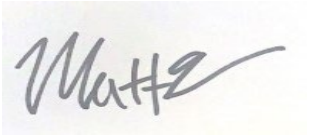
IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **ISAC D. MENDOZA** Staff Sergeant (E-6) United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. ARMY 20210647 USCA Dkt. No. 23-0210/AR



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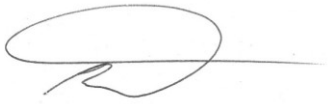

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER APPELLANT'S CONVICTION FOR SEXUAL ASSAULT WITHOUT CONSENT WAS LEGALLY SUFFICIENT

Statement of Jurisdiction

The Army Court of Criminal Appeals [Army Court] had jurisdiction over this case pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866. This Court has jurisdiction over this case under Article 67(a)(3), UCMJ.

Statement of the Case

On December 8, 2021, a military judge sitting as a general court-martial found Appellant, Staff Sergeant Isac D. Mendoza, contrary to his plea, guilty of

one specification of sexual assault, in violation of Article 120, UCMJ. (Statement of Trial Results [STR]). The military judge sentenced appellant to reduction to the grade of E-1, confinement for thirty months, and a dishonorable discharge. (STR). On January 6, 2022, the convening authority elected to take no action on the findings but approved the sentence. (Action). The military judge entered judgment on January 12, 2022. (Judgment of the Court).

On May 8, 2023, the Army Court affirmed the finding and sentence. (JA 5). On July 5 2023, Appellant filed his Petition for Grant of Review. This Court granted review on October 10, 2023. (JA 4)

Summary of Argument

The evidence was legally insufficient to sustain a conviction for sexual assault without consent. Without consent requires the government to offer affirmative evidence of non-consent beyond a reasonable doubt, or the rest of Article 120(b) is rendered meaningless. The government introduced no evidence that the alleged victim displayed affirmative non-consent at the time of the sexual act—she had no memory of the incident due to her level of intoxication. In this case, the alleged victim had no memory of whether she did or did not consent to sex. This is a problem—the absence of evidence cannot be proof of a crime beyond a reasonable doubt.

Statement of Facts

At the time of the alleged incident, JW, the alleged victim, was a Specialist (SPC) in the Army. She attended a party with others from her unit. (JA 117-18). Several people saw JW outside the barracks that evening and interacted with her.

Sergeant (SGT) Price testified he was in front of the barracks with a group of soldiers, kicking a beach ball around, when he saw JW. (JA 97). Sergeant Price saw JW ask to kick the ball and join in. (JA 98). She moved normally and kicked the ball back and forth. (JA 102-03). She even ran around while kicking the ball, without tripping or falling. (JA 103).

Specialist Levasseur saw JW and appellant together with their arms around each other. (JA 119-20). They were leaning towards each other with their faces close. (JA 133). When he approached JW and appellant, they were sharing a bottle of Bacardi Rum and both appeared intoxicated. (JA 133).

Specialist Levasseur testified he thought JW's behavior was inappropriate for a married woman. (JA 119-21, 126). Around 0145 he told JW she needed to call her spouse and escorted her to her room on the second floor. (JA 56, 121, 126). Two minutes after going into her room, JW came back out and rejoined the group in the dayroom. (JA 56).

In the dayroom, JW started to flirt with, rub, and touch members of the group, including SPC Cohea. (JA 82, 113). JW was normally introverted and kept

to herself. (JA 82). That evening, she was uncharacteristically outgoing and flirtatious. (JA 82, 88).

JW also flirted with appellant. (JA 91). Sergeant Price saw appellant sitting at the table shoulder to shoulder, with JW both whispering into and kissing and licking his ear. (JA 99, 104). Private First Class Law also saw JW leaning into and whispering into appellant's ear. (JA 110, 112).

At one-point, appellant told SPC Cohea that JW was "getting really flirty," she was "just too intoxicated," and he would send JW to her room. (JA 83).

