IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

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

USCA Dkt. No. 23-0219/AF

Crim. App. Dkt. No. ACM 40222

BRIEF ON BEHALF OF APPELLANT

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ISSUE PRESENTED

IS APPELLANT'S CONVICTION FOR A CLAUSE 2, ARTICLE 134, UCMJ, OFFENSE LEGALLY INSUFFICIENT AS TO THE TERMINAL ELEMENT?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (hereinafter Air Force Court) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

Airman (Amn) DeShaun L. Wells, Appellant, was tried at a General Court-Martial at Royal Air Force (RAF) Lakenheath, United Kingdom. *See* JA at 40. Contrary to his pleas, the panel of officer and enlisted members found Amn Wells guilty of one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928; one specification of obstructing justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b; and one specification of extramarital sexual conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. JA at 40-43. The members acquitted Amn Wells of 12 other specifications. JA at 40-42. The members sentenced Amn Wells to be reduced to the grade of E-1, to be restricted to the limits

[1] All references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], unless otherwise noted.

of RAF Lakenheath for a period of two months, to perform hard labor without confinement for two months, to be confined for 255 days,[2] to forfeit all pay and allowances, and to be discharged from the service with a bad conduct discharge. JA at 49. The convening authority took no action on the findings, disapproved the adjudged restriction to the limits of RAF Lakenheath and the hard labor without confinement, and took no action on the remainder of the adjudged sentence. JA at 52.

The Air Force Court affirmed the findings and sentence on May 23, 2023. *United States v. Wells*, No. ACM 40222, 2023 CCA LEXIS 222 (A.F. Ct. Crim. App. May 23, 2023); JA at 17.

STATEMENT OF FACTS

I. ADJUDICATING AMN WELLS'S EXTRAMARITAL SEXUAL CONDUCT

Of the 15 specifications facing Amn Wells, two were allegations that he wrongfully engaged in extramarital sexual conduct, and that such conduct was of a nature to bring discredit upon the armed forces. JA at 59. The allegations involved BF and LW[3], both short-term girlfriends of Amn Wells. JA at 118, 264.

[2] Appellant was credited with 255 days of pretrial confinement; therefore, the sentence to confinement was for time served. JA at 49.

[3] Throughout the JA, LW's name is not redacted, as she is not a complainant or victim in a sex offense case. Use of initials herein is for consistency, as BF, or "BMF" sometimes in the JA, was a complainant in a sexual offense allegation at trial. JA at 47, 49.

BF dated Amn Wells from approximately November 2019 to February 2020. JA at 118, 216-17. Their relationship developed rapidly. JA at 167. They met on Tinder, and after a few weeks of talking on social media, they met in person. JA at 115-16. The first time they met in person, they had sex, and BF got pregnant then or near then. JA at 120-21, 167, 207. Amn Wells and BF spoke of marriage and having children together. JA at 118. They spent weekends together. JA at 167. He met her parents. JA at 117-18. This whole time, Amn Wells was married. JA at 67, 209-10.

Around when they had first met in-person, Amn Wells told BF he was divorced, but then a week later, he told her he was in the process of getting a divorce. JA at 119. In January 2020, BF learned Amn Wells had lied to her; he was not, and never was, in the process of divorcing his wife. JA at 209-10, 217. Both her pregnancy and relationship with Amn Wells ended on February 12, 2020, the same day she emailed the 48th Fighter Wing Public Affairs Office to report that Amn Wells lied about being divorced and had impregnated her. JA at 216-18.

On cross-examination, BF agreed that her consensual sexual relationship with Amn Wells did not make her think any less of the United States Air Force, stating "it's not their responsibility to stop someone cheating." JA at 226-27. No other evidence about the terminal element was explicitly offered, and no evidence otherwise admitted for any other charge was argued to prove Amn Wells's affair with BF was "of a nature" to discredit the service. *See* JA at 288-300 (relevant excerpt of

Government closing argument).

Trial Counsel admitted there was no evidence on the terminal element concerning the affair with BF, arguing:

> As you look and you say, could it have been possible? Not did it actually happen, but could it have been possible that there were people, maybe the U.K. nationals involved in this, that could have said, I think less of the United States Air Force now. This is a problem. I don't like those boys as much anymore. Does Airman Wells'[s] conduct have the tendency? Was it of a nature to bring discredit upon the Air Force? Absolutely it was. Thankfully, it didn't, but it could have. That's what that last element means when it says, "of a nature." You can find, based on the conduct itself, that this could have damaged the reputation of the service, that it was of that type of nature.

JA at 290.

Amn Wells's relationship with LW was almost identical. LW dated Amn Wells from approximately July 2020 to October 2020. JA at 264-65. Their relationship developed rapidly. *See* JA at 265 (noting the relationship "snowballed"). They met on Instagram in July, and after talking on Instagram for a few weeks, they met in person. JA at 264. They had sex, which LW believes got her pregnant—though, this was never confirmed. JA at 265, 269-71. Amn Wells and LW spoke of marriage and having children together. JA at 265. They spent time at each other's houses. *Id*. He mentioned taking her back to the United States with him. *Id*. This whole time, Amn Wells was married. JA at 67, 266-67. No evidence was admitted as to why their relationship ended, but it was not until after their relationship that LW learned Amn Wells was married. JA at 266.

On cross-examination, LW agreed that her relationship with Amn Wells did not make her think any less of the Air Force. JA at 271-72. No other evidence about the terminal element was explicitly offered, and no evidence otherwise admitted for any other charge was argued to prove Amn Wells's affair with LW was "of a nature" to discredit the service. *See* JA at 300-01 (relevant portion of Government closing).

Trial Counsel argued the terminal element applicable to Amn Wells's affair with LW as follows:

> [S]imilar to [BF], thankfully [LW] is saying, "I'm personally not going to hold what he did against the United States Air Force." "I'm not going to think lesser of the Air Force because of that." That doesn't change the fact that she could have. When you go back to that, let's consider the factors. Where are we? He's out there making promises. You know, I'm going to take you back to the United States. We are going to get married. Having sex with this girl left and right. In reality, he's married to another airman. That has the potential to seriously tarnish the reputation of the Air Force here amongst the U.K. national population. Thankfully, it appears to have not done that, but that's not the requirement. Could it have? Does it have the tendency to do that?

JA at 301.

Seeing the similarities between the two charged offenses, Defense Counsel analyzed the two specifications together in closing, first attacking Trial Counsel's statement that "if it had a tendency to bring the reputation of the Air Force down, then that's enough." JA at 312.

> That's not quite accurate, so I want you to go back and read, when you get the chance, those instructions on what this actually means. If it was just that, it's possible that an affair could bring the reputation of the Air Force down and that's enough to make an affair criminal, all affairs

would be criminal because it would be possible for all of them.

JA at 313. However, when stating the law, Defense Counsel repeated what Trial Counsel said, but with an eye towards rebutting it through the requirement that the affair needed to be "open and notorious:"

> When we are talking about this, the law says discredit means to injure the reputation of the Armed Forces and includes extramarital, sexual conduct that has a tendency because of its open and notorious nature to bring the service into disrepute, make it subject to public ridicule or lower it in self-esteem. . . .
>
> There's a lot that they have to show. It's not enough then that that somebody has an affair. The Air Force is not in the business of being the morality police. There has to be more to the extramarital, sexual conduct in order for it to be criminal. It has to be open and notorious. It has to have the tendency to bring the reputation of the Armed Forces into repute because of its open and notorious nature. Nothing about the specifications in this charge were open or notorious. The sexual activity happened in private.

JA at 313-14. Defense Counsel offered an example of what they perceived as "open and notorious" to distinguish Amn Wells's case:

> Would it be a different scenario if we had a general officer who is having an affair in his office and he was missing meetings and the mission wasn't being completed because he was engaging in this extramarital, sexual conduct in his office? Yes. That would be a different scenario. That would be an affair that has a tendency because of its open and notorious nature, given all of the circumstances surrounding it, to lower the public's esteem of the Armed Forces. We can see scenarios where that might be; Airman Wells, an E-2, having an affair that nobody knows about, that not even the people who were involved in the affair, think any less of the Armed Forces as a result of it. The government wants

> you to believe that this extramarital, sexual conduct was criminal. Members, that doesn't make any sense, otherwise every affair would be criminal.

JA at 314.

