IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee* v. Mark J. GRIJALVA Machinery Technician Third Class (E-4) United States Coast Guard, *Appellant*	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 1482 USCA Dkt. No. 23-0215/CG

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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Issue Presented

WHETHER THE UNENUMERATED ARTICLE 134, UCMJ OFFENSE CHARGED IN SPECIFICATION 2 OF CHARGE III IS PREEMPTED BY ARTICLE 117a, UCMJ, WHICH CONGRESS ENACTED TO ADDRESS THE WRONGFUL BROADCAST OR DISTRIBUTION OF INTIMATE VISUAL IMAGES.

Statement of Statutory Jurisdiction

The Coast Guard Court of Criminal Appeals (CGCCA) exercised jurisdiction over this case pursuant to Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3). This Court has jurisdiction pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On 19 November 2021, Appellant was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members of making a false official statement, obstructing justice, and four offenses under the general article in violation of Articles 107, 131b, and 134, UCMJ.[1] (JA 0014.) Appellant was sentenced by members to reduction to E-3, confinement for three months, and a bad-conduct discharge. (JA 0014.) The convening authority took no action on the findings and the judgment was entered accordingly. (JA 0002.)

[1] 10 U.S.C. §§ 907, 931b, 934.

The CGCCA upheld Appellant's conviction but only affirmed the reduction to E-3, confinement for two months, and a bad-conduct discharge. (JA 0002.) On 3 October 2023, this Court granted Appellant's petition for review. (JA 0001.)

Statement of Facts

A. Facts Relevant to Charge III, Specification 2.

Appellant was best friends with Mr. R.K. and knew Mr. R.K.'s girlfriend, Ms. B.C. (JA 0003). In February of 2019, Appellant hacked into Ms. B.C.'s Snapchat account by guessing her password after "50 plus" attempts. (JA 0055, 0058.) Appellant found nude pictures of Ms. B.C. and admitted to downloading multiple nude and clothed pictures of her to his own device. (JA 0058, 0063.) Ms. B.C. had not consented to Appellant accessing her Snapchat account nor using these photos. (JA 0016, 0021.)

Appellant created a fictitious account on the Tinder dating application posing as Ms. B.C by using her pictures and name. (JA 0003.) Under the guise of being Ms. B.C., Appellant communicated with some matches, sent them nude pictures of Ms. B.C. via text message, and solicited them to send money in exchange for a promise to meet. (JA 0003, 0065–0073.) Overall, Appellant admitted he sent nude pictures of Ms. B.C. to "probably eight" people making around $200. (JA. 0062, 0073.)

When confronted with evidence of his actions by the Coast Guard Investigative Service (CGIS), Appellant admitted that uploading pictures of Ms. B.C. to the internet and using her actual name associated with those pictures could hurt Ms. B.C.'s reputations for years to come. (JA 0067.)

Overall, Appellant's actions lowered the opinion that at least two civilians had of the Coast Guard. (JA 0026–0027.) Appellant's actions also caused Ms. B.C. to become depressed and negatively impacted her relationship with Mr. R.K. (JA 0028–0029.)

B. Motions Pertinent to Charge III, Specification 2.

Charge III, Specification 2 alleges that Appellant:

> [O]n divers occasions between on or about 1 February 2019 to on or about 31 March 2019, knowingly, wrongfully, and without the explicit consent of Ms. B.C. broadcast an intimate visual image of Ms. B.C., who is identifiable from the visual image or from information displayed in connection with the visual image, when he knew or reasonably should have known that the visual image was made under circumstances in which Ms. B.C. retained a reasonable expectation of privacy regarding any broadcast and when he knew or reasonably should have known that the broadcast of the visual image was likely to cause harm, harassment, or emotional distress for Ms. B.C., or to harm substantially Ms. B.C. with respect to her safety, business, calling, career, reputations, or personal relationships, an act which is of a nature to bring discredit upon the armed forces.

(JA 0012.) On 10 August 2021, Appellant filed a Motion to Dismiss alleging the specification failed to state an offense. (JA 0074.) Appellant argued the

specification was preempted by Article 117a, UCMJ, 10 U.S.C. § 917a. (JA 0075, 0078–0081.) The Government opposed this motion. (JA 0074.)

