IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

DESHAUN L. WELLS,
Airman (E-2),
United States Air Force,
Appellant.

USCA Dkt. No. 23-0219/AF

Crim. App. Dkt. No. ACM 40222

REPLY BRIEF ON BEHALF OF APPELLANT

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ARGUMENT[1]

I. *PHILLIPS* AND—BY THE GOVERNMENT'S OWN RECOGNITION—CLAUSE 2 SANCTION "CONCLUSIVE PRESUMPTIONS." THIS IS UNCONSTITUTIONAL.

Clause 2 of Article 134, Uniform Code of Military Justice (UMCJ),[2] violates the constitutional requirement that the Government must prove every element beyond a reasonable doubt. It does so by merging the elements concerning the actus reus with the terminal element. The terminal element's hypothetical standard[3] makes this so because nothing else is needed but the conduct *itself* to prove it. *See, e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 523-24 (1979). This is a "conclusive presumption."[4] *Id*. While there is no "requirement" to presume the terminal element, "[a] presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect." *Morissette v. United States*, 342 U.S. 246, 275

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[1] At the outset, a scrivener's error concerning a substantive cross-reference in the initial brief needs to be corrected. Brief on Behalf of Appellant [App. Br.] at 43 n.29. The correct cross-reference should be to footnote 4, not 3.

[2] All references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], unless otherwise noted.

[3] "A rational factfinder *could* have found that *if* members of the . . . public learned of such behavior . . . their view of the armed forces *might* be tarnished." Brief on Behalf of United States [Gov. Ans.] at 49 (emphasis added).

[4] "A conclusive presumption in this case would 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury." *Sandstrom*, 442 U.S. at 523 (citations omitted) (alteration in original).

(1952); *Tot v. United States*, 319 U.S. 463, 467-68 (1943). This is simply how Clause 2 operates on its face: "all *conduct of a nature* to bring discredit upon the armed forces." The Government is not forced to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged," but instead gets the benefit of the elements being merged. *In re Winship*, 397 U.S. 358, 364 (1970). As a result, accused are deprived of their constitutional rights. *Id*.

A. *Phillips* epitomizes the unconstitutional functioning of Clause 2, which makes *Phillips* unworkable.

United States v. Phillips, 70 M.J. 161 (C.A.A.F. 2011), embodies the conclusive presumption effect. Despite the *Phillips* majority's (*id.* at 166-67) and the Government's (Gov. Ans. at 29-32) attempt to state otherwise, in *Phillips*, the element proscribing criminal conduct and the terminal element are the same. This is because, under the *Phillips* framework, possession of child pornography itself constituted evidence of service discrediting behavior. *Phillips*, 70 M.J. at 166-67. This is unconstitutional. "[A] conclusive presumption that the element of service discredit is met by the possession of child pornography itself would violate the Constitution." *Phillips*, 70 M.J. at 167 (Ryan, J., dissenting).

This is further evidenced by the fact that neither the Government nor the *Phillips* majority explain how the possession of child pornography is service

discrediting;[5] instead, both merely list the required facts for proof of the non-terminal element as proof for the terminal element:

> In this case, forensic analysis of Appellant's computer showed that searches had been performed seeking filenames associated with child pornography. Of the images the computer retrieved using LimeWire that were examined in detail by the forensic examiner, five images and two movies matched known child victims engaged in sexually explicit conduct. Appellant admitted downloading pornography that included child pornography and viewing the images on several occasions.

Phillips, 70 M.J. at 166. It is illustrative to break each "service discrediting" fact down to demonstrate how the facts listed by the *Phillips* Court are nothing more than facts of child pornography possession itself. *MCM*, pt. IV, ¶ 95.b.(1)(a) ("That the accused knowingly and wrongfully possessed child pornography.").[6]

[5] Conveniently, though, "the government is not required . . . to specifically articulate how the conduct is service discrediting." *Phillips*, 70 M.J. at 166. Though, somehow, if this was a guilty plea, some discussion of how the service was discredited would be required. *Phillips*, 70 M.J. at 167 n.1 (Ryan, J., dissenting) (citing *United States v. Jordan*, 57 M.J. 236, 237-39 (C.A.A.F. 2002)). Nonetheless, this kind of logic, where explanations and relevancy links are ignored, is ripe for presumptive conclusions. *E.g., Jordan*, 57 M.J. at 239.

[6] At the time *Phillips* was decided, the President had not yet enumerated child pornography as a possible Article 134, UCMJ, offense nor provided elements. *See MCM* (2012 ed.), App. 23, para. 68b (noting 2012 amendment introduced this enumerated offense).

1. "[F]orensic analysis of Appellant's computer showed that searches had been performed seeking filenames associated with child pornography."

This fact is proof of knowing possession. Searching implies that the accused, who owned the computer, was knowingly looking for this type of content and knew he had it.