In rebuttal, Trial Counsel argued Amn Wells's military status and where the affairs occurred were of huge significance:

> If Airman Wells was stationed at Barksdale back in the United States, maybe we don't care, but he's not. We are stationed in an ally country. We are a visiting force and he didn't have an affair with another American. He's doing it with British nationals. These two young ladies, absolutely were not the only people that knew about this. Their families knew about it, who are also British nationals. It's not the same. . . .
>
> When you consider the fact, whether or not he is a General or an Airman, he is still a member of the United States Air Force. We are stationed in the United Kingdom and these people, with whom he's having an affair, are not American. They are members of the nation where we are visiting, essentially. It matters. . . . It's how the affair unfolded, who was involved in it, looking at it specifically.

JA at 316. After arguing time, place, and circumstance, Trial Counsel summed up argument on the Clause 2 offenses with: "That image[4] that was presented absolutely has a tendency, it has the ability to bring the service into disrepute; to have our host nation partners look at us a little bit less. Thank God they didn't. That doesn't mean it's not possible." JA at 316-17.

Amn Wells was found *not guilty* of his conduct with LW, but *guilty* of his

[4] Trial Counsel is not referring to any physical image or physical evidence here, but how Amn Wells presented himself to others as an Airman.

conduct with BF. JA at 42.

II. THE AIR FORCE COURT'S DECISION

The Air Force Court upheld Amn Wells's conviction of extramarital sexual conduct with BF. JA at 7-8. The Air Force Court found "there was ample evidence for the trier of fact to determine 'beyond a reasonable doubt that [Appellant]'s conduct would tend to bring the service into disrepute if it were known.'" JA at 7 (quoting *United States v. Saunders*, 59 M.J. 1 (C.A.A.F. 2003)). The Air Force Court concluded "the evidence established Appellant showed a video of his extramarital sexual conduct to others and it was available to the general public to view on a website." *Id*. "As the video depicts [Amn Wells] engaging in intimate sexual acts with BF, it is strong evidence of the 'open or notorious nature' of the extramarital conduct." *Id*. Therefore, "a rational factfinder could readily find the essential elements of extramarital sexual conduct beyond a reasonable doubt." JA at 7-8.

The Air Force Court concluded this despite (1) no counsel arguing, or otherwise linking, the video to BF's affair, JA at 288-300, 312-14, (2) the military judge instructing on spillover two different times, JA at 103-04, 286-87, (3) there being a theme by all counsel at trial to keep every offense and its facts separate from another, JA at 74-80, 85, 302, and (4) Amn Wells being acquitted of the offense relating to the video, JA at 42-43. Further, while the video the Air Force Court referenced was (1) viewed 817 times on Pornhub, JA at 63, 244-46, (2) shown briefly

to LW by Amn Wells, JA at 268-270, and (3) shared via electronic communications by Amn Wells with another individual and on a group chat, JA at 65-66, 256-260, the video itself does not identify the participants. JA at 61, 112. Furthermore, the identities of the individuals in the video are not otherwise apparent. JA at 61, 112. Neither the video's metadata, description, nor any other context identify BF or Amn Wells (as *Airman* DeShaun Wells). JA at 61-66. Nothing in the video suggests either individual was married. JA at 61. Additionally, nothing in the video suggests Amn Wells was in the military or affiliated with the Air Force. *Id*.

Additionally, the Air Force Court noted a factfinder is "not required to accept" the views of a witness, and "could consider other evidence in determining whether Appellant's conduct tended to discredit the service." JA at 7 (citing *United States v. Heppermann*, 82 M.J. 794 (A.F. Ct. Crim. App. Sep. 28, 2022)).[5] This was coupled with the reminder that the Government does not need to prove anyone's "opinion of the military was lowered." JA at 7 (citing *United States v. Moore*, No. ACM S32477, 2018 CCA LEXIS 560 (A.F. Ct. Crim. App. Dec. 11, 2018)).[6]

[5] The full quote from the Air Force Court is: "Moreover, as the factfinder, the military judge could consider other evidence in determining whether Appellant's conduct tended to discredit the service, including the content of the messages *alone*." *Heppermann*, 82 M.J. at 802 (emphasis added).

[6] *Moore* provides, "Military law does not require that the public know of Appellant's conduct. *United States v. Phillips*, 70 M.J. 161, 165-66 (C.A.A.F. 2011)." 2018 CCA LEXIS 560, at *21.

SUMMARY OF ARGUMENT

To determine whether Amn Wells's conviction is legally sufficient, there are two interrelated preliminary questions this Court must answer. The first is whether *United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2011) remains controlling precedent. In evaluating whether to adhere stare decisis, the second question becomes whether Clause 2 is constitutional.

Article 134, UCMJ, 10 U.S.C. § 934, criminalizes, *inter alia*, all conduct "of a nature to bring discredit" upon the armed forces. The President has defined "discredit" to mean "to injure the reputation of [the service]. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem." *MCM* pt. IV, para. 91.c.(3). The vague language of "Clause 2," as it has come to be known, has stood the test of time, as it is often coupled with its more narrowly-defined and historically-grounded counterpart, Clause 1, "all disorders and neglects to the prejudice of good order and discipline in the armed forces." *MCM* pt. IV, para. 91.c.(2)(a). *See Parker v. Levy*, 417 U.S. 733 (1974); *infra* section II.A.1.a.-c. Shielded by Clause 1's history and tradition, Clause 2 has successfully dodged constitutional challenges despite its inherent vagueness and invitation for conclusively presuming the terminal element. *Infra* section II.A.1.a.-c.

The opportunity to reveal Clause 2's inherently unconstitutional nature came

in 2011 when this Court attempted to answer the question of what is the "necessary quantum of proof to establish" that which is service discrediting. *United States v. Phillips*, 70 M.J. 161, 163 (C.A.A.F. 2011). Standing alone, decoupled from Clause 1, Clause 2 operates to criminalize "per se" service discrediting conduct, making it exceedingly difficult, if not impossible in some circumstances, to defend against the terminal element. Had the *Phillips* Court realized this, it would have seen that no "quantum of evidence" or judicially tailored rule can cure the unconstitutional nature of Clause 2 because, ultimately, Clause 2 fails to provide fair notice of precisely what acts are forbidden and it allows discriminatory and arbitrary enforcement since the terminal element is meaningless. *Levy*, 417 U.S. at 774-75 (Stewart, J., dissenting). Instead of reaching that result, though, this Court decided that factfinders may conclusively presume the terminal element, which is a violation of the Due Process Clause of the Fifth Amendment. This result is unsurprising, though, when this Court did not want to "overrule almost a century" of per se service discrediting precedent. *Phillips*, 70 M.J. at 165. But this reluctance overlooks the sea change in Article 134, UCMJ, that occurred. *Infra* section II.A.1.d.

Phillips must be overruled; stare decisis does not require that this Court ignore that the basis for the historical practice of using Clause 2 for per se service discrediting conduct has been substantially eroded—and is unconstitutional. *See United States v. Fosler*, 70 M.J. 225, 232-233 (C.A.A.F. 2011). When analyzing

Phillips, the constitutional pitfalls of Clause 2 are clear. While this Court has appropriately attempted to apply the doctrine of constitutional avoidance[7] in interpreting Clause 2, such efforts are futile since every reading of Clause 2 is unconstitutional. Every reading raises "grave and doubtful constitutional questions"[8] that can no longer be avoided. What this Court avoided in 2011 it must now do—find Clause 2 of Article 134, UCMJ, unconstitutional.

Even if this Court decides *not* to overrule *Phillips*, Amn Wells's conviction is still legally insufficient. Amn Wells's affair was private and the testimony elicited—the only actual evidence offered that was linked to the terminal element—showed his conduct was not of a nature to discredit the service. When there is actual evidence presented rebutting the terminal element, speculative hypotheticals coupled with the conduct is not enough to prove the terminal element beyond a reasonable doubt.

ARGUMENT

I. THE STANDARD OF REVIEW FOR LEGAL SUFFICIENCY IN AMN WELLS'S CASE NECESSARILY ENCOMPASSES WHY ADHERING TO STARE DECISIS IS INAPPROPRIATE AND WHY AMN WELLS'S CONVICTION IS UNCONSTITUTIONAL.

This Court reviews issues of legal sufficiency *de novo*. *United States v. Richard*, 82 M.J. 473, 2022 CAAF LEXIS 637, at *7 (C.A.A.F. 2022) (citing *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)). In determining legal sufficiency,

[7] *Clark v. Suarez Martinez*, 543 U.S. 371, 381 (2005).
[8] *Jones v. United States*, 529 U.S. 848, 857 (2000).

this Court assesses "whether, viewed 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." *Richard*, 2022 CAAF LEXIS 637 at *7-8 (internal citation and quotations omitted).