On 31 October 2021, the military judge ruled that Appellant had not met his burden to show enactment of Article 117a, UCMJ, "indicates a clear intent by Congress to cover the *entire* field of wrongful distribution of intimate images and eliminate it as an offense chargeable under Article 134, UCMJ, particularly in situations where the images depict a civilian and are distributed to civilians." (JA 0097–0098 (emphasis in original).) Additionally, the military judge found that

> [t]he plain language of Article 117a's final element – that the conduct have a reasonably direct and palpable connection to a military mission or military environment – plainly limits that charge to the type of conduct committed in the Marines United scandal, where the images depict service members and/or are distributed among service members. Moreover, it cannot be disputed that the enactment of Article 117[a] was in direct response to the Marines United scandal and was intended to address that specific conduct with a direct military connection.

(JA 0098–0099.) The military judge held that the preemption doctrine did not apply and denied Appellant's Motion to Dismiss. (JA 0099–0100.)

C. <u>The CGCCA held Specification 2 of Charge III was not preempted by Article 117a, UCMJ</u>.

The CGCCA held that the text and legislative history of Article 117a, UCMJ, show that Congress did not intend Article 117a, UCMJ, to cover a class of offenses in a complete way. (JA 0004.) The CGCCA specifically found that:

> The statutory language makes clear that Article 117a is tailored to address nonconsensual sharing of intimate images of adults that, "under

> the circumstances, had a reasonably direct and palpable connection to a military mission or military environment." Article 117a(a)(4). Legislative history shows that the specific statutory purpose for doing so was to target the sharing/broadcasting of intimate images of servicemembers and veterans without their permission . . . .
>
> The language of Article 117a, along with the full context of its legislative history, persuades us that Congress intended it to enhance the military's ability to prosecute those who wrongfully broadcast intimate images of fellow servicemembers and others with a military nexus, not cover a class of offenses in a complete way so as to preclude prosecution under Article 134 when there is no such nexus.

(JA 0003–0004.) Additionally, the CGCCA opined that the addition of the final element of Article 117a, UCMJ, strengthens "the argument that Congress did not intend to cover civilian victims or preempt use of Article 134 for such victims." (JA 0004.)

Summary of Argument

Article 117a's legislative history shows Congress did not intend to comprehensively cover the offense of wrongful broadcast or distribution of intimate visual images with the enactment of the statute. Instead, Congress provided military commanders with what they themselves termed an "additional tool" in their toolbox to combat and prevent the conduct which occurred in the Marines United scandal. Further, the Government did not lessen its evidentiary burden by charging under Article 134, UCMJ. Therefore, Charge III, Specification 2 is not preempted by Article 117a, UCMJ.

Argument

ARTICLE 117a, UCMJ, DOES NOT PREEMPT THE UNENUMERATED ARTICLE 134, UCMJ, OFFENSE CHARGED IN SPECIFICATION 2 OF CHARGE III.

A. The standard of review is de novo.

"Whether an offense is preempted depends on statutory interpretation, which is a question of law" this Court reviews de novo. *United States v. Wheeler*, 77 M.J. 289, 291 (C.A.A.F. 2018) (citing *United States v. Cooley*, 75 M.J. 247, 257 (C.A.A.F. 2016)).

B. Charge III, Specification 2 is not preempted as Article 117a's legislative history does not explicitly or implicitly show Congress intended to cover the offense of wrongful broadcast or distribution of intimate visual images in a complete way and the Government did not lessen its evidentiary burden by charging under Article 134, UCMJ.

The *Manual for Courts-Martial* (*MCM*) states, "[t]he preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132." (J.A. 0110.) This doctrine "is designed to prevent the government from eliminating elements from congressionally established offenses under the UCMJ, in order to ease their evidentiary burden at trial." *Wheeler*, 77 M.J. at 293 (citations omitted).

The preemption doctrine is not triggered "simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article." *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979) (citation

omitted). It also "must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way." *Id*. If the following two questions are answered in the affirmative, then preemption applies:

> The primary question is whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; the secondary question is whether the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of either Articles 133 or 134.

