IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Thomas E. KRUSE, Corporal (E-4) U.S. Marine Corps Appellant	BRIEF ON BEHALF OF APPELLEE Crim.App. Dkt. No. 202500370 USCA Dkt. No. 26-____/MC

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Issues Presented

WHETHER THE LOWER COURT'S RULING ON THE EXCLUSIVE AUTHORITY GRANTED TO THE SPECIAL TRIAL COUNSEL UNDER ARTICLE 24a, UCMJ, RUNS COUNTER TO THE STATUTE'S PLAIN MEANING, THE WILL OF CONGRESS, AND CREATES AN ABSURD RESULT.

Statement of Statutory Jurisdiction

The lower court had jurisdiction under Article 62(a)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862(a)(1)(A). This Court thus has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

The Convening Authority referred charges against Appellee to a general-court martial, alleging drunk and disorderly conduct, aggravated assault, assault consummated by a battery, violation of a lawful written order, and drunken operation of a vehicle in violation of Articles 92, 113, 128, and 134, UCMJ, 10 U.S.C. §§ 892, 913, 928, and 934. Pursuant to a Plea Agreement, the Convening Authority withdrew the charges and referred them to a special court-martial.

On August 20, 2025, the Military Judge issued a Ruling dismissing both Specifications of Charge II—one Specification alleging aggravated assault and another alleging assault consummated by a battery. The United States timely appealed on August 23, 2025. (Notice of Appeal, Aug. 23, 2025.) The lower court

ruled in favor of the United States on January 21, 2026.

Appellant petitioned this Court for review and filed a Supplement to his Petition. (Pet., Mar. 19, 2026; Supp. Pet. Mar. 19, 2026.)

Statement of Facts

A. The United States charged Appellant with crimes against his spouse and one unrelated Specification.

The United States charged Appellant with four Specifications related to his interactions with his wife: one Specification of drunk and disorderly conduct, two Specifications of assault stemming from a September 2024 altercation, and one specification of violation of a lawful order—a Military Protective Order issued after the altercation. (Charge Sheet, April 22, 2025.) The United States also charged Appellant with drunken operation of a vehicle. (Additional Charge Sheet, June 11, 2025.)

B. After Appellant assaulted his wife, the Office of Special Trial Counsel exercised its authority over covered offenses and lesser included offenses.

On September 26, 2024, "Military Police aboard MCAS Yuma[] responded to a domestic assault incident between [Appellee] and his wife …" (Appellate Ex. X at 1, 6.) Military police observed multiple injuries and the Victim—Appellant's wife—reported "she was pushed multiple times and was strangled multiple times throughout the night." (Appellate Ex. X at 1, 6.)

After the incident, a criminal investigator with the Marine Corps Air Station

Yuma Criminal Investigation Division (CID) e-mailed two officers assigned to the Office of Special Trial Counsel. (Appellate Ex. X at 6.) The subject line was "Notification of Criminal investigation regarding domestic assault" and the e-mail described the prior night's incident. (Appellate Ex. X at 5–6.)

The Office of Special Trial Counsel then issued an e-mail "notice that the [office] ha[d] exercised its authority." (Appellate Ex. X at 4.) The e-mail included an attached letter from the Special Trial Counsel referencing R.C.M. 303A and explaining the office was "exercising authority over . . . [a]ll covered offenses and lesser included offenses alleged in the notification to OSTCW: Article 128b, Domestic Violence." (Appellate Ex. IX at 3.)

C. Appellant violated a protective order, but the Office of Special Trial Counsel never asserted authority over that offense.

In October 2024, Appellant's Commanding Officer issued a Military Protective Order restraining barring "any contact or communication with" his wife and directing him to "vacate [their] military residence." (Appellate Ex. IX at 7–10.) Then, in January 2025, Military Police, acting on a tip, apprehended Appellant after they observed him leaving the now off-limits residence. (Appellate Ex. IX at 13.) The Office of Special Trial Counsel never exercised authority over the Military Protective Order violation. (Appellate Ex. X at 1.)

D. The Special Trial Counsel deferred resolution of the allegations to the Convening Authority. The Convening Authority then referred Charges for disorderly conduct, domestic violence, and violation of the protective order. The Military Judge dismissed the domestic violence Charge.