JW claimed not to remember hours of drinking, socializing, kicking around a beach ball, and sitting next to appellant with her arms around his waist, kissing his ear, and sharing a bottle of vodka. (JA 54). JW also did not remember flirting with appellant, or speaking with others in the dayroom. (JA 55). JW did not remember touching appellant and continuing to talk to him. (JA 56).

Around 0200, JW left the dayroom and went to appellant's room. (JA 57). As the defense made clear when discussing the video, JW waited for appellant for almost forty-five seconds and then went back to the dayroom to retrieve him. (JA 217). In the hallway, she touched appellant's arm and smiled at him. (JA 57).

When they reached appellant's door, appellant reached down and touched JW's groin outside her pants. (JA 215, 221). JW turned to him and smiled. (JA 221). Then JW and appellant entered appellant's room. (JA 213).

Once inside appellant's room, the two had consensual sex where they undressed, JW voluntarily preformed oral sex on appellant, was able to get on top of appellant at least twice, and JW confirmed everything was "okay". (JA 164-66).

Prior to appellant's interview, SA DW reviewed some, but not all, of the Closed-Circuit Television (CCTV) footage from July 11-12. (JA 172). Based on this limited review, SA DW suggested throughout the interview that JW was "overly intoxicated," "incoherent," and "not in the right mental state." (JA 167, 172). Special Agent DW ultimately told appellant that JW was "incapable of consenting." (JA 167). Special Agent DW then typed these conclusions into appellant's written statement. (JA 167).

Expert Testimony

At trial, Dr. Wetherill, a forensic psychologist, testified about how a person experiencing an alcohol-induced blackout will try to fill memory gaps based on what they typically might do. (JA 200). Oftentimes, reconstructing the missing pieces of memory and what exactly happened, and finding out through someone else, is not what the blacked out person expects because of the involvement of alcohol. (JA 201).

Motion For a Finding of Not Guilty

At the close of the Government's case, defense moved for a Not Guilty Finding, arguing that the Government had failed to provide any affirmative

evidence of non-consent. (JA 208). The Government could not give a clear response, ultimately falling back on "the statutory definition of consent regarding a competent [sic] person has certainly been established in this case." (JA 208). The military judge denied the motion. (JA 209).

Closing Arguments

The Government's theme and theory was JW's incompetence. The Government repeatedly told the factfinder JW "could not consent." (JA 210-11). It contended that "every eyewitness confirmed that [JW] . . . met the definition of an incompetent person.

Further, as proof of JW's lack of consent considering her lack of memory over an eight-hour span, the government argued relying on JW's adamant personal belief that she would not have had sex while on her period. (JA 210-11). The government also argued appellant was aware JW was incapable of consenting. (JA 212).

Law and Argument

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (cleaned up).

Whether the three distinct paragraphs within Article 120(b), UCMJ are separate and distinct theories of liability is a question of statutory interpretation reviewed de novo. *United States v. Sager,* 76 M.J. 158, 161 (C.A.A.F. 2017).

A. Ambiguity

Article 120(b)(1) is ambiguous—it is unclear if sexual assault "without consent" means that the accused *did not* have the consent in fact of the alleged victim, or if it means the accused party *could not* have the consent of the alleged victim under these facts because they were incapable of consenting.

By way of illustration, imagine Person A is sleeping—a mischievous Person B grabs A's hand and scribbles A's name on the contract signing away A's life savings to B. There is a contract in fact—Person A's signature appears on the completed contract. However, that contract is unenforceable not because there is not a contract, but rather because a contract could not have been made with Party A while they were sleeping. What remains unclear is how we would refer to what occurred in common parlance. Would we say they had a contract but it was signed without Party A's agreement full stop. Would we say, while there was a contract, it was unenforceable because it was signed without Party A's agreement because they were *not competent* to agree? Would we say Party A could not consent because they were *incapable* of agreeing? Would we say Party A could not consent because a sleeping or unconscious person can never make an agreement?

