IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant

v.

ASHLEY R. ELLIS,
Lieutenant Colonel (O-5),
United States Army,
Appellee

BRIEF OF *AMICUS CURIAE*, AIR FORCE APPELLATE DEFENSE DIVISION, IN SUPPORT OF APPELLEE

Crim. App. Dkt. No. 20240254

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

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Pursuant to Rule 26 of this Court's Rules of Practice and Procedure, the Air Force Appellate Defense Division submits this brief in support of Appellee. Amicus Curiae (Amicus) specifically addresses Certified Issue III.

INTEREST OF AMICUS CURIAE

Amicus represents Airmen and Guardians before the Supreme Court, this Court, and the Air Force Court of Criminal Appeals (Air Force Court). Our representation includes clients who have been convicted under the Uniform Code of Military Justice (UCMJ) for conduct protected by the First Amendment.

Inherent in Issue III are serious free speech concerns. The matters asserted in this brief are relevant to the disposition of that issue. Specifically, Amicus outlines the state of free speech law in the military and how it should be applied in this and similar cases. Amicus further submits that there are inherent weaknesses in this Court's free speech approach that can and should be fixed; this case is the perfect vehicle to do so.

SUMMARY OF ARGUMENT

The Army Court of Criminal Appeals (Army Court) erred when it failed to dispose of the constitutional challenge before finding instructional error. Lieutenant Colonel (LTC) Ashley R. Ellis's speech is constitutionally protected under this Court's current free speech framework: the *Wilcox* test. *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008). Applying that framework, (1) no category of

unprotected speech applies; (2) there is no direct and palpable connection between the speech and the military mission; and (3) even assuming such a connection, LTC Ellis's interest in speaking privately with his spouse overcomes any interest the military has in restricting it. *See id.*

While LTC Ellis's conviction is unconstitutional under this framework, the third *Wilcox* factor is flawed for at least two reasons. First, the factor requires an ad hoc balancing test of the relative cost and benefit of the speech. Such balancing is not permitted for free speech cases. *United States v. Smith*, 85 M.J. 283, 289 (C.A.A.F. 2024) (citing *United States v. Stevens*, 559 U.S. 460, 471 (2010)). Second, this factor comes from the dangerous speech test, *United States v. Priest*, 45 C.M.R. 338 (C.M.A. 1972), which this Court has declined to use because it has been abrogated. *Smith*, 85 M.J. at 289-90. Instead, this Court should adopt the Supreme Court's tiered scrutiny approach. This is consistent with Supreme Court jurisprudence and the special needs of the Armed Forces.

Last, the Government's argument that the dangerous speech test applies to this case is flawed in several respects. The Supreme Court abrogated the dangerous speech test in 1969. *Smith*, 85 M.J. at 289-90 (citing *Brandenburg v. Ohio*. 395 U.S. 444, 447 (1969)). This Court has, likewise, declined to use it for free speech cases. *See Smith*, 85 M.J. at 290 (applying *Brandenburg*). Moreover, the Government asserts that the dangerous speech test applies to all conduct under

Article 133, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 933. But this betrays the Government's ultimate argument. If the dangerous speech test is merely a description of conduct proscribed under Article 133, UCMJ, then it must be instructed to the members.

Either way, LTC Ellis's conviction must be set aside. This Court can and should address the underlying free speech issues and clarify its First Amendment jurisprudence. Remanding to the trial court because of instructional error risks another unconstitutional conviction. Therefore, the free speech issues should be resolved by this Court or the Army Court.

ARGUMENT

I. The Army Court did not err. But, even if it did, it does not matter. LTC Ellis's speech is protected under the First Amendment and his conviction should be set aside.

The Army Court correctly held that the trial judge failed to instruct the members on the applicable law under Article 133, UCMJ, 10 U.S.C. § 933. *See* discussion *infra* Section II. Regardless of whether this was error, this Court can and should set aside the conviction as unconstitutional.

A. Standard of review.

This Court reviews constitutional questions de novo. *United States v. Marcum*, 60 M.J. 198, 202-03 (C.A.A.F. 2004).

B. LTC Ellis's Speech is constitutionally protected.

1. The Government can restrict servicemembers' speech more than civilians. But there are still limits on such restrictions.

a. The First Amendment prohibits the Government from restricting speech, except within narrow categories.