The legal sufficiency of Amn Wells's conviction is intertwined with whether the applicable law, *Phillips*, as instructed to the members and employed by the Air Force Court, remains controlling precedent. "Stare decisis is defined as the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (internal citation omitted). Encompassed therein is the idea "an appellate court must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself." *Id*. For Amn Wells's case, if *Phillips* is overruled, legal sufficiency on the terminal element still must be analyzed. This secondary analysis opens the door to the original question posed in *Phillips*: what evidence is required to prove the terminal element under Clause 2. *Phillips*, 70 M.J. at 163.

Succinctly, legal sufficiency becomes a matter of whether Clause 2 is constitutional. The constitutionality of a statute is a question of law reviewed *de novo*. *United States v. Begani*, 81 M.J. 273, 280 (C.A.A.F. 2021) (citing *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000))*; see also United States v. Matthews*, 16 M.J. 354, 366 (C.M.A. 1983) ("Congress intended for this Court to

have unfettered power to decide constitutional issues—even those concerning the validity of the Uniform Code.").

Altogether, to determine whether Amn Wells's conviction is legally sufficient, there are two intertwined preliminary questions this Court must answer: (1) whether *Phillips* remains good law and (2) in determining so, whether Clause 2 is constitutional. The answer to both is no.

II. *PHILLIPS* MUST BE OVERTURNED BECAUSE CLAUSE 2 IS UNCONSTITUTIONAL AND CANNOT BE SAVED BY ITS PRESIDENTIAL INTERPRETATION OR ANY RULE THIS COURT CAN IMPOSE.

When overruling precedent, this Court uses the doctrine of stare decisis. *United States v. Cardenas*, 80 M.J. 420, 423 (C.A.A.F. 2021). While adherence to precedent is the preferred course, *United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018), this Court is "not bound by precedent when there is a significant change in circumstances after the adoption of a legal rule, or an error in legal analysis." *Cardenas*, 80 M.J. at 423. This Court considers four factors when evaluating the application of stare decisis: "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Blanks*, 77 M.J. at 242 (citation omitted) (internal quotation marks omitted). As to the first factor, the analysis is not whether "the interpretation at issue is plausible, but whether the [decision is] so unworkable or poorly reasoned that [it] should be overruled."

Cardenas, 80 M.J. at 423. While no one factor is controlling, analysis of the first factor alone provides a "special justification"[9] for overturning *Phillips*: Clause 2 is unconstitutional.

A. *PHILLIPS* WAS WRONGLY DECIDED. IT WAS, AND REMAINS, UNWORKABLE AND POORLY REASONED BY SANCTIONING PER SE SERVICE-DISCREDITING CONDUCT, WHICH IS UNCONSTITUTIONAL.

Phillips is a Clause 2, Article 134, UCMJ, case where Corporal (Cpl) Phillips was charged with possession of child pornography. 70 M.J. at 163. The Government had to prove beyond a reasonable doubt that Cpl Phillips engaged in certain conduct and that the conduct was of a nature to bring discredit upon the armed forces. *Id*.; 10 U.S.C. § 934 (2006).[10] The issue before this Court was *how* the factfinder was supposed to determine whether the terminal element was proven. 70 M.J. at 163. On appeal, the *Phillips* Court called this issue "the necessary quantum of proof." *Id*.

At Cpl Phillips's court-martial, "no witnesses testified they found Appellant's conduct to be service discrediting. No witnesses testified that they had become aware or would have become aware of Appellant's conduct" absent his admission. *Id*. at 164. The Navy-Marine Corps Court of Appeals found "possession of child pornography by a uniformed servicemember of the Armed Forces is per se service

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[9] *See Andrews*, 77 M.J. at 399 ("Even if these factors weigh in favor of overturning long-settled precedent, we still require special justification, not just an argument that the precedent was wrongly decided.") (internal quotations omitted).

[10] The statute has remained unchanged since *Phillips.*

discrediting . . . especially under the facts and circumstances of this case." *Id*. (quoting *United States v. Phillips*, 69 M.J. 642, 645 (N-M. Ct. Crim. App. 2010)).

Confronted with the lower court's concerning "per se service discrediting" language, this Court emphasized that conclusive presumptions[11] are impermissible: "The terminal element cannot be conclusively presumed from any particular source of action." *Id*. at 165. Despite this, this Court went on to enumerate two separate conclusions that, when taken together, operates as a conclusive presumption.

First, this Court held actual evidence that the public is aware of the charged conduct is not required. *Id*. at 165-66. Without explicitly citing to it, this Court referenced the President's explanation of Clause 2,[12] stating, "The focus of clause 2

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[11] There is a fair argument that "conclusive presumption" is a term of art. *See, e.g.*, *United States v. Norman*, 74 M.J. 144, 150-51 (C.A.A.F. 2015) (finding there was no unconstitutional conclusive presumption because the military judge's instructions did not require the members to find proof of the terminal element simply because the Government provided proof of the underlying conduct). Nonetheless, "the word 'presumption' has often been used when another term might be more accurate." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 104 n.6 (2011) (quoting J. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 335 (1898) ("Often . . . maxims and ground principles get expressed in this form of a presumption perversely and inaccurately.")). Putting semantics aside, the use of this term by this Court to express the underlying due process problem of finding certain acts per se service discrediting does not change the nature of that problem: no element may be conclusively presumed from a set of facts; every element must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

[12] "This clause of Article 134 makes punishable conduct which *has a tendency to bring* the service into disrepute or which tends to lower it in public esteem." *MCM* pt. IV, para. 60.c.(3) (2006) (emphasis added). This is the same version in existence today. *MCM* pt. IV, para. 91.c.(3).

is on the 'nature' of the conduct, whether the accused's conduct would *tend to bring discredit on the armed forces* if known by the public, not whether it was in fact so known." *Id*. (emphasis added). This Court then stated *the statute* does not require evidence regarding the views of the public. *Id*. at 166. By using the President's description instead of applying "the common and ordinary understanding of the words in the statute," *id*. at 166 (citations omitted), this Court glossed over the broad scope of Clause 2's language. *See infra* section II.A.2.

Second, this Court held that "proof of the conduct itself *may* be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that under all the circumstances, it was of a nature to bring discredit upon the armed forces." *Id*. at 163. Wholly private and constitutionally protected conduct may be otherwise service discrediting based on "the facts and circumstances of the conduct." *Id*. at 166. This conclusion, especially when coupled with the fact that no evidence of the public's opinion need be offered at trial, permits a conclusion of "per se service discrediting conduct" (or conclusive presumptions, as labeled by this Court). This is evident from the Court's analysis, *id*. at 163, 165-66, and Judge Ryan's dissent. *Id*. at 167-68 (Ryan, J., dissenting) ("[T]o affirm Appellant's [Clause 2] conviction . . . one would expect the record to establish that the Government presented a theory at trial.").

In analyzing the terminal element, this Court only considered that Cpl Phillips had child pornography, that he knew he has such content, and such

content contained known child victims. *Id*. at 166. No evidence the public was or would have become aware of his conduct was ever introduced. *Id.* Despite no evidence being offered, this Court concluded that *if* the public knew of his conduct, Cpl Phillips's activity *would have tended* to discredit the service. *Id*.

Judge Ryan, joined by Judge Erdmann, correctly summarized the majority's unworkable rules:

> [I]t is entirely unclear to me what the actual distinction is between holding that the offense here cannot be *per se* or conclusively service discrediting and holding, at the same time, that "the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that Appellant's activity would have tended to bring discredit to the service had the public known of it." There is nothing in the record—other than the fact of the activity itself—upon which the military judge could have based this finding.

Id. at 167 (Ryan, J., dissenting) (citation omitted). Judge Ryan highlights the quintessential problem with how the *Phillips* Court interpreted Clause 2: nothing in the record—other than the fact of the activity itself—is required to make a finding of guilt. *Id*. This is likewise clear from the Court's own analysis where the terminal element was conclusively presumed from the possession of child pornography itself, without explanation. *Id.* at 166. The effect of *Phillips* is the service discrediting element is absorbed by the conduct element(s) and no evidence or testimony can rebut it. *See, e.g.*, *Morissette v. United States*, 342 U.S. 246, 275 (1952) ("A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.").

This absorption of the terminal element is the "conclusive presumption," which allows the factfinder to conclusively presume the terminal element without a logical connection to proven facts. *See Morissette*, 342 U.S. at 275 ("A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect."). The *Phillips* rules operates to eliminate both the prosecution's "burden of proving all elements of the offense charged" and its burden of persuading "the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (internal citations omitted).

