IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

Wendell E. MELLETTE, Jr.
Electrician's Mate (Nuclear)
First Class (E-6), U.S. Navy,
Appellant

Brief of Amici Curiae United States Navy, Marine Corps, and Coast Guard Victims' Legal Counsel & Special Victims' Counsel Programs in Opposition to Appellant's Brief

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ISSUE PRESENTED BY AMICI

Whether mental health diagnoses and treatment are protected communications under M.R.E. 513, the psychotherapist-patient privilege.[1]

INTEREST OF AMICI

Amici United States Navy Victims' Legal Counsel Program, United States Marine Corps Victims' Legal Counsel Organization, and United States Coast Guard Special Victims' Counsel Program provide survivors of sexual offenses with a dedicated attorney to help them understand the investigation and military justice process, guard their legal rights and interests, and obtain additional support in accessing resources that may assist in their recovery. This includes representing victims as they assert their M.R.E. 513 rights at courts-martial. *See LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013).

STATEMENT ON JURISDICTION

This Court has subject matter jurisdiction over the case under 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

In 2019, a general court-martial found Appellant guilty of sexually abusing a child and sentenced him to five years of confinement and dishonorable discharge. On May 14, 2021, the Navy-Marine Corps Court of Criminal Appeals (N.M.C.C.A.) issued an opinion holding, relevant to this brief, that Military Rule of Evidence (M.R.E.) 513 protects mental health

[1] Though the Court granted review on two issues, this brief only addresses the first.

diagnoses and treatment. Appellant petitioned this Court, which granted review on September 7, 2021.

SUMMARY OF ARGUMENT

As the N.M.C.C.A. correctly held, mental health diagnoses and treatment are protected communications under M.R.E. 513. The Rule's plain meaning and standard canons of construction support this conclusion. To exclude mental health diagnoses and treatment from protected communications, moreover, would lead to absurd conclusions, such as psychotherapy not being protected by the psychotherapist-patient privilege, and would undermine the purpose of the privilege.

M.R.E. 513 protects "confidential communication[s] … between the patient and a psychotherapist … made for the purpose of facilitating diagnosis or treatment" of the patient's mental health condition. The N.M.C.C.A. held that under M.R.E. 513's plain meaning, 'communications' extends to mental health diagnoses and treatment, and stated that holding otherwise would undermine the purpose of the privilege and create absurd results. *United States v. Mellette*, 81 M.J. 681 (N-M Ct. Crim. App. 2021).

The plain meaning of M.R.E. 513 protects mental health diagnoses and treatment. The rule protects all confidential communications so long as they are made to facilitate diagnosis or treatment. No language in M.R.E. 513 excludes diagnoses or treatment from protection. A diagnosis or treatment may be communicated to facilitate further diagnosis or treatment, and under

the general-terms canon, 'confidential communications' should be read to include all confidential communications. The privilege, moreover, protects communications *between* the patient and psychotherapist, not only communications from the patient to the psychotherapist.

The presumption of consistent usage canon also supports this conclusion. M.R.E. 502, the attorney-client privilege, "protects confidential communications 'between' the client and the lawyer that are 'made for the purpose of facilitating the rendition of professional legal services'"—identical phrasing as M.R.E. 513—and it is "beyond cavil" that M.R.E. 502 protects the professional legal services being facilitated, such as legal advice. *Mellette*, 81 M.J. at 692. It would be inconsistent to hold that M.R.E. 513 does not protect the psychotherapy services being facilitated, including diagnosis and treatment.

The N.M.C.C.A.'s opinion also properly understands the nature of mental health diagnoses and treatment. A psychotherapist's diagnosis is not an objective fact that sits outside of the communication between a psychotherapist and the patient. It is, rather, a summation of the patient's confidential communications. To reveal a diagnosis necessarily reveals significant details about the substance of the confidential communications. And, to exclude treatment from protected communications would exclude psychotherapy itself, even though psychotherapy consists mostly of communication between the patient and the psychotherapist.

To hold that such treatment is not protected would gut the privilege. As the N.M.C.C.A. recognized, confining the privilege to "only the patient's description of her symptoms, but not the psychotherapist's diagnosis and treatment of her condition, would deter patients from seeking mental health treatment." *Mellette*, 81 M.J. at 692. It is this exact chilling effect that the Supreme Court sought to avoid when it identified the privilege, as the "promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court." *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996). The N.M.C.C.A.'s decision, therefore, is correct and should be affirmed by this Court.