Article 120(b) as written is riddled with ambiguity. It is not enough to look to the word "without" in a vacuum. "The meaning of each word informing the others and all in their aggregate tak[ing] their purport from the setting in which they are used." *United States Nat'l Bank v. Indep. Ins. Agents of Am.,* 508 U.S. 439, 454-55, (1993) (internal citations omitted). "Over and over we have stressed that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Id.*

Not only is "without" ambiguous, but the definition of consent is unclear as well because in the definition of consent under 120(b)(1) there is no clear meaning to "competent person." It is uncertain if "competent" means a person who cannot appreciate or communicate a decision, as it does in the incapable of consenting context, or if it means something else.

Moreover, Article 120, UCMJ breaks out "incompetent" with separate definitions from "incapable." These terms being separated out in the statute suggests a distinction between the two. What that distinction is, is unclear. Based on its context in the statute, the meaning of without consent is not clear on its face. Interpretation is required.

This Court must look to its own precedent, the cannons of statutory construction, as well as policy arguments and ultimately determine whether without consent and incapable of consent are distinct legal theories.

B. *United States v. Riggins* and Affirmative Evidence of Non-Consent

This Court has already determined the clauses of Article 120(b) do represent distinct legal theories, and Article 120(b)(1) without consent means affirmative non-consent. *United States v. Riggins,* 75 M.J. 78 (C.A.A.F. 2016). "[T]he legal inability to consent [is] not equivalent of the Government bearing the affirmative responsibility to prove that [an alleged victim] did not, in fact, consent [under a bodily harm theory.]" *Id*. at 84 (emphasis in original). Thus, simply inferring an actual lack of consent from incapacitation alone wrongly equates the legal inability to consent to "without consent."

The fact that Congress struck "bodily harm" and inserted "without consent" in Article 120(b) shortly after *Riggins* only strengthens that case's applicability. *See* National Defense Authorization Act for FY2017, Pub. L. No. 114-328, div. E, § 5540, 130 Stat. 2000, 2949-50 (2016). Put simply, because this Court "assume[s] that Congress is aware of existing law when it passes legislation," *United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019), and because nothing suggests that Congress intended any substantive change by way of this specific amendment, this Court must take *Riggins* into account as part of the

"contemporary legal context" for determining the meaning of "without consent." *Id.*

C. Statutory Construction

1. Surplusage

Without consent must require affirmative non-consent, if not, Article 120(b)(2)(A) subsumes all other charging theories. First, because a separate subsection of Article 120(b)—(b)(3)— specifically criminalizes sexual acts committed when the other person is incapable of consenting, interpreting "without consent" to ipso facto include incapacity in every instance reduces (b)(3) to mere surplusage. *See Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) ("every provision is to be given effect and [ ] no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."); *see also Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) ("the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.") (internal quotation marks omitted) (citation omitted). This is not minimal surplusage, such a broad interpretation of "without consent" would render *every* other subsection of Article 120(b) surplusage.[1]

[1] Article 120(2)(a) sexual assault by threatening or placing that person in fear is also rendered surplusage to "without consent" if assimilated into the definition of consent requiring the "*freely given agreement* of a competent person."

In a recent opinion, this Court found provisions of Article 120c not redundant "because *some* conduct violates either Article 120c(a)(1) or 120c(a)(2), but not both." *United States v. Mays*, 83 M.J. 277, 281 (C.A.A.F. 2023)(emphasis added). That logic does not follow here—a holding that "without consent" also means the inability to consent renders the rest of Article 120(b) superfluous in *every* instance.

Second, a broad interpretation of "without consent" would be at odds with the federal analog statute. *See* 18 U.S.C. § 2242; *United States v. Freeman*, 70 F.4th 1265, 1273, n.4 (10th Cir. 2023) (suggesting that "without consent" in Sec. 2242(3) is a distinct crime from 2242(2) "incapable of appraising the nature of the sexual act"); *see also United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010) (discussing comparison to federal statutes to determine legislative intent of the UCMJ).

