

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,
Appellant

v.

Danielle E. DEREMER
Private First Class (E-2)
U.S. Marine Corps,
Appellee

BRIEF OF AMICI CURIAE IN
SUPPORT OF APPELLEE

Crim. App. Dkt. No. 202300205

USCA Dkt. No. 25-0158/MC

**Brief of the U.S. Navy Victims' Legal Counsel Program, U.S. Marine Corps
Victims' Legal Counsel Organization, U.S. Army Special Victims' Counsel
Program, and U.S. Coast Guard Special Victims' Counsel Program in
Support of Appellee**

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INTEREST OF AMICI CURIAE

Amici United States Navy Victims' Legal Counsel Program (VLCP), United States Marine Corps Victims' Legal Counsel Organization (VLCO), United States Army Special Victims' Counsel Program (SVCP), and United States Coast Guard Special Victims' Counsel Program (SVCP) provide eligible crime victims with a dedicated attorney to protect victims' rights and interests throughout the military justice process. Navy and Marine Corps Victims' Legal Counsel (VLC) and Army and Coast Guard Special Victims' Counsel (SVC) attorneys help victims understand the military's investigative and legal processes and can represent them at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense. When a victim's 10 U.S.C. § 1044e rights are not recognized, the very victims the Amici are dedicated to serve are left unrepresented creating considerable risk to their rights under Article 6b, Uniform Code of Military Justice (UCMJ). Amici file this brief pursuant to Rule 26(b)(3) as we filed an amicus curiae brief in the Navy-Marine Corps Court of Criminal Appeals in this case. *See United States v. Deremer*, 85 M.J. 546 (N-M Ct. Crim. App. 2025).

ISSUES PRESENTED

Amici address the following issues certified to this Court:

- I. DID THE LOWER COURT ERR HOLDING APPELLANT, AT AN INTERVIEW WHERE SHE WAIVED HER RIGHT TO COUNSEL, WAS ENTITLED TO 10 U.S.C. § 1044E RIGHTS WHEN SHE WAS INTERVIEWED AS A SUSPECT?¹
- II. DID THE LOWER COURT ERR FINDING THE INTERVIEW VIOLATED APPELLANT'S DUE PROCESS RIGHTS, AND FINDING THE STATEMENT INVOLUNTARY UNDER MIL. R. EVID. 304?
- III. DID THE LOWER COURT ERR HOLDING THAT SUPPRESSION IS AN APPROPRIATE REMEDY FOR A VIOLATION OF 10 U.S.C. § 1044E?

SUMMARY OF ARGUMENT

Victims enjoy a statutory, regulatory, and due process right to Victims' Counsel² representation during any military criminal investigator questioning related to their sexual assault allegation. A victim's right to counsel is based on the

¹ While the United States filed as Appellant and this Court identified PFC Deremer as the Appellee in its orders, the Judge Advocate General of the Navy certified issues identifying PFC Deremer as Appellant. For consistency with the certified issues, this Brief will refer to her as the Appellant.

² U.S. Navy and Marine Corps Victims' Legal Counsel are "Special Victims' Counsel," based on the original implementing orders. *See* MARADMIN 583/13, Establishment of the Marine Corps Victims' Legal Counsel Organization (VLCO), (Oct. 31, 2013) and NAVADMIN 087/14, Establishment of Navy Victims' Legal Counsel (VLC) Program, (Apr. 15, 2014). For consistency, amici use "Victims' Counsel" for both "Victims' Legal Counsel" and "Special Victims' Counsel" in this Brief.

plain language of 10 U.S.C. § 1044e, its statutory structure, and the subsequent regulations implemented by the Department of Defense. NCIS agents violated PFC Deremer's rights by: (1) failing to notify PFC Deremer of her right to Victims' Counsel before questioning, as required by statute; (2) not communicating through her detailed Victims' Counsel, as mandated by regulation; and (3) conducting an interview regarding her alleged sex-related offense without providing her detailed Victims' Counsel a reasonable opportunity to be present. As every Navy-Marine Corps Court of Criminal Appeals Judge who addressed the issue found, NCIS agents acted unlawfully. This Court should hold similarly.

Congress determined victims of alleged sex-related offenses, as defined in 10 U.S.C. § 1044e, be afforded representation by Victims' Counsel in any proceedings in connection with a military investigation of the alleged sex-related offense. Where Congress has spoken within its constitutional authority, this Court should respect Congress's legislative judgment about the proper balance between victims' rights and investigative procedures. Allowing NCIS to unilaterally decide to no longer treat as a victim someone entitled to Victims' Counsel by the plain language of 10 U.S.C. § 1044e, thwarts Congress's legislative judgment. NCIS did not adhere to departmental and service regulations concerning communication with

represented victims, implemented under Section 1044e.³ The Government cannot simply abandon established protocols that are in accordance with its regulatory obligations at its convenience. Finally, numerous federal circuits hold that deprivation of a statutory right to counsel in a similar regime can rise to the level of a due process violation.