ARGUMENT

A. Under M.R.E. 513's plain meaning, diagnoses and treatment are protected communications.

Generally, the parties to a court-martial "have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." 10 U.S.C. § 846(a). Under the rules prescribed by the President "[e]ach party is entitled to the production of evidence which is relevant and necessary." Rule for Courts-Martial (R.C.M.) 703(f)(1). But, evidence that is both relevant and necessary can be protected from production or disclosure by a proper claim of privilege. M.R.E. 501. The privilege at issue here—the psychotherapist-patient privilege—states:

> "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the [UCMJ], if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."

M.R.E. 513. 'Communication' is: "the expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception" or "the information so expressed or exchanged." *Communication*, Black's Law Dictionary (8th ed. 2004). Communications are 'confidential' if "not intended to be disclosed to third

persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication." M.R.E. 513 (b)(4).

'To facilitate' means "to aid, help, ease." Bryan A. Garner, *Garner's Modern American Usage*, 342 (3rd ed. 2009). A medical 'diagnosis' is "the act or process of discovering or identifying a diseased condition by means of a medical examination, laboratory test, etc." *Diagnosis,* Webster's New World College Dictionary (5th ed. 2018). Medical 'treatment' is "the act, manner, method, etc. of treating, or dealing with, a [medical condition]." *Treatment,* Webster's New World College Dictionary (5th ed. 2018). Psychiatric treatment or psychotherapy is "treatment of mental or emotional disorder by any of various means involving *communication* between a trained person and the patient and including counseling, psychoanalysis, etc." *Psychotherapy,* Webster's New World College Dictionary (5th ed. 2018) (emphasis added). In other words, mental health treatment is a two-way street of ongoing conversations between the psychotherapist and the patient.

For a number of reasons, M.R.E. 513's plain text protects mental health diagnoses and treatment. First, M.R.E. 513 uses the phrase "diagnosis *or* treatment" (emphasis added). This means the two terms operate independent of each other. *See* Garner at 44–46 (discussing the purpose of "and" versus "or" in legal drafting). M.R.E. 513 can, therefore, be read as two separate rules, protecting either: "confidential communications … made for the purpose of facilitating diagnosis" or "confidential communications … made

for the purpose of facilitating … treatment." So, if a diagnosis is communicated to facilitate treatment, or vice versa, M.R.E. 513's plain text protects that communication.

Second, a mental health 'diagnosis' or 'treatment' itself may be composed of confidential communications. As discussed in detail below, mental health diagnoses are generally defined by what the patient communicates to the psychotherapist. *See infra*, 14–16. A patient might, for example, confidentially communicate that they feel anxious in social situations, and also confidentially communicate that this interferes with their normal routine. If diagnosing a hypothetical social anxiety disorder requires that (1) the patient feels anxious in social situations and (2) this interferes with their normal routine, that diagnosis is entirely composed of confidential communications made to facilitate the diagnosis. Disclosing the diagnosis would allow for reverse engineering the statements required for the psychotherapist to provide that diagnosis. In the same vein, a psychotherapist may treat a patient by conversing with the patient about their condition. If so, those conversations are both confidential communications made to facilitate treatment, and the treatment itself.

Third, as the N.M.C.C.A. notes, M.R.E. 513 protects "confidential communication made *between the patient and a psychotherapist*," not *from* a patient *to* a psychotherapist. *See Mellette*, 81 M.J. at 691, citing M.R.E. 513. That is, "the protection covers not only the patient's description of her symptoms, but also the psychotherapist's rendering of a diagnosis and

treatment plan, based on those symptoms, back to the patient." *Id.*; *see also Ramada Inns v. Dow Jones & Co.*, 523 A.2d 968, 971–72 (Del. Super. Ct. 1986) (explaining, in the context of the attorney-client privilege, that the "use of single-directional language in [Rule 502(b)(3)] and bi-directional language in [Rule 502(b)(1)], shows that Rule 502(b)(1) was intended to apply equally to a communication made by the client to the attorney and to a communication made by the attorney to the client.").