United States v. McGuinness, 35 M.J. 149, 152 (C.M.A. 1992) (quoting *United States v. Wright*, 5 M.J. 106, 110–11 (C.M.A. 1978)).

This Court, however, has "required Congress to indicate through direct legislative or express legislative history that particular actions or facts are limited to the express language of an enumerated article, and may not be charged under Article 134, UCMJ." *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010) (citations omitted). Congress occupies the field if it "intended for one punitive article of the Code to cover the type of conduct concerned in a comprehensive . . . way." *McGuinness*, 35 M.J. at 151 (quoting *United States v. Maze*, 45 C.M.R. 34, 36 (1972)).

1. Article 117a's legislative history shows that Congress enacted the statute in response to the Marines United scandal to provide military commanders with an additional tool to ensure servicemembers are protected in similar circumstances.

In March of 2017, the Marines United scandal became public news. (JA 0220.) Marines United was a "males-only and invite-only Facebook group with 30,000 members" which included active-duty military members. (JA 0220.) One member in the group shared explicit images of servicewomen without their consent which led to other members sharing additional images. (JA 0220–0221.) The shared information also included personal information identifying the servicewomen in the images. (JA 0235.) The shared images were reported to the Marine Corps. (JA 0221–0222.)

Under the UCMJ, it was difficult to hold the servicemembers who participated in distributing the explicit images accountable, particularly under Article 120c, UCMJ, 10 U.S.C. § 920c, which does not account for nonconsensual photo sharing when the photo was originally received or taken with consent. (JA 0107, 0237, 0141 ("Right now, the reprehensible acts of nonconsensually distributed and consensually obtained photographs is not clearly defined as illegal under the Uniform Code of Military Justice.").) Accordingly, Congress crafted an additional tool to facilitate prosecution of this conduct by enacting Article 117a, UCMJ.

The first iteration of Article 117a, UCMJ, was proposed as H.R. 2052, Protecting the Rights of IndiViduals Against Technological Exploitation Act (PRIVATE Act). (JA 0125–0128.) During the first House debate, the majority of the eight speakers mentioned servicewomen as the victims the new legislation sought to protect. (JA 0133– 0138.) The House passed H.R. 2052 on 24 May 2017. (JA 0125–0128.) The Senate did not pass separate legislation but later included it in Section 533 of the National Defense Authorization Act (NDAA) for Fiscal Year 2018. (JA 0123, 0129.)

Prior to the enactment of the NDAA, the Department of Justice (DOJ) suggested Congress add the final element of Article 117a, UCMJ, requiring the conduct have a "reasonably direct and palpable connection" to "the military mission or military environment." (JA 0217.) The DOJ provided this suggestion to avoid First Amendment concerns. (JA 0217–0219.) Congress included DOJ's recommendation in Article 117a(a)(4), UCMJ, which requires that the accused's "conduct, under the circumstances, [have] a reasonably direct and palpable connection to a military mission or military environment." (J.A. 0106.)

a. <u>The legislative history demonstrates Congress did not occupy the field of wrongful broadcast or distribution of intimate visual images</u>.

The Congressional Record on the PRIVATE Act demonstrates Congress enacted Article 117a, UCMJ, to protect servicemembers from similar conduct that occurred in the Marines United scandal and provide military commanders an

additional tool to combat this behavior. Specifically, "The PRIVATE Act . . . would amend the [UCMJ] to ensure that the type of explicit sharing that was seen in the Marines United scandal is expressly prohibited." (JA 0135.)

For the first House debate on 2 May 2017, the Congressional Record contains the heading, "Raising Awareness of Marines United Offensive Facebook Page." (JA 0133.) Representative Frankel opened the debate by discussing the Marines United Facebook page stating that "male [M]arines posted nude or intimate photos of female servicemembers and veterans without their consent." (JA 0133.) During the debate, various representatives described the misconduct as unacceptable, shocking, disturbing, degrading, etc. (JA 0135, 0137, 0139.)