The First Amendment prohibits the Government from proscribing speech. U.S. CONST. amend. I. "As a general matter, the First Amendment means that government has no power to restrict expression because of . . . its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (cleaned up). Content-based restrictions of speech are presumed unconstitutional. *United States v. Alvarez*, 567 U.S. 709, 716-17 (2012).

However, the Supreme Court has recognized that certain, narrowly defined categories of speech are not protected by the First Amendment. These categories are "long familiar to the bar." *Smith*, 85 M.J. at 288 (quoting *Stevens*, 559 U.S. at 468). The unprotected categories are: (1) incitement; (2) obscenity; (3) defamation; (4) speech integral to criminal conduct;[1] (5) fighting words; (6) child pornography; (7) fraud; (8) true threats; and (9) speech presenting some grave and imminent threat the Government has the power to prevent. *Id.* "If a content-based restriction on speech does not fall within one of these historically recognized categories, the

[1] This refers to speech used to prove that someone intended to bring about some other unlawful action, such as speech inherent in a conspiracy. *See, e.g.*, *Giboney v. Empire Storage & Ice Co*., 336 U.S. 490, 498 (1949).

restriction is presumed to be unconstitutional." *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)).

b. The Armed Forces can restrict speech outside these narrow categories, but such restrictions are constrained by military law and tradition.

The Supreme Court has recognized that servicemembers have more limited rights under the First Amendment. *Parker v. Levy*, 417 U.S. 733, 758 (1974). However, such limitations are guided by military "laws and traditions" which have "developed . . . during its long history." *Id.* at 743. In the First Amendment context, military law is clear: the Government must satisfy the *Wilcox* test to restrict speech. *United States v. Grijalva*, 84 M.J. 433, 438 (C.A.A.F. 2024).

The *Wilcox* test has three parts. First, military courts ask whether the speech falls within an unprotected category. *Wilcox*, 66 M.J. at 449. If it does, then the analysis can end because the speech is not protected. *Id.* at 449. But if the speech is protected, courts move to the second factor.

The second factor asks whether there is a direct and palpable connection between the speech and the military mission. *Id.* at 449-50. When speech is both protected and does not have a connection to the military mission, criminal prosecution is barred by the First Amendment. *Id.* at 449.

Courts move to the third factor only when the speech is both protected and there is a connection between the speech and the mission. *Id.* at 451. This third

factor requires courts to balance "the essential needs of the armed services and the right to speak out as a free American." *Standage v. Braithwaite*, 526 F. Supp. 3d 56, 83 (D. Md. 2020) (quoting *United States v. Priest*, 45 C.M.R. 338, 344 (C.M.A. 1972)).

Some courts have implied that the *Wilcox* factors apply only in the Article 134, UCMJ, context. *Cf. Braithwaite*, 526 F. Supp. 3d at 82 ("Next, the court determines whether the elements of the offense were satisfied."). But this makes little sense. The canon of constitutional avoidance dictates that courts should avoid resolving constitutional questions if the case can be resolved in another manner. *Rescue Army v. Mun. Ct. of Los Angeles*, 331 U.S. 549, 569 (1947). If the Government fails to prove the elements of the offense, then courts should ordinarily resolve the case without addressing the constitutional question. *Wilcox*, 66 M.J. at 452 (Baker, J., dissenting).

Moreover, this Court in *Grijalva* reasoned that the *Wilcox* test applies to all cases implicating the First Amendment. *See Grijalva*, 84 M.J. at 438 ("We interpret *Wilcox* to require the Government to prove a direct and palpable connection to the military mission or environment not only when it is clear that the First Amendment would protect speech in a civilian context, but also in cases, as here, where a court cannot determine whether the speech would be protected."). *Wilcox* itself seems to indorse this approach. In *Wilcox*, this Court adopted the

direct and palpable connection requirement which, until *Wilcox*, was seemingly used only for Article 134, UMCJ, offenses charged as prejudicing good order and discipline. 66 M.J. at 448 (adopting the "direct and palpable connection" requirement for a service discrediting case). This is telling, especially when considering this Court's service discrediting precedent which does not require the Government prove a direct and palpable connection. S*ee United States v. Wells*, 85 M.J. 154, 158-59 (C.A.A.F. 2024) (declining to overturn *United States v. Phillips*, which upheld a service discrediting conviction even when the Government put on no evidence of a connection to the military). *Smith*, which did not involve Article 134, UCMJ, used the *Wilcox* approach too, albeit, without explicitly saying so. *See* 85 M.J. at 288 (concluding that there was no connection between the subject speech and the military and, therefore, only the first *Wilcox* factor (whether the speech is unprotected) had to be analyzed).

