a-84a. The CAAF's decision is pending publication in the military justice reporter. It is available at 2024 CAAF LEXIS 662 and reproduced at page 53a.

JURISDICTION

In each of petitioners' cases, the CAAF granted discretionary review of the question presented here. In Airman Wells's case, the CAAF issued an opinion and judgment on September 24, 2024. In Technical Sergeant Nestor's case, CAAF issued judgement on October 24, 2024. The Chief Justice extended the time for filing a petition for writ of certiorari to, and including, February 21, 2025. This Court's jurisdiction rests on 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, in pertinent part, provides: "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law."

Article 134, UCMJ, 10 U.S.C. § 934 (2018), provides, in pertinent part:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary

court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

STATEMENT OF THE CASE

A. Airman Wells's Case

Airman Wells had consensual sex with BF and LW, both short-term girlfriends, while he was married to another woman. CAAF.JA 42, 118, 120, 264-65. For this, Airman Wells faced court-martial charges under Clause 2 for extramarital sexual conduct. CAAF.JA 42. The Government alleged the affairs were criminal solely because they were "of a nature to bring discredit upon the armed forces." *Id*.

The affairs were astonishingly similar. Both BF and LW met Airman Wells online and proceeded to have a three-month long relationship with him. CAAF.JA 115-16, 118, 216-17, 264-65. Both women were British nationals and both claimed Airman Wells impregnated them. CAAF.JA 120-21, 207, 269-271. Both women were misled about his marital status. CAAF.JA 209-10, 217, 266-67. Both women told their respective parents, each other, and the Air Force that Airman Wells had sex with them when he was married to someone else. CAAF.JA 118, 217-18, 220, 266-68. Both testified their opinions of the United States Air Force and United States military were *not* impacted as a result of Airman Wells's extramarital sexual conduct. CAAF.JA 226-27, 272. There was no evidence presented that either affair affected the reputation of the military.

Despite having no evidence as to how Airman Wells's conduct discredited the service, the prosecution argued that Airman Wells's conduct *could* have harmed the Air Force's reputation. CAAF.JA

290. This was because his adulterous conduct had "the *potential* to seriously tarnish the reputation of the Air Force." CAAF.JA 301 (emphasis added). But even the prosecutor recognized that, in this case, the service was not actually discredited. CAAF.JA 289, 301. For both offenses, the prosecutor relied on the conduct alone, with no other evidence, to argue in the hypothetical that the extramarital conduct was "of a nature to bring discredit upon the armed forces." CAAF.JA 289-90, 300-01, 315-17.

The trial defense counsel rebutted the prosecutor's arguments by highlighting how neither affair was "open" nor "notorious." CAAF.JA 313-14. The conduct was done in private, no one in the public knew about the affair, and "not even the people who were involved in the affair, [thought] any less of the Armed Forces as a result of it." CAAF.JA 314. The trial defense counsel noted, "If it was just . . . possible that an affair could bring the reputation of the Air Force down and that's enough to make an affair criminal, all affairs would be criminal because it would be possible for all of them." CAAF.JA 313.

Despite the identical presentation of evidence about the affairs and the lack of proof introduced on discredit to the service, Airman Wells was convicted of the affair with BF, but not with LW.

On appeal, Airman Wells argued the Government presented no evidence that his conduct was service discrediting and, in fact, there was evidence to the *contrary*. Pet. 34a. The Air Force Court disagreed and affirmed Airman Wells's adultery conviction. Pet. 34a-35a. The Air Force Court determined that Airman Wells's affair was "neither private nor discreet" because Airman Wells filmed one of his consensual

sexual encounters with BF and posted it online. Pet. 35a. The video that the Air Force Court relied on did not identify Airman Wells or BF, did not show their faces, and made no reference to Airman Wells being a servicemember. Pet. 20a (Hardy, J., dissenting); CAAF.JA 61-62, 112. Following the affirmance, Airman Wells appealed to the CAAF.