Representative Lee stated:

> I want to make it clear. Exploiting sexual images of fellow servicemembers online is unacceptable, and it should be a crime. Rest assured, as a woman, as a mother, grandmother, daughter of a veteran, and a member of the Military Construction and Veterans Affairs Appropriations Subcommittee, I will work day and night to address the threats to our country and to our women servicemembers. Women in the military are critical to our national security. They should have a safe workplace free from sexual assault and harassment and intimidation.

(JA 0134.) Representative Lawrence joined her sentiments stating, "Our servicemembers must have the confidence that their brothers and their sisters in uniform always have each other's back. There is simply no room in the military or in our society for behavior that humiliates and degrades women servicemembers." (JA 0135.)

During the debate, Congress was particularly focused on the victims of the Marines United scandal stating that "enactment of a new law was necessary to protect victims of nonconsensual sharing of intimate media in the Armed Forces and to hold those who engage in this dishonorable practice accountable under the military law." (JA 0137.) Representative Bacon reasoned that "Congress has an obligation to act and to remove any doubt that those who traffic in intimate pictures of their teammates and wrongfully share them not only violate the bonds of human decency, but are breaking the law." (JA 0137.) Additional Representatives added that action by Congress was necessary to "fix this problem so we can continue to have our military brothers and sisters serve together without being attacked by their own" and "[t]he victims of Marines United don't just deserve our sympathy and our support, they deserve a commitment to doing everything that we can to finally bring an end to sexual harassment in the military in all forms." (JA 0135, 0137.)

The proponent for this Act, Representative McSally, acknowledged that

> The unearthing of this widespread problem has highlighted the difficulty in prosecuting Active Duty military members, though, who do this, who share private, intimate photos of their teammates without consent. This action is harmful, and it destroys the bonds of trust in the unit that are so critical for our warfighting capabilities.

(JA 0139.)

On 23 May 2017, the House held their second debate on the PRIVATE Act. (JA 0140.) At the beginning, Representative McSally articulated that

> [T]he notion that any servicemember would think it is acceptable to upload, view, or comment on nude photos of their fellow servicemembers is a serious problem that must be fixed. This bill will help hold perpetrators of these types of crimes accountable . . . . The PRIVATE Act is designed to protect our servicemen and -women . . . .

(JA 0141 (emphasis added).) The focus during this debate was again on the servicewomen victims of the Marines United scandal. Specifically, Representative Speier stated, "That is why this bill is a critical step in ensuring that our female servicemembers aren't distracted from protecting the country by having to also protect themselves against online abusers and colleagues within the services." Speaking directly to "those warriors whose honor was violated" Representative Frankel said, "We stand with you today to declare that you were targets of behavior that we will not tolerate; and we will seek to punish those who offended and prevent similar conduct . . . because that conduct is not only degrading to brave patriots, it threatens the safety and security of our Nation." (JA 0141–0142.)

Anticipating a gap in the PRIVATE Act, Representative Speier explicitly stated:

> I also want to note that the passage of the PRIVATE Act *does not apply to the civilian people* in our country. Although 34 States have passed laws to address nonconsensual pornography, their approaches vary widely, and some are very flawed. That is why a Federal law is needed to provide a single, clear articulation of the elements of this crime to

> ensure that Americans in every part of the country—civilian and military—are protected if they are subjected to this heinous abuse.[2]

(JA 0141 (emphasis added).)

Additionally, during both debates, the PRIVATE Act was described as an additional tool for military commanders to utilize. Specifically, during the first debate, Representative McSally stated the bill is "not going to solve it by itself, but it is going to give the commanders *another tool*." (JA 0139 (emphasis added).) During the second debate, Representative McSally highlighted that "[w]hile the [UCMJ] currently contains two general articles under which these crimes can already be prosecuted, this new provision will give commanders an *additional specific tool* and send a clear message to servicemembers that this behavior is unacceptable and is, in fact, a crime." (JA 0141 (emphasis added).) She also stated, "I know that you need to give commanders *all the tools* they need to hold perpetrators accountable . . . . This bill gives commanders an *additional tool* in order to address this culture and to hold people accountable for their abhorrent behavior." (JA 0143 (emphasis added).) Representative Lee added, "I know that