In January 2025, the Special Trial Counsel issued a "notice of initial disposition" to Appellant's commander "defer[ing] all allegations of covered offenses against Cpl Kruse and all other known and/or related offenses . . . for resolution." (Appellate Ex. IX at 5; Appellate Ex. X at 1.)

The Convening Authority referred the Charges and Specifications to General Court-Martial, before withdrawing them and referring them to Special Court-Martial under a Plea Agreement. (Appellate Ex. VII at 5–6, 8; R. 2.) The assault Specifications alleged Appellant had "strangl[ed]" his wife and "throw[n her] down the stairs." (Charge Sheet.) Before Arraignment, the Military Judge ordered briefing on jurisdiction and the Convening Authority's referral authority which prompted Appellant to move to dismiss Charges II (assault) and III (military protective order violation). (R. 6–7; Appellate Exs. IV, V, VIII, XI.)

The Military Judge granted the Motion with respect to Charge II (assaults), denied the Motion with respect to Charge III (protective order violation), and did not address Charge I (disorderly conduct) at all. (R. 29–35.) He reasoned:

> The OSTC's ultimate deferral . . . of the covered offense back to the commander or convening authority does not . . . change the OSTC's determination that the reported conduct, battery and strangulation of the accused's spouse, is a covered offense. That conduct remains a covered

offense even after deferral by the OSTC.

(R. 33.) He then explained Charge III was not a covered offense because:

> [T]he OSTC has not determined that the conduct that forms the sole Specification of Charge III is a covered offense. This is also consistent with the Courts analysis of that offense. There is no indication whatsoever that the conduct at issue in Charge III includes the gravamen of an Article 128b offense.

(R. 35.)

E. The lower court reversed the Military Judge's Ruling.

The lower court reversed the Military Judge's Ruling. *United States v. Kruse*, No. 202500370, 2026 CCA LEXIS 13 (N-M. Ct. Crim. App. Jan. 21, 2026). It held "the plain language of the statute is clear" when it says "the [Convening Authority] 'may exercise *any* of the authorities of such a . . . convening authority with respect to such offense, *except* that such . . . convening authority may not refer charges and specification for a *covered offense*.'" *Id*. at *10 (emphasis in opinion). It further explained that "[n]either the UCMJ nor the Rules for Courts-Martial say that the OSTC's determination . . . means the underlying misconduct may only be . . . treated as a covered offense." *Id*.

Summary of Argument

Congress granted the special trial counsel exclusive authority over a narrow class of specifically enumerated covered offenses. The inclusion of those offenses necessarily excludes those not provided in Article 1(17). In enacting that statute,

Congress could have included other misconduct, lesser included offenses, or more expansive language in scoping the authority of the Special Trial Counsel. Instead, Congress explicitly rejected that more complex arrangement in favor of the simple and easily-applied list of offenses and authorities now found in Articles 1(17) and 24a. The court below correctly reversed the Military Judge, whose ruling would have permitted the Special Trial Counsel unilaterally to amend Article 1(17) by adding non-covered offenses to the list over which a Convening Authority's options are limited following deferral of a covered offense.

This Court should decline to add language Congress omitted. Reading the term "covered offenses" narrowly is consistent with: (1) other provisions of Article 24a; (2) the Code as a whole; and (3) this Court's precedent interpreting similar definitions.

Because the lower court correctly determined that the "plan language of the statute is clear," this Court need not look to legislative history sources such as Staff Reports and the Congressional Record to determine congressional intent. *Kruse*, 2026 CCA LEXIS 13, at *10. But if it does, it will find Congress considered—and rejected—alternate definitions of "covered offense," including one broad enough to include the "underlying misconduct." Likewise, Article 24a does not contain—and Appellant expressly disclaimed—any ambiguity that might justify applying the heavily-disfavored absurdity doctrine.

Argument

THE LOWER COURT CORRECTLY FOUND THE PLAIN LANGUAGE OF ARTICLE 24a IS CLEAR: A COMMANDER MAY EXERCISE ANY AUTHORITY UNDER THE UCMJ TO DISPOSE OF ALL NON-COVERED OFFENSES FOLLOWING DEFERRAL BY SPECIAL TRIAL COUNSEL, INCLUDING REFERRAL OF NON-COVERED OFFENSES FOR TRIAL BY SPECIAL OR GENERAL COURT-MARTIAL.