2. "Of the images the computer retrieved using LimeWire that were examined in detail by the forensic examiner, five images and two movies matched known child victims engaged in sexually explicit conduct."

This fact is proof of sexually explicit conduct involving a minor, i.e., the material was, in fact, child pornography. To possess child pornography, the visual depictions have to legally qualify as "child pornography." *MCM*, pt. IV, ¶ 95.c.(4).

3. "Appellant admitted downloading pornography that included child pornography and viewing the images on several occasions."

These facts are proof of knowing and wrongful possession. By admitting he had child pornography and viewing it on more than one occasion, the accused admitted he knew he had the child pornography and did not delete the depictions despite viewing their content.

Altogether, these facts are necessary to prove possession of child pornography beyond a reasonable doubt in the non-terminal element. Yet, both the *Phillips* Court and the Government argue that those facts, and those facts alone, demonstrate that the terminal element is met.

This reasoning is a conclusive presumption, which is unconstitutional. "A

presumption which would *permit but not require* the jury to assume [an element] from an isolated fact would prejudge a conclusion which the jury should reach of its own volition." *Sandstrom*, 422 U.S. at 522 (emphasis added). Put another way, Clause 2 is a self-fulfilling prophecy for any agent of the Government wishing to criminalize any conduct, since no evidence is required to prove the terminal element other than the conduct itself.

B. *Phillips* permits a conclusive presumption because Clause 2, itself, is fundamentally flawed.

As a function of Clause 2's statutory text, it is not possible to separate the terminal from the non-terminal elements. The statute, as the Government highlights, does not require proof of how the service is discredited. Gov. Ans. at 25-26. Furthermore, as the Government notes, the President's definition is "merely another way to communicate [of a nature]." Gov. Ans. at 26. Finally, as the Government concedes, the rules in *Phillips* mirror the statute. *Cf.* Gov. Ans. at 29 ("In *Phillips*, this Court held that actual public knowledge of the alleged misconduct is not required to prove the conduct was service discrediting."); Gov. Ans. at 25-26 (arguing "of a nature" requires no direct or actual impact to the service).

As stated before (App. Br. at 16-17, 34), if Clause 2 is equivalent to the President's language, and the President's language is equivalent to the rules espoused in *Phillips*, the problem lies beyond *Phillips.* It is the language of Clause 2 itself, unchanged by *Phillips* or the President's definitions, that withdraws the terminal

element from the factfinder by presupposing "service discrediting" in the "certain act" itself (otherwise required to be proved), because nothing other than the proven conduct itself is required.

C. Clause 2's paradigm is the unconstitutional use of the proscribed conduct itself, not the lawful use of the same facts for multiple elements.

Using the underlying facts for multiple elements is *not* what is happening in this legal framework, contrary to the Government's assertion. Gov. Ans. at 35-37. A quick example about wrongful use of 3,4-methylenedioxymethamphetamine ("ecstasy") helps illustrate this point.

Under Article 112a, UCMJ, 10 U.S.C. § 912a, there are two elements: (1) that the accused used a controlled substance, and (2) that the use was wrongful. *MCM*, pt. IV, ¶ 50.b.(2). For this example, consider evidence adduced at trial similar to that in *United States v. Paul*, 73 M.J. 274, 276 (C.A.A.F. 2014):

> [A] civilian witness, Holly Kern, testified that she had seen [the accused] using ecstasy in his apartment on two separate occasions during the charged time period. Ms. Kern described the tablets, explained her role in procuring them, and detailed the drug's effects when she took the same pills herself. In addition, she testified to seeing [the accused] put the substance into his mouth under the belief that it was ecstasy. The Government also admitted into evidence several text messages sent from Appellant's phone stating:
>
> > I'm gonna reward myself with some e tonight.
> > Hey grab me 4 rolls when you get yours. . . . I'm being a designated driver tonight so I need some E.
> > [We] are excited about rolling. . . . We aren't gonna have any of my military friends over here for obvious reasons.

Additionally, for this example, consider that the Government called an expert who testified "ecstasy" is 3,4-methylenedioxymethamphetamine, that it is a controlled substance, and the description Ms. Kern gave of the effects of "ecstasy" match those of 3,4-methylenedioxymethamphetamine.[7]

When the facts above are broken down, it is undisputed that some facts may support more than one element. For example, "she testified to seeing [the accused] put the substance into his mouth under the belief that it was ecstasy" can go to "use of a controlled substance" and "wrongful" (knowing use without authorization, *MCM*, pt. IV, ¶ 50.c.(5)). The following can also go to two elements: "We aren't gonna have any of my military friends over here for obvious reasons." This fact is circumstantial evidence for both use and wrongful use because it indicates future use of a controlled substance and in a place where military members are not present because it is "without authorization."