Allowing members to find certain acts are per se service discrediting "conflict[s] with the overriding presumption of innocence with which the law endows the accused and which extends to *every element* of the crime." *Morissette*, 342 U.S. at 275 (emphasis added). Under *Phillips*, even if there is no evidence of discredit to the service, as in *Phillips*, or evidence to the contrary, as in Amn Wells's case,[13] the conduct alone still leads to proof of the terminal element. As a result, the Government is relieved of its burden to prove all elements of a charged offense beyond a reasonable doubt—this is unconstitutional. *In re Winship*, 397 U.S. at 364 ("[T]he Due Process Clause protects the accused against conviction except upon proof

[13] *E.g.*, JA at 226-27 (referencing BF's testimony).

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

The instructions for a Clause 2 offense do not overtly tell the members to conclude that if the conduct is proven so too is the terminal element, but that is not the problem. The very nature of Clause 2 is the source of the problem because it forecloses independent consideration of whether proven facts establish elements by leaving no ability to rebut the terminal element other than by rebutting the "certain acts" being proven. *See Carella v. California*, 491 U.S. 263, 265-266 (1989) (discussing principles of conclusive presumptions); *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979) (discussing how a conclusive presumption is one that cannot be rebutted "[g]iven the common definition of 'presume' as 'to suppose to be true without proof,' Webster's New Collegiate Dictionary 911 (1974)").[14]

1. History and precedent reveal how Clause 2 is unconstitutional.

Unfortunately, what *Phillips* does is not new—criminalizing "per se" service discrediting conduct is the fundamental history of Clause 2. Therefore, merely overruling *Phillips*, and fashioning a new rule, cannot cure this constitutional defect. The Court's reasoning in *Phillips* is inherently flawed because it rests on an unconstitutional statute's perceived validity through its longevity. The majority in

[14] This definition is unchanged. Merriam-Webster, *Presume* (last visited Dec. 7, 2023) https://www.merriam-webster.com/dictionary/presume.

Phillips fails to analyze Clause 2's full history, when the complete history is relevant to understanding the unconstitutional nature of the statute. Had this Court fully engaged with the statute's history, it would have seen what had been happening since 1916: Clause 2 has always been employed for "per se service discrediting conduct."[15]

a. Clause 2's origin is separate and distinct from the other Article 134, UCMJ, clauses, such that it cannot be shrouded by either.

As the *Phillips* Court noted, "[T]he language now found in clause 2 first entered military law for a single purpose: to subject noncommissioned officers on the retired list to criminal sanctions." *Phillips*, 70 M.J. at 165. But, as also noted by the majority, "Since its enactment in 1916 . . . the provision has never been so restricted by its text or in practice." *Id*. The majority gives little consideration to what this actually means, other than to "decline to overrule almost a century of precedent." *Id*. It is necessary to see how Clause 2 evolved, though, to see why Clause 2 inherently invites the factfinder to conclusively presume the terminal element.

The 1917 Manual for Courts-Martial, had the first—albeit, hesitant—reference to what would become Clause 2: "There is, however, a *limited* field for the application of this part of the general article to soldiers on the active list in cases where their discreditable conduct is not made punishable by any specific article or by the other parts of the general article." *MCM*, 1917, para. 446 (II) (emphasis added). Since at

[15] *Infra*. section II.A.1.b.

least 1621, some version of Clauses 1 and 3 of Article 134, UCMJ, existed to punish "whatever is not contained in these [enumerated] Articles." *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 914 (2nd ed. 1920) (quoting CODE OF ARTICLES OF KING GUSTAVUS ADOLPHUS OF SWEDEN (1621)). Yet, in 1917, there sprung up a "limited field" of application for Clause 2 when active duty members' "discreditable conduct" was not punishable by the two historically grounded articles. Because of its unique origin, and now expansive application, Clause 2 does not have the same history or "common law" of Clauses 1 and 3. As such, Clause 2 cannot be saved by sweeping it under its counterparts. *But see Levy*, 417 U.S. at 746-52 (holding Article 134, UCMJ, constitutional in total). When it stands on its own, Clause 2 can be evaluated for what it is—a novel invitation to find a limitless number of "certain acts" as per se service discrediting.

b. This Court has employed a "per se service discrediting analysis" for "obvious criminal" or "detestable" conduct for years—and not just with Clause 2.

This Court's predecessor did not always employ a per se service discrediting analysis overtly with Clause 2, but it has, and Judge Latimer frequently did, the best example being *United States v. Sanchez*, 11 U.S.C.M.A. 216, 218 (C.M.A. 1960). Writing for the majority, Judge Latimer wrote,

> And most assuredly, when an accused performs **detestable and degenerate acts which clearly evince a wanton disregard for the moral standards generally and properly accepted by society, he**

> **heaps discredit on the department of the Government he represents** . . . . it would be an affront to ordinary decency to hold that an act such as [having sex with a chicken] was **not criminal *per se***[16] and would not dishonor the service in the eyes of a civilized society.

Id. *See also United States v. Gittens*, 8 U.S.C.M.A. 673, 674 (C.M.A. 1958) (Latimer, J., dissenting) ("My dissenting opinions . . . called attention to **the sheer futility** of requiring a court-martial to find that the commission of certain crimes had an adverse impact on the Services.[17]"); *Grosso*, 7 U.S.C.M.A. at 573 (Latimer, J., dissenting) ("In the event a serviceman takes indecent liberties with a child of tender years, no reasonable person need be told that the offense has an adverse impact in military service. **Every right-thinking person would concede that xrimes [sic] such as those bring the service into disrepute**."[18]).

Over time, the idea that a "criminal per se" act was inherently service discrediting was echoed outside of Article 134, UCMJ, jurisprudence. In *United*

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[16] In his dissent, Judge Ferguson warns of the majority's use of the words "per se:" "I trust, however, their characterization of the accused's behavior as 'criminal per se' is not intended to detract from the formerly expressed requirement that court members be instructed that they must find as a fact such acts are discreditable." *Sanchez*, 11 U.S.C.M.A. at 221 (Ferguson, J., dissenting).

[17] Because the panel would "find what is obvious to everyone." *United States v. Grosso*, 7 U.S.C.M.A. 566, 573 (C.M.A. 1957).

[18] Judge Latimer does proceed to say, though, that some petty crimes, as a matter of law, would not constitute military offenses. *Grosso*, 7 U.S.C.M.A. at 573. He does not explain how, but, instead turning to the facts of the case, writes, "Certainly when members of the military services maliciously and untruthfully broadcast information that their senior officers are sex perverts . . . the confidence and respect of the civilian population is shaken." *Id*.

States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994), this Court's predecessor held, "The enumerated articles are rooted in the principle that such conduct *per se* is either prejudicial to good order and discipline or brings discredit to the armed forces; these elements are implicit in the enumerated articles." This was reiterated in *United States v. Fuller*, 54 M.J. 107, 112 (C.A.A.F. 2000): "[E]very enumerated offense under the UCMJ is *per se* prejudicial to good order and discipline or service discrediting." It was obvious the enumerated crimes were "so detestable and degenerate" by their very nature, and therefore service discrediting. *See Sanchez*, 11 U.S.C.M.A. at 218.

c. Parker v. Levy*'s "specialized society" and "military common law" justifications have helped the Government avoid proving every element of Clause 2 as required by* In re Winship *and the Constitution for almost 40 years.*

In *In re Winship*, the Supreme Court unequivocally held, "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[19] 397 U.S. at 364. *In re Winship* provides clear foundation for why conclusively presuming certain acts are service discrediting is unconstitutional: the Government is "not forced to prove 'beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged.'" *Sandstrom*, 442 U.S.

[19] This is why *Foster* and its progeny have been overruled—every element must be proven and the accused must have fair notice of what those elements are. *See Richard*, 2022 CAAF LEXIS 637, at *7; *Fosler*, 70 M.J. at 232.

at 523.

Then, in *Parker v. Levy* the Supreme Court announced that the "military is, by necessity, a special society," 417 U.S. at 743, with its own "customary military law." *Id*. at 744. But this reasoning can only preserve Clauses 1 and 3 from being void for vagueness, not Clause 2. The *Levy* majority does lip service to Clause 2, quickly noting it existed since 1916 and then couching it in the same history and tradition as Clause 1 for the rest of the analysis. 417 U.S. at 746-52. This is misleading because Clause 2 does not share the same history and tradition of Clauses 1 and 3. WINTHROP, at 914. Pulling Clause 2 away from its historical counterparts allows proper analysis of its vagueness.

