IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLANT
v.	)	
Lieutenant Colonel (O-5) **ASHLEY R. ELLIS**, United States Army, Appellee	)	Crim. App. Dkt. No. 20240254
	)	USCA Dkt. No. 25-0197/AR

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

Issues Presented

I. WHETHER THE ARMY COURT ERRED BY FINDING APPELLANT HAD NOT WAIVED WHETHER THE MILITARY JUDGE SHOULD HAVE INSTRUCTED THE PANEL ON THE STATE OF LAW OF THE 1ST AMENDMENT.

II. WHETHER THE ARMY COURT ERRED BY OMITTING ANALYSIS REGARDING FORFEITURE ON WHETHER THE MILITARY JUDGE SHOULD HAVE INSTRUCTED THE PANEL ON THE STATE OF THE LAW OF THE 1ST AMENDMENT.

III. WHETHER THE ARMY COURT ERRED BY FINDING A MANDATORY PANEL INSTRUCTION ON THE STATE OF THE LAW OF THE 1ST AMENDMENT THAT THE MILITARY JUDGE FAILED TO GIVE.

IV. WHETHER THE ARMY COURT ERRED BY FINDING THE MILITARY JUDGE NEEDED TO PROVIDE A PANEL INSTRUCTION REGARDING A QUESTION OF LAW.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

Statement of the Case

On 17 May 2024, an officer panel sitting as a general court-martial convicted appellee, contrary to his plea, of one charge with one specification of conduct unbecoming of an officer, in violation of Article 133, UCMJ, and found him not guilty of all other charges and specifications. (JA 16, 114-15, 117-22).

The military judge sentenced appellee to a reprimand. (JA 16, 116). On 31 May 2024, the convening authority took no action on the finding and approved the sentence. (JA 23). On 19 June 2024, the military judge entered judgment. (JA 22). On 23 May 2025, a panel on the Army court issued its Summary Disposition, setting aside the finding and ordering a rehearing. (JA 6-10).

Statement of Facts

A. Appellee's Criminal Conduct.

Appellee is and has been an officer in the United States Army during these events. (JA 154-55). Ms. JS (hereinafter the "Victim") was also an officer, though now retired; married appellant on 21 December 2006; and remained so married

through appellee's trial. (JA 48-49, 154-55). Appellee and the Victim have two children, a 16-year-old son and a 7-year-old daughter. (JA 51). Appellee started having an affair with someone outside the marriage during July 2022, and the Victim became aware of his infidelity that autumn. (JA 51-52). As a result, their marriage began to deteriorate; they decided to pursue divorce, and both agreed to start seeing other people. (JA 52).

In the middle of April 2023, appellant sent the Victim an 88-second prerecorded video to her phone. (JA 53, 153). The video pans through the Victim's closet focusing on her clothes. (JA 153). In the video, appellant can be heard saying, "

> Got some more ho dresses, right. Look at this. I mean, it's like a swim suit, but actually not a swimsuit. You know a lot of shit that…never been Jana's style but all of a sudden is. I mean damn, guess my tussin, guess my cousin taught you real good how to dress like a ho, right."

(JA 153).

B. Procedural History

Prior to trial, the Government withdrew Specification 1 of Charge III. (JA 16). After that, but still before trial, appellee moved for the military judge to dismiss the remaining Article 133 Specification, alleging the 1st Amendment to the United States Constitution [1st Amendment] protected his conduct. (JA 33, 125-38). During the Article 39(a), the military judge asked the Government how he was to instruct panel members specifically on 1st Amendment matters regarding the

Specification. (JA 37). The Government responded any instruction should focus on whether the conduct met the standards expected of an officer. (JA 37-40). In response, counsel for appellee reiterated that the 1st Amendment protected appellee's conduct. (JA 40-42). Appellee's counsel did not request a 1st Amendment panel instruction as alternative relief. The military judge denied appellee's motion after applying the Clear and Present Danger standard set out in *United States v. Hartwig*, 39 M.J. 125 (C.M.A. 1994) [the Clear and Present Danger standard]. (JA 43, 146-51).

At the close of evidence, appellee renewed his motion to dismiss the Article 133 Specification on 1st Amendment grounds and for being void for vagueness. (JA 72-75). The government responded by articulating the Clear and Present Danger standard. (JA 75-77). The military judge also articulated the Clear and Present Danger standard and then deferred ruling. (JA 78-79).