These cases make clear that the *Wilcox* test applies to all free speech cases in the military. Here, though, the lower courts seemed confused about the application of this test. To "[a]void any future confusion," *id.*, this Court should unequivocally hold that the *Wilcox* test applies to all free speech challenges.

c. The dangerous speech test has been abrogated; it does not survive in any form, including under Article 133, UCMJ.

The framework for assessing free speech in the military is settled under the *Wilcox* framework and no part of it calls for the dangerous speech test. Yet, the

Government urges this Court to use it for Article 133, UCMJ. Br. on Behalf of Appellant (Gov't Br.) at 18-22. This Court should reject the Government's urging.

In 1919—prior to the Supreme Court's delineation of the unprotected speech categories in 1942, *Chaplinsky* 314 U.S. at 571-72—the Supreme Court decided *Schenck v. United States*. 249 U.S. 47 (1919). *Schenck* was an incitement case.[2] *Id.* at 48-89; *see also Debs*, 249 U.S. at 212. The Supreme Court reasoned that speech can be constitutionally regulated so long as the underlying words and circumstances created "a clear and present danger" that "bring about the substantive evils that Congress has a right to prevent." *Schenck*, 294 U.S. at 52.

The clear and present danger test was used, intermittently, for incitement cases until the Court's decision in *Brandenburg*. 395 U.S. at 450-54 (Douglas, J., concurring). In the intervening years, however, the "clear and present danger" test was subject to significant critique. *Id.* at 452, 454 ("When one reads the opinions closely and sees when and how the 'clear and present danger' test has been applied, great misgivings are aroused."); *Smith*, 85 M.J. at 289 ("The *Schenck* dangerous speech test has been the subject of substantial criticism since its inception."). One of the most vocal critics included Justice Holmes, who authored the *Schenck* majority opinion. *Brandenburg*, 395 U.S. at 452 (Douglas, J.,

[2] The Espionage Act of June 15, 1917, made it a crime to incite, or attempt to cause and incite, "insubordination, disloyalty, mutiny and refusal of duty in the military." *Debs v. United States*, 249 U.S. 211, 212 (1919).

concurring); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (criticizing the "clear and present danger test" as unworkable, since "[e]very idea is an incitement."). The dangerous speech test is unworkable because it is "[d]evoid of any [] limiting criteria," resulting in the unconstitutional restriction of a wide array of otherwise protected speech. *United States v. Miselis*, 972 F.3d 518, 532-33 (4th Cir. 2020), *cert denied*, 141 S. Ct. 2756 (2021).

In *Brandenburg*, the Supreme Court abrogated the clear and present danger test in favor of the current approach for incitement: speech is unprotected as incitement only if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447; s*ee Smith*, 85 M.J. at 289-90 ("Although the Supreme Court has never officially overruled the dangerous speech test . . . that test has effectively been abrogated."). Noting this development—and the "substantial criticism" of the dangerous speech test—this Court declined to use it in *Smith*.[3] 85 M.J. at 289-90.

Despite this backdrop, the Government believes the dangerous speech test survives in the Article 133, UCMJ, context. Gov't Br. at 19-20. The Government's affinity for this test is unsurprising. The dangerous speech test allows for the

[3] While this Court did not use the dangerous speech test in *Smith*, it was ostensibly still good law at the time of LTC Ellis's trial. *Compare Smith*, 85 M.J. 283 (deciding the case on November 26, 2024)), *with* JA at 113-14 (announcing findings of guilt on May 17, 2024).

regulation of all speech which encompasses "the substantive evils Congress has a right to prevent." Gov't Br. at 19 (citing *United States v. Hartwig*, 39 M.J. 125, 128 (C.A.A.F. 1994)). Under this test, so long as a crime exists in the UCMJ, it cannot violate the First Amendment. Gov't Br. at 19-20. But this is the exact reason the dangerous speech test is unworkable: it has no limiting criteria. *Miselis*, 972 F.3d at 532-33; *see Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting) (arguing that the dangerous speech test makes "every idea" unprotected).