Clause 2 authorizes the Government to prosecute otherwise permissible, private, and constitutionally protected conduct.[20] *See infra* section II.A.2. This is made even more clear by the fact that the military can already criminalize any conduct "to maintain a disciplined and obedient fighting force" under Clauses 1 and 3. *Levy* properly describes that Clauses 1 and 3 have long existed and been successfully applied for that exact purpose. 417 U.S. at 763 (Blackmun, J., concurring).

[20] *United States v. Rocha*, No. ACM 40134, 2022 CCA LEXIS 725 (A.F. Ct. Crim. App. Dec. 16, 2022) (conviction for private masturbation with a child-like sex doll overturned); *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008) (conviction for private hate speech overturned); *United States v. Guerrero*, 33 M.J. 295 (C.A.A.F. 1991) (convicted for cross-dressing); *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988) (convicted for cross-dressing); *United States v. Day*, 11 U.S.C.M.A. 549 (C.M.A. 1960) (conviction for private high-interest money-lending overturned).

What the majority and concurrence in *Levy* fail to acknowledge is "patently criminal conduct" under Clause 2 is "ever-expanding." 417 U.S. at 784 (Stewart, J., dissenting). The unrestrained evolution of Clause 2 shows there is little doubt "an infinite variety of other conduct, limited only by the scope of a commander's creativity or spleen, can be made the subject of court-martial under these articles." *Id*. at 779 (Stewart, J., dissenting) (internal citation omitted). Two cross-dressing cases, *United States v. Davis* and *United States v. Guerrero*, epitomize the dissent's vagueness concerns, while also highlighting the majority's improper reliance on history for Clause 2.

In *Davis,* the appellant is described to have worn women's clothes to their therapy groups and "in and around the Puget Sound Naval Shipyard." 26 M.J. at 447. This Court's predecessor explained that "[t]he essence of appellant's crime is that [their] unusual conduct" violated Article 134, UCMJ, because the facts and surrounding circumstances recited in the specifications describe conduct on a military installation that "virtually always" would be discrediting. 26 M.J. at 448-49.[21]

[21] The "virtually always" conclusion relies heavily on the moral judgment of the prosecutor, factfinder, and appellate court, enabling any one of them to define new crimes whenever and however. This is clear from this Court's statement that had the appellant been in a "King Neptune ceremony" or a "Kibuki theater," their conduct would not have been service discrediting. *Id.* at 449. Presumably, this is because there is a long history of these cross-dressing scenarios being of "the moral standards generally and properly accepted by society," *Sanchez,* 11 U.S.C.M.A. at 218, or within the "fundamental concepts of right and wrong," *Levy*, 417 U.S. at 763 (Blackmun, J., concurring).

In *Guerrero*, this Court tried to walk back the "virtually always" conclusion, noting that "[i]t is not the cross-dressing *per se* which gives rise to the offense. Rather, it is (1) the time, (2) the place, (3) the circumstances, and (4) the purpose for the cross-dressing, all together, which form the basis for determining if the conduct is" service discrediting. 33 M.J. at 298. To this Court, "if a servicemember cross-dresses in the privacy of his home, with his curtains or drapes closed and no reasonable belief that he was being observed by others or bringing discredit to his rating as a petty officer or to the U.S. Navy, it would not constitute the offense." *Id*. However, *this* appellant was seen, off-base, *in his home, in his bedroom*, with "his wig on or whatever and makeup on" by his neighbor, who happened to be a servicemember. *Id*. at 296-297. The neighbor complained because "it was beginning to be a nuisance, having to look out my curtains and see this going on or whatever." *Id*. at 297. In *Guerrero*, appellant's conduct was not "patently criminal;" it was conduct criminalized by the "commander's spleen," justified only through an imagined (fictional) effect on certain persons. Clause 2 invites a level of uncertainty about what is criminal while also allowing the factfinder to conclusively presume the proven conduct is of a nature to discredit the service without any proof to that effect.

Judge Everett in his opinion in *Guerrero*, concurring in part and dissenting in part, notes exactly this. He finds that just being casually seen cross-dressing "is not within the contemplation of Article 134. Indeed, to affirm such a conviction expands

Article 134 so greatly as to raise problems of notice and vagueness." 33 M.J. at 299 (Everett, J., concurring in part, dissenting in part). Continuing, he states, "although I realize that *Parker v. Levy* upheld Article 134 against constitutional attack on such grounds, an overly broad application of Article 134 in cases like this is an invitation for the Supreme Court to reexamine its holding there." *Id*. (internal citation omitted).

d. The "sea change" to Article 134, UCMJ, set the stage for Clause 2 to be found unconstitutional in Phillips.

Between *Levy* and *Phillips*, a "sea change" occurred in Article 134, UCMJ, jurisprudence. In *United States v. Medina*, this Court held the terminal elements under Clauses 1 and 2 are not implied elements of a prosecution under Clause 3. 66 M.J. 21, 25-26 (C.A.A.F. 2008). Then, using *Medina*, this Court, in *United States v. Miller*, overruled *Foster* and its progeny "[t]o the extent those cases support the proposition that clauses 1 and 2 of Article 134, UCMJ, are per se included in every enumerated offense." 67 M.J. 385, 389 (C.A.A.F. 2009). While both cases are about lesser-included offenses, they are founded on the same legal requirement espoused by *In re Winship*: if an accused is charged with a crime, the Government must prove beyond a reasonable doubt every element of the charged offense. 397 U.S. at 364. Slipping in Clause 2 as a lesser-included offense because criminal conduct is "per se" service discrediting is "at odd[s] with [this] principle." *Miller*, 67 M.J. at 389 ("'[A]n accused has a right to know to what offense and under what legal theory' he will be

convicted."). In other words, no longer can certain conduct be considered "per se service discrediting" just because that conduct is a crime under Clause 3 or the enumerated articles.

By the time *Phillips* comes to this Court, the stage is set for discovering the fatal constitutional flaws of Clause 2. *Miller* foreshadows the conclusion in *Phillips* that the terminal element in Article 134, UCMJ, offenses must be proven beyond a reasonable doubt. *Miller* also forecloses the idea that criminal conduct can be *per se* service discrediting. *In re Winship* requires the Government to prove every element of the charged offense without allowing the factfinder to conclusively presume an element. Instead of realizing that it is impossible to square these principles with the plain language of Clause 2, the *Phillips* Court avoided the constitutional implications and attempted to formulate a rule to govern Clause 2. This rule fails to save Clause 2, and its application is just as unconstitutional as Clause 2 itself.

2. While the *Phillips* Court improperly avoided the void for vagueness issue inherent in Clause 2, the Supreme Court's analysis from *Johnson v. United States* illustrates exactly why Clause 2 is unconstitutional.

Justice Scalia wrote for the Court in *Johnson v. United States*, where the Court found 18 U.S.C. § 924 (e)(2)(B) void for vagueness. 576 U.S. 591 (2015). Reviewing the language from the *Johnson* Court demonstrates that the vagueness issues inherent with 18 U.S.C. § 924(e)(2)(b) apply squarely to Clause 2:

> Two features of [Clause 2] conspire to make it unconstitutionally vague. In the first place, [Clause 2] leaves grave uncertainty about how to

> [determine what is service discrediting]. It ties the [certain conduct] to a judicially imagined [idea of what could discredit the service], not to real-world facts. . . . How does one go about deciding what kind of conduct [is 'of a nature' to discredit the service]? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?' . . . . Critically, picturing [how the service could be discrediting] is not enough; . . . assessing [of a nature to discredit the service] seemingly requires the [factfinder] to imagine how the idealized [public could think of the conduct]. . . .

Id. at 597-98 (internal citation omitted) (edited to apply the Court's rationale to Clause 2, Article 134, UCMJ). Succinctly, this is a speculative enterprise.