[2] Appellant argues that the "plain meaning of her language indicates that while the PRIVATE Act cannot be used to prosecute civilians, it will certainly protect them." (Appellant's Br. at 17.) Representative Speier during her allotted time, however, made clear that her focus was on the victims of this type of behavior. (JA 0141.) She was highlighting that the PRIVATE Act does not protect civilian victims to emphasize that a federal law is needed so that both military and civilian victims are properly protected as she articulated at the end of her statement above.

this legislation that gives the military leadership *additional tools* to ensure that the depiction of women and others in the United States military, against their will, on social media, will not be tolerated and will not be viewed as an honorable act under the [UCMJ]." (JA 0143 (emphasis added).) Instead of the PRIVATE Act being the only tool military commanders could use to combat this misconduct, Congress intended for it to be an *additional tool* they could utilize.

Overall, the Congressional Record demonstrates Congress was concerned with addressing the misconduct that occurred in the Marines United scandal and ensuring that servicemembers are protected from that misconduct. There is no direct legislative language that shows Congress limited the prosecution for all wrongful broadcast and distribution of intimate visual images to Article 117a, UCMJ. *See United States v. Avery*, 79 M.J. 363, 369 (C.A.A.F. 2020) (finding that no direct legislative language or express legislative history compelled "the conclusion that Congress intended to wholly subsume the field of indecent language communicated to children within Article 120b(c), UCMJ" and therefore it was not shown that Congress intended to limit prosecution to that provision). Congress's enactment of Article 117a, UCMJ, did not occupy the entire field of wrongful distribution of intimate images, especially when the misconduct occurs solely in a civilian setting or when the misconduct is directed toward someone under the age of eighteen.

b. The military nexus element of Article 117a, UCMJ, further indicates that Congress intended for the statute to protect servicemembers and not cover the entire field when the same misconduct occurs in a civilian setting.

After the Department of Justice recommended the language to address First Amendment concerns, Congress included the final element of Article 117a, UCMJ, which requires the "conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment[.]" (JA 0106, 0217–0219); *see United States v. Wilcox*, 66 M.J. 442, 447 (C.A.A.F. 2008) (recognizing "that when assessing a criminal violation implicating the First Amendment: the proper balance must be struck between the essential needs of the armed services and the right to speak out as a free American").

The addition of this element, however, further demonstrates that Congress when enacting Article 117a, UCMJ, was focused on protecting servicemembers as well as ensuring the statute was constitutional. (*See* JA 0004 ("Notwithstanding the First Amendment impetus for the addition, we see this addition as also strengthening the argument that Congress did not intend to cover civilian victims or preempt use of Article 134 for such victims.").) Congress's acceptance of this final element supports that Congress was focused on the prosecution of servicemembers for the type of repulsive behavior that occurred in the Marines United scandal. (*See* JA 0142 ("This legislation will support broader cultural reform and improve the lives of our brave servicemembers.").)

The legislative history makes clear Congress was aware of the difficulties of prosecuting this type of crime in the civilian sector.[3] Representative Speier expressly stated that "the PRIVATE Act does not apply to the civilian people in our country" and that "a Federal law is needed to provide a single, clear articulation of the elements of this crime to ensure that Americans in every part of the country—civilian and military—are protected if they are subject to this heinous abuse." (JA 0141.) Since Congress was concerned with the "abhorrent behavior by servicemembers against other servicemembers" and its effect on the military when enacting Article 117a, UCMJ, it is understandable that Congress would not have had an issue with the addition of the last element and its effect of preventing prosecution specifically under Article 117a, UCMJ, when the conduct occurs in a solely civilian setting with civilian victims. (JA 0141.)

Appellant cites to *United States v. Jones* and *United States v. Hiser* to argue that "Article 117a safeguards victims of a broader demographic, not just military personnel, so long as there is an evident military linkage in the conduct."[4]

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[3] (*See* JA 0139 ("Civilian law faces challenges in prosecuting this crime. Thirty-five States and the District of Columbia have statutes against sharing private, intimate digital media without consent, but the State laws vary in their proof, the elements, and the punishment . . . . My bill provides clear, unambiguous charge that gives commanders a sharper tool in the UCMJ for targeting and prosecuting this behavior. It clearly defines this behavior as a crime, and it also addresses the issues of intent and free speech.").)

