IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES *Appellee* v. **Danielle E. DEREMER** Private First Class (E-2) U.S. Marine Corps *Appellant*	*Amicus Curiae* Brief Crim. App. Dkt. No. 202300205 USCA Dkt. No. 25-0158/MC

Brief of *Amicus Curiae* In Support of Neither Party

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INTEREST OF *AMICUS*

Boston University School of Law's Legislative Policy and Drafting Clinic (Clinic) has trained law students on developing legislative policy and drafting statutes for nearly 50 years. Students work for legislators and persons or organizations interested in proposing new legislation or amending existing bills. The Clinic also trains students in researching legislative history and methods of statutory interpretation by agencies and courts. The Fall 2024 Semester Clinic members were: Emily Anthony, Jackson Gossett, Carleigh "C.J." Hill, Andrew Katz, Sadie Keller, Myra Khan and Marc Wolf.

Amicus filed a brief with the U.S. Navy-Marine Corps Court of Criminal Appeals on this case, has no personal stake in the outcome of the proceedings, has not consulted either party on the contents of this brief, and is only interested in improving the military justice system and its processes.

ISSUES ADDRESSED

I. DID THE LOWER COURT ERR HOLDING APPELLANT, AT AN INTERVIEW WHERE SHE WAIVED HER RIGHT TO COUNSEL, WAS

ENTITLED TO 10 U.S.C. §1044E RIGHTS WHEN SHE WAS INTERVIEWED AS A SUSPECT?

II. DID THE LOWER COURT ERR HOLDING THAT SUPPRESSION IS AN APPROPRIATE REMEDY FOR A VIOLATION OF 10 U.S.C. §1044E?

RELEVANCE OF THE BRIEF

During the investigation into PFC Deremer's allegations of sexual assault, government investigators determined she was not a victim, no longer entitled to a VLC in advance of an interview where NCIS revealed she was the suspect of a crime, and succeeded in obtaining PFC Deremer's waiver of her right to counsel.

Amicus writes to provide the court with a statutory interpretation of 10 U.S.C. §1044e, where Congress provided new and sweeping legal services to military personnel who are alleged victims of a sexual offense. Congress created this statute because of past abuses by government investigators and the chain of command during sexual abuse investigations, including dismissing the alleged victim's allegations, accusing the alleged victim of an offense, or discouraging the alleged victim from making and pursuing sexual offense accusations.

The Court should interpret §1044e to provide Appellant, and any alleged victim of a sexual offense, with a substantive right to a Victim Legal Counsel (VLC), prevent the government from using internal military policies to terminate the attorney-client relationship, and to protect these newly established rights by excluding improperly obtained evidence from government use at trial.

SUMMARY OF ARGUMENT

This brief will argue:

Appellant was entitled to 10 U.S.C. §1044e rights when the government interviewed her as a suspect. Congress intended to require new and sweeping legal protections for the victims of alleged sex-related offenses through 10 U.S.C. §1044e. Despite these protections, the government investigators improperly excluded the Appellant's VLC during the second interview.

The suppression of evidence due to a violation of 10 U.S.C. §1044e is warranted as a deterrent to future government efforts to exclude Victims' Legal Counsel.

ARGUMENT

1. **Appellant was entitled to 10 U.S.C. §1044e rights when the government interviewed her as a suspect.**

    a. Congress intended to require new and sweeping legal protections for the victims of alleged sex-related offenses through 10 U.S.C. §1044e.

Congress enacted 10 U.S.C. §1044e in 2013 as a key part of an ongoing effort to address the persistent and troubling problem of sexual assault within the United States Military. The legislative history for the statute shows how pervasive Congress considered the problem and the members' hope that Victims' Legal Counsel (VLC) would safeguard against retaliation and other forces preventing victims from coming forward with sexual offense allegations.

Courts should consider the "plain language" of the statute first, and legislative history evidence should not "'muddy' the meaning of 'clear statutory language.'" *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S __, 139 S. Ct. 2356, 2364 (2019). Still, the use of legislative history to understand Congress's purpose in passing a statute can help a court effectively carry out the Congress's objectives for the

statute. *See* Stephen Breyer, *Making Our Democracy Work*, 88-98 (Vintage Books 2011). As Justice Frankfurter wrote:

> A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning.