A three-to-two majority at the CAAF found Airman Wells's conviction legally sufficient. Pet. 1a-2a. The majority largely adopted the Air Force Court's reasoning, relying on the anonymously posted video as the basis for why Airman Wells's extramarital sexual conduct "would tend to bring the service into disrepute *if it were known*." Pet. 7a-8a (emphasis added); *see* Pet. 20a (Hardy, J., dissenting) (noting the identities of those associated with the video were anonymous). The majority also determined there were no constitutional problems with Clause 2 because such a challenge was "conclusively" foreclosed by this Court's decision in *Levy*. Pet. 8a, 10a.

The dissent took exception to the majority's logic. First, citing a case the CAAF decided earlier last term, Judge Hardy reasoned the CAAF should overturn its Clause 2 precedent because it is constitutionally suspect and raises due process concerns. *Compare* Pet. 12a (Hardy, J., dissenting) (citing *United States v. Rocha*, 84 M.J. 326 (C.A.A.F. 2024)), *with Rocha*, 84 M.J. at 352-54 (Hardy, J., dissenting). Second, Judge Hardy emphasized that, here, there was no evidence supporting a conviction under Clause 2. Pet 17a-23a (Hardy, J., dissenting). He pointed out "the only evidence in the record that directly addressed whether [Airman Wells's] extramarital conduct was service discrediting was *contrary* evidence—BF . . . did not hold Appellant's conduct against the Air Force." Pet.

18a-19a (Hardy, J., dissenting). Finally, he stressed that the Government did not argue Airman Wells's conduct was actually service discrediting, nor did the Government argue the video was relevant to this offense. Pet. 19a-22a (Hardy, J., dissenting).

B. Technical Sergeant Nestor's Case

Technical Sergeant Nestor was convicted of possessing and distributing child pornography under Clause 2. Pet. 55a. On appeal, he challenged the legal sufficiency of his conviction because the Government did not present evidence that the charged conduct discredited the service. Pet. 77a. The Air Force Court upheld the conviction for possession, noting that the CAAF does not require proof of the service discrediting element. Pet. 80a-81a. Instead, "proof of the conduct itself" is sufficient for the factfinder "to conclude beyond a reasonable doubt that . . . it was of a nature to bring discredit." Pet. 79a-80a (quoting *Phillips*, 70 M.J. at 163).

While the Air Force Court noted Technical Sergeant Nestor's rank was ostensibly known to a Japanese internet provider, the court relied primarily on the conduct itself—the possession of child pornography—to uphold the conviction. Pet. 80a. Technical Sergeant Nestor appealed the Air Force Court's decision to the CAAF. The CAAF summarily affirmed in accordance with its decision in *Wells*. Pet. 53a.

REASONS FOR GRANTING THE PETITION

I. This Court's decision in *Levy* cannot save Clause 2. The CAAF's reliance on *Levy* was error, which only this Court can fix.

When this Court decided *Levy*, military law required a direct and palpable connection between the Article 134 misconduct and the military mission. But, in the years since *Levy*, the CAAF made clear no such requirement exists for Clause 2. This renders Clause 2 unconstitutional under *Levy*.

A. Article 134, and its general article predecessors, were catch-all provisions created to regulate conduct having military-specific impacts.

The predecessor to Article 134 was the general article. *United States v. Snyder*, 4 C.M.R. 15, 17 (C.M.A. 1952). This article punished conduct not otherwise proscribed by the enumerated articles. WINTHROP at 720. The "evident purpose" of the general article "was to provide for the trial and punishment of any and all *military offenses* not expressly made cognizable by courts-martial in the other more specific articles." *Snyder*, 4 C.M.R. at 17 (quoting WINTHROP at 720) (emphasis added).

While some version of the general article has existed since 1775, WINTHROP at 720, the modern-day Article 134 was not enacted until 1916. *Levy*, 417 U.S. at 746. Article 134 has three clauses. Clause 1 criminalizes conduct which prejudices good order and discipline. 10 U.S.C. § 934. Clause 2 criminalizes conduct which is "of a nature to bring discredit upon the armed forces." 10 U.S.C. § 934. And Clause 3 assimilates federal law into the UCMJ. 10 U.S.C. § 934.