If Clause 2's terminal element is added to this completed crime, what would make this alleged conduct of a nature to discredit the service? Is it Ms. Kern witnessing the use (i.e., wrongful use of ecstasy)? Is it the texts (i.e., wrongful use of ecstasy)? Is it that the accused wrongfully used ecstasy? Clause 2 does not, and cannot, articulate a distinction.

[7] Notably, these facts are not present in *Paul*, which is part of the issue in the case. *Id*. at 277.

The difference between using the same facts for different elements and using the "certain act" *itself* is that nothing is required to make a finding of guilt on the terminal element. Once the non-terminal element is proven, the terminal element necessarily follows. This is comparable to taking judicial notice of an element. *Paul*, 73 M.J. at 276. It has the effect of a conclusive presumption required by an instruction or statute. *Sandstrom*, 442 U.S. 510; *Morissette*, 342 U.S. 246; *Tot*, 319 U.S. 463. The Government's burden of proving the terminal element is eliminated, contrary to *Winship*. The terminal element means nothing, which is distinct from an element meaning something, and being proved by the same evidence.

D. Obscenity's "community standard" construct is an inapt and inapplicable comparison for how Clause 2 operates.

The Government's obscenity analogy is plagued by the same conclusive presumption logic as Clause 2. Gov. Ans. at 21-22, 35-37. The Government speaks only of obscenity itself, a class of unprotected speech, not obscenity as it is criminalized. The Government ignores the actus reus that makes what is otherwise simply unprotected speech criminal: the "conduct" specifically defined by law. *Miller v. California*, 413 U.S. 15, 24 (1973). In a constitutional, criminal statute that involves obscenity, the actus reus and definition of obscenity (which is very narrow and focused to avoid First Amendment infringement) are not synonymous. Criminal statutes proscribing acts related to obscenity require more than a mere finding that something is obscene based on a local community standard.

This is distinct from Clause 2, where Clause 2's elements do not operate separately; they are one and the same. The "community standard" in Clause 2 is in effect the conduct itself; the actus reus is the same as that which tends to discredit the service. If an obscenity statute had two elements, one of which is the proscribed conduct (i.e., distributing obscene material in the mail) and the second element was that such conduct was obscene, such a statute would also be unconstitutional assuming they required the same proof. That is not how obscenity works, but it is effectively how Clause 2 works. And therein lies the problem.

Additionally, the Government's argument that the factfinder can "use their own understandings of the public's standards to evaluate whether the conduct is of a nature to discredit the service," Gov. Ans. at 36-37, is unpersuasive based on how obscenity is defined. *Miller* opines a proceeding structured around a national standard would be an exercise in futility—there is no provable national standard for obscenity. 413 U.S. at 30-34. Along that same vein, with a national standard, there is a high risk of suppression of free speech, or, more broadly, otherwise constitutionally protected conduct. *See id*. at 33 ("People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.").

Clause 2, by its plain language and as defined by the President, is a national standard. "Of a nature to discredit the service" and "tendency to bring the service

into disrepute or which tends to lower it in the public esteem" are "the same thing," *see* Gov. Ans. at 26, and they all invoke a nation-wide view of the Armed Forces. The national standard in Clause 2 allows for per se service discrediting conclusions of the terminal element and produces the same indeterminacy as a national standard for obscenity.

First, with a national standard, the conclusive presumption logic of Judge Latimer returns with patently criminal conduct. *E.g., United States v. Sanchez*, 11 U.S.C.M.A. 216, 218 (C.M.A. 1960). For example, with producing child pornography, "it would be an affront to ordinary decency to hold [such an act] was not criminal *per se* and would not dishonor the service in the eyes of a civilized society." *Id.*; *see also United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008) ("It is intuitive that the viewing of child pornography discredits those who do it, as well as the institutions with which those persons are identified."). Nationally, production of child pornography is criminal *itself.* But under Clause 2, the terminal element suggests production of child pornography is not always a crime; there is some set of "facts and circumstances" of producing child pornography that would not "tend to discredit the service." That defies belief and exemplifies the problem of Clause 2: when conduct is service discrediting *per se*, the Government does not have to prove the terminal element in contravention of *Winship* and the Constitution.

Second, just like with a national obscenity standard, there is no provable national standard for what tends to discredit the service, whether something is patently criminal or not. But Clause 2 requires just that—a national evaluation, possibly even a world-wide evaluation. *United States v. Vaughan*, 58 M.J. 29, 36 (C.A.A.F. 2003) ("The behavior of U.S. [servicemembers] abroad is the face of the armed forces in many countries, and the reputation of the military is equally at stake worldwide."). Servicemembers are no more able to determine what a national standard is for service discrediting than the average juror or legislature attempting to divine the national standard for obscenity.