United States v. Monia, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting). A statute's legislative history can illuminate Congress's purpose by explaining "the mischief at which the statute was aimed." William D. Popkin, *A Dictionary of Statutory Interpretation*, 167 (2007). Further, there is no constitutional objection to using legislative history to understand Congress's purpose since it is not presented to rival the legislative text but is another piece of evidence to understand the statute. *Id.* at 168. Indeed, the U.S. Supreme Court in recent years has tried to determine Congress'

purpose, even if it does not admit or highlight this fact. See, e.g. *King v. Burwell,* 576 U.S. 473 (2015)("[I]n every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan."); *Pulsifer v. United States*, 601 U.S. __ (2024)(ambiguous text required "context" that one proposed reading of a federal statute results in offender with a serious criminal history being eligible for a lesser sentence than other offenders); *Fischer v. United States*, 603 U.S. __ (2024)(overturning a conviction for obstructing an official proceeding where alleged behavior was far different from the acts and situations that prompted the legislation.)

The legislative history for §1044e demonstrates Congress' bi-partisan agreement as to why the statute was needed and what it would accomplish.

A 2012 Department of Defense report found that approximately 26,000 men and women serving in the armed services had experienced some form of unwanted sexual contact in the past year, yet only 3,374 of those assaults were reported. Dep't of Def., *Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012* 24-25 (2013) [*DOD Annual Report on Sexual Assault*]. In 2013, at a Senate Armed Services Committee's Subcommittee on

Personnel hearing, subcommittee chair Senator Kirsten Gillibrand (D-N.Y.) expressed concern over the "estimated 19,000 sexual assaults [that] happened in 2011 alone" and noted a need for "institutional accountability and the prosecution of cases to create a real deterrent to criminal behavior." *Testimony on Sexual Assaults in the Military,* 113th Cong. 2-3 (2013). Subcommittee ranking member Senator Lindsay Graham (R-S.C.), agreed there was a lack of accountability for perpetrators and spoke of victims being intimidated in reporting assault resulting in almost 50% of victims not speaking up out of fear of reprisal. *Id.* at 4-5. While sexual assaults are underreported everywhere, the problem is especially troublesome in the military due to a history of retaliation against those who make sexual offense allegations. Sixty-two percent of women service members who experienced and reported unwanted sexual contact had experienced at some form of retaliation. *DOD Annual Report on Sexual Assault* at 27.

Preventing and mitigating retaliation through representation by a VLC was clearly a concern for Congress in adopting §1044e as part of the National Defense Appropriations Act of 2014. In an unusual show of support, the "Dean of women senators," Senator Barbara Mikulski (D-Md.) organized several of her colleagues to speak on the bill's

sexual assault in the military's provision prior to the general debate, including: Senator Susan Collins (R-Me.), Senator Kelly Ayotte (R-N.H.), Senator Patricia Cantwell (D-Wash.), Senator Lisa Murkowski (R-Alaska), Senator Amy Klobuchar (D-Minn.), Senator Tammy Baldwin (D-Wis.), Senator Claire McCaskill (D-Mo.), Senator Patty Murray (D-Wash.), and Senator Elizabeth Warren (D-Mass.). *Sexual Assault in the Military*, 159 Cong. Rec. S8143-53 (daily ed. Nov. 19, 2013).

Senator Mikulski stated that sexual assault in the military had been a constant problem during her 25 years in the Senate, shared the story of a midshipman at the Naval Academy being chained to a urinal and taunted by her fellow students, and referenced the 1991 Tailhook scandal. *Id*. at S8145. Tailhook, where 26 women were sexually assaulted while traversing a "gantlet" of drunken officers, implicated over 70 Navy and Marine officers who either committed assaults, were witnesses, hindered the investigation, or otherwise violated the military's standards of conduct. *See* John Lancaster & Ann Devroy, *Head of Navy Quits in Tailhook Scandal*, Wash. Post (June 26, 1992, 8:00 PM), https://www.washingtonpost.com/archive/politics/1992/06/27/head-of-navy-quits-in-tailhook-scandal/7074a7b3-c6b6-4785-a7d6-204cf077f57a/. Senator Klobuchar cited a 2012 scandal at Lackland Air Force Base where at least 12 basic training

instructors were accused of sexually assaulting female trainees. 159 Cong. Rec. at S8149. Senator Tammy Baldwin (D-Wis.) spoke of a constituent who was sexually assaulted the year she joined the army while doing advanced individual training at Fort Meade. *Id.* at S8150. After reporting her assault to her commanding officer, she was interrogated for hours over numerous days and ultimately forced to drop the charge. *Id.* While her assailant was not charged with a crime, she was punished for fraternization. *Id.* Senator Baldwin stated, "we must do everything that we can to make sure that all victims of sexual assault have the support they deserve." *Id.*

Senator Mikulski, along with several other senators, quoted the estimate of 26,000 sexual assaults in the military in the past year from the 2012 Department of Defense report cited above. *See, e.g.*, 159 Cong. Rec. S8145, 49, 51 (statements of Senators Mikulski, Klobuchar, and Murray). Three senators went so far as to declare sexual assault in the armed forces an "epidemic." *See id.* at S8147, 50, 52 (statements of Senators Cantwell, Baldwin, and Murray).