Congress's enactment of 10 U.S.C. § 1044e in December 2013, later reinforced by Department of Defense regulations, established a framework to ensure victims have access to Victims' Counsel during every phase of military investigative and adjudicative proceedings in connection with an alleged sex-related offense. The lower court was correct to recognize that NCIS's second interview of PFC Deremer improperly disregarded her rights as a victim.

ARGUMENT

A. Appellant was entitled to 10 U.S.C. § 1044e Victims' Counsel rights during NCIS questioning about the alleged sex-related offense and did not waive them when NCIS titled her as a suspect and interviewed her.

First, Section 1044e's plain language, statutory structure, and legislative history provide victims with a right to Victims' Counsel. Second, a victim's eligibility under 10 U.S.C. § 1044e is triggered by any allegation of a sex-related offense.

³ U.S. Dep't of Def., Inst. 5505.18, Investigation of Adult Sexual Assault in the Department of Defense (22 Mar. 2017) (C5, 26 Jul. 2024) [hereinafter DoDI 5505.18]; U.S. Marine Corps, Order 5800.16A, Legal Support and Administration Manual (20 Feb. 2018) (C7, 26 Aug. 2021) [hereinafter LSAM].

Third, Appellant’s second interview by NCIS violated regulations implicating statutory protections of personal liberties and interests.

1. Based on the plain language of 10 U.S.C. § 1044e(b)(6), its statutory structure, and the legislative history, Congress provided victims a statutory and substantive right to Victims’ Counsel during military law enforcement questioning in connection with the alleged sex-related offense.

i. Plain language. Congress has the constitutional power to legislate the rights of servicemembers, and when it does, judicial deference is at its highest.⁴ Congress provided that the Secretary concerned “shall” designate Victims’ Counsel to provide legal assistance to certain classes of individuals who are victims of alleged sex-related offenses.⁵ Pursuant to 10 U.S.C. § 1044e(b)(6), legal assistance provided by Victims’ Counsel includes “[r]epresenting the victim at any proceedings in connection with the reporting, military investigation, and military

⁴ Article I invests Congress with plenary authority to “raise and support Armies,” to “provide and maintain a Navy,” and to “make Rules for the Government and Regulation of the land and naval Forces.” U.S. Const. art. I, § 8, cls. 12, 13, 14. This includes the power to legislate “balancing the rights of servicem[embers] against the needs of the military,” and judicial deference is at its “apogee” when Congress does so. *United States v. Anderson*, 83 M.J. 291, 298–99 (C.A.A.F. 2023) (quoting *Solorio v. United States*, 483 U.S. 435, 447 (1987) and *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). See also *Weiss v. United States*, 510 U.S. 163, 176–178 (1994) (citations omitted); *United States v. Begani*, 81 M.J. 273, 279–80 (C.A.A.F. 2021) (citations omitted).

⁵ 10 U.S.C. § 1044e(a) (2021). Titled “Special Victims’ Counsel for victims of sex-related offenses,” the statute is in Chapter 53 of Title 10, MISCELLANEOUS RIGHTS AND BENEFITS. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 672, 966 (2013).

prosecution of the alleged sex-related offense.”⁶ The first step in statutory interpretation is “to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”⁷ Section 1044e(b)(6)’s language is unambiguous and, for several reasons, plainly states Victims’ Counsel representation will be provided during military law enforcement questioning of victims concerning alleged sex offenses. First, Congress used the broad phrase “any proceedings,” defined as any “step or series of steps in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations.”⁸ Law enforcement questioning is a necessary step in the adjudication of criminal laws, falling within the ambit of that phrase. Second, Congress clarified the proceedings must be “in connection with” the “reporting” and “military investigation” phases, thereby eliminating any possible ambiguity that a right to Victims’ Counsel only involves court proceedings.⁹

⁶ 10 U.S.C. § 1044e(b)(6). *See also* Br. for B.U. Sch. L. Legis. Pol’y & Drafting Clinic as Amicus Curiae in Supp. of Neither Party at 22–24 (noting National Defense Authorization Act of 2015’s amendment of Section 1044e(b)(6) substituted “accompanying” with “representing”).

⁷ *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quotations and citations omitted).

⁸ *Proceeding*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/proceeding> (last visited August 26, 2025). “Any” is a broad adjective, *see infra* A.2.