However, convictions occur because of the per se nature of the terminal element for something obviously criminal; servicemembers believe if the public knew one servicemember produced child pornography, or committed some other obvious crime, then the service as a whole would be discredited. However, this is ultimately an assumption unsupported by the evidence, giving an otherwise proven fact artificial and fictional effect. *Morisette*, 342 U.S. at 275; *Tot*, 319 U.S. at 467-68. Furthermore, it is an assumption based on what a factfinder believes someone else would believe (the national public), which is also not how obscenity operates. "The average person, applying contemporary community standards" is a narrow community standard that is not hypothetical or unascertainable. Clause 2's standard

is both. In this regard, the national standard also renders Clause 2 indeterminate, a consequence of its allowing the assumption of the terminal element.

E. Based on the nature of the constitutional issue, Amn Wells's argument is a facial challenge to Clause 2.

The Government argues Amn Wells's case should be resolved as applied. By the nature of this case, though, Amn Wells's extramarital sexual conduct conviction implicates more than just his own fact pattern because it requires the application of *Phillips*. The question of whether *Phillips* remains good law is squarely before this Court, implicated by Amn Wells's case and the trailer case, *United States v. Nestor*, USCA Dkt. No. 23-0224/AF.[8] While the Government may desire the ripple effects of an unconstitutional law to be contained to the facts of a particular case, this is not persuasive, nor is it a reason to maintain an unconstitutional law. *See* Gov. Ans. at 39-40 (lamenting, generally, the loss of a criminal statute for prosecuting servicemembers and how that would undermine public confidence in the law, despite the fact that other military justice tools and criminal jurisdictions exist). Nevertheless, should this Court resolve Amn Wells's case without overruling *Phillips*, Amn Wells still prevails because his extramarital sexual conduct was not open or notorious. App. Br. at 47-49.

Therefore, Appellant respectfully requests this Court set aside and dismiss the

[8] *United States v. Nestor*, USCA Dkt. No. 23-0224/AF (C.A.A.F. Nov. 2, 2023) (order granting review).

findings of guilt for Specification 1 of Second Additional Charge I, and set aside the sentence.

II. CLAUSE 2 IS VOID FOR VAGUENESS, BUT VAGUENESS IS NOT THE DISPOSITIVE CONSTITUTIONAL ISSUE PRESENTED, RATHER A BY-PRODUCT OF THE PER SE SERVICE DISCREDITING PRESUMPTION CLAUSE 2 PERMITS.

The constitutional issue raised by Amn Wells is not vagueness, as the Government's brief contends. Gov. Ans. at 15-22. The fact that Clause 2, as written, permits conviction for per se service discrediting conduct is the constitutional issue. That independent constitutional issue produces vagueness, but vagueness is neither the sole nor dispositive due process issue before this Court.

A. Clarifying the constitutional nature of the issue narrows this Court's focus and renders several of the Government's arguments irrelevant.

When the basis for the constitutional challenge is clear, the first half of the Government's brief becomes moot. Gov. Ans. at 15-25. It does not matter that the Supreme Court found Article 134, UCMJ, constitutional under a vagueness analysis. *Parker v. Levy*, 417 U.S. 733, 757 (1974). Clause 2 being void for vagueness is not the crux of Amn Wells's challenge, recognizing binding Supreme Court precedent precludes this argument.[9] The finding of constitutionality of Clause 2 by the Supreme Court in *Levy* under a vagueness analysis does not bar this Court from finding Clause

[9] However, Amn Wells maintains Clause 2 *is* void for vagueness under a similar construct as what was analyzed in *Johnson v. United States*, 576 U.S. 591 (2015). He preserves this argument as an overall challenge to *Parker v. Levy* and its finding that Clause 2 is not void for vagueness.

2 unconstitutional under a different constitutional analysis. *See, e.g., United States v. Medina*, 69 M.J. 462, 464-65 (C.A.A.F. 2011) ("While the underlying statutory scheme in [*United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011)] and in this case are the same, and thus raised the potential for an unconstitutional burden shift, in this case we have a distinctly different instructional situation and the holding in *Prather* is therefore not dispositive.").

Additionally, it is irrelevant whether Amn Wells's conduct is "clearly captured" by the statute or whether he is on notice. Gov. Ans. at 17-20. Captain (CPT) Levy could not raise a facial void for vagueness challenge for conduct the statute "clearly" captured. *Levy*, 417 U.S. at 756-57. But that is not Amn Wells's legal situation or argument. Amn Wells is challenging Clause 2 because it sanctions a per se service discrediting analysis—and this is a facial challenge because Clause 2 is *always* unconstitutional based on how it is written. An analysis of the history of Clause 2, including cases like *Sanchez* and *Levy*, demonstrates Clause 2's perpetual unconstitutional structure.