Senator Mikulski stated that "the women of the Senate" agreed on the goals of the legislation; to "make sure we get help to the victims." *Id.* at S8145. Two particular problems the senators repeatedly highlighted were retaliation against

victims bringing allegations of sexual offenses and the lack of reporting of such assaults. Several senators stated they wanted to see an end to the retaliation against service members who report sexual offenses. *Id*. at S8146-47, 51 (statements of Senators Mikulski, Collins, Ayotte, and McCaskill). Senator Cantwell stated, "We need to put an end to an environment that allows sexual assault to occur and that lets the perpetrators go unpunished and discourages victims of sexual assault through fear and intimidation." *Id*. at S8148. Related to retaliation was the problem of underreporting. *See id*. at S8147, 50 (statements of Senators Ayotte and McCaskill relating victims' reluctance to report to fear of retaliation). Sen. Murray stated that in the past year only 3,000 victims even reported an offense, and Senator Klobuchar noted that of those only 880 alleged perpetrators faced any kind of discipline for a sex crime. *Id*. at S8151 (statement of Senator Murray); *Id*. at S1849 (statement of Senator Klobuchar). Senator Warren pointed out the "outrageous situation" that about half of all female sexual assault victims in a 2012 DOD survey indicated they did not report these crimes because they believed such reports would simply be ignored. *Id*. at S8152. When so many service members believe their report will not be taken seriously, the risk of facing retaliation is immense. Senator Collins stated her goal was to ensure that survivors

"do not think twice" about reporting an assault for fear of retaliation or damage to their careers. *Id*. at S8146.

Senator McCaskill stated that if we are going to ask victims to "lay herself or himself bare to the public about what has happened" it was necessary that "every single victim gets their own lawyer." *Id*. at S8151. The existing victim advocates provided by the Sexual Assault Prevention and Response (SAPR) Program were not enough, and legal counsel would perhaps encourage more victims to come forward and perhaps make an unrestricted report.

The VLC program created in 10 U.S.C. §1044e was based on an Air Force pilot program that provided alleged victims of sexual violence access to a Special Victims' Counsel. Speaking before the Senate Armed Services Subcommittee on Personnel, Lt. Gen. Richard C. Harding testified:

> This pilot program's primary purpose is to give the very best care to our people . . . [SVC's] establish an attorney-client relationship with victims, and they zealously represent on their client's behalf, thereby protecting victims' privacy and immeasurably helping victims not feel revictimized by having to endure alone what can be a complex, exhausting and often confusing criminal justice process.

Testimony on Sexual Assaults in the Military, 113th Cong. 49 (2013). General Mark A. Welsh also testified to the House Armed Services Committee that the SVC's "job is to advise the victim and to assist the victim throughout the investigatory and prosecutorial phases of their case . . . . so that [victims] do not feel like they have been victimized a second time by the process." *A Review of Sexual Misconduct by Basic Training Instructors at Lackland Air Force Base, Hearing Before the H. Comm. on Armed Servs.*, 113th Cong. 200 (2013).

Congress understood that extending the Air Force program throughout the military would be a dramatic change for victims of sexual offenses. Senator Klobuchar emphasized the importance of providing information to the victims of sexual offenses, including explaining the crime, legal process, and outcome. 159 Cong. Rec. at S8149. Senator Ayotte stated these victims "will actually now have their own lawyer, someone to represent them and their interests, to know that if they come forward there is someone looking out for them." *Id.* at S8147. Senator McCaskill praised the creation of special victim's counsel, "I don't think many Members understand how *extraordinary* that is. That reform alone will make our military the most victim-friendly criminal justice system in the world. In no other criminal justice system anywhere—

civilian, military, United States our allies—does a victim get that kind of support." *Id*. at S8151 [emphasis added]. Senator Murray argued that special victims counsel would add great value, "For example, when a young private first class is intimidated into not reporting a sexual assault by threatening her with unrelated legal charges such as underage drinking, this new legal advocate would be there to protect her and tell her the truth." *Id*. at S8151.