⁹ The Supreme Court has frequently recognized that the phrase “in connection with” can be interpreted broadly, while also noting its inherent ambiguity; however, courts don’t need to explore the full scope of the phrase when there is a

Congress’s legislation under 10 U.S.C. § 1044e is no different than the “substantive” rights in 10 U.S.C. § 806b,¹⁰ recognized in *EV v. United States*.¹¹ Clear in the statutory language described above, Congress intended to provide victims a procedural safeguard in the right to Victims’ Counsel for “any proceedings” in connection with “military investigation” of any allegation of a sex offense. Like the rights enumerated in 10 U.S.C. § 806b(a), Congress’s provision of Victims’ Counsel in 10 U.S.C. § 1044e conferred a benefit onto a specific class of individuals—victims—making it a substantive right.¹²

The record shows NCIS’s second interview of PFC Deremer was a proceeding in connection with the military investigation of the *same* sex-related offense allegation that initially entitled her to Victims’ Counsel. PFC Deremer was

direct link, and they “cannot override Congress’ choice to employ the more capacious phrase ‘in connection with.’” *See Mont v. United States*, 587 U.S. 514, 521–22 (2019) (citations omitted).

¹⁰ A victim’s right to be reasonably heard in 10 U.S.C. § 806b(a) is necessarily linked to 10 U.S.C. § 1044e’s right to counsel since the right to be heard may include “through counsel.” *See LRM v. Kastenber*, 72 M.J. 364, 369–71 (C.A.A.F. 2013) (citations omitted).

¹¹ *EV v. United States*, 75 M.J. 331, 334 (C.A.A.F. 2016), overruled by statute on other grounds.

¹² *See Univs. Research Ass’n v. Coutu*, 450 U.S. 754, 772 (1981) (substantive right is one where Congress intended to benefit an identifiable class, differentiating where Congress instead framed the statute as a general prohibition or command to an agency); *Substantive Right*, Black’s Law Dictionary (10th ed. 2014) (defining a substantive right as a “right that can be protected or enforced by law”).

a victim within the definition of the statute.¹³ She formed an attorney-client relationship with a Victims' Counsel, who represented her at the first NCIS interview about her allegation.¹⁴ PFC Deremer was called in for a second interview—another proceeding in connection with the military investigation—in which the primary focus of the conversation was the *same* sex-related offense allegation. As it is “impossible, as a matter of common sense, to disentangle” the two interviews,¹⁵ the inquiry conducted in the second interview falls within the scope of 10 U.S.C. § 1044e(b)(6). Thus, PFC Deremer was entitled to Victims' Counsel representation during the second interview under the statute's plain language.

ii. Statutory structure. Further, Section 1044e's structure supports the right to Victims' Counsel during military law enforcement questioning, for which Congress included a notification requirement, a temporal requirement, and no veracity requirements. The meaning of “certain words or phrases may only become evident

¹³ See 10 U.S.C. §§ 1044e(a), 1044e(h) (eligible for military legal assistance under Section 1044 and victim of an alleged sex-related offense, including any allegation of a violation of Article 120, UCMJ).

¹⁴ See 10 U.S.C. §§ 1044e(c), 1044e(b)(6) (nature of relationship between a Victims' Counsel and a victim “shall” be the relationship between an attorney and client; Victims' Counsel represent the victim at any proceedings in connection with the military investigation of the alleged sex-related offense).

¹⁵ *Deremer*, 85 M.J. at 552.

when placed in context.”¹⁶ Words of a statute must be read “with a view to their place in the overall statutory scheme.”¹⁷ Here, Congress added several later provisions in Section 1044e’s statutory scheme that also make a right to Victims’ Counsel during military law enforcement questioning “evident.” First, Congress mandates notification to victims about the availability of Victims’ Counsel before any military criminal investigator interviews them or requests a statement about the alleged sex-related offense.¹⁸ Second, Congress provided the assistance of Victims’ Counsel “shall” be available “regardless of whether” a victim’s report is “unrestricted or restricted,” establishing their entitlement as wholly independent of law enforcement action.¹⁹ Third, Congress requires that a Victims’ Counsel be made available within 72 hours, absent exigent circumstances, to a victim who requests one.²⁰ Finally, and most importantly, Congress mandated the relationship “shall be the relationship between an attorney and client.”²¹ These provisions show

¹⁶ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994)), superseded by statute on other grounds; see also *Yates v. United States*, 574 U.S. 528, 537 (2015) (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)) (noting “the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used”).

¹⁷ *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (2000) (quotations and citations omitted).

¹⁸ 10 U.S.C. § 1044e(f)(2) (using “shall,” except for exigencies not present here).

¹⁹ 10 U.S.C. § 1044e(f)(3).

²⁰ 10 U.S.C. § 1044e(f)(4)(A).

²¹ 10 U.S.C. § 1044e(c).