The military judge next discussed panel instructions with the parties. (JA 79-94). The military judge identified he would give the standard panel instruction regarding Conduct Unbecoming an Officer which related only to the Article 133 Specification and no other Charge or specification. (JA 89). Neither party objected. (JA 89). The military judge proceeded to identify all other instructions he intended to give. (JA 89-90). He then asked the parties if there were any other specific instructions either were requesting. (JA 91). Appellee's counsel requested several

instructions, none relating to Conduct Unbecoming an Officer nor the 1st Amendment. (JA 91-93).

The military judge held an Article 39(a) hearing the next morning to complete coordination on panel instructions. (JA 95). At the beginning of this hearing, the military judge summarized for the record what had previously occurred during several R.C.M. 802 conferences and email exchanges regarding panel instructions. (JA 95). The military judge identified the forty-one pages of panel instructions he intended to give and asked both parties if either party had objections to a proposed non-standard instruction. (JA 96). Neither party objected to this instruction. (JA 96).

Counsel actively corrected the military judge and provided comments during the lengthy panel instruction process. (JA 100-03). However, neither party objected when the military judge provided the panel instruction for Conduct Unbecoming an Officer. (JA 104-05). At no point was an objection nor request made to the panel instructions relevant to Conduct Unbecoming an Officer, the 1st Amendment, or the Clear and Present Danger standard.

After panel instructions concluded, the military judge asked outside the presence of the panel, "Are the parties satisfied that I did correctly, subject to all the objections and such, correctly advise the members as to all the substantive law in this case?" (JA 107). Both parties answered in the affirmative. (JA 107). The

military judge then denied appellee's renewed motion to dismiss the Specification. (JA 112-13). After doing so, the military judge again asked whether there were any other matters to address while the panel deliberated. (JA 113). Both parties answered there were not. (JA 113).

C. Summary Disposition

In its Summary Disposition, the Army court found the following: that appellee moved to dismiss the relevant specification before trial and at the close of evidence, "essentially arguing the First Amendment protected his private speech to this spouse"; these denials were, "well within reasoned the range of reasonable judicial discretion…including the need for adequate panel instructions"; the military judge gave the panel instructions on Article 133, Conduct Unbecoming an Officer; and the military judge asked the parties whether they were "satisfied I correctly, subject to all the objections and such, correctly advised the members as to all of the substantive law in this case," with all parties answering affirmatively. (JA 7-8).

In the Law and Discussion section, the Army court cited to the 1st Amendment solely identifying its protections related to speech. (JA 8). The Army court then cited to *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006), to state the standard for reviewing whether a military judge failed to provide a

mandatory instruction. (JA 8). The Army court, however, did not identify any authority requiring a panel instruction regarding the 1st Amendment. (JA 8-9).

While the Army court mentioned the legal standards for waiver and forfeiture, it only discussed waiver in its analysis. (JA 9). The Army court declined to find the issue of whether the military judge had failed to give a mandatory panel instruction as waived. (JA 9). It did so reasoning, "the military judge's broad 'subject to all the objections and such' caveat…transmogrified the defense's previous motions into objections to the instructions, too."[1] (JA 9). The Army court did not cite to an authority supporting its proposition that motions could be considered for any other purpose or have any other legal effect, specifically that they could be considered as objections to panel instructions. (JA 9). The Army court then found this case implicated the 1st Amendment, citing to *United States v. Hartwig*. (JA 9). Based on this, the Army court determined:

> The military judge incorrectly withheld the military-specific "clear and present danger" standard from the factfinder. Along with evaluating the unique facts of a case, the factfinder must be aware of the relevant law. While the law requires us to presume a military judge understands it – it is equally clear a panel does not enjoy the same presumption. Instead, panel members must obtain all operative legal guidance from the judge. Without proper explanation as to the "clear and present danger" legal standard applicable to a case involving an officer's private speech, appellant's panel was unable to consider this critical factor in reaching its guilty finding.

[1] The term "transmogrified" does not appear in caselaw, exist in the Manual for Courts-Martial, nor appear to have legal significance.

(JA 9).

Summary of the Argument

The Army Court of Criminal Appeals (ACCA) erred when it found the issue of whether the military judge should have instructed the panel on the state of 1st Amendment law was not waived. It did so when it reasoned motions to dismiss, litigated before trial and again at the close of the government's case, qualified effectively as objections to panel instructions on the same basis.