A. This case includes an issue which "has not been, but should be, settled by this Court."

"Review on petition for grant of review requires a showing of good cause." C.A.A.F. R. 21(a); *see also* Art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2024). The Appellant needs a "direct and concise argument showing why there is good cause to grant the petition, demonstrating with particularity why the errors assigned are materially prejudicial to [his] substantial rights." C.A.A.F. R. 21(b)(5). While the Rule does not specifically define "good cause," it does require Appellant—"[w]here applicable"—to "indicate whether" the lower court: (1) addressed unsettled law; (2) ruled in conflict with precedent; (3) adopted a law materially differently than civilian courts; (4) addressed a military custom, regulation, or statute; (5) ruled en banc or non-unanimously; (6) deviated from the accepted course of judicial proceedings; or (7) inadequately addressed an issue on remand. *See* C.A.A.F. R. 21(b)(5)(A)–(G).

Here, the issue presented "has not been, but should be, settled by this Court." C.A.A.F. R. 21(b)(5)(A).

B. Where the plain language of a statute is unambiguous and the statutory scheme is coherent and consistent, that plain language controls and the analysis is complete.

"The first step in statutory interpretation cases is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *United States v. Valentin-Andino* 85 M.J. 361 (C.A.A.F. 2025) (internal quotations omitted). "If the statutory language is unambiguous and the statutory scheme is coherent and consistent, the inquiry is done." *Id*. at 218 (quoting *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014)); *see also Valentin-Andino*, 85 M.J. at 365 (using nearly identical language). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016).

C. No good cause exists to grant review, nor is there basis to overturn the lower court. The plain language of 10 U.S.C. §§ 801(17) and 824a is unambiguous: Article 128 is not a covered offense.

1. Article 24a gives special trial counsel exclusive authority only over "covered offenses."

Article 24a, UCMJ, establishes the authorities of "special trial counsel" and grants the special trial counsel "exclusive authority" to: (1) "determine if a

reported offense is a covered offense;" and to (2) "refer charges and specifications for a covered offense for trial[.]" 10 U.S.C. § 824a. A special trial counsel who "exercised authority over an offense" can return the case back to the "commander or convening authority" for action by "elect[ing] not to prefer . . . or . . . refer . . . charges." Article 24a(c)(5); 10 U.S.C. § 824a(c)(5). Article 24a calls this procedure "deferral." *Id*.

Once deferred, "a commander or convening authority may exercise any of [his or her] authorities" under the Code with one exception: "the commander or convening authority may not refer charges and specifications for a *covered offense* for trial[.]" 10 U.S.C. 824a(c)(5) (emphasis added).[1] In other words, after deferral, Article 24a leaves intact the commander's traditional "broad discretion . . . to choose the appropriate disposition of alleged offenses" with one narrow exception—"covered offenses." 10 U.S.C. § 824a; *United States v. Gammons*, 51 M.J. 169, 173 (C.A.A.F. 1999).

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[1] As the lower court pointed out, "The Rules for Courts-Martial track the language of the UCMJ" and grant "each commander . . . discretion to dispose of offenses" by referral to court-martial "except for covered offenses and other charges for which a special trial counsel has exercised authority and not deferred." *Kruse*, 2026 CCA LEXIS 13, at *7–8 (citing R.C.M. 306, 401, 404, and 407).

2. The plain meaning of "covered offense" is defined by the finite list of offenses included in Article 1(17), UCMJ.

When Congress established the Office of Special Trial Counsel it enumerated, by statute, what constituted a "covered offense." *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 533, 135 Stat. 1541, 1695 (2021). "The term 'covered offense' means"—among other things—"an offense under section 917a [], section 918 [], section 919 [], section 920 [], section 920b [], section 920c [], section 925 [], section 928b (article 128b), section 930 [], section 932 [], or the standalone offense of child pornography punishable under section 934 [][.]" *Id*.

Congress has since specified additional covered offenses, to include section 919a, section 920a, and sexual harassment punishable under section 934. 10 U.S.C. § 801(17); *See* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 541, 136 Stat. 2395, 2579–2580 (2022). Neither lesser included offenses, nor offenses under section 928, Article 128, UCMJ, fall within Article 1(17)'s definition of "covered offense." *See* 10 U.S.C. § 801(17).

D. Reading the term "covered offense" as a list of statutory violations is consistent with the plain text of Article 24a, the Code as a whole, and this Court's precedent.