The VLC's role as codified in §1044e is extraordinary, providing alleged victims legal consultation and representation concerning: potential criminal liability of the victim stemming from the sex-related allegations (10 U.S.C. § 1044e(b)(1)); regarding the Victim Witness Assistance Program, (10 U.S.C. §1044e(b)(2)-(3)); civil litigation against other parties (10 U.S.C. §1044e(b)(4)); the military justice system, including the roles and responsibilities of investigators and the government's authority to compel cooperation and testimony (10 U.S.C. §1044e(b)(5)); representing the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense (10 U.S.C. §1044e(b)(6)); assistance in personal civil legal matters (10 U.S.C. §1044e(b)(8)(A)); regarding "any proceedings of the military

justice process in which a victim can participate as a witness or other party" (10 U.S.C. § 1044e(b)(8)(B)); and assistance with incidents of retaliation, including the filing of complaints and related to any resulting military justice proceedings (10 U.S.C. § 1044e(b)(10)).

From this sweeping list of responsibilities, Congress clearly intended the VLC to have a significant and active role advising and representing alleged sexual assault victims beyond those of a victim advocate, criminal defense counsel, or civil attorney. The VLC, through counsel and representation, are intended give victims the support needed to come forward and ensure the military takes the allegations seriously, the victim gets the services they need, and to prevent retaliation by the command structure and government investigators though threats of civil or criminal actions.

b. The government investigators improperly excluded the Appellant's VLC during the second interview.

The government argues that Appellant was not entitled to her VLC during the second interview because NCIS closed her case "as unfounded" and thus, she was not a true victim

of a sexual assault. Proceeding as if it was a new case, the investigators obtained Appellant's waiver of counsel. The statute, however, does not provide only those who the government determines to be "true" victims with VLC advice and representation. Instead, §1044e requires the military to provide a VLC to anyone who alleges being the victim of the listed sexual offenses.

Section 1044e mandates the branch secretary to appoint a VLC to those who allege a sexual offense—"[t]he Secretary concerned *shall* designate legal counsel . . . for the purpose of providing legal assistance to an individual described in paragraph (2) who is the victim of an alleged sex-related offense[.]" 10 U.S.C. §1044e(a)(1) (emphasis added). By the plain language of the statute, the secretary and government investigators, do not have discretion to decide who is deserving of a VLC and who is not. There is no requirement for proof, not even probable cause, that the sexual offense took place before a VLC is assigned. Further, the statute requires the designation of a VLC "regardless of whether the report of that offense is restricted or unrestricted." 10 U.S.C. §1044e(a)(1). Therefore, it does not matter whether the alleged victim plans to formally proceed with charges against the alleged perpetrator; the alleged victim may never prove what did or did not happen.

Under the canons of statutory construction, the term "victim" includes any person who alleges they have been injured, rather than only those who have factually or credibly been injured. The general-terms cannon states that "general terms should be interpreted generally" and not arbitrarily construed narrowly. *See, e.g.*, *United States v. Weiss*, 52 F.4th 546, 552-53 (3d Cir. 2022)(interpreting the term "appeal" broadly where the statute does not indicate the term should be given its narrow meaning) (citations omitted). While "victim" might often mean one who has factually been injured, this general term may also refer to those who allege injury. For instance, in Rule 412 of the Federal Rules of Evidence, the term "victim" is a general term and defined to include "an alleged victim." Fed. R. Evid. 412(d). Furthermore, 10 U.S.C. § 832 similarly defines a victim as anyone who "is *alleged* to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered[.]" 10 U.S.C. § 832(h) (emphasis added). South Carolina, where the alleged sex-related offense occurred, broadly defines a "victim" of criminal sexual conduct as "the person *alleging* to have been subjected to criminal sexual conduct." S.C. Code Ann. § 16-3-651(i) (1976) (emphasis added). The terms "victim" in 10 U.S.C. §1044e should likewise be read generally.

Next, the rule against superfluities instructs courts to give meaning to all of a statute's provisions. *See* Norman J. Singer, *Statutes and Statutory Construction § 46.06*, 181-86 (6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (footnotes omitted)). If government investigators can determine who is a valid or unfounded victim, the term "alleged" used throughout the statute, becomes superfluous. Victim status would depend on law enforcement's determination of the person's credibility, rather than the allegation itself. This Court should likewise read the statutory wording "any allegation" broadly rather than limit VLC involvement to probable or credible allegations.