Clause 2, by its historical nature, has always sanctioned per se service discrediting conduct. *See e.g., Sanchez*, 11 U.S.C.M.A. at 218; *United States v. Gittens*, 8 U.S.C.M.A. 673, 674 (C.M.A. 1958) (Latimer, J., dissenting); *United States v. Grosso*, 7 U.S.C.M.A. 566, 573 (C.M.A. 1957) (Latimer, J., dissenting). As Judge Latimer succinctly put it, this is because the panel simply finds "what is

obvious to everyone." *Grosso*, 7 U.S.C.M.A. at 573 (Latimer, J., dissenting). It is obvious "crimes," or socially "detestable and degenerate" acts, are service discrediting—*per se.* This is supported by the per se analysis creeping into the other punitive articles. *See United States v. Fuller*, 54 M.J. 107, 112 (C.A.A.F. 2000) ("[E]very enumerated offense under the UCMJ is per se prejudicial to good order and discipline or service discrediting."); *United States v. Foster*, 40 M.J. 140, 143 (C.M.A. 1994) (noting the enumerated articles outside of Article 134, UCMJ, are per se service discrediting). This is also supported by how this Court attempts to determine whether servicemembers receive fair notice that their conduct is subject to criminal sanction under Clause 2. *See Vaughan,* 58 M.J. at 36 ("An unlawful act can serve to establish service discredit." (citing *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998) (prosecuting bigamy, even though specified bigamy elements not met because bigamy historically a crime); *United States v. Davis*, 26 M.J. 445, 448 (C.M.A. 1988) (noting that conduct that is generally illegal tends to be discrediting for that very reason))); *see also United States v. Merritt*, 72 M.J. 483, 487-88 (C.A.A.F. 2013) (finding lack of fair notice where viewing of child pornography not currently or historically criminalized).

Had the Supreme Court declined to hear *Levy*, perhaps history would have revealed itself faster. Instead, Clause 2 has been shrouded by *Levy* for nearly fifty years, skirting constitutional challenges because of the lofty rhetoric and its overall

holding. *See generally* Gov. Ans. at 38 (arguing *Levy* is reliable because it is cited so often).[10] However, the holding in *Levy* is neither representative of today's military-justice system nor Clause 2. While *Levy*'s vagueness holding may be binding, the "very significant differences between military law and civilian law and between the military community and the civilian community [kept] in mind," *Levy*, 417 U.S. at 752, are not, nor do they remain, true. *Compare Levy*, 417 U.S. at 479 ("[The] Code cannot be equated with a civilian code.") *with Ortiz v. United States*, 585 U.S. __, 138 S. Ct. 2165, 2170-71 (2018) ("[T]he jurisdiction of those tribunals overlaps substantially with that of state and federal courts. And courts-martial are now subject to several tiers of appellate review, thus forming part of an integrated 'court-martial system' that closely resembles civilian structures of justice.") (citations omitted).

While this Court recently distinguished *Ortiz'*s rhetoric in *United States v. Anderson,* 83 M.J. 291, 301 (C.A.A.F. 2023) (noting that this Court was "not persuaded that the Supreme Court intended to suggest that military and civilian defendants are similarly situated for *equal protection purposes*") (emphasis added), where an issue of proof of *every element* is at issue, *United States v. Richard*, 82 M.J. 473, 2022 CAAF LEXIS 637, at *7 (C.A.A.F. 2022), controls: "Article 134,

[10] Yet, cases like *Vaughan* cite *Levy* to determine how fair notice is determined, and in doing so, engage in a per se service discrediting analysis. *Vaughan*, 58 M.J. at 31, 36.

UCMJ, is a statutory criminal offense, and as such, this Court has recognized that the Constitution demands that the Government prove *every* element of an Article 134 offense—including the second or 'terminal' element—beyond a reasonable doubt." There is no special exception to this rule for cases in military jurisdiction, regardless of the fact the military has, "due to its unique and critical mission, 'developed laws and traditions . . . during its long history.'" *Id*. (quoting *Levy*, 417 U.S. at 743). Ultimately, *Parker v. Levy* is neither controlling nor persuasive.

B. Vagueness is a consequence of the "conclusive presumption" inherent in Clause 2, which is helpful in evaluating why *Phillips* is unworkable.

The Government contends vagueness cannot enter this Court's analysis because the Supreme Court found Article 134, UCMJ, constitutional on vagueness grounds. While this Court need not find Clause 2 void for vagueness, analyzing vagueness is not a wholly academic exercise because vagueness is a by-product of how *Phillips* and Clause 2 operate, which lends itself to the stare decisis analysis.

The vagueness problems with the *Phillips* framework supports why the reasonable expectation of servicemembers favors overturning *Phillips* and finding Clause 2 unconstitutional. The cross-dressing cases demonstrate this dynamic well.

In *United States v. Davis*, this Court's predecessor openly stated the "unusual" conduct of cross-dressing on a military base would be "virtually always" discrediting. 26 M.J. at 448-49. This highlights the conclusive presumption problem. Much like possession of child pornography, cross-dressing is apparently always a crime; there

is no way to disprove the terminal element because the conduct itself is per se service discrediting.