This is the central problem with the dangerous speech test: "every idea" can be restricted. The dangerous speech test allows the Government to prosecute any speech it dislikes.[4] But, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

This Court should, therefore, do what it did in *Smith* and reject the Government's urging to reanimate the dangerous speech test; holding otherwise endangers servicemembers' First Amendment rights.

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[4] In another part of its brief, the Government seems to suggest that the First Amendment never applies to Article 133, UCMJ. Gov't Br. at 22 ("[W]hether the conduct is speech . . . and whether it is protected by the 1st Amendment . . . is irrelevant. The only relevant determination [is] whether the conduct risks diminishing the individual's standing as an officer."). This is simply not the case. *See generally Hartwig*, 39 M.J. 125 (analyzing whether the First Amendment protected the appellant's speech for an Article 133, UCMJ, conviction).

2. Under *Wilcox*, LTC Ellis's speech is protected.

a. No category of unprotected speech applies in this case and there is no direct and palpable connection between the speech and the military mission.

No category of unprotected speech applies to the charged words in this case. The Government seems to agree. *See* Gov't Br. at 21-22 (referencing no such category and instead relying on the dangerous speech test); Br. on Behalf of Appellee at 11-21, *United States v. Ellis*, 2025 CCA LEXIS (A. Ct. Crim. App. May 13, 2025) (ARMY 20240254), at 11-21 (Gov't Br. Below) (arguing that the test for speech in the military is the "clear and present danger" test).[5] Therefore, this Court must ask whether the speech has a direct and palpable connection to the military mission or environment. *Grijalva*, 84 M.J. at 438.

This Court has not created a hard-and-fast rule for what qualifies as a direct and palpable connection to the military mission. But *Wilcox* and its progeny are instructive. In *Wilcox*, the appellant identified himself online as an Army paratrooper. 66 M.J. at 449. While using that Army profile, the appellant stated he was a "Pro-White activist doing what I can to promote the ideals of a healthier environement [sic]" and that "[we] must secure the existence of our people and a

[5] At the lower court, the Government said: "assuming *arguendo* appellant's conduct would qualify as protected speech outside of the military context, this court should still affirm appellant's conviction." Gov't Br. Below at 11. However, it then failed to say why this is so. *Id.* at 11-21.

future for white children." *Id.* at 445 (alteration in original). The appellant also had several conversations with an undercover agent online, again identifying himself as a soldier. *Id.* at 445-46. Despite these facts, this Court held there was no evidence of a direct and palpable connection to the military environment or mission. *Id.* at 449-51.

The cases preceding *Wilcox* are also instructive. *See id.* at 449 (discussing the origins of this factor). For instance, in *Priest*, the appellant published a newsletter calling for desertion from the military, as well as violent revolution against the United States, during the Vietnam War. 45 C.M.R. at 342. In *United States v. Brown*, this Court reviewed appellant's convictions for organizing a strike during the Gulf War. 45 M.J. 389, 392 (C.A.A.F. 1996). In both cases, this Court held that the appellants' actions were not constitutionally protected. *Id.* at 392-93, 395; *Priest*, 45 C.M.R. 338. This is because "the speech was directed to servicemembers" during a time of war. *See Wilcox*, 66 M.J. at 450.

What these cases demonstrate is that this Court, and its predecessor, are concerned with the war fighting mission. Merely being a servicemember—like in *Smith*—or identifying oneself as a servicemember to others—like in *Wilcox*—is simply not enough. But this leaves a significant gap between cases like *Brown* and *Wilcox*. For example, in *United States v. Pulley*, the Air Force Court reasoned that merely talking about a military dependent while on base created a "direct and

palpable connection to the military environment." No. ACM 40438 (f rev), 2024 CCA LEXIS 442, at *45 (A.F. Ct. Crim. App. Oct. 24, 2024). Yet, the appellant's conduct there—talking about their daughter to an undercover agent online—is a far cry from interfering with the war fighting mission, like in *Brown* and *Priest*.