Congress balanced a victim's right to Victims' Counsel during questioning with military law enforcement's legitimate need to investigate promptly and effectively.

This Court must defer to Congress's plenary power and its legislative judgment, balancing the rights of servicemembers versus the needs of the military.²² The notification provision would be superfluous without an underlying substantive right to Victims' Counsel during military law enforcement questioning.²³ The temporal requirement reflects Congress's balancing of the legitimate need to investigate promptly against the right to Victims' Counsel. Congress did not create a veracity or credibility requirement, or even require a report initiating law enforcement action, as conditions of a victim's right to Victims' Counsel. Considering these provisions together, Congress intended victims who reported an alleged sex-related offense to have an unconditional statutory right to Victims' Counsel before any military criminal investigator interviewed them.

²² See *Anderson*, 83 M.J. at 298–99 (citations omitted).

²³ Notably, the notification provision in Section 1044e(f)(2) was not a part of the original statute and was added two years later. This shows Congress recognized military law enforcement needed to notify a victim of their right prior to any interview. Compare National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 672, 966–71 (2013) with National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 534, 129 Stat. 726, 815–16 (2015).

In *United States v. Wiechmann*, the CAAF made clear that statutory rights to counsel in the military justice system are not mere formalities.²⁴ Although the error there was deemed harmless beyond a reasonable doubt, the Court held a convening authority's refusal to recognize a properly detailed second defense counsel violated the servicemember's statutory rights under 10 U.S.C. §§ 827, 838 (2000).²⁵ Judge Ryan's concurrence is particularly instructive: the legal concern lies in the government's disruption of a statutory framework Congress designed to ensure a proper balance is struck in the military justice system.²⁶ That logic applies here. Section 1044e, enacted to address systemic failures in the military's treatment of sexual assault victims, *see infra* A.1.iii, entitles such victims to the assistance of specially trained legal counsel at any proceedings in connection with the military investigation of the alleged sex-related offense. It reflects Congress's judgment regarding due process for victims in the military justice system. When government agents, despite statutory obligations, circumvent that entitlement, they undermine the legal structure Congress put in place, which, as *Wiechmann* recognized, is an error warranting a remedy if sufficiently prejudicial.

²⁴ *United States v. Wiechmann*, 67 M.J. 456, 462 (C.A.A.F. 2009).

²⁵ *Id.* at 461–63.

²⁶ *Id.* at 464–66 (Ryan, J., concurring). *See United States v. Gnibus*, 21 M.J. 1, 5–8 (C.M.A. 1985) (discussing history of rights to counsel in the military as creations of statute and regulation); *United States v. Teller*, 13 C.M.A. 323, 326–27 (1962).

iii. Legislative history. Rather than muddy the waters, the legislative history of Section 1044e helps crystallize that Congress intended to provide victims the right to Victims' Counsel at military law enforcement questioning.²⁷ Congress passed Section 1044e in significant part because victims were "intimidated" when reporting sexual assault and feared "reprisal."²⁸ One senator provided a specific example of a victim being interrogated for hours and forced to drop the charges, resulting in her punishment instead of her assailant's.²⁹ Congress wanted "every single victim" to get "their own lawyer" to, in part, prevent risk of retaliation.³⁰ The history solidifies the statutory analysis above: Congress provided victims a right to Victims' Counsel at military law enforcement questioning.

²⁷ See *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436–37 (2019) (in statutory interpretation cases, begin with the "ordinary meaning and structure of the law itself," and do not allow legislative history to "muddy the meaning of clear statutory language") (quotations and citations omitted); *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011) (while not allowing it "to muddy clear statutory language," jurists "who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text").

²⁸ *Testimony on Sexual Assaults Mil.: Hearing before the Subcomm. on Pers. Comm. on Armed Serv.*, 113th Cong. 4–5 (2013) (statement of Sen. Lindsey Graham).

²⁹ 159 Cong. Rec. S8150 (daily ed. Nov. 19, 2013) (statement of Sen. Tammy Baldwin).

³⁰ 159 Cong. Rec. S8151 (daily ed. Nov. 19, 2013) (statement of Sen. Claire McCaskill).

2. Section 1044e victim eligibility is triggered by “any allegation” with no veracity or credibility requirement. Allowing NCIS to obtain a victim’s waiver based on suspect’s warnings would nullify Congress’s legislation and read words into 10 U.S.C. § 1044e(f)(2) that do not exist.