Further, the Army court erred when, after finding the matter not waived, it omitted any analysis on forfeiture. While the Army court identified the legal standard for forfeiture, it omitted any analysis on how, if the matter were not waived, it could or could not be reviewed after piercing forfeiture. This omission leaves appellant guessing as to the Army court's reasoning on this point.

Additionally, the Army court erred when it found a requirement for the military judge to provide a panel instruction on the 1st Amendment and that he failed to do so. The court did not cite an authority in support of this finding, propose a panel instruction, nor explain how the 1st Amendment was implicated other than a conclusory statement. Providing a panel instruction regarding a question of law and instructing a panel on the state of an area of law are unrelated concepts.

Finally, the Army court erred by finding the military judge needed to provide a panel instruction that addressed a question of law and failed to do so.[2] The Army court did not cite any authority supporting this requirement. While the government agrees military judges must educate panel members on the state of the law, the military judge did so correctly in his instructions.

For these reasons, this Court should set aside the Army court's Summary Disposition and its order to conduct a rehearing and instead return the matter to the Army court to issue a new opinion consistent with the state of the law.

Argument

I. WHETHER THE ARMY COURT ERRED BY FINDING APPELLANT HAD NOT WAIVED WHETHER THE MILITARY JUDGE SHOULD HAVE INSTRUCTED THE PANEL ON THE STATE OF LAW OF THE 1ST AMENDMENT.

Standard of Review

Whether an appellant has waived an issue is a legal question this Court reviews de novo. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020). A valid waiver leaves no error for this Court to correct on appeal. *Id.*

[2] The Army court's opinion was ambiguous whether it was creating a requirement for panels to answer a question of law. The government is operating on the assumption that the Army court did not intend that specific result.

Law and Discussion

Waiver is the intentional relinquishment or abandonment of a known right. *Davis*, 79 M.J. at 331. Whereas "a forfeiture is basically an oversight[,] a waiver is a deliberate decision not to present a ground for relief that might be available in the law." *United States v. Rich*, 79 M.J. 472, 475 (C.A.A.F. 2020). "[T]here are no 'magic words' dictating when a party has sufficiently raised an error to preserve it for appeal, of critical importance is the specificity with which counsel makes the basis for his position known to the military judge." *Id.* (citations omitted). In making waiver determinations, a court looks to the record to see if the statements signify that there was a purposeful decision at play. *United States v. Gutierrez*, 64 M.J. 374, 377–78 (C.A.A.F. 2007) (considering whether an instructions claim was waived in a contested trial).[3]

"Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for

[3] *See, e.g.*, *Davis*, 79 M.J. at 331-32 (finding appellant affirmatively declining to object to the military judge's instructions was waiver); *United States v. Ahern*, 76 M.J. 194 (C.A.A.F. 2017) (finding affirmative waiver where appellant stated "No, Your Honor" when the military judge asked if he objected to the stipulation); *United States v. Swift*, 76 M.J. 210, 217–18 (C.A.A.F. 2017) (finding "no objection" constitutes an affirmative waiver of the right or admission at issue); *United States v. Campos*, 67 M.J. 330, 332–33 (C.A.A.F. 2009) (finding affirmative waiver where appellant stated, "No objection," to the admission of testimony); *United States v. Danylo*, 73 M.J. 183, 188 (C.A.A.F. 2014) (holding that a waive all waivable motions clause waived a claim for sentencing credit).

waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (internal citation and quotation marks omitted). An appellant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution. *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009); *United States v. Cooper*, 78 M.J. 283 (C.A.A.F. 2019) (finding knowing and intelligent waiver of an appellee's right to individual military counsel).

A. Appellee knowingly waived issues regarding panel instructions.

The military judge discussed panel instructions repeatedly throughout the proceedings with both parties. (JA 37-42; 79-103, 106-07). He discussed panel instructions generally with both parties, (JA 79-93, 95-96), asked specifically about panel instructions and the 1st Amendment, (JA 37-42), and provided the standard panel instruction for Conduct Unbecoming an Officer (JA 104-05). The military judge repeatedly inquired about the parties' satisfaction with the instructions. (JA 91, 96, 107, 113).

Counsel for appellee requested several instructions and objected to others (JA 91-93). Both parties were active in the panel instruction discussion with the military judge. (JA 79-93, 99-103). The record, however, is absent any objection or request relating to a 1st Amendment panel instruction or the panel instruction for Conduct Unbecoming an Officer. To find appellee preserved the issue of whether

the military judge failed to provide a mandatory panel instruction lacks a foundation in the record, as well as in law, logic, and equity.