This Court has not provided clear guidance on what constitutes a direct and palpable connection to the military mission or environment. And, until it does, the Courts of Criminal Appeals will struggle to properly apply this factor. This Court can and should provide that guidance in this case.

The facts of this case are distinct from *Brown*, *Priest*, and even *Wilcox*. Here, there is only private speech between a husband and wife. Despite its attempts to elicit evidence of an impact, the Government presented no evidence of a direct and palpable connection to the military, let alone the "military mission or environment." JA at 48-68. Second, the only evidence remotely showing a nexus to the military environment is the fact that LTC Ellis and his wife were both Army officers. JA at 48. However, the video LTC Ellis sent his wife had nothing to do with their duties. Instead, it had only to do with a marital dispute about his wife's choice of dress. *E.g.*, JA at 663-64.

Ultimately, this private conversation between a husband and wife is unrelated to the military, let alone the "military mission or environment." This Court should hold that, absent a "direct and palpable" connection to the *war*

fighting mission, speech otherwise constitutionally protected cannot be restricted. Here, the speech is protected under the First Amendment because there is no connection to the military at all, let alone the "mission or environment."

b. The third *Wilcox* factor is inconsistent with the Supreme Court's jurisprudence and should be changed.

The third *Wilcox* factor asks courts to "balance . . . the essential needs of the armed services and the right [of the servicemember] to speak out as a free American." *Wilcox*, 66 M.J. at 458.

In *Priest*, the Court of Military Appeals used a modified version of the dangerous speech test to conduct this balancing: "The question in every case is whether the words used . . . create a clear and present danger that . . . will bring about the substantive evils that Congress has a right to prevent." *Priest*, 45 C.M.R. at 344 (quoting *Dennis v. United States*, 341 U.S. 494, 510 (1951)). While this Court adopted this factor in *Wilcox*, it has used it only once since. *United States v. Rapert*, 75 M.J. 164, 172 (C.A.A.F. 2016).

There are many problems with the third *Wilcox* factor. First, as this Court has recognized, ad hoc balancing is not permitted in the free speech context. *Smith*, 85 M.J. at 289; *see Stevens*, 559 U.S. at 470 ("[T]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."). Yet, this is exactly what the third *Wilcox* factor asks military courts to do: balance the free speech interests of

servicemembers against Government policies criminalizing speech. *Rapert*, 75 M.J. at 172. This is expressly prohibited by the Supreme Court. *Stevens*, 559 U.S. at 470.

Second, this factor comes from the dangerous speech test, which has been abrogated and cannot inform a free speech analysis. *Compare Priest*, 45 C.M.R. 338, *and Rapert*, 75 M.J. at 172, *with supra* discussion at Section I.B.2.a. Even if it were not abrogated, using the dangerous speech test in a non-incitement case is nonsensical. The modified dangerous speech test in *Dennis* demonstrates this: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its *improbability*, justifies such invasion of free speech as is necessary to avoid *the danger*." *Dennis*, 341 U.S. at 510 (quoting Chief Judge Learned Hand in *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)) (emphasis added). In the incitement context, the italicized portions make sense: courts should assess the "improbability" that speakers will be drawn to incite the "danger" that Congress proscribes (i.e., drawn to commit unlawful action). *See id.* at 212-13. But in the non-incitement context, courts give little weight to whether it is "probable" that others will be drawn to commit unlawful acts. For instance, if one makes a true threat to another, it makes little difference whether there is a probability the listener will be drawn to unlawful action. *See Counterman v. Colorado*, 600 U.S.

66, 69 (2023) (discussing the speaker's mens rea, not the probability that the victim will commit unlawful conduct).

Because of these problems, this Court should eliminate the third *Wilcox* factor and replace it with the Supreme Court's tiered scrutiny approach. The tiered scrutiny approach is used by all other federal courts for free speech analyses. *See, e.g.*, *Free Speech Coalition v. Paxton*, 145 S.Ct. 2291 (2025) (deciding the type of scrutiny that should apply to a restriction of speech). Under this framework, "'[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if' they satisfy strict scrutiny." *Id.* at 2302 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). A restriction on speech is constitutional only when the Government proves that it is narrowly tailored to serve a compelling interest. *Town of Gilbert*, 576 U.S. at 163.