Moreover, under the presumption of consistent usage canon, "identical words used in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (citation omitted). By the terms of the statute, a victim of an alleged sex-related offense shall be offered VLC assistance upon report of an alleged sex-related offense when the victim seeks assistance from various personnel. 10 U.S.C. § 1044e(f)(1). There is no requirement for investigation first to merit a VLC, so a

"victim" must mean any qualifying individual who alleges they were the target of an alleged sex-related offense. Appellant received a VLC when she made the report, and was therefore entitled to the full slate of consultation and representation by the VLC found in §1044e(b).

Congress's amendments to the legislation also demonstrate it intended the term "victim" to include anyone who makes an allegation of a sex-related offense. The Senate committee-reported bill required the military to provide a VLC "to members of the Armed Forces, and dependents of members, who are victims of a sexual assault committed by a member of the Armed Forces." National Defense Authorization Act for Fiscal Year 2014, S. 1197, 113 Cong. § 539(a)(1) (2013). In contrast, the House language, which became part of 10 U.S.C. §1044e, specifically used the added phrase, "victim of an alleged sex-related offense." Staff of H. Comm. on Armed Services, 113th Cong., Legislative Text and Joint Explanatory Statement to Accompany H.R. 3304, Public Law 113-66 at 302 (Comm. Print); *see also* 10 U.S.C. §1044e(a)(1). Congress's decision to use the more expansive House language indicates that VLC assistance was not reserved for those who could, or were willing to, prove the

assault, but for all service members who make such an allegation.

Speaking on behalf of the legislation, Senator Mikulski stated the reforms would help "those who *feel* they have been victimized . . . [and] to be sure they are not victimized by the very system they count on." 159 Cong. Rec. S8146 (statement of Senator Barbara Mikulski) (emphasis added). Similarly, Senator Baldwin's constituent, as discussed previously, was clearly not treated as a victim because the government did not believe her allegations of being sexually victimized or wanted to use her alleged fraternization to intimidate her into dropping the charges. *Id*. at S8150 (statement of Senator Tammy Baldwin). Congress understood the difficult nature of bringing allegations of sexual offenses—especially in the military. Members clearly believed many allegations had not been formally charged because: the victim is embarrassed or ashamed, the allegation will be hard to prove as a so-called "he said / she said" situation, the alleged victim did not have clean hands because they committed a violation of the Uniform Code of Military Justice such as fraternization or underage drinking, and because the chain of command, with the help of government investigators, have a history of intimidating victims into silence. The mandate of §1044e is to

assign a VLC to anyone who alleges that they were injured or that someone else attempted to injure them. If government investigators can unilaterally determine the veracity of a victim's story or determine the victim was also guilty of an offense and use that information to terminate or undermine the relationship between the alleged victim and the VLC, §1044e will be rendered far narrower than Congress intended and the statutory language requires.

c. Individuals assigned a VLC under 10 U.S.C. §1044e are entitled to have the VLC represent them in all proceedings, including government interviews.

Under the clear terms of §1044e, once the VLC was assigned to Appellant, an attorney-client relationship existed, and the VLC was to represent the alleged victim as her attorney at a broad range of specific investigatory and adjudicatory events. Importantly, this list is not exclusive to maximize the assistance provided to alleged victims.

Congress clearly intended the alleged victim and the VLC to have an attorney-client relationship. 10 U.S.C. § 1044e(c) ("The relationship between a Special Victim's Counsel and a victim in the provision of legal advice and assistance shall be the relationship between an attorney and

client."). The use of the mandatory language "shall" requires the VLC to assume certain duties to the alleged victim. *See United States v. Harrington*, 83 M.J. 408, 419 (C.A.A.F. 2023) ("Special victims counsel represent the victim's interests instead of the government's."). A VLC owes a duty "to represent the interests of the victim–and only the victim," even when in conflict with the government, by providing a representation independent from and unbiased by government influence. *LRM v. Kastenburg*, No. 2013-05, 2013 CCA LEXIS 286 at *7 n. 7 (A.F. Ct. Crim. App. Apr. 2, 2013) (unpublished) (citation omitted). A third-party terminating the relationship without the alleged victim's consent or knowledge should be considered a due process violation.