[4] In *Jones*, the appellant sent intimate photos of his then wife without her consent to another female military member, MK. (JA 0113–0114.) In *Hiser*, the appellant

(Appellant's Br. at 11–12.) Unlike *Jones* and *Hiser*, however, the misconduct here did not sufficiently contain a military nexus as the victim was a civilian and the associated misconduct occurred in a civilian setting on dating apps and through text messages which did not reach into the military environment.

In *Jones*, the victim was a military spouse and MK was known by the appellant to be a military member. (JA 0113–0114, 0116.) The reason the appellant sent the images was to facilitate a sexual liaison between the victim, himself, and MK. (JA 0116.) In *Hiser*, the victim was in the military, she found the explicit videos online, and the appellant attested that other members in the command could view the videos and think that it degrades the military and that it caused a negative impact on the military community. *Hiser*, 82 M.J. at 66–67. The appellant uploaded the explicit videos online where any member in the appellant's and the victim's command could view it and identify the victim and himself based on a combination of the visual images in the videos and the information displayed in connection with the videos. *Id*. at 65.

In this case, the victim was a civilian, the majority of the individuals that received the images were civilians, and Appellant did not purposefully direct the

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plead guilty to violating Article 117a, UCMJ, for uploading sexually explicit videos of him and his then wife without her permission to the website Pornhub. *United States v. Hiser*, 82 M.J. 60, 62–63 (C.A.A.F. 2022). His wife was also in the military. *Id*.

images at a servicemember. Appellant's use of the photos and distribution could not be connected to a military mission or environment. When Appellant privately communicated with the individuals that received the intimate photos, the individuals did not know they were interacting with Appellant. (*See* JA 0030–0054.) Without Appellant explicitly telling them, they had no way of knowing that they were truly interacting with a servicemember that was distributing intimate photos without the victim's consent. The misconduct here occurred against a civilian victim with no ties to the military other than knowing Appellant through her boyfriend and occurred in a solely civilian setting with no impact on a military mission or military environment.

The House debate on Article 117a's precursor made it clear that Article 117a, UCMJ, was enacted in the wake of the Marines United scandal with the purpose of providing commanders with a tailored UCMJ offense criminalizing the misconduct publicized in that scandal. What it did not do was prevent commanders from using Article 134, UCMJ, to prosecute analogous misconduct when the misconduct occurs in a civilian setting against civilian victims with no military nexus.

This is precisely what occurred in this case. Appellant's misconduct fell into an existing gap between Articles 120c, UCMJ, and 117a, UCMJ. As such, the Government properly charged Appellant with violating Article 134, UCMJ, given

that his conduct discredited the Coast Guard in the eyes of civilians.[5] (*See* JA 0026–0027.)

c. Article 117a, UCMJ, does not apply to minors under the age of eighteen which further supports that Congress did not intend to cover this class of offense in a complete way.

The inapplicability of Article 117a, UCMJ, to someone under the age of eighteen further supports that Congress did not intend to occupy the field of wrongful broadcast or distribution of intimate images. Appellant argues that Article 117a, UCMJ, occupies the field of nonconsensual broadcast and distribution of consensually taken intimate images which protects servicemembers, veterans, and civilians. (Appellant's Br. at 11.) The protection under Article 117a, UCMJ, however, explicitly does not apply to someone under the age of eighteen excluding a vulnerable class of victims of this type of offense. (JA 0106.)

By not protecting minors under the age of eighteen, Article 117a, UCMJ, leaves a gap as Article 134 (Child Pornography), UCMJ, does not cover all instances of wrongfully distributing intimate visual images of children based on the definition of child pornography. Child pornography under Article 134 means

[5] Additionally, the inclusion of the "service discrediting" element in Charge III, Specification 2 protects against a constitutional overbreadth challenge while also encompassing Appellant's misconduct of sharing intimate visual images of Ms. B.C., a civilian, which did not violate Article 117a, UCMJ, but still served to violate Article 134, UCMJ. *See Parker v. Levy*, 417 U.S. 733, 757–58 (1974) (rejecting the contention that Article 134 is facially invalid because of overbreadth).