Because Article 134 and its general article predecessors were created to try and punish "every possible *military offence*," WINTHROP at 720 n.67 (emphasis added), it is unsurprising that early military courts held that such offenses must include a direct and palpable connection to the military mission. *See, e.g.*, *United States v. Gray*, 42 C.M.R. 255, 260 (C.M.A. 1970) (reasoning that Article 134 offenses must have a direct and palpable impact on the military mission); *United States v. Sadinsky*, 34 C.M.R. 343, 345 (C.M.A. 1964) (concluding that the misconduct had a direct and palpable impact); *United States v. Sanchez*, 29 C.M.R. 32, 33-34 (C.M.A. 1960) ("[W]hen it enacted [Article 134], Congress intended to proscribe conduct which directly and adversely affected the good name of the service."); *Snyder*, 4 C.M.R. at 17-18 (reasoning that Article 134 offenses require the Government to prove that misconduct palpably impacts the military mission). This Court decided *Levy* against this backdrop.

B. In *Levy*, this Court held that Article 134 is facially constitutional. But this was based on the direct and palpable connection requirement.

In *Levy*, this Court considered a facial challenge to Article 134. *Levy*, 417 U.S. at 753. At that time, "Article 134 [did] not make 'every irregular, mischievous, or improper act a court-martial offense.'" *Id.* at 753 (quoting *Sadinsky*, 34 C.M.R. at 345). Rather, Article 134 was limited to that misconduct which had a direct and palpable relation to the military mission or environment. *Id.* (citing *United States v. Holiday*, 16 C.M.R. 28, 30 (C.M.A. 1954)). This limiting principle was recognized by the dissent, too. *Id.* at 778 (Stewart, J., dissenting) (reasoning that

Article 134 and its general article predecessor are limited to criminalizing acts with a "reasonably direct and palpable" impact to the military).

Based on the direct and palpable connection requirement, this Court held that Article 134 was not void for vagueness.

C. Since *Levy*, military courts have held that Clause 2 does not require a direct and palpable connection to the military mission. Without this requirement, Clause 2's constitutionality is not supported by *Levy*.

Just one year after this Court decided *Levy*, the Court of Military Appeals (CMA) narrowed the direct and palpable connection requirement to Clause 1. *See United States v. Caballero*, 49 C.M.R. 594, 596 (C.M.A. 1975) ("[Clause 1] is confined to cases in which the prejudice is reasonably direct and palpable. . . . [The CMA] has employed much the same language in attempting to define the outer limits and scope of [C]lause 1."). The CAAF continued to tailor this requirement to just Clause 1 in later cases. *United States v. Cendejas*, 62 M.J. 334, 340 (C.A.A.F. 2006) (drawing a distinction between the direct and palpable connection requirement for Clause 1 and Clause 2's requirement of lowering the service in public esteem); *cf. United States v. Caldwell*, 72 M.J. 137, 140 (C.A.A.F. 2013) (discussing the direct and palpable connection requirement for Clause 1 only). *But see United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F. 2008) (requiring a direct and palpable impact to the military mission or environment under Clause 2, but only for speech-related cases); *cf. United States v. Grijalva*, 84 M.J. 433, 438 (C.A.A.F. 2024)

(explaining that the direct and palpable connection requirement applies to all cases where free speech is implicated).

In *United States v. Phillips*, the CAAF considered the type of evidence necessary to convict a servicemember under Clause 2. 70 M.J. at 164. While the CAAF recognized that Clause 1 and Clause 2 come from the same general article, *id.*, the court ultimately concluded that to convict a servicemember of discrediting the service, the Government was not required to present evidence of a direct and palpable connection to the military mission. *Id.* at 166 ("[T]he government's obligation is to introduce sufficient evidence of the accused's allegedly service discrediting conduct to support a conviction."). Following *Phillips*, no evidence of discredit to the service is required at all. *Id*. This is distinct from the type of proof historically required for Article 134 offenses, and which is still required under Clause 1. *United States v. Richard*, 82 M.J. 473, 2022 CAAF LEXIS 637, at *13 (C.A.A.F. 2022).