Then, in *United States v. Guerrero*, this Court had to retract that language because it was untenable: "[i]t is not the cross-dressing *per se*" that makes the conduct service discrediting, it is just everything about it, like the time, place, circumstances, and purpose. 33 M.J. 295, 298 (C.A.A.F. 1991). Despite this Court's attempts to say otherwise, this "facts and circumstances" rule is still just the conduct itself. And this evolves into a vagueness issue.

To distinguish non-criminal cross-dressing from criminal (service discrediting) cross-dressing, an accused simply needs to cross-dress at home with no audience.[11] *Id*. Somehow that would not discredit the service, even though the statute does not require anyone to know about the conduct. *See Phillips*, 70 M.J. at 166 (holding the Government was not required to introduce evidence the public knew or would ever know of the alleged conduct). Presumably, then, if a servicemember was ever discovered to be cross-dressing at home, private cross-dressing would be criminal. This indiscriminate and arbitrary criminalization is a vagueness problem, but it arises *because of* the conclusive nature of Clause 2.

Vagueness is the hidden devil in Clause 2—giving merit to the overall Article's

[11] Although perhaps not, as the appellant in *Guerrero* was doing just that, but at the apparent disgust of his neighbor who chose to peer into the appellant's home. *Guerrero*, 33 M.J. at 296-97.

historical name: the "Devil's Article." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 720 n.67 (2d ed. 1920). As Judge Everett noted, Clause 2 has become so expansive that "this is an invitation for the Supreme Court to reexamine its holding [in *Levy*]" on vagueness grounds. *Guerrero*, 33 M.J. at 299 (Everett, J., concurring in part, dissenting in part). Clause 2 *is vague* but because it is unconstitutional on another ground: permitting per se service discrediting conclusions.

Therefore, Appellant respectfully requests this Honorable Court set aside and dismiss the findings of guilt for Specification 1 of Second Additional Charge I, and set aside the sentence.

III. THE VIDEO IS IRRELEVANT AND CANNOT BE INVOKED DURING A LEGAL SUFFICIENCY ANALYSIS, REGARDLESS OF WHETHER *PHILLIPS* IS OVERTURNED.

As the Air Force Court of Criminal Appeals (JA at 7-8) and the Government (Gov. Ans. at 47-49) appear to resolve this case on Amn Wells sharing a sex video of himself and BF, it is worth reiterating Amn Wells sharing the video and any facts related to that sharing are irrelevant for the extramarital sexual conduct allegation because nothing about the video shows *extramarital* sexual conduct was occurring.[12] *See* JA at 277 (noting service discrediting conduct includes extramarital sexual

[12] The video, and any evidence it was shared, is only relevant to Second Additional Charge II, broadcasting an indecent recording, and its lesser included offense, indecent recording. JA at 59, 69, 274, 280-85; *see also* JA at 291-300 (covering Trial Counsel's closing argument about this allegation). Amn Wells was acquitted of this conduct. JA at 49.

conduct that is open or notorious). The video itself does not show anything other than the sexual act. JA at 61, 112. It has no relevance to the extramarital sexual conduct allegation other than that fact.

No reasonable fact finder would consider the video or that it was shared for anything other than the broadcasting charge it was offered for because: (1) Amn Wells shared this video outside of the charged timeframe of the extramarital sexual conduct allegation, JA at 63, 65-66, 247, 268; (2) the video does not identify either participant, JA at 61, 112; (3) the video's post does not identify any participant, JA at 61-62; (4) the video does not reveal either participant is married, JA at 61, 112; (5) the video does not reveal either participant is in the United States Air Force, *id*.; (6) the video does not reveal Amn Wells's marital status, military rank, grade, position, spouse's or co-actor's military status, or spouse's or co-actor's relationship to the Armed Forces, JA at 61; and (7) the video does not reveal if Amn Wells's marriage was pending legal dissolution, JA at 61. *See* JA at 277-78 (listing the "facts and circumstances" to consider). It *does* show where the sexual conduct occurred: in the privacy of a bathroom. JA at 61, 270. But it *does not* show open or notorious extramarital sexual conduct because the video does not inform anyone *extramarital* sexual conduct is occurring. JA at 61-62; *see also* JA at 267-68 (demonstrating not even LW, the girlfriend Amn Wells showed a still shot of the video to, knew Amn Wells was having an affair in the video because she only found out about his marital

status after she was shown the video and after her own relationship with Amn Wells was over).

Additionally, testimony about who is in the video and that the video was viewed 817 times does not show that the 817 views were by 817 people who knew Amn Wells was engaging in *extramarital* sexual conduct, who he was, or his relationship to the Armed Forces. *See also* JA at 258 (noting the video, when shared via instant messaging, may not have been viewed at all). Moreover, it is unlikely the members considered the video for this alleged offense when the video was never tied to the terminal element or extramarital sexual conduct charge, only to the indecent broadcasting charge of which Amn Wells was acquitted. JA at 288-300, 312-14.