B. There is no basis to determine that motions to dismiss should be treated as objections to panel instructions.

Despite appellee's lack of an objection regarding panel instructions on the 1st Amendment, the Army court determined the military judge preserved the issue with a statement. (JA 9). After providing the extensively coordinated instructions to the panel, he asked, "[A]re the parties satisfied that I did correctly, subject to all the objections and such, correctly advise the members as to all of the substantive law in this case?" (JA 107). The parties responded affirmatively. (JA 107). The record makes clear, however, the military judge's reference to panel instructions and objections was unrelated to those regarding the 1st Amendment or Conduct Unbecoming an Officer.

The Army court's finding the "military judge's caveat transmogrified the defense's previous motions into objections to the instructions" is without a legal basis or authority. "A motion is an application to the military judge for particular relief. A motion shall state the grounds upon which it is made and shall set forth the ruling or relief sought. The substance of a motion, not its form or designation, shall control." R.C.M. 905.

The legal significance of any motion is specifically identified and limited to the relief sought. *See generally* R.C.M. 707, 905, 906, 907, 910, and 918. Unless a

motion specifically relates to panel instructions, the law lacks any mechanism to make that motion do otherwise. It is unclear how the Army court concluded appellee's motions to dismiss, not in any way related to panel instructions, could somehow have preserved an issue related to panel instructions. Based on a plain reading of the military judge's statement, he was not referring to the motions appellee made to dismiss the Article 133 Specification. Even if his intent were to equate their effect to objections regarding panel instructions, he lacked the authority to do so.

II. WHETHER THE ARMY COURT ERRED BY OMITTING ANALYSIS REGARDING FORFEITURE ON WHETHER THE MILITARY JUDGE SHOULD HAVE INSTRUCTED THE PANEL ON THE STATE OF THE LAW OF THE 1ST AMENDMENT.

Standard of Review

Issues not raised at trial are reviewed for plain error, so long as they are not waived. *United States v. Cole*, 84 M.J. 398, 404 (C.A.A.F. 2024) (citation omitted); *see United States v. Coleman*, 79 M.J. 100, 102 (C.A.A.F. 2019); *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000); *United States v. Lloyd*, 46 M.J. 19, 20 (C.A.A.F. 1997).

Law and Discussion

"To prevail [on plain error review], [a]ppellant bears the burden of establishing (1) error, (2) that is clear or obvious, and (3) results in material

prejudice to a substantial right of the accused." *Cole*, 84 M.J. at 404 (quoting *United States v. Bodoh*, 78 M.J. 231, 236 (C.A.A.F. 2019)); *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019).

The Army court fundamentally erred by finding appellee had not waived the issue. Because of that, it did not provide analysis regarding forfeiture. This absence leaves appellant guessing at the Army court's reasoning regarding how it would have considered forfeiture. Assuming, arguendo, appellee forfeited the issue, there was no error. And if there was error, it was not plain. Finally, if this court finds there was plain error, the error did not prejudice appellee.

The Army court found this case implicated the 1st Amendment. (JA 9). It determined the military judge did not provide a panel instruction on the Clear and Present Danger standard. (JA 9). It reasoned:

> [P]anel members must obtain all operative legal guidance from the judge.[4] Without proper explanation as to the 'clear and present danger' legal standard applicable to a case involving an officer's private speech, appellant's panel was unable to consider this critical factor in reaching its guilty finding.

(JA 9).

The Clear and Present Danger standard asks whether the officer's speech poses a clear and present danger that the speech will, in dishonoring or disgracing

[4] It is important to note the phrase "operative legal guidance" does not appear in case law nor the Manual for Courts-Martial.

the officer personally, seriously compromise the person's standing as an officer. *Hartwig*, 39 M.J. at. 128. The military judge provided the panel members instructions, to include:

> Conduct unbecoming an officer" means conduct that is likely to seriously compromise the accused's standing as an officer. A military officer holds a particular position of responsibility in the armed forces and one critically important responsibility of a military officer is to inspire the trust and respect of the personnel who must obey the officer's orders. Conduct unbecoming an officer is action or behavior in an official capacity, that in dishonoring or disgracing the person as an officer, seriously compromises the officer's character. It also includes actions or behavior in an unofficial or private capacity that in dishonoring or disgracing the officer personally seriously compromises the person's standing as an officer…The gravamen of this offense is that the officer's conduct disgraces the officer personally, or brings dishonor to the military profession in a ma[nn]er that [a]ffects the officer's fitness to command[] the obedience of the officer's subordinates so as to effectively complete the military mission.