Finally, there is no language in M.R.E. 513 that excludes diagnoses or treatment from protection. Appellant claims that because they are separated by the phrase 'for the purpose of facilitating,' 'diagnoses and treatment' cannot be 'confidential communications.' *See* Appellant's Brief, 22, 26–28. But, there is no textual basis for this claim and Appellant's appeals to *noscitur a sociis* are unavailing. *See* id.

'Confidential communications' is a general, categorical term, and there is no reason why specific types of communication—like diagnoses or treatment—are excluded just because they are separated by the phrase 'for the purpose of facilitating.' Under the general-terms canon, "it is presumed, absent some indication to the contrary, that general terms should be accorded 'their full and fair scope' and not be 'arbitrarily limited.'" *Seed Co. Ltd. v. Westerman*, 266 F. Supp. 3d 143, 148 (D.D.C. 2017), citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 101 (2012). And it is entirely natural to say that a facilitated diagnosis or treatment can facilitate *further* diagnosis or treatment. As shown above, a

patient's description of their symptoms may aid diagnosis, communicating that diagnosis to the patient may aid treatment, communications made as part of that treatment may aid further treatment, and so on. *See* Garner at 342; *see also supra,* 6–8. In fact, it is hard to imagine the purpose of a diagnosis or the communications comprising psychotherapy *other* than to facilitate mental health treatment. Because no language in M.R.E. 513 explicitly excludes diagnoses and treatment, it would arbitrarily limit the term 'confidential communications' to hold that it does not include diagnoses or treatment.

In support of his textual claims, Appellant cites the unpublished Army Court of Criminal Appeals' (A.C.C.A.) opinion in *United States v. Rodriguez.* No. ARMY 20180138, 2019 CCA LEXIS 387 (A. Ct. Crim. App. Oct. 1, 2019); *see also* Appellant's Brief at 26. The *Rodriguez* court held that under its plain text, M.R.E. 513 does not protect diagnoses and treatment because the rule says "'communication' 'made for the purpose of facilitating diagnosis or treatment,' not *including* diagnosis and treatment.'" *Id.* at *7, quoting *H. V. v. Kitchen*, 75 M.J. 717, 721 (C.G. Ct. Crim App. 2016) (Bruce, R., dissenting). But the *Rodriguez* court mistakes the function of the word 'including' in legal text.

'Including' generally introduces a non-exhaustive list, though it is sometimes used to introduce an exhaustive list. *See* Garner at 454; *see also United States v. Herrera*, 974 F.3d 1040, 1048 (9th Cir. 2020) (discussing the "presumption of nonexclusive 'include'"), quoting Scalia & Garner at 132. If

non-exhaustive, the phrase 'including diagnosis and treatment' would merely be surplusage providing specific examples of the general term 'confidential communications.' *But see United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (invoking the surplusage doctrine, which counsels against interpretations that render statutory language superfluous). And if exhaustive, the phrase could limit 'confidential communications' to those specific examples.

By not using the phrase 'including diagnosis and treatment' in M.R.E. 513, the President chose not to provide specific—and potentially limiting—examples of 'confidential communications.' The proper plain text conclusion is that all confidential communications are included. *See supra,* 8 (discussing the general-terms canon). But, the A.C.C.A. takes the upside-down position that the general term 'confidential communications' is limited *precisely because the rule does not use limiting language*. *See Rodriguez*, 2019 CCA LEXIS 387 at *7–8 (claiming "had the President wished to broaden the category of information that would be privileged under [M.R.E.] 513, he could have included diagnosis and treatment in the plain language of the rule.").

Put another way, the A.C.C.A.'s argument is that because the Rule does not say 'confidential communications, *including diagnoses or treatment* … made for the purpose of facilitating diagnosis or treatment' the rule actually means 'confidential communications, *excluding diagnoses or treatment* … made for the purpose of facilitating diagnosis or treatment.' By the same

logic, the statement 'Mary loves animals' should be interpreted to mean that Mary does not love pandas and tigers—after all, the statement is not 'Mary loves animals, *including pandas and tigers*.' But this conclusion is absurd on its face. Likewise, 'confidential communications' means all confidential communications, including diagnoses and treatment, unless diagnoses and treatment are explicitly excluded.