As stated above, Congress clearly intended the VLC to provide greater counsel and protections to alleged victims than the military had provided in the past. Congress intended the VLC to go beyond that of the Sexual Assault Response Coordinators (SARCs) and Victim Advocates (VAs). *See* Sec'y of Defense, MARADMINS 583/13, *Establishment of the Marine Corps Victims' Legal Counsel Organization (VLCO)*, para. 1 (Oct. 31, 2013) [MARADMINS 583/13, para. 1]. The VLC's role is to represent the alleged victim at a wide range of events after the allegation is made. The statute specifies the, "[t]ypes of legal assistance authorized by subsection (a)

include the following…." 10 U.S.C. § 1044e(b) (emphasis added). The use of the word "include" and lack of limiting qualifiers imply that the accompanying list of the duties and roles a VLC may perform is neither exhaustive nor exclusive. The statutory term "include," is typically the introductory term for an incomplete list of examples. *See* 82 C.J.S. *Statutes* § 368 (emphasis added).

Congress has also clarified that the VLC was to be an active participant throughout the legal proceedings related to the alleged sexual offense. The statute, as originally passed, read:

> "(b) Types of Legal Assistance Authorized.- The types of legal assistance authorized by subsection (a) include the following:
>
> (6) *Accompanying* the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense."

10 U.S.C. § 1044e(b)(6) (2013) (amended 2014) (emphasis added). In 2014, however, the National Defense Authorization Act of 2015 amended §1044e(b)(6) to substitute the word

"accompanying" with the word "representing." Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 § 534, 10 U.S.C. §1044(e)(b)(6) (2014).

A VLC "accompanying" victims at proceedings could be mistaken for the role played by a victim advocate. By changing that word to "representing," Congress made clear that the VLC is the victim's attorney, in "any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense." 10 U.S.C. §1044e(b)(6). While the Manual of the Judge Advocate General does not explicitly define "representing" or "accompanying," the words are never used interchangeably and have distinct uses from each other. *See generally* Dep't of the Navy, Judge Advocate General Instr. 5800.7G, *Manual of the Judge Advocate General*, sec. 0131 (Dec. 1, 2023) [JAGMAN]. "Representing" is used to describe: the nature of pretrial preparation by counsel, the attorney-client relationship itself, and how counsel champions a party's interests. *Id.* By contrast, the word "accompanying" is used in the document only in the traditional dictionary sense of the word, "to go with or attend as a companion[.]" *Id*. at sec. 0225; *Accompany*, Merriam-Webster (last visited July 8, 2025), https://www.merriam-webster.com/dictionary/accompany.

Similarly, the use of "represent" in the JAGMAN aligns with the dictionary definition of the word in this context, "to manage the legal and business affairs of." *Represent*, Merriam-Webster (last visited July 8, 2025), https://www.merriam-webster.com/dictionary/represent. By the plain terms and evolution of the statute, Congress intended to provide alleged victims of sexual offenses with robust legal protections and ample access to legal counsel as they navigate not only the military criminal justice system, but also the chain of command issues and government investigations.

The government argues the two NCIS interviews were separate matters, allowing investigators to not inform the Appellant's VLC of the second interview and obtaining Appellant's waiver of counsel easier. The court below correctly dismissed that argument.

In this case, an NCIS special agent, based on an unpublished NCIS policy, decided the Appellant was no longer entitled to her assigned VLC because her NCIS "title" had changed from "victim" to "subject." The record is clear that the VLC was never even informed the second interview was going to take place. Had the VLC been present, would

the Appellant have waived her rights and made statements to the investigators? Perhaps—but perhaps not. The VLC, who had an existing attorney-client relationship with the Appellant, likely would have advised the Appellant to not waive her right to counsel and make a statement until they had conferred further or spoken to a criminal defense attorney. This may have been inconvenient for government investigators and perhaps delayed the investigation or prosecution, but the VLC would have fulfilled Congress' vision for providing legal representation to people who allege sexual offenses.

Judges Gross and Harrell took issue with the majority opinion reviving this Court's decision in *United States v. McOmber*. *See, United States v. Deremer,* NMCCA No. 202300205 J. Gross concurring, p. 5; J. Harrell, concurring and dissenting in part, p. 7 (*citing*, *United States v. McOmber,* 1 M.J. 380 (C.M.A. 1976) *overruled by United States v. Finch*, 64 M.J. 118, 124 (C.A.A.F. 2006)). There is no need for a *McOmber* revival; Congress, reacting to a very real military problem with powerful protections in the form of legal representation for a specific class of alleged victims passed 10 U.S.C. §1044e. Congress's protections should not be undone by either the military chain of command or government investigators.