(JA 104-05).

When providing this instruction, the military judge was reading the model instruction included in the Military Judge's Benchbook (18 July 2024 update). (JA 319-20). The model instruction was also sent back with the panel to deliberate. (JA 123-24). The instruction provided both orally and in written form contained all necessary language regarding the Clear and Present Danger standard articulated in *Hartwig*. It is unclear how the Army court came to the conclusion the military judge failed to provide an instruction on the Clear and Present Danger standard. Therefore, assuming arguendo appellee forfeited the issue, there was no error, and

the Army court was not able to review it.

If, somehow, there was error, the panel instruction provided sufficiently articulated the Clear and Present Danger standard, and therefore any error was not plain nor was there prejudice to appellee. Contrary to the Army court's finding that "appell[ee]'s panel was unable to consider this critical factor in reaching its guilty finding," the panel had exactly the guidance it needed.

III. WHETHER THE ARMY COURT ERRED BY FINDING A MANDATORY PANEL INSTRUCTION ON THE STATE OF THE LAW OF THE 1ST AMENDMENT THAT THE MILITARY JUDGE FAILED TO GIVE.

Standard of Review

Courts review allegations a military judge failed to provide a mandatory instruction de novo. *Dearing*, 63 M.J. at 482. When a properly preserved instructional error raises constitutional concerns, the government must establish any prejudice was "harmless beyond a reasonable doubt." *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007); *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006).

Law

A. What implicates the 1st Amendment.

"Congress shall make no law ... abridging the freedom of speech ... " U.S. Const. amend. I. Conduct implicating the 1st Amendment must be, "sufficiently imbued with elements of communication to fall within the scope of the First […]

Amendment[]." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citing *Spence v. Washington*, 418 U.S. 405, 409 (1974). Whether conduct possesses sufficient communicative elements to bring the 1st Amendment into play, the Court must ask whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Id*. at 410-11.

B. Conduct Unbecoming an Officer, Article 133, UCMJ.

The elements of Article 133, Conduct Unbecoming an Officer, are: 1) the accused was a commissioned officer; 2) the accused did or omitted to do certain acts; and 3) under the circumstances, those acts or omissions constituted conduct unbecoming an officer. UCMJ art. 133, ¶ 90.b. Relevant conduct is an "action or behavior in an official capacity that, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character, or action or behavior in an unofficial or private capacity that, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer." UCMJ art. 133, ¶ 90.c.(2). Being drunk and disorderly, committing a crime, or attempting to commit a crime (not speech-specific) are examples of conduct that violate Article 133. Article 133, para. 90(c)(3). Therefore, conduct that violates this article includes speech but is not limited to it.

C. The Clear and Present Danger standard.

When determining if an Article 133 charge violates the 1st Amendment, this Court looks to "whether the officer's speech poses a 'clear and present danger' that the speech will, 'in dishonoring or disgracing the officer personally, seriously compromise[] the person's standing as an officer.'" *Hartwig*, 39 M.J. at 128. This is a modified test for free speech, and it takes into consideration that the Supreme Court and the Court of Appeals for the Armed Forces (C.A.A.F.) "have recognized that the government may place additional burdens on a servicemember's 1st Amendment rights due to the unique character of the military community and mission." *United States v. Smith*, 85 M.J. 283, 288 (C.A.A.F. 2024) (citing *United States v. Wilcox*, 66 M.J. 442, 448 n.3 (C.A.A.F. 2008); *United States v. Priest*, 21 C.M.A. 564, 570-72, 45 C.M.R. 338, 344-46 (1972); *United States v. Gray*, 20 C.M.A. 63, 66, 42 C.M.R. 255, 258 (1970)).

The military "is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). As such, "the military has, again by necessity, developed laws and traditions of its own during its long history." *Id*. These military specific laws mean "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Id*. at 744 (citing *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)). Therefore, "while the members of the military are not

excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." *Id*. at 758. Specifically, "the fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Id*. Further, the Supreme Court has also, "recognized that a military officer holds a particular position of responsibility and command in the Armed Forces." *Id*. at 744.