"material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct." (JA 0112.) With the definition of child pornography, there could be cases where a servicemember distributes a photograph of a topless seventeen-year-old female which does not display sexually explicit conduct, but the military would not be able to prosecute the misconduct as Article 117a, UCMJ, precludes minors under the age of eighteen.

Certainly, Congress did not intend to prohibit military commanders from charging perpetrators under Article 134, UCMJ, of the same misconduct solely because the victim is under the age of eighteen. This gap between Article 117a, UCMJ, and Article 134 (Child Pornography), UCMJ, further supports that Congress did not intend for Article 117a, UCMJ, to preempt Article 134, UCMJ, when the same misconduct occurs against a minor under the age of eighteen and does not fit under another enumerated article.

Accordingly, it reasonably cannot be inferred that by promulgating Article 117a, UCMJ, Congress intended to fully occupy the field for an offense which has infinite reach through the internet. Instead, Congress intended to occupy a portion of the field to provide military commanders a specific tool to ensure the wrongful broadcast or distribution of intimate visual images which occurred in the Marines United scandal is prohibited. (*See* JA 0142 ("I am proud to support H.R. 2052, the

PRIVATE Act, which will update the Uniform Code of Military Justice to ensure that the type of explicit image sharing we saw in the Marines United scandal is expressly prohibited.").) Appellant's misconduct was different from the Marines United scandal in that he did not share intimate visual images of his fellow servicemembers, but his conduct was still service discrediting and necessitated punishment. To that end, the Government validly prosecuted Appellant of Charge III, Specification 2, under Article 134, UCMJ. This charge was not preempted by Article 117a, UCMJ.

d. Contrary to Appellant's assertion, the CGCCA did not hold that Article 117a, UCMJ, requires a victim-centric military nexus.

Appellant argues that the CGCCA interpreted Article 117a, UCMJ, to require a victim-centric military nexus. (Appellant's Br. at 8–9, 11.) The CGCCA's opinion, however, does not explicitly state that Article 117a, UCMJ, could never apply to a civilian victim, but instead found that the legislative history shows that "Congress did not intend to cover civilian victims or preempt use of Article 134 for such victims." (JA 004.) Congress not intending for the statute to cover civilian victims does not mean that when there is a civilian victim and a direct and palpable military nexus exists that Article 117a, UCMJ, cannot be used to prosecute a servicemember.

The CGCCA explicitly stated that, "Congress intended [Article 117a, UCMJ] to enhance the military's ability to prosecute those who wrongfully

broadcast intimate images of *fellow servicemembers* and *others with a military nexus*, not cover a class of offenses in a complete way so as to preclude prosecution under Article 134 when there is no such nexus." (JA 0004 (emphasis added).) Congress enacted Article 117a, UCMJ, to provide military commanders with an additional tool in their arsenal to prosecute servicemembers for wrongfully distributing and broadcasting intimate images when there is a sufficient military nexus. (*See* JA 0143 ("This bill gives commanders an additional tool in order to address this culture and to hold people accountable for their abhorrent behavior.").) It was not, however, meant to handicap military commanders from prosecuting the same misconduct when a servicemember commits it in a completely civilian setting with no military nexus.

Additionally, despite Appellant's characterization that the military nexus is about the conduct rather than the victim's status, (Appellant's Br. at 11–12), it is not one or the other, but instead about the level of military nexus that exists under the facts of said conduct. This can be derived from any aspect of the conduct, including the status of the victim it is directed towards. *See Hiser*, 82 M.J. at 66 (determining the Government proved the military nexus element because the victim was a servicemember and found the intimate images posted online). For a factfinder to examine the conduct's connection to the military, particularly its

impact on a military mission or environment, while ignoring the status of the victim especially if it were a servicemember victim, would be illogical.

2. Charge III, Specification 2 did not lessen the Government's evidentiary burden.

The Government did not ease its evidentiary burden at trial by charging Appellant with service discrediting misconduct for distributing intimate visual images of the victim. The concern "that the government would take an extant UCMJ offense and remove a vital element to create a diluted crime under Article 134, UCMJ—is the very impetus for the preemption doctrine." *Avery*, 79 M.J. at 367 (citing *Wheeler*, 77 M.J. at 293). The preemption doctrine "is designed to prevent the government from eliminating elements from congressionally established offenses under the UCMJ, in order to ease their evidentiary burden at trial." *Wheeler*, 77 M.J. at 293 (citations omitted).