Despite military courts eliminating the direct and palpable connection requirement for conduct charged under Clause 2, the CAAF relied on *Levy* to dismiss Airman Wells's constitutional challenge. Pet. 8a ("[*Levy*] established conclusively the constitutionality of Article 134, UCMJ."), 10a (reasoning that Article 134, UCMJ, is not void for vagueness pursuant to *Levy*). This was error. Article 134, UCMJ, is constitutional *because of* the direct and palpable connection requirement. *Levy*, 417 U.S. at 753-54. Without this limiting principle, "every irregular, mischievous, or improper act" is a criminal offense under Article 134. *Levy*, 417 U.S. at 753 (quoting *Sadinsky*, 34 C.M.R. at 345).

The direct and palpable connection requirement protects servicemembers against the "very broad reach of the literal language of" Article 134. *Id.* at 756. Without this requirement, Article 134 has an *unconstitutionally* broad reach, which is exemplified in this case. The Government presented no evidence in either Airman Wells's or Technical Sergeant Nestor's of a direct and palpable connection between the charged conduct and the military mission. Pet. 17a-20a (Hardy, J., dissenting), 80a-81a. Making matters worse, the public was not aware of either servicemember's status or their conduct. *Id*. Instead, both servicemembers were convicted with hypothetical evidence: if the public knew what they did, then the service would be discredited. Pet. 7a-8a, 79a-81a. This speculative, undefined standard is a far cry from the direct and palpable requirement this Court relied on in *Levy*.

When this Court decided *Levy*, military caselaw and tradition supported Clause 2's constitutionality because the Government had to prove a direct and palpable connection between the conduct and the military mission. In narrowing the direct and palpable connection requirement to Clause 1, the CAAF has invited "[this Court] to reexamine its holding [in *Levy*]." *United States v. Guerrero*, 33 M.J. 295, 299 (C.A.A.F. 1991) (Everett, J., concurring in part, dissenting in part). By relying on *Levy* explicitly here, the CAAF has put the constitutional problem directly in front of this Court for consideration.

II. Clause 2 is unconstitutional because the second element has no quantum of proof.

When this Court decided *Levy*, it made no distinction between Clause 1 and Clause 2 to find

Article 134 facially constitutional. In the years since *Levy*, military courts have interpreted the clauses to mean different things. *United States v. Fosler*, 70 M.J. 225, 230 (C.A.A.F. 2011). Clause 2 offenses require the Government prove beyond a reasonable doubt two elements: (1) that there was a certain act; and (2) that act was of a nature to discredit the service. 10 U.S.C. § 934; *MCM*, pt. IV, para. 91.b.(2) (2019 ed.); *Phillips*, 70 M.J. at 163. Clause 1 similarly requires the Government to prove a certain act, but the second element requires proving the act prejudiced good order and discipline. 10 U.S.C. § 934; *MCM*, pt. IV, para. 91.b.(1) (2019 ed.). In delineating these clauses, military courts changed the quantum of proof required for each. While Clause 1 requires the charged act have a direct and palpable connection to the military mission, Clause 2 has no such requirement. *Compare Richard,* 82 M.J. 473, 2022 CAAF LEXIS 637, at *13-15, *with Phillips*, 70 M.J. at 163.

Without the direct and palpable connection requirement or any other limiting principle, Clause 2 is unconstitutional because every act is a potential violation of Article 134. This is especially so when there is no quantum of proof required for the second element, meaning proof of the act (element 1) is proof of discredit to the service (element 2). As several CAAF judges have noted, this means the proven conduct is "per se" service discrediting. *E.g.*, *Phillips*, 70 M.J. at 167 (Ryan, J., dissenting). By condensing two elements into one, the Government avoids proving the second element of Clause 2 beyond a reasonable doubt. *See In re Winship*, 397 U.S. at 364 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime

with which he is charged."). This interpretation of Clause 2 violates due process and renders Clause 2 void for vagueness. *Phillips*, 70 M.J. at 167 (Ryan, J., dissenting); *Rocha*, 84 M.J. at 352-54 (Hardy, J., dissenting).