Appellant criticizes the N.M.C.C.A.'s "faulty spirit-of-the-law" analysis, and claims that "because a narrower reading is possible consistent with the text of M.R.E. 513(a), the narrower reading prevails." Appellant's Brief at 28. But Appellant's 'narrower' reading requires the Court to read into the Rule the phantom phrase 'excluding diagnoses and treatment,' and courts do not typically read arbitrarily limiting language into legal text in search of a narrower reading. *See Seed Co. Ltd.*, 266 F. Supp. 3d at 148. As the Rule's plain language does not exclude mental health diagnoses and treatment, Appellant's argument is fundamentally flawed and should be rejected by this Court.

B. The presumption of consistent usage canon supports holding that M.R.E. 513 protects diagnoses and treatment.

Under the presumption of consistent usage canon, courts presume that a word or phrase bears the same meaning throughout a text. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (stating "Generally, words used in different parts of the same statute are … presumed to have the same meaning."); *see also* Scalia & Garner at 170–73. M.R.E.

513 mirrors M.R.E. 502, the attorney-client privilege, which protects confidential communications "between" the client and the lawyer that are "made for the purpose of facilitating the rendition of professional legal services to the client." "'Professional legal services' include, at a minimum, providing legal advice." *Mellette*, 81 M.J. at 692. If, as Appellant argues, a plain text interpretation of 'confidential communications … made for the purpose of facilitating [some type of communication]' excludes the facilitated communication from protection, then under its plain text M.R.E. 502 does not protect legal advice.

But this would be absurd. It "is beyond cavil that the attorney-client privilege covers not only the description of the issue from the client to the attorney, but also the diagnosis—i.e., the legal advice—from the attorney to the client." *Mellette*, 81 M.J. at 692. And yet, the phrase 'including professional legal services' does not appear in M.R.E. 502. So long as a legal service, such as legal advice, is confidentially communicated for the purpose of facilitating legal services, it is presumed the Rule protects that legal service. It would be inconsistent to interpret M.R.E. 513 as excluding diagnoses and treatment, simply because the Rule lacks the phrase 'including diagnosis and treatment.' If the word 'including' is unnecessary in M.R.E. 502, it is unnecessary in M.R.E. 513. To hold otherwise violates the presumption of consistent usage.

Appellant argues that comparisons to the attorney-client privilege "miss[] the point" because "the Supreme Court did not recognize the

psychotherapist privilege until 1996." Appellant's Brief at 31–32. Appellant does not explain how the date when the privilege was recognized is in any way relevant to the textual symmetry between the rules. And if anything, because "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law," it is especially telling that the President chose to mirror M.R.E. 502's language in M.R.E. 513. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

C. Excluding diagnoses or treatment would gut the privilege.

A primary reason Appellant's argument fails textually is because it misunderstands the nature of mental health diagnoses and treatment. Appellant cites to the A.C.C.A.'s opinion in *Rodriguez,* which claims that a

> "diagnosis, prescribed medications, and other treatments are matters of fact that exist independent of any communications between the patient and the psychotherapist … . The facts that there was a diagnosis, that medications were prescribed, or that other treatments were given, exist regardless of whether or to what extent they were discussed with the patient."

2019 CCA LEXIS 387 at *7, quoting *Kitchen*, 75 M.J. at 721 (Bruce, R., dissenting); *see also* Appellant's Brief at 23. But, the same can be said about all elements of a conversation. One person knows a fact or forms an independent thought, impression, opinion, reaction, advice, etc., and then

shares it with another. Facts, by their very nature, exist whether or not two individuals discuss them. If a patient shares that they were abused as a child, for example, that is an external fact, but the communication is still protected by the privilege. In the same way, a client may share with his defense counsel that he sent an incriminating message to his friend. That 'fact' exists external to the communication, but the defense counsel cannot disclose it. Nor can he disclose the thoughts, impressions, analysis, or advice communicated back to the client based on that fact. *See In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (stating "Communications from attorney to client are shielded if they rest on confidential information obtained from the client."), citing *Mead Data Central, Inc. v. United States Department of Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977).