This Court should, therefore, find that Appellant continued to be protected by §1044e and reject the argument that she properly waived her right to counsel without the benefit of her VLC during the second interview.

2. **Suppression of evidence due to a violation of 10 U.S.C. §1044e is warranted as a deterrent to future government efforts to exclude Victims' Legal Counsel.**

The lower court was correct to suppress the evidence obtained during the second NCIS interview, in that this was the appropriate remedy for the government violating Appellant's due process rights created by 10 U.S.C. §1044e in violation of the Fifth Amendment of the U.S. Constitution.

Statutes and regulations can establish constitutionally protected liberty interests when they create some sort of "expectation or interest[.]" *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' . . . or it may arise from an expectation or interest created by state laws or policies[.]") (citations omitted). However, to be constitutionally protected, the

"expectation or interest" must be "a present and legally recognized substantive entitlement[,]" rather than a "judicially unenforceable substantial hope[.]" *Kerry v. Din*, 576 U.S. 86, 98 (2015) (plurality opinion). Generally, such an expectation or interest becomes a legally recognized substantive entitlement when a statute sets forth criteria that can be met by an individual and uses sufficient mandatory language to cabin officials discretion. *See Hewitt v. Helms*, 459 U.S. 460, 472 (1983) ("[W]e are persuaded that the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest."), *overruled in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

Section 1044e creates a present and legally recognized substantive entitlement, as the statute is replete with mandatory language and requires specific substantive predicates regarding who is entitled to a VLC. First, the statute begins with the declaration that the Secretary "*shall* designate legal counsel" to an individual meeting the criteria in paragraph (2) "who is the victim of an alleged sex-related offense[.]" 10 U.S.C. §1044e(a)(1) (emphasis added). Moreover, the statute commands that the "nature of

relationship" between a VLC and the victim "*shall* be the relationship between an attorney and client." 10 U.S.C. §1044e(c) (emphasis added). Finally, while the statute does give some leeway for "exigent circumstances," the statute further demands that "notice of the availability of a [VLC] *shall* be provided to an individual described in subsection (a)(2) before any military criminal investigator or trial counsel interviews, or requests any statement from, the individual regarding the alleged sex-related offense." 10 U.S.C. §1044e(f)(2) (emphasis added). The statute explicitly creates an attorney-client relationship between the VLC and the alleged victim, and that relationship may generally only be ended by the client or the attorney. 10 U.S.C. §1044e(c); *see* JAGMAN, para. 0131.d(2). While the government can sever the relationship on some occasions where "good cause exists," this is generally limited to situations where an attorney is rendered unavailable, such as through counsel's release from active duty or terminal leave. *see* JAGMAN, para. 0131.d(3). Accordingly, given that Appellant met the criteria to have a VLC, the statute's terms sufficiently cabined the government's discretion to establish a protected right.

PFC Deremer had a legitimate expectation to consult with a VLC regarding potential legal liability in the aftermath

of filing her report. The government effectively terminated her attorney-client relationship by unilaterally closing the alleged sexual assault investigation, thus depriving Appellant of her liberty without due process of law. The U.S. Supreme Court "requires courts to consider three factors when determining if procedures are constitutionally sufficient: (1) the private interest to be affected by the action; (2) the risk of erroneous deprivation of that interest through the procedures that were used, and the probable value of added procedures; and (3) the government's interest, including the fiscal and administrative burdens of added procedures." *United States v. Al-Hamdi*, 356 F.3d 564, 575 (4th Cir. 2004) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Here, the private interest is incredibly important—PFC Deremer was a very young adult, away from home for the first time, and having potential mental health struggles under the difficult pressures of Parris Island. *See* Appellant's Brief and Assignments of Error at 2-6, *United States v. Deremer*, N-M. Ct. Crim. App. (No. 202300205) (filed Mar. 8, 2024). PFC Deremer also faced serious legal consequences for making a false statement to NCIS investigators. Second, the risk of erroneous deprivation through the procedures used is also incredibly high. NCIS closed the original sexual assault investigation after simply speaking with other witness

without the benefit of cross-examination or corroboration. *Id.* at 3-4. This Court should not interpret §1044e in such a way that will allow government investigators or the chain of command to unilaterally remove legal representation that Congress so clearly intended to provide to alleged sexual offense victims. Senator Murray was prescient when she described a young private first class being intimidated with unrelated legal charges and needing a VLC to protect her. 159 Cong. Rec. at S8151. Third, providing a clear procedure or adversarial proceeding to determine whether a victim should keep their VLC is a small administrative burden, given Congress's clear concern regarding the military's history of preventing sex-related victims from seeking redress. The statute created due process protections under the Fifth Amendment.