A. Military courts have struggled to define the quantum of proof for Clause 2 offense.

Even before *Levy*, there were warning signs that Clause 2 was unconstitutional because "obvious" criminal conduct was viewed as "per se" service discrediting. For example, in *United States v. Sanchez*, the accused had sex with a chicken. 29 C.M.R. at 33. The CMA upheld the conviction because the conduct was "criminal per se" and because, "when an accused performs detestable and degenerate acts . . . he heaps discredit" upon the service. *Id*. The CMA did not require proof of actual discredit. *Id*. Despite the majority endorsing a "per se" service discrediting analysis, the limiting principle later endorsed in *Levy* persisted in Judge Ferguson's concurrence. *Id.* at 37 (Ferguson, J., concurring in part and dissenting in part). He "trusted" the majority's "characterization of [the] accused's behavior as 'criminal *per se*' [was] not intended to detract from the formerly expressed requirement that court members be instructed that they must find as a fact such acts are discreditable." *Id*.

But after *Levy*, military courts fashioned an unconstitutional interpretation of Clause 2. They did so by eliminating any quantum of proof for the second element. For example, in *United States v. Davis*, a servicemember cross-dressed "in and around the Puget Sound Naval Shipyard." 26 M.J. 445, 447 (C.M.A. 1988). Even though cross-dressing was not

specifically prohibited by the UCMJ, the CMA upheld the conviction because such conduct is "virtually always" service discrediting. *Id.* at 448-49. Despite this confident conclusory statement, the CMA provided no evidence or analysis supporting why cross-dressing was "virtually always" service discrediting. *Id.* at 449.

Over the years, the CAAF has tried to cure Clause 2's constitutional deficiencies. It has failed. One of the court's first attempts was to draw a distinction between the charged conduct and "(1) the time, (2) the place, (3) the circumstances, and (4) the purpose for the [conduct]." *Guerrero*, 33 M.J. at 298. This was a distinction without a difference. By attempting to differentiate between the charged act and the "service discrediting" element, the CAAF referred to the same thing: the conduct itself.

Two decades later, the CAAF admitted that "proof of the conduct itself" *is* sufficient to prove a Clause 2 offense. *Phillips*, 70 M.J. at 163. This means that the Government need only prove the charged conduct, and nothing else, to prevail in a Clause 2 prosecution. *Id.* at 167-68 (Ryan, J., dissenting); *see Rocha*, 84 M.J. at 353 (Hardy, J., dissenting) (highlighting that Clause 2 requires merely hypothetical, rather than real, evidence). In other words, so long as prosecutors charge a "certain act," and that act is proven beyond a reasonable doubt, the servicemember is guilty under Clause 2. Unsurprisingly, calls to examine Clause 2's constitutionality persist. *Rocha*, 84 M.J. at 352-54 (Hardy, J., dissenting); *see* Pet. 12a (Hardy, J., dissenting) (citing how the CAAF did not reexamine Clause 2's precedent in *Rocha*).

B. Clause 2 is void for vagueness because the Government does not have to prove the second element.

Without the second element—and without a requirement that the conduct have a direct and palpable connection to the military mission—prosecutors can and do criminalize otherwise lawful conduct at their discretion. This means that servicemembers can be prosecuted for conduct without fair notice. The lack of fair notice is emphasized by the fact that not even military judges can agree on what conduct falls under Clause 2. *Guerrero*, 33 M.J. at 299 (Everett, J., concurring in part, dissenting in part) (explaining that cross-dressing "is not within the contemplation of Article 134. Indeed, to affirm such a conviction expands Article 134 so greatly as to raise problems of notice and vagueness.").

Coupled with the failure to provide notice is the elimination of the Government's burden of proof. The life and liberty of servicemembers is subject to a hypothetical standard: *if* certain acts were known, the conduct would *tend* to discredit the service. *Phillips*, 70 M.J. at 165-66. The second element of Clause 2 is the *reason* why conduct is criminal under Article 134. But if the Government does not have to prove discredit to the service in any way, this is a "dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citing *In re Winship*, 397 U.S. at 364).

Because the Government can charge and convict servicemembers of any act under Clause 2 without proving the second element, Clause 2 is void for

vagueness. *Cf. Levy*, 417 U.S. at 779 (Stewart, J., dissenting) (citing Edward F. Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV.. 3, 80 (1970) ("[A]n infinite variety of other conduct, limited only by the scope of a commander's creativity or spleen, can be made the subject of court-martial under these articles."). This conflict with *Levy* and constitutional misunderstanding repeatedly affirmed by the CAAF can only be cured by this Court, justifying review.