Psychological conditions, moreover, are not independent 'facts' in the way Appellant imagines. Diagnoses based on the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) (DSM-5) are, largely, labels that describe symptoms communicated to the psychotherapist. To say that a diagnosis is separate from the communications elides the substance of diagnoses in the DSM-5. For a psychotherapist to diagnose gender dysphoria, for example, the patient must have communicated to the psychotherapist at least two of these factors:

1. "[a] marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics";
2. "[a] strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender";
3. "[a] strong desire for the primary and/or secondary sex characteristics of the other gender";
4. "[a] strong desire to be of the other gender";
5. "[a] strong desire to be treated as the other gender"; or
6. "[a] strong conviction that one has the typical feelings and reactions of the other gender."

Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 595 (4th Cir. 2020), citing DSM-5 at 452. The only way a psychotherapist discovers a 'marked incongruence,' 'strong desire,' or 'strong conviction' is by the patient telling them so. Revealing the ultimate diagnosis, thus, would also reveal significant portions of the underlying confidential communications about these symptoms.

This is true across many mental health diagnoses. *See, for example,* DSM-5 at 162 (requiring, to diagnose a Major Depressive Episode, that the patient communicated to the psychotherapist a "depressed mood," "diminished interest," "feelings of worthlessness," or "thoughts of death").

Unlike the presence of a virus, psychological disorders generally are not identified based on the results of laboratory tests. Rather, the psychotherapist classifies the disorder mainly based on symptoms communicated by the patient. It is impossible, then, to separate the diagnosis from the communicated symptoms comprising that diagnosis. To divulge a diagnosis of gender dysphoria, major depressive episode, or other psychological disorder *is to divulge significant details about what the patient communicated to the psychotherapist*.

In his *Kitchen* dissent, Judge Bruce argues that because a "psychotherapist can decide on a diagnosis by comparing the patient's condition to criteria listed in the [DSM]," the diagnosis is an independent fact. 75 M.J. at 721. But if a client tells his lawyer a series of facts, and the lawyer uses their professional expertise to match those facts to the elements of a crime, the lawyer's advice based on that expertise is still privileged. Legal advice "does not spring from lawyers' heads as Athena did from the brow of Zeus." *In re Sealed Case*, 737 F.2d at 99. Because the privilege is meant to "cloak[] communication from attorney to client 'based, *in part at least,* upon a confidential communication [to the lawyer] from [the client]," advice that relies on the lawyer's professional education and experience is still protected. *Id.* In the same way, confidential communications from a patient to a psychotherapist do not become non-confidential just because the psychotherapist uses their professional expertise to categorize them.

Appellant also completely ignores that a primary form of treatment provided by psychotherapists is, unsurprisingly, psychotherapy. Psychotherapy, often referred to as 'talk therapy,' depends heavily on communication between the psychotherapist and the patient. *See* Ranna Parekh, M.D., M.P.H. & Lior Givon, M.D., PH.D., *What is Psychotherapy?*, Am. Psychiatric Ass'n (November 9, 2021, 8:41 AM), https://www.psychiatry.org/patients-families/psychotherapy. Cognitive behavioral therapy, for example, is psychotherapy treatment where the "psychologist and patient/client work together, in a collaborative fashion, to develop an understanding of the problem and to develop a treatment strategy," including treatment such as "using role playing to prepare for potentially problematic interactions with others." Am. Psychological Ass'n, *What is Cognitive Behavioral Therapy,* (November 9, 2021, 8:41 AM), https://www.apa.org/ptsd-guideline/patients-and-families/cognitive-behavioral. In other words, communication between the psychotherapist and the patient is the treatment.

To adopt Appellant's position would bizarrely mean that psychotherapy is not protected by the psychotherapist-patient privilege. This strange conclusion is unavoidable. Appellant interprets M.R.E. 513 to categorically cordon off 'communication' from 'treatment' because M.R.E. 513 does not use the phrase "including diagnosis and treatment." *Rodriguez*, 2019 CCA LEXIS 387 at *7; Appellant's Brief at 26. If 'treatment' is excluded, psychotherapy must be excluded. Incredibly, this would protect the less

sensitive information leading a psychotherapist to determine that talk therapy is appropriate, or administrative communications between the psychotherapist's assistant and the patient, but not the much more sensitive information divulged in the course of talk therapy.