The court below, therefore, correctly held the trial judge abused his discretion by denying the Defense motion to suppress Appellant's second interview with NCIS. (*Deremer*, Opinion of the Navy-Marine Corps Court of Criminal Appeals, p.12). Chief Judge Holifield and Judge Harrell both argued that Congress did not include a remedy, including the exclusionary rule, for violations of the VLC provisions. (*Deremer*, C.J. Holifield concurring and dissenting in part, p.

2; J. Harrell concurring and dissenting in part, p. 2). Chief Judge Holifield writes, "[I]f Congress intended criminal courts to enforce the victim-focused rights of §1044e by providing remedies in the criminal law context, it would have explicitly said so." (*Deremer*, C.J. Holifield, p. 3).

The exclusionary rule is a judicially created remedy to address evidence gathered due to unlawful police activity. *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014)(citing, *Weeks v. United States*, 232 U.S. 383 (1914), overruled on other grounds by *Mapp. v. Ohio*, 367 U.S. 643 (1961). Suppression depends on the gravity of government overreach and the deterrent effect of applying the rule. *Wicks*, 73 M.J. at 103 (citing, *Herring v. United States*, 555 U.S. 135 (2009). The exclusionary rule deters deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *United States v. Harborth*, __M.J.__, 2025 WL 1607400 (U.S. Armed Forces) *8 (C.A.A.F. 2025) (citing, *Herring v. United States*, 555 U.S. 135, 144 (2009). Evidence derived from an unlawful interrogation is considered the "fruit of the poisonous tree" and generally not admissible at trial. *United States v. Darnell*, 76 M.J. 326, 331 (C.A.A.F. 2017). The Court should consider the purpose and flagrancy of the official misconduct. *Darnell*, 76 M.J. at 331

(citing, *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)). The investigators' misconduct does not have to "outrageous," but rather "unwise, avoidable, and unlawful." *Darnell*, 76 M.J. at 331.

Congress clearly intended VLCs to protect alleged sex-offense victims in several contexts including victim specific situations and in civil and criminal matters as well. Trying to define the VLC role as victim specific, civil law specific, or criminal law specific defeats the purpose of the statute. In this case, government investigators circumvented the protections of §1044e, making the exclusionary rule necessary. Congress collectively knows that since 1914 federal courts have excluded evidence gathered from police misconduct. *H.V.Z. v. United States*, 85 M.J. 8, No. 23-0250/AF, 2024 CAAF LEXIS 410, at *9 (C.A.A.F. July 18, 2024)(presumption Congress knows the law). Had Congress included a different remedy, the courts would likely interpret that as a substitution for, or a limitation to, the exclusionary rule. Here the NCIS investigator knowingly violated the Appellant's right to representation during the second interview by putting an unpublished NCIS policy above the dictates of Congress in §1044e. If this Court does not suppress the improperly gained evidence, government investigators

may simply find ways, likely involving their own unpublished policies, to undo Congress' sweeping protections for alleged victims of sexual abuse in the military.

CONCLUSION

This Court should interpret §1044e in a manner consistent with its purpose and statutory terms; Congress intended to provide sweeping new protections to alleged victims of a sexual offense in the military. Victim Legal Counsels play a key role by representing victims not just in the military justice system, but in civil courts and accessing benefits and services. The VLC program was necessary due to the poor record of the military protecting alleged victims —or even taking sexual offense allegations seriously—in the past. Narrowing the protections of §1044e by allowing the government to decide who is deserving of a VLC, obtaining waivers of counsel by reclassifying victims to subjects, and using the resulting fruit of the poisonous tree, will seriously undermine the efforts of Congress in passing the statute.

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CERTIFICATE OF COMPLIANCE

I certify that this *amicus* brief complies with the maximum length authorized by Rule 26(d) as it contains 6404 words not including front matter, the certificate of compliance, and the certificate of filing and service. This brief complies with the typeface and typestyle requirements of Rule 37 because it was prepared using Century Schoolbook 14-point font.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means on 11 July 2025, to the Clerk of the Court; Government Appellate Division, and Counsel for Appellant.

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