2. Specificity

Where a general and a specific statute speak to the same concern, a prosecutor must charge the more specific statute even if the general provision was enacted later. *See Simpson v. United States*, 435 U.S. 6, 15 (1978) (finding it impermissible to charge both bank robbery with a firearm, and the use of firearm while committing a felony). Two state Supreme Courts have followed suit. Washington and Kansas both have held "when two statutes are concurrent, the

specific statute prevails over the general." *State v. Danforth,* 643 P.2d 882, 883 (Wash. 1982); *State v. Williams* 829 P.2d 892 (Kan. 1992).

Unquestionably, the conduct the government sought to convict appellant for was having sex with JW when she was incapable of consenting due to alcohol. Between without consent, and incapable of consenting due to intoxication, the latter is clearly more specific to the instant case. The principles of statutory construction require appellant be charged with Article 120(b)(3).

3. Constitutional Avoidance

Failing to interpret without consent to require affirmative proof of non-consent has major constitutional implications. Allowing a finding of guilt for without consent to be borne from facts wherein the alleged victim has no memory whether or not they consented upends due process and the presumption of innocence.

The principle of constitutional avoidance requires "the federal courts . . . to avoid constitutional difficulties by [adopting a limiting interpretation] if such a construction is fairly possible. *Skilling v. United States*, 561 U.S. 358, 405-406 (2010). Stated differently, when the constitutionality of a statute is assailed, if the statute could be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is courts must adopt a

construction which will save the statute from constitutional infirmity. *Id*. at 423. (Scalia J and Thomas J concurring).

Article 120(b)(1) without consent must require affirmative proof on non-consent because, in general, criminal law operates on a standard that is the exact opposite of affirmative consent: a standard of "affirmative non-consent." Under an affirmative non-consent standard, prosecutors can meet their burden of proving there was no consent *only* by showing that the victim affirmatively communicated the fact of non-consent to her assailant. Sarah L. Swan, *Between Title IX and the Criminal Law: Brining Tort Law to the Campus Sexual Assault Debate*, 64 U. Kan. L. Rev 963, 980 (2016)(emphasis added). "This presumption need not be inherently offensive; it can be viewed as merely effectuating the constitutional guarantee of a presumption of innocence and reflecting the fact that the majority of sexual interaction is consensual." *Id.* n.100.

Article 120(b)(2)(A) criminalizes a sexual act when committed "without the consent of the other person." "Consent" is statutorily defined in relevant part as "a freely given agreement to the conduct at issue by a *competent person*." Article 120(g)(7)(emphasis added). Congress never adopted the language from American Bar Association Resolution number 114 which proposed an affirmative consent requirement for sexual assault. This was vigorously opposed by both the prosecution and criminal defense bars alike, because it assumes a crime in the

absence of evidence to the contrary, eviscerating the constitutional guarantee of a presumption of innocence. Press Release, National Association of Criminal Defense Lawyers, NACDL Opposes Affirmative Consent Resolution ABA Resolution 114 (July 25, 2019); Press Release, Center for Prosecutor Integrity, In Historic Win for Due Process ABA Defeats Controversial 'Affirmative Consent' Measure (August 13, 2019).

No such constitutional concern exists in cases charged due to incapacitation. In cases charged under the Article 120(b)(3) theory of incapable of consent due to intoxication, "incompetent person" is an individual so incapacitated that they lack the ability "to make or to communicate a decision" *United States v. Pease*, 75 M.J. 180, 186 (C.A.A.F. 2016). Thus that part of the statute is criminalizing sex with a person too drunk to consent, rather than the constitutionally dubious absence of consent.

4. Article 120c UCMJ

If Congress intended for all modalities of sexual assault to be captured under one general offense, they could have drafted the sexual assault statute to mirror Article 120c UCMJ. That statute also contains "without consent" but does not offer other means to accomplish the crime. No one would contend that a statute meant to criminalize voyeurism did not capture a situation where a person is secretly recorded while they are unconscious. By not separating out ways to

accomplish the crime, without consent can fairly mean *all* situations, including a situation where the person says "no", *and* where the person is unaware. It is a catchall.

Article 120(b) is not a catchall like 120c. It is the opposite. In this statute without consent is meant to criminalize only instances not criminalized by other portions of the same statute. Meaning only instances of sex where the alleged victim was *not* asleep unconscious or otherwise unware; *not* where they were incapable of consent due to intoxication; *not* where they were placed in fear.