Disclosing a patient's mental-health related prescriptions—which communicate a pharmacological treatment recommendation to the patient—creates the same problems as those discussed above. "Diagnoses and the nature of treatment necessarily reflect, in part, the patient's confidential communications to the psychotherapist," and thus, "revealing what psychiatric medication a patient has been prescribed to treat a diagnosed condition would in many circumstances suggest, if not reveal, the diagnosis itself." *Mellette*, 81 M.J. at 692. It is often impossible for a person to "answer questions meaningfully about his diagnoses or the purposes of his medications without divulging his communications with his psychotherapist." *Jakubaitis v. Padilla,* 604 B.R. 562, 572 (B.A.P. 9th Cir. 2019). Indeed, questions about medications "go to the heart of the psychotherapist-patient relationship, inasmuch as they directly seek information regarding advice the mental health care professional made during the 'course of diagnosis [and] treatment.'" *Id.*, citing *United States v. Romo*, 413 F.3d 1044, 1047–48 (9th Cir. 2005).

The A.C.C.A. suggests that prescriptions are not confidential, as they are meant to be disclosed to third parties. *Rodriguez*, 2019 CCA LEXIS 387 at *1. First, this only focuses on whether the communication is confidential, not

whether M.R.E. 513 generally protects mental health diagnoses or treatment. But even so, communications are confidential under M.R.E. 513 (b)(4) if they are "not intended to be disclosed to third persons *other than those to whom disclosure is in furtherance of the rendition of professional services to the patient* or those reasonably necessary for such transmission of the communication" (emphasis added). Disclosure of a prescription to a pharmacist furthers the rendition of professional services to the patient, as it enables pharmacological treatment of the mental health condition. Such communications, therefore, remain protected under M.R.E. 513.

Appellant's faulty textual analysis would ultimately gut the privilege. Because there is a "societal interest in a mentally healthy populace," "confidentiality is a *sine qua non* for successful psychiatric treatment." *Mellette*, 81 M.J. at 692; *Jaffee*, 518 U.S. at 10. As the Supreme Court explained, the "promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court." *Jaffee*, 518 U.S. at 13. Confining the privilege to "only the patient's description of her symptoms, but not the psychotherapist's diagnosis and treatment of her condition, would deter patients from seeking mental health treatment in precisely the way *Jaffee* sought to avoid." *Mellette*, 81 M.J. at 692; *see also Stark v. Hartt Transp. Sys.*, 937 F. Supp. 2d 88, 92 (D. Me. 2013) (arguing that ordering a psychotherapist to testify about a person's diagnosis or treatment would "defeat the societal interests" undergirding the Supreme Court's reasoning in *Jaffee*). A patient who believes that her mental

health diagnosis could be exposed in court—including to someone who sexually assaulted her—is less likely to be forthcoming with a psychotherapist, or even seek treatment at all. Appellant's position, thus, not only asks the Court to interpret M.R.E. 513 against its plain meaning, but also in a way that contradicts the principles established by the Supreme Court in *Jaffee*.

As a final note, the issue granted by the Court asks whether the N.M.C.C.A. erred by concluding that diagnoses and treatment are also subject to the privilege, invoking the absurdity doctrine. But, Amici do not read the N.M.C.C.A.'s opinion as relying on the absurdity doctrine. The N.M.C.C.A. quotes the general principal that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Mellette*, 81 M.J. at 691, quoting *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007). It then argues that "under a plain reading of [M.R.E. 513], the privilege protects" diagnoses and treatment. *Mellette*, 81 M.J. at 691. The N.M.C.C.A. only uses the term "absurd" when describing the implications of the A.C.C.A.'s interpretation, which "ignores the plain language of the rule." *Id.* at 692. Because the N.M.C.C.A. did not hold that the "disposition required by the text" was absurd, it did not rely on the absurdity doctrine. *Id.* at 691.

CONCLUSION

Mental health treatment and diagnoses are protected communications under M.R.E. 513. The Rule's plain meaning and standard canons of construction support this conclusion. Appellant's arguments to the contrary are wrong textually and would lead to absurd conclusions such as psychotherapy not being protected by the psychotherapist-patient privilege. Adopting Appellant's arguments would also undermine the purpose of the privilege by deterring patients from seeking mental health treatment. The N.M.C.C.A. was right to reject this flawed position, and this Court should affirm.

Respectfully submitted,

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