The Clear and Present Danger standard applies to speech that normally, outside the context of the military, would be entitled to 1st Amendment protection. *See United States v. Meakin*, 78 M.J. 396, 403 (C.A.A.F. 2019). In *Parker v. Levy*, the Supreme Court analyzed *Brandenburg v. Ohio* and found that due to the unique nature of the military, considerations outside the civilian context must be weighed. *Parker*, 417 U.S. at 758-59 (discussing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). *Hartwig* held the "Clear and Present Danger" standard first articulated in *Schenck v. United States* applied to speech by military members, but the standard requires a different application in a military context. *See Hartwig*, 39 M.J. at 127-28 (referencing *Schenck v. United States*, 249 U.S. 47 (1919)). In the military context, the substantive evils Congress has a right to prevent are violations of the Uniform Code of Military Justice. *Hartwig*, 39 M.J. at 128. The conduct in

question does not need to violate other provisions of the UCMJ nor be otherwise criminal to violate Article 133. *Id.* The Supreme Court has also firmly rejected any requirement that the government prove actual damage to the reputation of the military as forbidden speech is measured by its "probability of success," not its actual effect. *See Priest*, 45 C.M.R. at 345 (citing *Schenck*, 249 U.S. at 52).

"Over a century and a half ago, the Supreme Court upheld Congress' authority to prohibit private or unofficial conduct by an officer, 'which compromised the person's standing as an officer and brought scandal or reproach upon the Service.'" *Hartwig*, 39 M.J. at 128-29 (citing *Smith v. Whitney*, 116 U.S. 167, 185 (1886)). The ability to punish private speech was recognized again in *United States v. Guaglione* and later in *United States v. Moore*. *United States v. Guaglione*, 27 M.J. 268, 272 (C.M.A. 1988); *United States v. Moore*, 38 M.J. 490 (C.M.A. 1994).

This Court has upheld convictions when the government charged otherwise constitutionally protected conducted under Article 133. In *United States v. Forney*, the government charged appellant with an Article 133 offense but adopted language from a provision of the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2252A (2000). 67 M.J. 271, 273 (C.A.A.F. 2009). The charge incorporated language the Supreme Court found unconstitutionally overbroad under the First Amendment. *Id*. at 278. The C.A.A.F previously reversed

convictions charged under Article 134, clause 3 for using the same language. *Id*. However, in cases charged under Article 133, or Article 134 clause 1 or 2, this Court found the additional elements a factfinder must find did not violate the Constitution. *Id*. at 278 (citing *United States v. Mason,* 60 M.J. 15, 20 (C.A.A.F. 2004)).[5]

Argument

The Army court determined the Specification implicated the 1st Amendment and, therefore, the military judge was required to give a mandatory instruction regarding the 1st Amendment. (JA 9). The Army court did not cite to an authority for such a requirement, such an instruction is absent from the Benchbook, and the Army court did not provide a sample instruction. First, appellant urges this Court clarify the Clear and Present Danger standard does not implicate necessarily the 1st Amendment. In the alternative, if this Court finds the Clear and Present Danger standard only implicates the 1st Amendment, this Court should find no such panel instruction requirement exists.

[5] The extent that the Article 133 "conduct unbecoming" element subsumes First Amendment concerns is outlined in Judge Erdmann's dissent. *Forney*, 67 M.J. at 280-82 (The majority opinion "essentially concludes that there are no First Amendment concerns in the context of Article 133, UCMJ." Later, Judge Erdmann wrote, "Under the unique facts of this case and in light of the narrow issue before us, I would find that Forney was deprived the chance to argue to the members that his possession of images of child pornography was constitutionally protected."). The majority of the court did not adopt this argument for stronger First Amendment protections with military-specific offenses.

A. The Clear and Present Danger standard does not implicate the 1st Amendment.

This Court's predecessor created a modified version of the Clear and Present Danger in *United States v. Schenck*. *Hartwig*, 39 M.J. at 128. *Schenck* focused on the reach of 1st Amendment protections. *Schenck*, 249 U.S. at 51-53. However, references to the 1st Amendment by *Hartwig* should be recognized as identifying the conduct in that case, which was speech, but not that *Hartwig's* precedent applies only to speech.