What remains to be covered by "without consent" are the exact types of instances we would expect—sex where one party said "no" or evidenced they did not consent by their actions, or at the very least testified that in their mind they did not consent, but froze.

D. The Government Failed To Offer Any Evidence of Affirmative Non-Consent

If Article 120(b)(2)(A) requires affirmative proof of non-consent, the facts of this case are legally insufficient for a conviction. The *only* evidence about consent comes from appellant. When the two went to his room, JW kissed appellant, who kissed her back. (JA 164). Appellant asked, "is this okay" and she responded, "show me what you've got." (JA 164). They undressed and JW voluntarily performed oral sex on appellant. (JA 165). During intercourse, JW was on top of appellant at least twice. (JA 165, 167). These events make sense,

and are corroborated by JW's conduct toward appellant in public—Sergeant Price saw appellant sitting at the table shoulder to shoulder, with JW both whispering into and kissing and licking his ear. (JA 99, 104).

At trial, the government argued that despite JW having no memory whatsoever of how she acted during the sex, because she had a tampon in she would not have agreed to have sex on her period. (JA 210-11). What JW thought the day *after* she had sex with appellant is of no moment.

The military courts of criminal appeals have been grappling with cases with similar facts, but are distinguishable in one incredibly important way—the alleged victim could provide evidence on non-consent during the sex. For example in *Weiser,* the alleged victim, despite a similar level of intoxication, *did recall pushing away from Weiser while the sex was happening. United States v. Weiser*, 80 M.J. 635, 641 (C.G. Ct. Crim. App. 2020)(emphasis added). This case, on the other hand, is wanting for *any* proof of affirmative non-consent at the time of the sex—the only evidence is that the alleged victim did consent in fact. (JA 165).

Even if JW never pushed appellant away, as the victim did in *Weiser*, and only remembered not consenting in her own mind while the sex was occurring, but doing nothing else, that might have been enough—but even that fact is absent from this case.

Indeed, the majority opinion in the Army Court below did not rely on any evidence related to affirmative non-consent. Instead, it cited the following facts relevant to incapacity due to intoxication, and not to consent: (1) many parties agreed the victim was intoxicated; (2) the Closed Circuit Television footage suggested the victim was intoxicated; (3) Appellant told Specialist RC he was concerned about JW's flirting and high level of intoxication; (4) Appellant's narrative concerning JW's conduct during the night changed during multiple tellings. *United States v. Mendoza*, ARMY 20210647 (Army Ct. Crim App. May 8 2023) (mem op.) (pg.5).

E. Appellant Suffered a Due Process Violation

1. Impermissible Constructive Amendment

When the evidence at trial deviates from what is alleged in the indictment, a variance may occur, but so too may a "constructive amendment." *United States v. Hawkins*, 934 F.3d 1251, 1260 (11th Cir. 2019). A variance occurs where facts proved deviate from facts in the indictment; a constructive amendment occurs when elements are altered to broaden to the bases for conviction. *Id.* The latter occurs when the Government specifies a particular legal theory in the indictment but proves a different legal theory in the case. *Ingram v. United States,* 593 A.2d 992, 1006 (D.C. App. 1991). A constructive amendment is per se reversible error. *See United States v. Holt*, 777 F.3d 1234, 1261 (11th Cir. 2015); *Stirone v. United*

States, 361 U.S. 212, 217 (1960) (holding that a variance which destroys an accused's substantial right to be tried only on charges presented in the indictment "is far too serious to be treated as nothing more than a variance and then dismissed as harmless error."). Here, the government brought appellant's case to an Article 32, UCMJ, preliminary hearing under a without consent theory, but proved the case at trial with an incapacitation theory.

2. Limitations on Defense

The government's variance between their charging theory and their proof has real consequences. By charging under a without consent theory and proving the case via an incapacitation theory the government removes a number of arrows from defense counsel's quill.