While the video is irrelevant to the extramarital sexual conduct charge and Amn Wells was otherwise acquitted for any involvement in the recording and sharing, this conduct as a whole is clearly the conduct the Government is upset about. Gov. Ans. at 49 (using the word "exploit" in some form to describe Amn Wells's actions concerning the video, twice). This purely emotional appeal about conduct Amn Wells was acquitted of does not make the fact at issue—whether Amn Wells's extramarital sexual conduct tends to discredit the service—more or less likely. It only highlights the indiscriminate nature of Clause 2 by revealing its tendency to turn on the Government's perception of what is "duplicitous, crass, [and] flagrant" when the facts and the law do not support such sweeping characterizations. Gov. Ans. at 49.

Comparing BF and LW, the women named in the extramarital sexual conduct allegations, Amn Wells's relevant extramarital sexual conduct with each was identical. He lied to both of them about his marital status. JA at 119-20, 209-10, 217, 266-67; *see also United States v. Mason*, 59 M.J. 416, 422 (C.A.A.F. 2004) (equating a "false statement" to a "material omission" in the context of search affidavits). Both testified he got them pregnant. JA at 120-21, 207, 269-71. Both testified they told their parents about their relationship. JA at 118, 266. Both testified they told the Air Force about Amn Wells's conduct with them. JA at 217-18, 220, 266-68. The only difference is, as the Government's brief highlights, no one liked what Amn Wells did with BF; in the Government's words, his extramarital sexual affair with her was "duplicitous, crass, flagrant, and exploitive," when it apparently was not with LW. Therefore, in the Government's judgment, it *should* be a crime and was rightly *found* to be a crime. *See Sandstrom*, 422 U.S. at 522 (discussing this kind of prejudgment schema as part of the problem with constitutional presumptions).

This arbitrary enforcement is a vagueness issue that is a by-product of conclusive presumptions. Whereas every other crime requires proof beyond reasonable doubt for every element, Clause 2's terminal element requires nothing more than proof the "certain act" was committed. Walking through the facts the Government points out to support its legal sufficiency argument demonstrates this.

The Government's analysis that "justified a reasonable factfinder to determine

that [Amn Wells's] conduct met the terminal element" is contained in one paragraph. Gov. Ans. at 47. Parsing through these facts, broken down individually below, this *is* the extramarital sexual conduct, nothing more (once the irrelevant facts are excised, those which a reasonable fact finder could not lawfully consider).

Starting with the law, the panel was instructed to find the following elements:

> One, that at or near Brandon, United Kingdom, between on or about 23 November 2019 and on or about 12 January 2020, the accused wrongfully engaged in extramarital sexual conduct, to wit: sexual intercourse with [BF];
>
> Two, that, at the time, the accused was married to someone else, which he knew; and
>
> Three, that, under the circumstances, the conduct of the accused was of a nature of bring discredit upon the Armed Forces.

JA at 276. The actus reus of this alleged crime is contained in elements one and two. To prove extramarital sexual conduct *itself*, the Government must prove both elements beyond a reasonable doubt. The relevant facts the Government cited do just that:

1. "At trial, the evidence unequivocally established Appellant was married to A1C LW on 18 July 2019 and remained so throughout the charged time period."

This is element two, that Amn Wells was married to someone else during the charged time frame. This fact equally applies to LW. *See* JA at 67 ("Marriage License"), 278 (noting Amn Wells's wife's married name).

2. "Appellant and BF engaged in a consensual sexual relationship for

approximately three months."

This is element one, that Amn Wells engaged in sexual intercourse with BF. This fact equally applies to LW. *See* JA at 264-65 (noting the length and nature of the relationship).

3. "Throughout the course of their relationship, Appellant lied to BF and told her he was divorced."

This is element two, that Amn Wells knowingly engaged in extramarital sexual conduct. This fact equally applies to LW, but for LW, it was a lie by omission. JA at 266-67 (showing how LW learned Amn Wells was married).

4. "Appellant met BF's parents and her extended family[13] on multiple occasions during the course of the relationship."

This fact could go to the terminal element of whether Amn Wells's conduct tended to discredit the service due to its open or notorious nature. However, no rational factfinder would consider the fact Amn Wells met BF's parents—two people who did not know Amn Wells was married (*see* JA at 117-18 (showing it is not clear BF's parents actually knew Amn Well was married))—as evidence that the public knew Amn Wells was having an affair and that the affair discredited the service. Even if

[13] It is unclear who the "extended" family the Government refers to here is. There is a comment made by Trial Counsel in opening about Amn Wells meeting *LW's* "extended members of her family," JA at 97, but it appears no evidence was offered on that proffer for her. At some point, Amn Wells met "a part" of BF's family, but it is not clear in the record if those individuals were more than just her parents. JA at 208-09.

they did know about the extent of the affair, two people knowing about it is simply not open or notorious such that it would tend to discredit the service. As compared to LW, it is not clear Amn Wells ever met her parents, but her parents knew of him and the relationship. JA at 266. Ultimately, there is no distinction between BF and LW on this fact.