Charge III, Specification 2 did not include two of the elements under Article 117a, UCMJ: (1) that the intimate visual image involves a person who is at least 18 years of age at the time the intimate visual image was created; and (2) that the accused's conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment. (JA 0106.) Although the remaining elements of Charge III, Specification 2 are similar to the elements of Article 117a, UCMJ, the Government did not charge Appellant with a "diluted" crime under Article 134, UCMJ, especially as the Government still had to prove

the misconduct was service discrediting. Instead, the Government applied the same type of criminal activity to a different set of victims and circumstances.

As argued above, Congress's intent when enacting Article 117a, UCMJ, was to prohibit the sharing of intimate visual images of servicemembers without their consent within the military environment by a servicemember. *See* Section B, *supra*. Appellant on the other hand targeted a civilian victim with no ties to the military and distributed intimate images of her in a civilian setting. This conduct was still criminal, resulting in the Government appropriately charging Appellant under Article 134, UCMJ, which applies to a wider class of misconduct. Dissimilarly Article 117a, UCMJ, limitedly applies to a subset of misconduct connected to the wrongful broadcast or distribution of intimate visual images of a person over eighteen years old when a military nexus exists.

Charge III, Specification 2 containing the service discrediting terminal element still required the Government to prove the impacts of Appellant's conduct. Instead of showing the impact on a military mission or the military environment as required by Article 117a, UCMJ,[6] the Government had to show the impact

[6] *See* Dep't of the Army Pam. 27-9, *Military Judges' Benchbook*, para. 3a-41a-1 (Oct. 25, 2023) (defining a "reasonably direct and palpable connection to a military mission or military environment" as "conduct that has a measurably divisive effect on unit or organization discipline, morale, or cohesion, or must be clearly detrimental to the authority or stature of or respect toward a Servicemember. The connection between the conduct and a military mission or military environment is contextually oriented and cannot be evidenced by conduct that is connected only in

Appellant's misconduct had on the public's perception of the armed forces. *See United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011) (citing *United States v. Saunders*, 59 M.J. 1, 11 (C.A.A.F. 2003) ("The trier of fact . . . must . . . evaluate the nature of the conduct and determine beyond a reasonable doubt that Appellant's conduct would tend to bring the service into disrepute if it were known.")). The Government at trial called two witnesses who testified that Appellant's misconduct lowered their perception of the Coast Guard. (JA 0026–0027.)

Therefore, Charge III, Specification 2 is not preempted by Article 117a, UCMJ.

C. Appellant had fair notice that his conduct was punishable.

Appellant implies that prosecuting him under Charge III, Specification 2 conflicts with the notion that a servicemember must have fair notice.[7] (Appellant's Br. at 21.) Appellant, however, had adequate notice of the criminality of his conduct from the numerous state laws which prohibit conduct like Appellant's here. *See United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (finding the *MCM*, federal law, state law, military case law, military custom and usage, and military regulations are potential sources of fair notice). In 2017, when the

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a remote or indirect sense").

[7] "The military is a notice pleading jurisdiction." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (citation omitted). Servicemembers must have "fair notice" that their conduct is punishable under the UCMJ. *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998) (quoting *Parker*, 417 U.S. at 756).

PRIVATE Act was introduced, Representative McSally noted, "Thirty-five States and the District of Columbia have statutes against sharing private, intimate digital media without consent . . . ." (JA 0139.) Washington state specifically has a statute which prohibits disclosing intimate images without consent. Wash. Rev. Code § 9A.86.010 (2016). The majority of states and particularly Washington state criminalizing the nonconsensual sharing of intimate visual images establishes that Appellant had fair notice that his conduct was criminal.

Conclusion

Wherefore, the United States respectfully requests this Court affirm the decision of the lower court.

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I certify that a copy of the foregoing was delivered electronically to the Court and was transmitted by electronic means to Appellate Defense Counsel and Special Victims' Counsel on 4 December 2023.

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