III. If the CAAF is right that *Levy* precludes finding Clause 2 unconstitutional, then this case presents an ideal vehicle for this Court to revisit *Levy* and resolve important issues.

The CAAF failed to meaningfully engage with the constitutional challenge to Clause 2 in this case, determining *Levy* "conclusively" established the general article's constitutionality. Pet. 8a, 10a. For the reasons noted above, *Levy* cannot save Clause 2; post-*Levy* military precedent stripped Clause 2 of its limiting principles. But, if the CAAF is correct that *Levy* bars challenges to Clause 2, then *Levy* has sanctioned a constitutional error in the military justice system that is based on faulty historical reasoning, is divorced from the plain text, and which creates a vague criminal statute. Only this Court can correct this error and this is the case to do so.

Levy has been "on a collision course with the Constitution from the day it was decided." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 218 (2022). The due process clause requires the Government prove each element beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364. But, under the CAAF's reading, *Levy* excepts Clause 2 from this

requirement. And military precedent following *Levy* only "perpetuated its errors." *Dobbs*, 597 U.S. at 219. That is apparent from cases like *Phillips* and this case, where "conclusive presumptions" are denounced through judicial lip-service, but are nevertheless applied by the courts. *Phillips*, 70 M.J. at 165-67; Pet. 10a-11a.

Levy cloaked all of Article 134 in rhetoric about "specialized" differences between military members and their civilian counterparts. *See Levy*, 417 U.S. at 743-52 (discussing the history and evolution of the military justice system). But this historical reasoning was faulty, too.

Whatever "specialized" differences between military members and civilians existed at the Founding, a different military—and military justice system—existed in 1974. David A. Schlueter, *The Court-Martial: A Historical Survey*, 87 MIL. L. REV. 129, 145-64 (1980) (explaining the American evolution of the court-martial from the Founding to 1980). Gone was the "small, professional, and voluntary force" and in came the "military establishment whose members numbered in the millions, a large percentage of whom were conscripts or draft-induced volunteers, with no prior military experience and little expectation of remaining beyond their initial period of obligation." *Levy*, 417 U.S. at 781-82 (Stewart, J., dissenting).

Today, those "specialized" differences are even more nonexistent. *Levy*'s assertion that the UCMJ "cannot be equated to a civilian criminal code," 417 U.S. at 749, has been abrogated by *Ortiz v. United States*, 585 U.S. 427 (2018). In *Ortiz*, this Court highlighted the evolution of the military justice system, noting its "judicial" nature, how it "can try

service members for a vast swath of offenses, including garden-variety crimes unrelated to military service," and how the punishments are similar to those meted out in federal and state courts. 585 U.S. at 437-39. This is not the military justice system *Levy* describes.

Whether then or now, the average military member cannot read Clause 2 and know the extent of its reach. Sherman, *supra* at 80; *see, e.g.*, *Rocha*, 84 M.J. at 353 (Hardy, J., dissenting) (remarking "as a matter of common sense" no servicemember would know whether his or her entirely private conduct could be criminalized as service discrediting). The plain text of Clause 2, which *Levy* did not directly analyze, is driving the problem. The statute does not require *actual* discredit to the service. Rather, it only requires that the conduct is "*of a nature*" to *bring* discredit upon the service. 10 U.S.C. § 934. This means the proscribed act need only have "the character or quality of" discrediting the service. Collins Dictionary, *Of A Nature Of* (last visited Feb. 6, 2024) https://www.collinsdictionary.com/us/dictionary/english/of-the-nature-of. This language is facially vague because *any* act could—depending on the law prosecutor—potentially bring discredit upon the service. And, the direct and palpable connection requirement *Levy* used to limit this vague text has since been abrogated. While it is true that "[f]acially vague statutes may . . . be saved from unconstitutionality by narrowing judicial construction," the opposite has occurred here. *Levy*, 417 U.S. at 777 (Stewart, J., dissenting). Clause 2 no longer has any limiting construction.