What one person thinks is "of a nature" to discredit the service, another will almost always disagree: cross-dressing (*Guerrero*); criminal but completely private possession of child pornography[22] (*Phillips*). Every person could, and likely does, have a different perspective on any variety of "certain acts" charged. "[Clause 2] offers no reliable way to choose between these competing accounts of what is ['of a nature' to discredit the service.]" *Id*. at 598. Even still, the factfinder could disregard every competing account, and go off their "spleen" or "gut instinct." No servicemember knows what is criminalized under Article 134, UCMJ, because no servicemember knows what any particular factfinder thinks could discredit the service. Even if a servicemember could read minds, that is not sufficient. While only

[22] It is uncontroverted possession of child pornography is detestable and criminal under state and federal law, but under Clause 2, how this conduct is criminal becomes a morality question, embedded in speculation about what fact makes such possession service discrediting and why.

the opinion of the randomly selected panel members matter, this would be at a time disconnected from the crime because standards and morality change over time. The time component adds additional uncertainly; no servicemember has notice of what the moral standard is in 2023 for misconduct committed in 2019.

At the same time, Clause 2 creates uncertainty by its invitation for factfinders to conclusively presume certain acts are service discrediting. Since at least 1950, servicemembers have been convicted for "per se" service discrediting conduct because that conduct was "inherently" criminal. This is embodied by cases like *Foster* and *Fuller* because enumerated crimes were inherently service discrediting. When prosecuted or convicted for Clause 2 offenses, servicemembers were faced with not knowing exactly what constituted service discrediting behavior on top of the sheer futility of trying to rebut that which was considered inherently criminal (i.e., possession of child pornography). However, conduct under Clause 2 is only criminal *because* it is service discrediting.

This circular logic reveals the underlying fallacy. Clause 2 casts an unfair and practically impossible burden of persuasion upon the defense when nothing more than the certain "criminal" act needs to be proven and it has *always* been this way. This is clearer with "benign" conduct, like the cross-dressing cases. By comparing the cross-dressing cases with child pornography cases, conduct which is not serious (and arguably constitutionally protected) can be a "per se" crime because someone (law

enforcement, prosecutors, commanders, random bystanders) believes that it "virtually always" is service discrediting. This element does not need to be proven by virtue of the statute's language.

Clause 2 allows the prosecution's burden to be lowered by the elimination of an element, rendering it vague because *anything* can be charged. Additionally, because of the meaninglessness of the terminal element, the accused has no ability to rebut the service discrediting element, no matter how "wholly private or constitutionally protected" the conduct is. All of these due process concerns come together to

> permit the jury to make an assumption which all the evidence considered together does not logically establish . . . giv[ing] to a proven fact an artificial and fictional effect. . . . *[T]his presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.*

Sandstrom, 442 U.S. at 522 (internal citations omitted). Despite the words "must presume" never being uttered in an instruction or by the statute, the speculative and assuming nature of the statute does not change. Clause 2 produces more unpredictability and arbitrariness than the Due Process Clause tolerates. *Johnson*, 576 U.S. at 598.

Even if there is clear conduct captured by Clause 2 which servicemembers would arguably have notice of, the Supreme Court has stated, "[O]ur *holdings* squarely contradict the theory that a vague provision is constitutional merely because

there is some conduct that clearly falls within the provision's grasp." *Johnson*, 576 U.S. at 602-603 (citing *Coates* v. *Cincinnati*, 402 U.S. 611 (1971); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921)). Consequently, even some potentially "obviously service discrediting conduct" falling under Clause 2 does not save it from being unconstitutional.

The Supreme Court has also "acknowledged that the failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness." *Johnson*, 576 U.S. at 598 (citing *L. Cohen Grocery Co.*, 255 U.S. at 91). Here, this Court's repeated attempts and failures to craft a principled and objective standard out of Clause 2 confirm its hopeless indeterminacy. The history reveals that, as does *Phillips*. Clause 2 is void for vagueness and no definition, whether by the President or this Court, corrects it.

3. No explanation by the President nor tailored definition by this Court can save Clause 2 from being unconstitutional.

Assuming this Court overrules *Phillips*, the same issue this Court faced then will face the Court today: what "quantum of proof" is necessary to prove the conduct is "of a nature to bring discredit to the Armed Forces." Analyzing this question in the context of overturning *Phillips* further reveals Clause 2 is beyond saving. The President's current explanation is too expansive, which this Court has found to be impermissible. Any definition this Court provides will contravene the express language of the statute, invading Congress' legislative function, which is also

impermissible.

First, the President lacks authority to create new criminal offenses or to expand the scope of the statutory offenses enacted by Congress. *United States v. Brown*, No. 22-0249, 2023 CAAF LEXIS 734, *25-26 (C.A.A.F. 2023) (Hardy, J., concurring in part, dissenting in part) (citing *United States v. Jenkins*, 7 U.S.C.M.A. 261, 262 (C.M.A. 1956)). The President's explanation for the terminal element of Clause 2, which permeates through all "enumerated" Article 134, UCMJ, offenses as well, does what this Court has prohibited—it expands the scope of the statute to what "tends" to discredit the service. *See id.* If this is a fair reading of "of a nature," that only bolsters the unconstitutional nature of both the statutory language and the President's explanation. The President's explanation does not narrow the "of a nature" language because "tendency" puts the analysis even farther into the hypothetical; as this Court concluded in *Phillips*, by using the word "tend," the service does not need to be actually harmed. *Phillips*, 70 M.J. at 165-66. A provision of the Manual for Courts-Martial (Manual) cannot sanction a violation of an accused's constitutional rights, which, as discussed, this hypothetical "tendency" paradigm does.[23] *See United States v. Stephens*, 67 M.J. 233 (C.A.A.F. 2008).

Second, assuming this Court were to require a direct connection or actual harm

[23] *Supra* II.A.1-2.

to the service upon overruling *Phillips*,[24] this Court would be constraining the language of the statute to mean something other than what Congress wrote. *Richard*, 82 M.J. 473, 2022 CAAF LEXIS 637, at *22 (Maggs, J., concurring) ("This Court cannot revise the clauses of Article 134, UCMJ, so that they are more readily defined, nor can it adopt definitions of its own choosing that would constrain the language of the statute."). Neither the words "direct" nor "actual" are found in Clause 2 nor do they mean "of a nature." *See* Collins Dictionary, *Of A Nature Of* (last visited Nov. 16, 2023) https://www.collinsdictionary.com/us/dictionary/english/of-the-nature-of ("having the character or qualities of"). "Of a nature" has an inherent or per se value to it, such that whatever is being described only needs to have the characteristics of the underlying subject. *See, e.g.*, *Phillips*, 70 M.J. 161. Ultimately, "the responsibility clearly rests with Congress to revise the statute to remedy the unconstitutional statutory scheme. . . . It is not the province of this court to rewrite a statute to conform to the Constitution, as that would invade the legislative domain." *Medina*, 69 M.J. at 465 n.5 (internal citations omitted).

This concept from *Medina* is consistent with when it is appropriate to apply the constitutional avoidance doctrine. The canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text,

[24] *See, e.g.*, *Wilcox*, 66 M.J. 442 (requiring for speech cases under Article 134, UCMJ, Clause 2, a "direct and palpable connection between speech and the military mission of environment.")

resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts. The canon is thus a means of giving effect to congressional intent, not of subverting it." *Suarez Martinez*, 543 U.S. at 381-82 (internal citations omitted). Congress chose the words "of a nature." There are not multiple meanings to this phrase, such that a competing interpretation can prevail to avoid the constitutional due process concerns.

"It has been said that the life of the law is experience." *Johnson,* 576 U.S. at 601. Whether it is 107 years, 63 years, or 12 years, this Court's repeated attempts to derive meaning from the Clause 2 shows it is time to do what the *Phillips* Court elected not to—find Clause 2 unconstitutional. Uncertainties in Clause 2 may be tolerable in isolation, but "their sum makes a task for [courts, factfinders, practitioners, and servicemembers] which at best could be only guesswork." *United States* v. *Evans*, 333 U.S. 483, 495 (1948). "Invoking so shapeless a provision to condemn someone to prison for [] years to life does not comport with the Constitution's guarantee of due process." *Johnson*, 576 U.S. at 602.

The *Phillips* Court simply stated that it "decline[d] to overrule almost a century of precedent" because Clause 2 has never been restricted to its original purpose of subjecting retired enlisted to court-martial jurisdiction. Upon a reexamination of *Phillips*, history cannot so easily be overlooked. The Due Process Clause and this Courts' own precedent reveal *Phillips* was poorly reasoned, and the constitutional

question can no longer be avoided. This factor of the stare decisis analysis weighs heavily in favor of overruling *Phillips* and taking the next step of finding Clause 2 unconstitutional.

B. THE OTHER COMPONENTS OF THE STARE DECISIS ANALYSIS ALSO SUPPORT OVERTURNING *PHILLIPS*—AND FINDING CLAUSE 2 UNCONSTITUTIONAL.