Using the tiered scrutiny approach makes the most sense for content-based restrictions and is in line with current Supreme Court precedent. Additionally, this approach is consistent with the current *Wilcox* test. The third factor essentially asks whether the compelling government interest (i.e., the military's interest in restricting the speech) overcomes the member's interest in speaking. Asking whether the restriction is narrowly tailored to serve that interest is merely a

constitutional way of framing the standard by limiting how that compelling interest is accomplished—this is the framing that *Wilcox* is missing.

Amicus is sensitive to the military's unique interest in restricting speech. However, the Government need not worry that a tiered scrutiny approach would unduly limit its ability to regulate the Armed Forces. At the outset, the military mission is almost always considered a compelling government interest. *See, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) ("No one could deny that . . . the Government's interest in raising and supporting armies is an 'important governmental interest.'"); *cf. Goldman v. Weinberger*, 475 U.S. 503, 509-10 (1986) (finding no violation of the First Amendment because of the military's need for uniformity). Moreover, history demonstrates that the speech the military seeks to restrict will ordinarily be permitted under this approach. Consider the speech in *Brown* and *Priest*. In both cases, the Government's compelling interest in the war fighting mission was furthered by the restriction of speech. And it is difficult to imagine a more narrowly tailored way to enforce a speech restriction than a targeted prosecution of the speaker inciting unlawful dissent in the ranks.

In this case, however, the Government does not have a compelling interest because there is no relation between the subject speech and the military mission and environment. And, even if there was, the restriction of private speech between a husband and wife is not narrowly tailored to serve such an interest.

c. Even under the current third *Wilcox* factor, LTC Ellis's right to "speak as a free American" outweighs the Government's interest in restricting the speech.

If this Court is unwilling to modify the third *Wilcox* factor—and finds a direct and palpable connection—it should nevertheless hold that the speech is protected under the balancing test. LTC Ellis has a free speech right to privately remark about his wife's choice of dress. The "*essential* needs" of the Armed Services are not furthered by the restriction of this speech. Therefore, it is constitutionally protected.

In conducting an analysis under the third *Wilcox* factor, this Court "must be sensitive to protection of 'the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.'" *Priest*, 45 C.M.R. at 344 (quoting *United States v. Schwimmer*, 279 U.S. 644, 654-655 (1929)). We can disagree with the content of LTC Ellis's speech. We can find the speech distasteful, sexist, and misogynistic. But that does not, on its own, justify its censorship.

LTC Ellis's speech is constitutionally protected both under the current *Wilcox* test and the proposed version incorporating the tiered scrutiny approach. The Army Court's finding of instructional error presumes the prosecution of this speech was constitutional, but that conclusion is wrong.

C. This Court can and should set aside the conviction as unconstitutional.

This Court is not limited to answering the certified questions and it should not restrict itself here. This is especially so when the Army Court's decision authorizing a rehearing is incorrect because the speech is protected. Instead, this Court should take the opportunity to "review the record" outside of the issue certified by the Judge Advocate General of the Army. 10 U.S.C. § 867(a). Nothing in the statute prohibits this Court from doing so.

This Court can act upon the findings, setting them aside as incorrect in law by the lower court. 10 U.S.C. § 867(c)(1)(A). While this Court *need* only take action to the issues raised by the Judge Advocate General, the statute *does not prohibit* the Court from reviewing the case further. 10 U.S.C. § 867(c)(2). As here, where the lower court reached the wrong result of a rehearing—rather than setting aside the conviction with prejudice—this Court should view the certified issues through the lens of the unconstitutional conviction.

This Court has acted similarly in previous cases. For example, in *United States v. Leak*, this Court specified other issues while "the Government's certificate [was] under consideration." 61 M.J. 234, 238 (C.A.A.F. 2005). In *United States v. Rocha*, this Court had to "answer [a] general question" regarding fair notice before turning to the certified issue. 84 M.J. 346, 350 (2024). To be sure, this Court has not limited itself when other issues of law are implicated in the certified issues.