Congress’s use of the terms “any” and “alleged” eliminates any veracity or credibility determination by military law enforcement. The plain language of a statute “will control” unless it leads to an absurd result.³¹ Here, Congress provided Victims’ Counsel to military members and affiliates who are victims of “an alleged sex-related offense, regardless of whether the report of that offense is restricted or unrestricted.”³² Congress defines the term “alleged sex-related offense” as “any allegation” of a violation of Articles 120, 120b, 120c, or 130 of the UCMJ.³³

The adjective “any” is broad. “Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’”³⁴ “Alleged” is defined as: (1) accused but not proven or convicted; (2) asserted to be true or to exist; and (3) questionably true or of a specified kind.³⁵ Thus, the allegation can be of whatever kind, of whatever quantity, and of whatever

³¹ *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012) (citation omitted).

³² 10 U.S.C. § 1044e(a)(1).

³³ 10 U.S.C. § 1044e(h).

³⁴ *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster’s Third New International Dictionary). *See also CitiCorp Indus. Credit v. Brock*, 483 U.S. 27, 34–35 (1987) (defining “any” broadly).

³⁵ *Alleged*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/alleged> (last visited August 26, 2025).

quality—so long as it alleges a violation of the enumerated sexual offenses.³⁶

Congress placed no veracity or credibility determination in the statute. Rather, a victim’s right to Victims’ Counsel attaches when a victim *reports* a qualifying sex offense. Any subjective credibility determinations of law enforcement cannot unilaterally change a victim’s eligibility.

The language of Section 1044e(f)(2) supports the same conclusion. Congress mandated military law enforcement notify a victim of their right to Victims’ Counsel based on the subject matter of the questioning, not investigators’ determination of the victim’s truthfulness.³⁷ When “any military criminal investigator” interviews or requests any statement “regarding the alleged sex-related offense,” their statutory obligations and Congress’s protections for victims are triggered regardless of the veracity of the allegation. NCIS violated their statutory obligations under Section 1044e, as well as their own regulations, *see infra* A.3.

For this Court to hold law enforcement can obtain a waiver of a victim’s right to counsel from Section 1044e based on a suspect’s acknowledgement form would drastically undermine Congress’s legislation. First, there is no language within Section 1044e, or any other statute, that grants military law enforcement the

³⁶ See 10 U.S.C. § 1044e(a), (h).

³⁷ See 10 U.S.C. § 1044e(f)(2).

authority to “no longer treat[] as a victim”³⁸ an individual who made an allegation of an alleged sex-related offense. This Court would have to read a veracity requirement into the statute where it does not exist. Second, this Court would allow military criminal investigators, based on their own subjective beliefs, to circumvent all requirements in Section 1044e by merely providing a suspect’s acknowledgement that never mentions Victims’ Counsel.³⁹ Congress declined to provide this exception in the statute, and this Court cannot judicially create such an exception.⁴⁰ Congress designed Section 1044e to address systemic failures in military sexual assault investigations and prosecutions, where victims historically faced intimidation and retaliation, bureaucratic impediments, and inadequate support and counsel.⁴¹ That decision must be honored.

In a situation where law enforcement is interrogating a victim related to the alleged sex offense, they must still honor all their statutory and regulatory obligations under Section 1044e in addition to Article 31b. In the second interview, PFC Deremer was not notified she could have Victims’ Counsel present—she could not have knowingly waived that right. Holding an Article 31b waiver applies

³⁸ J.A. 327.

³⁹ J.A. 590.

⁴⁰ *Lomax v. Ortiz-Marquez*, 590 U.S. 595, 600, (2020) (courts may not “narrow a provision’s reach by inserting words Congress chose to omit”) (citations omitted).

⁴¹ *See* Br. for B.U. Sch. L. Legis. Pol’y & Drafting Clinic as Amicus Curiae in Supp. of Neither Party at 6–14.

to Section 1044e directly conflicts with the statute, adds language not present, and undermines over a decade of victims' rights legislation. NCIS policy to unilaterally decide to no longer treat as a victim someone who reports any allegation of sexual assault violates the plain language of 10 U.S.C. § 1044e and the statutory framework established by Congress. It also runs counter to the regulations implemented pursuant to Congress's framework.⁴²

3. Appellant's second NCIS interview violated regulations implicating statutory protections of personal liberties and interests in DoDI 5505.18 and the LSAM.

“It is well-settled that a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests.”⁴³ Military courts can enforce and protect

⁴² The Secretary of Defense implemented no regulations, and the Agent identified none at trial, authorizing NCIS to unilaterally terminate a victim's rights after a sexual assault allegation. Congress assigned “administrative responsibility” for Victims' Counsel to the respective Judge Advocate Generals and the Marine Corps Staff Judge Advocate to the Commandant, *see* 10 U.S.C. §1044e(e). The Staff Judge Advocate to the Commandant of the Marine Corps signed the LSAM, *see* LSAM page 2. And Congress tasked the Secretary of Defense to “prescribe regulations to carry out” the statute, *see* 10 U.S.C. § 1044e(i). Congress, however, did not give NCIS or any Military Criminal Investigative Organizations (MCIOs) the authority to implement regulations or policies that would rescind victims' statutory or regulatory rights. Therefore, NCIS's policy is *ultra vires*. NCIS is prohibited, by statute, from implementing policies relevant to Congress's Section 1044e framework, as that power was expressly directed to other entities.