1. Intervening events favor overturning *Phillips* by further demonstrating the unconstitutional nature of the *Phillips* rules—and Clause 2.

When it comes to intervening events, there are two subsequent cases that are relevant. The first is *Fosler*, 70 M.J. 225, which came during the sea change of Article 134, UCMJ, and immediately after *Phillips*. It covers the history of Article 134, UCMJ, much more, explaining how the terminal element of Article 134, UMCJ, historically need not be expressly alleged. *Id*. at 231-32. It also covers the implications of *Levy* on Article 134, UCMJ, along with how the President does not have authority to decide questions of substantive criminal law. *Id*. at 231-33 (noting how Supreme Court jurisprudence has changed since *Levy* so invoking it is unpersuasive and the President cannot omit terminal elements through the discussion or Rules for Courts-Martial). It confronts and covers everything *Phillips* should have, but in the context of how significantly the law had changed regarding Article 134, UCMJ, and lesser included offenses. The *Fosler* Court held, "Stare decisis does not require that we ignore that the basis for the historical practice of omitting the terminal element when an Article 134 offense is charged has been substantially eroded." *Id*.

at 232-33. *Phillips* should not have ignored the basis for the historical practice of not proving the "service discrediting" when it too was substantially eroded.

In his dissent, Judge Baker notes the deterioration of fair notice when the majority lowered the persuasive value of the President's contributions to the Manual. *Id*. at 246-47 (Baker, J., dissenting). When those contributions are unconstitutional, the persuasive value *should* be lowered, but that creates a different problem, as Judge Baker notes:

> [W]ithout reference to the Manual, it is not clear how members of the military will be put on notice as to what conduct might violate Article 134, UCMJ. Certainly, the statutory elements alone do not provide such notice. But if the Manual is unpersuasive here and unpredictable in application, how then is fair notice provided?
>
> One suspects that the issue is not one of fair notice in this case or with R.C.M. 307, but with Article 134, UCMJ, itself. Has Article 134, UCMJ, lost its capacity to serve as a predictable, and thus fair and reliable tool to uphold good order and discipline? Is *Parker v. Levy* . . . still good law?

Id. (internal citations omitted). Now, after *United States v. Richard*, this Court can confront this reality, overrule *Phillips*, and find Clause 2 unconstitutional.

Last year, this Court reiterated the requirement that the Government must prove the terminal element, but for Clause 1. *Richard*, 2022 CAAF LEXIS 637, at *2. In doing so, the Court highlighted how Clause 1 has a clear, historically-based standard consistent with what the Manual provides as notice to servicemembers. *Id*. at *12-14 (discussing "direct and palpable"). It criticized the Government's argument

that the accused's "military status and misuse of military property" cured the Government's failure to offer actual harm to good order and discipline as required by the law. *Id*. at *11-12, 15.

> Viewed in the best possible light, these are purely speculative arguments about how Appellant's misconduct *might* have prejudiced good order and discipline. . . . But viewed less charitably, these arguments—which presume prejudice to good order and discipline based on facts such as the location of the offense or the military status of the accused—urge a return to exactly the kind of per se rules that this Court has expressly rejected as constitutionally deficient. *See Phillips*, 70 M.J. at 164-65 ("The use of conclusive presumptions to establish the elements of an offense is unconstitutional because such presumptions conflict with the presumption of innocence and invade the province of the trier of fact.").

Id. at *15-16 (internal citation omitted).

Richard makes a revealing point: "might" is not good enough and presuming an element based on facts such as the location of the offense or the military status of the accused is a per se constitutionally deficient rule. Ironically, this is exactly what *Phillips* authorizes, by harking back to the "facts and circumstances test" announced in *Guerrero*: (1) the time, (2) the place, (3) the circumstances, and (4) the purpose for the certain conduct all together, form the basis for determining if the conduct is service discrediting. *Richard* treats this as unconstitutional, but Clause 1 survives by its narrow and clear definition. However, since Article 134, UCMJ, is not three separate offenses, but merely different ways of proving the criminal nature of the

charged misconduct,[25] there is no reason they should be treated differently. The burden of proof is *lower* in Clause 2 than Clause 1 because of how Clause 2 is written (both by Congress and the President). However, ultimately, Rules that are unlawful for Clause 1 are lawful for Clause 2 because of the unlawful nature of the definition, which goes back to Clause 2's inherent unconstitutionality.

2. The reasonable expectation of servicemembers also favors overturning *Phillips* considering the inherent vagueness problem.

From all the discussion and historical analysis above, it is evident that no servicemember is going to know whether their conduct is "criminal" or merely "unusual" under Clause 2. The reasonable expectation of servicemembers is undermined by *Phillips* and Clause 2 itself. There is no obvious case that puts a servicemember on notice for what constitutes a Clause 2 offense, which is distinguishable from offenses under Clauses 1 or 3, where servicemembers do have notice. When the law allows servicemembers to be prosecuted and convicted on the whims and the imagined perception of a hypothetical public, Clause 2 violates the Constitution and flouts the reasonable expectation of servicemembers.

[25] *Miller* and *Medina* combine to show that Article 134, UCMJ, contains not three separate offenses, but alternative ways of proving the criminal nature of charged misconduct. *See Medina*, 66 M.J. at 26 (citing *United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000).

3. *Phillips* undermines public confidence in the law by depriving servicemembers of constitutional rights the military justice system unequivocally affords them.

Phillips, grounded in the very nature of Clause 2, also undermines public confidence in the law. There are, and have always been, other ways of prosecuting both "uniquely military" offenses and "per se" criminal activities. Clauses 1 and 3 serve that purpose. Whether or not prosecutors can effectuate either properly[26] is beside the point. Prosecutions can proceed with those Clauses and the public can remain assured the military justice system is punishing those it has jurisdiction over without violating the rights of its members. In weighing the legislative goal of ensuring discipline in the military against the interests military members have in a fair proceeding—to include both notice and ensuring the Government proves all elements of the alleged crime—this Court can finally do what it has long avoided: find Clause 2 of Article 134, UCMJ, unconstitutional.

"The military justice system's essential character [is] in a word, judicial." *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018) (citations omitted). As noted by the Supreme Court in *Ortiz*, the military justice system is no longer a simple "drumhead" court-martial system, but "an integrated 'court-martial system' that closely resembles

[26] *E.g., Richard*, 82 M.J. 473, 2022 CAAF LEXIS 637, at *17. "It is a mystery to me why, after this Court's ten-year history of invalidating convictions for child pornography offenses under [C]lause 3, and of upholding convictions for such offenses under [C]lause 2, we continue to see cases charged under [C]lause 3." *Medina*, 66 M.J. at 29 n.1 (Stucky, J., dissenting).

civilian structures of justice." *Id.* at 2170. If that is true, Clause 2 is beyond the pale—it is textually in conflict with a portion of the Constitution that has always applied to servicemembers. Service custom and practice are not relevant to Clause 2; they never have been. Its historical justifications, which courts have glossed over for decades, are consistently and inaccurately coupled with those to justify Clause 1, when Clause 2 stands distinctly alone. Clause 2 enables the "per se" criminalization of any offense law enforcement or the enterprising, imaginative prosecutor dreams up. Not only is it time to overrule *Phillips*, but it is also time to find Clause 2 unconstitutional for all the very same reasons. In doing so, this Court must set aside Amn Wells's conviction as well.

C. AMN WELLS'S CONVICTION IS AN EXAMPLE OF THE UNCONSTITUTIONALITY OF *PHILLIPS* AND CLAUSE 2.

Amn Wells's court-martial exemplifies the problems Clause 2 invites. His conduct with BF and LW as presented and argued to the members was identical, yet he was found guilty of one but not the other.

Factually, both BF and LW met Amn Wells online and then proceeded to have, approximately, a three-month long relationship with him. JA at 115-16, 118, 216-17, 264-65. Both women were U.K. nationals and they both claimed Amn Wells impregnated them. JA at 120-21, 207, 269-271. Both women were misled about his marital status. JA at 209-10, 217, 266-67. Both told other people that Amn Wells had concealed the fact he was married—both told their parents (either overtly or

impliedly), each other, and the Air Force that Amn Wells had sex with them when he was married to someone else. JA at 118, 217-18, 220, 266-68. Both testified their opinions of the United States Air Force and United States military were not lowered as a result of Amn Wells's extramarital sexual conduct with them. JA at 226-27, 272.