First, in an incapacitation case where both parties consumed alcohol, appellant would be entitled to a voluntary intoxication instruction. "Voluntary intoxication from alcohol or drugs may negate the elements of premeditation, *specific intent*, willfulness, or knowledge. The military judge must instruct, sua sponte, on this issue when it is raised by some evidence in the case." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 5-12 (October 25, 2023). However, when a general intent offense is charged voluntary intoxication is not a factor for the members to consider. *Id.* Specialist Levasseur testified when he approached JW and appellant outside, they were sharing the

bottle of Bacardi and *both* appeared intoxicated. (JA 133). Appellant would have been entitled to a voluntary intoxication defense if correctly charged as an incapacitation case.

In a similar vein, Dr. Wetherill, a forensic psychologist, testified about JW's level of intoxication. (JA 200). That expertise could have been marshalled to support appellant's voluntary intoxication defense as well.

Second, by proving the case via in incapacitation theory, while still charged as a without consent case, the government clamped down on the challenges to JW's credibility regarding her motive to fabricate. JW was married and the fact that she was flirting with other soldiers including appellant did not go unnoticed. SPC Cohea saw JW kiss and lick appellant's ear. (JA 110). Specialist Levasseur testified he thought JW's behavior was inappropriate for a married woman. (JA 120-21, 126, 133). After the incident, JW told her spouse that she was sexually assaulted. (JA 63). Normally, this would be strong evidence of a motive to fabricate which would undermine JW's credibility and support appellant's contention that she consented to sex. But because the government repeatedly asserted JW was too drunk to consent, that defense falls away. Even if she would have lied, it matters not if the government proved she never could have consented.

Third, cases with disputed evidence related to consent where the defense wins admission of the evidence under Military Rule of Evidence 412 are rendered

similarly irrelevant by charging without consent and switching to an incapacitation theory. For example, in *Robinson,* there was no prejudice for the exclusion of evidence showing the alleged victim and appellant had "flirted" prior to the incident because the Government introduced ample evidence that the alleged victim was intoxicated, and Robinson knew she was intoxicated. *United States v. Robinson*, 77 M.J. 294, 299 (C.A.A.F. 2018).

3. The Pease Standard

If the facts of this case are legally sufficient to affirm a verdict in a without consent case, then no prosecutor will ever again need to contend with this Court's decision in *Pease*. 75 M.J. at 186. Rather than put on evidence sufficient to demonstrate the alleged victim was so incompetent they could not "make or communicate a decision" as to whether they consented to sex, prosecutors will carry a lower burden and fact finders will inject their own subjective views as to how intoxicated a person must before until they are no longer competent to consent to sex. For some, that will mean a single drink, for others it will mean unconsciousness.

For example, in *Robinson* this Court found legal sufficiency for facts very similar to the instant case, but charged under an incapacitation theory—and thus required to satisfy *Pease*. There, the alleged victim consumed five or six mixed alcoholic beverages at a single party, nearly drove into a stop sign when she tried

to drive away, vomited in the kitchen sink in her barracks, and had to place a trashcan next to her bed and Robinson acknowledged that the alleged victim was "probably too intoxicated to consent to sex." *Robinson*, 77 M.J. at 298

Potentially, the facts of the instant case could have, like *Robinson*, supported a conviction under an incapacitation theory. In any case with facts related to intoxication like in the future, the prosecution will find it much easier to convict where they can spend their time focused on intoxication evidence, but need not concern themselves with proving it all the way to incapacitation causing incompetence by the *Pease* standard. This impermissibly lowers the burden of proof.

Conclusion

If this Court finds the facts of this case legally sufficient to prove "without consent" it will have deep ramifications. Never again will any other portion of Article 120(b) be charged and prosecutors will be able to make an end run around precedent of this Court. This Court must find the facts legally insufficient and set-aside the findings and sentence.

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 4506 words.

2. This Brief on Behalf of Appellee complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Mendoza, Crim. App. Dkt. No. 20210647, USCA Dkt. No. 23-0210/AR was electronically filed with the Court and Government Appellate Division on November 27, 2023

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