⁴³ *United States v. Dillard*, 8 M.J. 213, 213 (C.M.A. 1980) (quoting *United States v. Russo*, 1 M.J. 134, 135 (C.M.A. 1975) (citations omitted)); *see also Yellin v.*

substantive rights, whether created by statute or regulation,⁴⁴ and “excluding evidence from a court-martial to remedy a regulatory violation may be appropriate if the alleged violation implicated constitutional or statutory rights.”⁴⁵

DoDI 5505.18 incorporates the notification requirements in 10 U.S.C. § 1044e(f)—requiring NCIS agents to advise victims of Victims’ Counsel availability.⁴⁶ This notice “must occur” prior to any interview “regarding the reported sexual assault.”⁴⁷ DoDI 5505.18 expressly entitles victims to their Victims’ Counsel’s “representation during any proceeding in connection with the ... military investigation ... of the reported sexual assault” and *requires* investigators to coordinate victim communications “through the assigned” Victims’

United States, 374 U.S. 109, 123–24 (1963) (reversing conviction where congressional committee ignored rules that conferred witnesses’ procedural rights and stating, “Certainly the rights created by the Committee’s rules cannot be that illusory.”); *cf. United States v. Caceres*, 440 U.S. 741, 749, 753 (1979) (declining to suppress where violated regulation was not mandated by federal law nor designed for an individual’s benefit); *United States v. Kohut*, 44 M.J. 245, 250 (C.A.A.F. 1996) (analyzing how the JAGMAN section that stated, “This policy is based on comity between the Federal Government and State/Foreign Governments and is not intended to confer additional rights upon the accused,” did not impose a legal or binding restriction).

⁴⁴ *See, e.g., Kastenber*, 72 M.J. at 369–71 (protecting a victim’s right to a reasonable opportunity to be heard under Mil. R. Evid. 412 and 513).

⁴⁵ *United States v. Guzman*, 52 M.J. 318, 320–21 (C.A.A.F. 2000) (citations omitted).

⁴⁶ *See* DoDI 5505.18 § 3.1.b.(1). DoDI 5505.18 is binding on NCIS. *See* DoDI 5505.18 §§ 1.1, G.2.

⁴⁷ DoDI 5505.18 § 3.1.b.(1)(a).

Counsel.⁴⁸ Similarly, the Marine Corps requires “notice to the detailed” Victims’ Counsel when an investigator communicates with a represented victim related to the subject of representation and prohibits any “external entity” from making an eligibility determination on behalf of the Victims’ Legal Counsel Organization.⁴⁹

The relevant sections of DoDI 5505.18 and the LSAM do not merely govern internal administrative conduct; they create procedural rights and benefits protecting victims’ personal liberties and interests in accordance with statute, thereby warranting judicial enforcement. NCIS violated these regulations by disregarding Victims’ Counsel notification and coordination requirements in their interaction with PFC Deremer. The NCIS Agent was aware that a Victims’ Counsel represented PFC Deremer and recognized their official obligations, telling her they’d “go through” her Victims’ Counsel for any further questions.⁵⁰ Yet, in a second interview, which the Agent admitted was about the abusive sexual contact,⁵¹ they did not. Instead, they willfully violated their regulatory policies and PFC Deremer’s rights. To conclude PFC Deremer was not entitled to a Victims’ Counsel for her second NCIS interview would produce the very situation Congress

⁴⁸ DoDI 5505.18 § 3.1.b.(2).

⁴⁹ LSAM, Vol. 4, paras. 010604, 010403.

⁵⁰ J.A. 556.

⁵¹ J.A. 326–31 (in transcript, “the abuse of sexual contact allegations”).

sought to end—an environment where victims are reluctant to report offenses for fear of recalcitrant action by law enforcement.

NCIS’s regulatory violations implicate PFC Deremer’s statutory right to Victims’ Counsel under Section 1044e, as well as her rights under the Fifth Amendment’s Due Process Clause, *see infra* B. Unlike *Guzman*, the regulations here are “directly tied to protection of individual rights,” namely, victims’ rights.⁵² PFC Deremer reasonably relied upon them based on NCIS’s statements to her at the first interview. They told her they would communicate through her Victims’ Counsel, as required, only to then deliberately circumvent her Victims’ Counsel to interrogate her. PFC Deremer suffered substantially from this breach. Under *Guzman*, NCIS’s regulatory violation requires exclusion because it violated constitutional and statutory law, involved the protection of individual rights, and was reasonably relied upon by victims and PFC Deremer.