In closing argument, Trial Counsel argued the same basis for the service discrediting element, with per se service discrediting commentary.[27] JA at 288-90, 300-01. The primary focus for both specifications was that the conduct *could have* been known and it *could have* been possible people thought less of the service as a result, even though no such evidence was elicited. *Id*. The conduct only had to be "of a nature." *Id*. For both specifications, Trial Counsel acknowledged both women did not think less of the Air Force, but clarified, "that's not the requirement. Could it have? Does it have the tendency to do that," became the emphasis. JA at 289, 301.

In rebuttal, Trial Counsel focused more on the (1) time, (2) place, and (3) circumstances[28] for both affairs, heavily insinuating Amn Wells's conduct would not be service discrediting if it hadn't happened in the U.K. JA at 316-17. "How the affair unfolded" and "who was involved in it" were critical to Trial Counsel: "That image[29] that was presented absolutely has a tendency, it has the ability to bring the

[27] For BF, Trial Counsel overtly stated the conduct alone was enough to convict Amn Wells: "You can find, based on the conduct itself, that this could have damaged the reputation of the service, that it was of that type of nature." JA at 290.
[28] *Guerrero*, 33 M.J. at 298.
[29] *See supra* footnote 3.

service into disrepute; to have our host nation partners look at us a little bit less." *Id*.

Defense Counsel attempted to rebut Trial Counsel's arguments by highlighting how neither affair was open or notorious. JA at 313-14. Both were in private, no one in the public knew about the affair, and "not even the people who were involved in the affair, [thought] any less of the Armed Forces as a result of it." JA at 314. However, Defense Counsel was completely accurate in stating, "If it was just . . . possible that an affair *could* bring the reputation of the Air Force down and that's enough to make an affair criminal, *all affairs would be criminal because it would be possible for all of them*." JA at 313 (emphasis added).

That captures the problem. How can Amn Wells or any other servicemember know when or how the factfinder will speculate that *this* particular affair was service discrediting but not some *other* one? This exemplifies the vagueness problem; there is no difference between these affairs and yet one resulted in a conviction. It is not about facts; it is about an artificial and fictional effect given to an unproven element.

The language of the statute, the President's elements and explanation, and the instruction advising the members (especially for extramarital sexual conduct) demonstrate as much. All three tell the panel the conduct need only "tend" to discredit the service and the members are advised to look at the "accused's status," the place where the conduct occurred, and who many have known. *See* JA at 276-80 (referencing the military judge's instructions). The first, military status, was

criticized in *Richard* as being "exactly the kind of per se rules that this Court has expressly rejected as constitutionally deficient." *Richard*, 2022 CAAF LEXIS 637, at *15-16. "Place" is simply referring to the conduct itself; it is built into the specification and is no different than "military status;" it is just another "per se" rule. "Who may have known" could be a helpful fact not related to the extramarital sexual conduct itself; however, here, that fact does not vary between LW and BF. JA at 118, 217-18, 220, 266-68.

This Court will never know why the panel members found Amn Wells not guilty of extramarital sexual conduct with LW but found him guilty of it with BF. The conduct was identical; the arguments concerning the conduct were likewise identical. There is no difference between these allegations, but somehow Amn Wells's having sex with BF "tended" to "discredit" the service "enough" to constitute a conviction. If the reason is because of the video, as the Air Force Court reasoned, that makes no sense considering counsel's arguments and the judge's instructions. Neither counsel invoked the video to characterize the relationship with BF as "open and notorious." And, the military judge instructed the panel twice about spillover specifically stating the following:

> Each offense must stand on its own and *you must keep the evidence of each offense separate*. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming or proving that he committed any other offense. If *evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense*

to which it is relevant.

JA at 103-04, 286-87 (emphasis added). The evidence about the video was solely offered for another charge and specification, a specification for which he was acquitted. JA at 291-300. Even if the members wrongly considered the video for the convicted specification, there is no evidence from the video indicating Amn Wells was married, that he was in the military, or even who in the video was having sex.

Further, the video still does not link to any particular "fact and circumstance" the panel was instructed about. It does not change Amn Wells's marital status, rank, grade, position, who his spouse is, where the conduct occurred, whether he was pending divorce, or who may have known. Nothing about the video or the Pornhub post suggests anyone knew that one person in the video was married to someone else and that is the critical piece.

The problem with the Air Force Court's reasoning is that it rests on untethered morality judgements and fictional hypotheticals. *If* the public knew Amn Wells was in that video, that he was married, that he was in the military, *would* the conduct in the video *tend* to discredit the Air Force?

Amn Wells's conviction for extramarital sexual conduct demonstrates Clause 2 is limited only by the scope of a factfinder's, or appellate court's, creativity or spleen. It is indeterminate, making it unconstitutionally vague, and ripe for inviting assumptions about something being "per se" service discrediting, making it

unconstitutional two times over.

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

III. SHOULD THIS COURT DECIDE NOT TO OVERRULE *PHILLIPS*, AMN WELLS'S CLAUSE 2 CONVICTION IS STILL LEGALLY INSUFFICIENT.

In determining legal sufficiency, this Court assesses whether the evidence, when viewed 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. *Phillips*, 70 M.J. at 166.

Amn Wells's conviction is legally insufficient because the only direct evidence elicited at trial on the terminal element demonstrated that the service was not discredited. While "proof of the conduct itself *may* be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that, under all the circumstances, it was of a nature to bring discredit upon the armed forces," it remains that there still must be facts and circumstances entered into evidence, not mere speculation. *Phillips*, 70 M.J. at 163.

Here, the facts and circumstances entered into evidence show Amn Wells was having a private sexual relationship with BF. During the charged timeframe, from 23 November 2019 to 12 January 2020, their sexual relationship was not open or notorious. Based on the evidence presented at trial, the only people who potentially

knew about the extramarital relationship (the charged "certain acts") were BF's parents. That two people—the parents of BF—were the only ones that knew of the relationship does not make the conduct "open or notorious."

The remaining facts and circumstances of the conduct were Amn Wells, an E-2, was stationed in the UK, married to a military member, with no intention of getting a divorce, having sex with BF, talking about marriage, having kids, and he got BF pregnant. These are all the same facts underlying LW's testimony. The only difference is BF and Amn Wells filmed some of their sexual encounters, he lied to her about getting divorced, and BF emailed the base after she found out Amn Wells was married. The email also does not render the conduct open and notorious when no evidence about who knew of or read the email was offered at trial—plus it was sent after the charged timeframe.

As discussed above, the video is not relevant to the terminal element because the video's content, shared after the charged timeframe, does not make Amn Wells's sexual relationship with BF any less private or discreet. Specifically, nothing in the video indicates it captures an affair at all. The video proves nothing, other than a specific sexual act occurred between Amn Wells and BF—which is merely cumulative to BF's testimony.

Moreover, the only evidence presented on the terminal element was not the video, but BF's testimony, where she stated her opinion of the service was not

lowered as a result of the affair. Faced with a lack of evidence, Trial Counsel argued solely in hypotheticals, speculating that BF's parents' opinions of the service could have been lowered and that the "image that was presented absolutely has a tendency, it has the ability to bring the service into disrepute; to have our host nation partners look at us a little bit less. *Thank God they didn't.* That doesn't mean it's not possible." JA at 316-17 (emphasis added).

Defense had no burden to elicit the opinion evidence from BF—and yet they did *and rebutted* any presumption the extramarital sexual conduct invited. Evidence rebutting the terminal element trumps any speculative argument otherwise attempting to prove the terminal element. As such, with this as the only evidence, no rational trier of fact could conclude that the conduct with BF was of a nature to bring discredit upon the armed forces. In sustaining the conviction, especially by using the video, the Air Force Court erred.

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

CONCLUSION

This Court has before it an opportunity to correct decades of unconstitutional prosecutions. The stage has been set for some time, but after *Richard*, it would be error to treat Clause 1 and Clause 2 differently by requiring the terminal element be

proven with evidence under Clause 1 but permitting mere speculation and hypotheticals under Clause 2. Amn Wells's case illustrates all the constitutional problems inherent with Clause 2 because there is nothing distinguishable about his two extramarital sexual conduct allegations other than the factfinder's potential gut instinct that one ought to be criminal. Convictions based on gut feelings violate the Due Process Clause because they are based on vague laws, invite conclusively presumptive findings, and lower the Government's burden. As written, no rule can save Clause 2 because this Court would have to go far beyond the text of the statute to make it constitutional. Consequently, *Phillips* must be overturned and Clause 2 should held unconstitutional.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on December 15, 2023.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 13,139 words.

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

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