See, e.g., *B.M. v. United States*, 84 M.J. 314, 321 (C.A.A.F. 2024) (resolving questions of standing, ripeness, and mootness before "answering" the certified questions). It should similarly do so here.

A remand would permit the Government to seek—and potentially again obtain—a conviction based on constitutionally protected speech. But the issue of constitutionality is implicated in the certified questions. The Army Court's determination that there was instructional error—and remanding the case for a rehearing—presumes the speech restriction is constitutional. But this presumption is wrong. *Supra* discussion at I.B. The lower court never addressed the constitutional issue, despite LTC Ellis raising it. *Compare* JA at 6-10, *with* Gov't Br. Below at 16-21. This Court, in evaluating the instructional error, can assess the free speech issue. *Cf. Stromberg v. California*, 283 U.S. 359, 364-65, 370 (1931) (noting that, while the error was initially raised as an instructional one, the Court nevertheless resolved the free speech issue).

But, if this Court decides to remand, it should provide clear instructions to reverse the conviction as unconstitutional. Failing to instruct the Army Court on the applicable First Amendment law will likely result in confusion, hamper judicial economy, and prejudice LTC Ellis. *Compare Rocha*, 84 M.J. at 358-62 (Johnson, J., dissenting) (outlining why the conviction was unconstitutional in the first place through the lens of the certified fair notice issue), *and United States v. Rocha*, No.

ACM 40134 (rem), 2025 LX 25723 (A.F. Ct. Crim. App. Jan. 15, 2025) (setting aside the conviction *again* on the constitutional grounds identified by this Court), *with United States v. Rocha*, No. 25-0157/AF, 2025 CAAF LEXIS 352 (C.A.A.F. May 5, 2025) (certifying this case *again* in connection with constitutional issues this Court identified but did not resolve).

II. If LTC Ellis's speech is not protected, then the members should have received an instruction on the scope of Article 133, UCMJ.

A. Standard of review.

This Court reviews instructional issues de novo. *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006). When preserved instructional errors raise constitutional questions, the Government must prove any prejudice was harmless beyond a reasonable doubt. *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007).

B. The Government argues that the dangerous speech test under Article 133, UCMJ, applies regardless if the conduct implicates speech. If so, then an instruction was required.

The Government's brief is "at war with itself." *Paxton*, 145 S. Ct. at 2320 (Kagan, J., dissenting). It argues that the dangerous speech test should apply, but not as a free speech test. Instead, the Government believes it is a test for conduct. Gov't Br. at 22. Confusingly, the Government goes on to argue that this conduct-based test should not be instructed to the members. Gov't Br. at 22-24. This makes no sense.

Military judges "instruct the members on questions of law and procedure." Rule for Courts-Martial (R.C.M.) 801(a)(5). And judges are *required* to instruct members on "the elements of each offense charged." R.C.M. 920(e)(1). If, as the Government argues, dangerous speech defines the scope of the "conduct unbecoming" proscribed by Article 133, UCMJ, then it goes to the legal contours of the second element and therefore must be instructed.

If, as the Government argues, *Hartwig* creates a test for what conduct is proscribed under Article 133, UCMJ, then the military judge had to instruct the members on the state of the law. Here, the judge failed to do so. So, even under the Government's own argument, the military judge had to provide an instruction. His failure to do so was reversible error.

CONCLUSION

This case provides this Court with a unique opportunity to clarify its free speech jurisprudence. It can, and should, assess the underlying free speech claim and hold that LTC Ellis's conviction violates the First Amendment. In doing so, this Court should hold that the dangerous speech test is no longer applicable in any form, particularly Article 133, UCMJ. This Court should also hold that the third *Wilcox* factor is bad law and replace it with the Supreme Court's tiered scrutiny approach. Doing so will clarify military free speech law, safeguard

servicemembers' speech rights, and ensure the Government can effectively safeguard its interest in the military mission and environment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 24(b) because it contains 5,617 words. This brief complies with the typeface and style requirements of Rule 37.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically sent to the Court and served on the Army Government Appellate Division, at usarmy.pentagon.hqda-otjag.mbx.usalsa-gad@army.mil, and the Army Defense Appellate Division, at usarmy.pentagon.hqda-otjag.mbx.usalsa-dadservice@army.mil, on 29 August 2025.

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