4. NCIS’s advisement did not satisfy the notice-and-coordination requirements of DoDI 5505.18 and the LSAM.

NCIS’s standalone suspect’s waiver did not fulfill the statutory Victims’ Counsel notification requirement in this case, *see supra* A.2. It also did not cure NCIS’s failure to coordinate communications through Victims’ Counsel as required by regulation. To ensure eligible victims “are aware of and afforded” assistance

⁵² *Guzman*, 52 M.J. at 321.

available to them, which under the statute includes Victims' Counsel representation during questioning in connection with the alleged sex-related offense, departmental regulations require: "Once a victim is represented by [Victims' Counsel], further communications with the victim will be coordinated through the assigned [Victims' Counsel]." ⁵³ A standalone Article 31(b) rights advisement to a victim who has a Victims' Counsel does not meet the compulsory notification requirements that law enforcement must abide under 10 U.S.C. § 1044e(f)(2), DoDI 5505.18, and the LSAM. Article 31(b) requires informing "a person suspected of an offense" of the nature of the accusation and advising them that they are not required to make any statements regarding the offense, and that any statements they do make may be used as evidence in a court-martial. ⁵⁴ Here, NCIS's form for "MILITARY SUSPECT'S ACKNOWLEDGEMENT AND WAIVER OF RIGHTS" ⁵⁵ included these, as well as an advisement of a "right to a *defense* attorney." ⁵⁶ The suspect's rights on NCIS's advisement form may be supplementary, but they are not

⁵³ DoDI 5505.18 § 3.1.b.(2). *See also* LSAM, Vol. 4, para. 010604 ("Communication with represented victims related to the subject of representation requires notice to the detailed [Victims' Counsel]. . . . This requirement includes requests to interview the victim by . . . criminal investigators.").

⁵⁴ 10 U.S.C. § 831(b) (2021).

⁵⁵ J.A. 590.

⁵⁶ Gov't Br. at 41 (emphasis added).

coextensive, and certainly not substitutive, of protections conferred upon victims under 10 U.S.C. § 1044e and its implementing regulations.⁵⁷

Under Section 1044e, a right to Victims' Counsel is triggered not by law enforcement's credibility determination, but simply by the fact that someone from a listed class of military affiliates made an allegation of a listed sex offense. Once this threshold is met, as it was in this case, the government's obligations are clear: military criminal investigators must inform the victim of their right to Victims' Counsel before any interview about the alleged sex-related offense, and if Victims' Counsel is already assigned, coordinate all further communications through them. In this case, NCIS did neither.

Although Victims' Counsel was already assigned to represent PFC Deremer, as NCIS knew, she was questioned about the same underlying sex offense allegation without the prior notice or coordination required by DoDI 5505.18 and the LSAM. NCIS's suspect's acknowledgement form does not fulfill the separate statutory and regulatory safeguards to notify a victim of the availability of Victims'

⁵⁷ See, e.g., 32 C.F.R. § 114.6(e)(2) (2021) (Victims' Counsel attorney-client information and services "will include . . . *representing* the victim at any proceedings when necessary and appropriate, including interviews, in connection with the reporting, investigation, and prosecution of the alleged sex-related offense. . . . Legal *representation* or consultation regarding the potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense Victims may *also* be referred to the appropriate defense services organization") (emphasis added).

Counsel. Nor does it replace the necessary coordination with assigned Victims' Counsel that should have occurred prior to the second interview. To suggest otherwise would require grafting on two conditions: (1) a veracity screen for allegations, *see supra* A.2, or (2) a rule that suspect warnings suffice to override protections specific to victims. Neither is grounded in the text of the statute or regulation, nor in precedent in light of the text of NCIS's form, which did not mention Victims' Counsel at all.⁵⁸ NCIS's form did not satisfy the notice-and-coordination requirements that attach once Victims' Counsel is assigned under Section 1044e, as per DoDI 5505.18 and the LSAM. Accordingly, Appellant did not waive her right to Victims' Counsel.