5. "At some point during the relationship, BF became pregnant with Appellant's child."

This is element one, that Amn Wells engaged in sexual intercourse with BF. This fact equally applies to LW. JA at 269-70 (testifying she thought she was pregnant with Amn Wells's child).

6. "Sometime later, BF ended the relationship with Appellant."[14]

This is the end of the actus reus. The extramarital sexual conduct itself is complete. This fact equally applies to LW. JA at 265-66 (showing the end of the relationship).

7. "During the course of their relationship Appellant recorded himself and BF engaged in sexual intercourse."

This is corroborating proof for element one, that Amn Wells engaged in sexual intercourse with BF. It is more than just BF's testimony on the matter, but an actual recording corroborating her claim. This fact does *not* apply to LW. No evidence at

[14] While this is one possible interpretation of the evidence based on BF's testimony, the other interpretation is Amn Wells ended the relationship after the pregnancy was terminated. JA at 216.

trial was introduced that LW and Amn Wells recorded any sexual encounters.

8. "After BF broke off the relationship with Appellant, Appellant uploaded a pornographic video of himself and BF to PornHub. Appellant entitled the video in a degrading and demeaning manner: 'British slut loves American BBC in her ass.' BF had not consented to this video being shared with anyone. Appellant made the pornographic video publicly viewable, and at the time of trial, the video had 817 views. Appellant had also sent a shortened version of the video to a group chat and another individual on the Kik messenger application. LW testified that while Appellant was engaged in a consensual sexual relationship with her, he showed her the video of BF."

All of this is irrelevant to the extramarital sexual conduct allegation. As already discussed, these are *not* facts and circumstances offered on the issue or relevant to the terminal element.

When broken down, these "facts and circumstances" are the extramarital sexual conduct *itself*. Furthermore, the extramarital sexual conduct, as defined by the facts above, is identical to LW except for the video, and the video is not a lawful distinction. Trial counsel argued both affairs identically. JA at 288-90, 300-01. Defense Counsel defended both affairs in the same breath. JA at 312-14. Yet, Amn Wells was convicted of his affair with BF, but not LW. JA at 42. What this demonstrates, vagueness and indiscriminate enforcement aside, is the extramarital sexual conduct *itself* is what was service discrediting.

Under such a construct, Amn Wells was unable to defend himself. *See, e.g.*, *Morissette*, 342 U.S. at 275 ("A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense."). The

Government contends that because Amn Wells was found not guilty of the conduct with LW he *is* able to rebut the Government's evidence. This is where the Devil's Article rears its ugly head again. Vagueness, the by-product of the merger of the elements, makes it impossible for servicemembers to know which affairs are criminal and how they can be defended against. The Government is not even "required to specifically articulate how the conduct is service discrediting." *Phillips*, 70 M.J. at 166. If that is true, independent of *Phillips*, then *only* the conduct itself can be defended against to avoid the terminal element's pernicious operation. In hampering the accused by eliminating an element, the Government reaps the benefit of not proving all the elements beyond a reasonable doubt, possible through *Phillips* and ultimately the plain language of Clause 2. Amn Wells's case epitomizes this problem because Amn Wells's conduct between BF and LW was identical, but apparently one was a crime and the other was not.

Therefore, Appellant respectfully requests this Court set aside and dismiss the findings of guilt for Specification 1 of Second Additional Charge I, and set aside the sentence.

CONCLUSION

Amn Wells's case resolves the issues embodied by *Phillips* and Clause 2 in a two-step process. This Court must first overturn *Phillips* because it is unworkable and poorly reasoned by violating the Constitution. The rules *Phillips* outlines for

how to determine whether certain acts are of a nature to discredit the service permit "per se" service discrediting conduct—or conclusive presumptions. Through sanctioning the elimination of an element by not requiring evidence of discredit to the service, *Phillips* operates in violation of the Constitution.

However, as the Government helpfully points out, *Phillips* is only doing what Clause 2, and the President's definition, requires. Gov. Ans. at 25-26. This means that Clause 2 itself is what sanctions "per se" service discrediting conduct. As "[i]t is not the province of this [C]ourt to rewrite a statute to conform to the Constitution," this Court does not have an avenue to save Clause 2 from unconstitutionality. *Medina*, 69 M.J. at 465 n.3. That is Congress's responsibility. *Id*. Consequently, once *Phillips* is overturned, Clause 2 should be held unconstitutional, and Amn Wells's conviction of a Clause 2 offense should be set aside along with his sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on February 9, 2024.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 6,994 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

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