The same standard, whether conduct risks diminishing an individual's standing as an officer, is applied whether the conduct qualifies as unprotected speech, protected speech, or non-speech. In all three instances, the reviewing court applies the Clear and Present Danger standard, based on the definition of conduct unbecoming an officer. UCMJ art. 133, ¶ 90.c.(2). Therefore, whether the conduct is speech or not, and whether it is protected by the 1st Amendment or not in the civilian context, is irrelevant. The only relevant determination remains whether the conduct risks diminishing the individual's standing as an officer. Because of this, appellee's conduct does not implicate the 1st Amendment.

B. There is no requirement to provide a panel instruction on the 1st Amendment.

Assuming *arguendo* the Clear and Present Danger standard implicates the 1st Amendment, there was no requirement to provide a panel instruction on the

state of law regarding the 1st Amendment. While the Army court determined implication of the 1st Amendment requires a panel instruction, it did not cite an authority to support this. As such, the Army court's reasoning and its scope are unknown. The only authority identifying such a requirement is *United States v. Henderson*, an Army court case that relied heavily, though incorrectly, on *United States v. Byunggu Kim*. *United States v. Henderson*, 83 M.J. 735 (Army Ct. Crim. App. 2023); *United States v. Byunggu Kim*, 83 M.J. 235 (C.A.A.F. 2023). In *Byunggu Kim*, the accused pled guilty to offenses that, under certain circumstances, some offenses could occupy a constitutionally gray area of the 1st Amendment. *Byunggu Kim*, 83 M.J. at 239. *Byunggu Kim* requires the colloquy between a military judge and an accused contain "an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior" when a charge implicates constitutionally protected conduct. *Id.* at 239. However, this requirement exists to satisfy due process requirements regarding knowing waiver of constitutional protections and when that area of law is gray.

At a contested trial, the accused typically does not waive any rights relevant to the contested issue. Therefore, the holding in *Henderson* erroneously expands *Byunggu Kim*'s requirements to contested trials and creates an undue burden on military judges. To the government's knowledge, this requirement to give a panel

instruction when the 1st Amendment is implicated does not appear elsewhere. The government urges this Court to clarify this area of law muddied by *Henderson* and recognize there is no such panel instruction requirement.

Even if *Henderson* remains as precedent, the Clear and Present Danger standard does not occupy a constitutionally gray area of the 1st Amendment. Its applicability and validity are not in dispute. Therefore, even applying *Byunggu Kim* and *Henderson*, the Specification did not trigger the need to instruct the panel further on this area of 1st Amendment law.

IV. WHETHER THE ARMY COURT ERRED BY FINDING THE MILITARY JUDGE NEEDED TO PROVIDE A PANEL INSTRUCTION REGARDING A QUESTION OF LAW.

Standard of Review

Allegations a military judge failed to provide a mandatory instruction are reviewed de novo. *Dearing*, 63 M.J. at 482. When a properly preserved instructional error raises constitutional concerns, the government must establish any prejudice was "harmless beyond a reasonable doubt." *Lewis*, 65 M.J. at 87; *Wolford*, 62 M.J. at 420.

Law

The military judge is the presiding officer in a court-martial. The military judge shall rule on all interlocutory questions and questions of law raised during the court-martial. R.C.M. 801(a)(4). The military judge shall instruct the members

on questions of law and procedure which may arise. R.C.M. 801(a)(5). Whether conduct qualifies as speech is a question of law. *Texas v. Johnson*, 491 U.S. at 410-11. Whether the 1st Amendment protects speech is also a question of law. *Dennis v. United States*, 341 U.S. 494, 513 (1951).

Argument

The Army court found the military judge failed to give a mandatory panel instruction. (JA 9). It is unclear what requirement the Army court referred to as it did not cite any. As argued in the previous assignment of error, there is no requirement to provide a panel instruction on the 1st Amendment. However, if the Army court was requiring the military judge to instruct on a question of law, it fundamentally erred. The military judge provided the panel members the necessary instruction on Conduct Unbecoming an Officer and what conduct would be violative of this article of the UCMJ. (JA 104-05, 123-24). When the military judge did this, he satisfied all requirements under R.C.M. 801.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court vacate the Army court's Summary Disposition, vacate its order to conduct a rehearing, and return the matter to the Army court to issue a new opinion consistent with the state of the law.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because this brief contains 5,789 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins on all four sides.

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July 23, 2025

CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov on 23 July 2025 and electronically filed to Defense Appellate on July 23, 2025.

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