B. The second NCIS interview infringed on Appellant's due process rights.

NCIS's subject titling of PFC Deremer in order to question her without her detailed Victims' Counsel present violated her due process rights under the Fifth Amendment. As recognized in *Middendorf v. Henry*, whether due process entails a right to counsel depends on the "interests of the individual and those of the regime to which he is subject," the analysis of which "must give particular deference to the

⁵⁸ *See Edwards v. Arizona*, 451 U.S. 477, 482–84 (1981) (recognizing "waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances") (quotations and citations omitted); *United States v. Mott*, 72 M.J. 319, 326–27 (C.A.A.F. 2013) (servicemember's waiver of rights must be knowing and intelligent, and not merely voluntary) (citations omitted).

determination of Congress, made under its authority to regulate the land and naval forces.”⁵⁹

All federal circuits hold the deprivation of an independent statutory right to counsel in immigration proceedings can constitute a due process violation.⁶⁰ That is because the right to counsel is a “particularly important procedural safeguard” in proceedings “fraught with serious consequences.”⁶¹

Similarly, deprivation of a victim’s right to Victims’ Counsel can constitute a due process violation. As Congress recognized when passing Section 1044e, a victim’s decision to report a sex-related offense and participate in the military

⁵⁹ *Middendorf v. Henry*, 425 U.S. 25, 43–44 (1976) (discussing application of U.S. Const. amend. V and right to counsel in the “military context”) (citations omitted).

⁶⁰ The 12 regional circuits are only split on whether petitioners must also show prejudice for remedial action. *See Lara v. Barr*, 962 F.3d 45, 56 & n.14 (1st Cir. 2020) (discussing cases addressing 8 U.S.C. §§ 1362, 1229a(b)(4)(A) and derivative regulations); *see also Iavorski v. INS*, 232 F.3d 124, 128 (2d Cir. 2000) (noting aliens’ statutory right to counsel at their own expense is an integral part of their procedural due process) (quotations and citations omitted); *Leslie v. AG of the United States*, 611 F.3d 171, 181 (3d Cir. 2010) (showing of prejudice not required); *Delgado-Corea v. INS*, 804 F.2d 261, 263 (4th Cir. 1986) (showing of prejudice required); *Ogbemudia v. INS*, 988 F.2d 595, 598 (5th Cir. 1993) (same); *Mendoza-Garcia v. Barr*, 918 F.3d 498, 504, 508 & n.1 (6th Cir. 2019) (same); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1302 (7th Cir. 1975) (showing of prejudice not required); *Njoroge v. Holder*, 753 F.3d 809, 811–12 (8th Cir. 2014) (showing of prejudice required); *Montes-Lopez v. Holder*, 694 F.3d 1085, 1088–94 (9th Cir. 2012) (showing of prejudice not required); *Michelson v. INS*, 897 F.2d 465, 468 (10th Cir. 1990) (showing of prejudice required); *Priva v. AG of the United States*, 34 F.4th 946, 954 (11th Cir. 2022) (same); *Yiu Fong Cheung v. INS*, 418 F.2d 460, 464–65 (D.C. Cir. 1969) (showing of prejudice not required).

⁶¹ *Leslie*, 611 F.3d at 181; *Castaneda-Delgado*, 525 F.2d at 1302.

justice process and investigation is fraught with serious consequences. Victims were, and continue to be, subject to reprisals, discipline, retaliation, and vindictive prosecutions upon reporting.⁶² Congress enacted procedural safeguards in Section 1044e, which include a right to Victims' Counsel, a right to be notified of Victims' Counsel availability, and a right to prompt Victims' Counsel availability.⁶³ This is no different than the Congressional balancing in *Anderson* and *Weiss*, where judicial deference must be at "its apogee."⁶⁴

Law enforcement's conduct here highlights the reasons behind Congress's procedural safeguards and the serious consequences victims still experience reporting sex offenses. The NCIS Agent's deliberate actions to subject title a victim and circumvent the requirements of Section 1044e, pursuant to NCIS "policy," constitute a due process violation.

C. Appellant's second NCIS interview statement should be suppressed.

Where NCIS unilaterally, systematically, and unlawfully infringes victims' rights based on law enforcement's subjective beliefs, suppression is appropriate to

⁶² See *supra* A.1.iii.; Br. for B.U. Sch. L. Legis. Pol'y & Drafting Clinic as Amicus Curiae in Supp. of Neither Party at 6–14.

⁶³ See 10 U.S.C. §§ 1044e(b), (c), (f).


⁶⁴ See *Anderson*, 83 M.J. at 298 (lack of unanimous verdicts) (citations omitted); *Weiss v. United States*, 510 U.S. 163, 177–78 (lack of fixed terms for judges) (citations omitted).

deter their unlawful policy. Amici adopt and join PFC Deremer's suppression argument.

CONCLUSION

Amici respectfully request this Court find that NCIS agents violated PFC Deremer's right to Victims' Counsel and affirm the lower court's judgment.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

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I certify that a copy of the foregoing was electronically delivered to the Court (efiling@armfor.uscourts.gov, uscaaf.efiling@mail.mil) and contemporaneously delivered to the Appellate Defense Division (raymond.e.bilter.mil@us.navy.mil), Appellate Government Division (mary.c.finnen.mil@us.navy.mil), and other Amicus Curiae (skealy@bu.edu) on August 26, 2025.

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