Additionally, military members cannot rely on what *Levy* described as the limits to Article 134, such

as the list of offenses in the Manual under Article 134, to know what is criminal. *Levy*, 417 U.S. at 753 & n.22 (citing *MCM*, pt. IV, para. 213c (1969 ed.)); *see MCM*, pt. IV, paras. 92-108 (2019 ed.) (identifying possible Article 134, Clause 2, offenses). This is because, to this day, servicemembers are criminalized for "novel" Clause 2 offenses—offenses not otherwise envisioned by the Manual. *See, e.g.*, *Grijalva*, 84 M.J. at 434 (criminalizing the broadcast of intimate images under Article 134 instead of Article 117a, the enumerated offense for such conduct); *Rocha*, 84 M.J. at 348 (C.A.A.F. 2024) (criminalizing private "sexual acts with a sex doll with the physical characteristics of a female child," an act not criminal in any American jurisdiction at the time the accused committed the act); *United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020) (criminalizing indecent communications with a minor under Article 134 instead Article 120b, the enumerated offense for such conduct); *United States v. Reese*, 76 M.J. 297, 298 (C.A.A.F. 2017) (criminalizing "general disorder for making a statement to a child that was of a nature to bring discredit upon the armed forces").

In cases like *Grijalva* and *Avery*, the apparent Government motive behind charging under Article 134, Clause 2, rather than the otherwise specifically enumerated offense, was to lower or avoid the burden of proof on certain elements. *See Grijalva*, 84 M.J. at 439 (Hardy, J., concurring) ("In the military justice system, the preemption doctrine exists to prevent the government from easing its evidentiary burden at trial by eliminating vital elements from congressionally established, enumerated offenses and charging the remaining elements as a novel offense under Article 134.") (citing *Avery*, 79 M.J. at 366). This

pernicious workaround causes even more due process and vagueness concerns.

Even Airman Wells, whose "extramarital sexual conduct" is an example offense listed under Article 134, *MCM*, pt. IV, para. 99 (2019 ed.), could not know his affair would be criminal under the circumstances. He was charged with two counts of adultery. CAAF.JA 42. No one except the women involved—and their respective parents—knew of Airman Wells's conduct and his relationship to the military. CAAF.JA 117-18, 217-18, 220, 266-68. Furthermore, both women testified Airman Wells's affair with them did *not* affect their opinions of the service. JA at 226-27, 272. Neither the evidence presented nor the arguments at trial made the affairs distinguishable. But Airman Wells was only convicted of one affair, not both.

This curious result demonstrates the unpredictable nature of Clause 2's "evidentiary" standard. The Government "has no obligation to present any evidence or argument with respect to the [second] element in any Clause 2, Article 134, case," and instead, "the accused has the burden to affirmatively refute *every possible theory* for why his extramarital conduct was service discrediting." Pet. 21a (Hardy, J., dissenting). This circumvents due process while also turning Clause 2 into a guessing game of how "bad" the conduct has to be to discredit the service.

Airman Wells's case provides a perfect vehicle for assessing Clause 2's constitutionality because there was no evidence of discredit to the service and no argument from the Government about the service suffering any discredit; in fact, evidence existed to the contrary. Pet. 17a-20a (Hardy, J., dissenting). The

only explanation for these conflicting findings is the whim of the factfinder. Airman Wells's case highlights how Clause 2 now operates: without regard for proof beyond a reasonable doubt on the second element and without notice for what conduct is actually criminal. If *Levy* precludes challenge to this unconstitutional dynamic, this is the case to reexamine Clause 2 and *Levy*'s reasoning.

CONCLUSION

The repeated attempts to make Clause 2 constitutional reveal its true nature: it is unconstitutional. Uncertainties in Clause 2 may be tolerable in isolation, but "their sum makes a task for [courts, factfinders, practitioners, and servicemembers] which at best could be only guesswork." *United States v. Evans*, 333 U.S. 483, 495 (1948). For the foregoing reasons, this Court should grant the petition for certiorari to either correct the military justice system's interpretation of *Levy* or do away with *Levy*'s unjustified defense of Clause 2.

Respectfully submitted,

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