1. Reading "covered offense" as a list of statutory violations is consistent with the statutory scheme, but expanding its meaning would render the terms "reported offense" and "known offense" surplusage.

a. When interpreting statutes, appellate courts presume Congress knew and considered applicable law—including the statutory scheme, applicable Rules for Courts-Martial, and appellate precedent.

The term "covered offense" is defined by enumeration under Article 1(17), which contains an explicit list of offenses. Accordingly, as a statutory analysis issue, must be read consistent with the larger statutory scheme involving both special trial counsel powers, but also how offenses are handled in the military justice system. *See Shell Oil Co.*, 519 U.S. at 341; *Pease*, 75 M.J. at 184.

Moreover, appellate courts "assume that Congress is aware of existing law"—including cases interpreting R.C.M.s—"when it passes legislation." *United States v. McDonald,* 78 M.J. 376, 380 (C.A.A.F. 2019) (internal quotation marks and citation omitted); *United States v. Tyler,* 81 M.J. 108 (C.A.A.F. 2021). For example, in *Tyler,* the Court considered whether trial counsel could comment on a victim's unsworn statement offered under R.C.M. 1001A—a rule the President promulgated to implement Article 6b(a)(4)(B)'s statutory right of a victim to be heard. 81 M.J. 108. This Court first noted that it had previously interpreted

R.C.M. 1001(g) as allowing Trial Counsel to comment on an accused's unsworn statement and then held that "[b]ecause we presume that Congress and the President were aware of our caselaw interpreting an accused's unsworn statement, we further presume that they intended unsworn victim statements to be treated similarly." 81 M.J. at 113 (internal citation omitted).

So too here: this Court should presume Congress was aware of at least forty years of precedent and practice regarding how the military justice system defines "reported offenses."

b. For over forty years, "reported offenses" under R.C.M. 301 and 303 has meant raw initial "information" received from "any person" about "suspected offenses."

Since at least the 1983, Manual for Courts-Martial, R.C.M. 301, "Report of Offense," has prescribed that "any person may report an offense" and that "any military authority who receives a report of an offense shall forward . . . the report and any accompanying information to the immediate commander of the suspect."[3] And since at least 1983, R.C.M. 303, "Preliminary inquiry into reported offenses," has prescribed that "upon receipt of [this] information . . . the immediate commander shall make or cause to be made a preliminary inquiry."[4] The inquiry is

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[3] *See, e.g.,* R.C.M. 301 (2024); R.C.M. 301 (2018); R.C.M. 301 (2016); R.C.M. 301 (2013); R.C.M. 301 (1983).
[4] *See, e.g.,* R.C.M. 303 (2024); R.C.M. 303 (2018); R.C.M. 303 (2016); R.C.M. 303 (2013); R.C.M. 303 (1983).

to assist the commander in acting to "initially dispose of a charge or suspected offense." R.C.M. 306(c). This may result in preferral of charges. R.C.M. 307. The preliminary inquiry and preferral may result in more offenses than the initial, raw, "reported offense" facially suggested. *See* R.C.M. 307(c)(4).

Appellate courts have interpreted this scheme accordingly. This Court rejected a military judge's holding citing R.C.M. 301 and 303 that "charges were pending . . . when his immediate commander began to investigate . . . before preferral," instead reaffirming that "charges are pending . . . when charges are preferred." *United States v. Gray,* 26 M.J. 16, 19 (C.M.A. 1988). And this Court cited R.C.M. 301, 303, and 306 to note that "the immediate commander is often responsible for the *initial* inquiry into *potential* misconduct . . . and the *initial* decision as to disposition." *United States v. Briggs,* 64 M.J. 285, 287 (C.A.A.F. 2007) (emphasis added).

Nothing about Article 24a changes that "reported offenses" require "initial" examination of "potential" misconduct prior to an "initial disposition." Congress left that general mechanism unchanged. All that Article 24a changes is that if the "reported offense" might include one or more "covered offenses," it is no longer

the immediate commander—but instead is the special trial counsel—that must make the initial disposition decision.

c. Congress is presumed to have used "reported offense" in Article 24a consistent with over forty years of precedent and consistent Rules for Courts-Article, enacted under Article 36(a).

While Congress did not define "reported offense" in Article 24a, appellate courts presume Congress acted knowing how the Code and Rules for Courts-Martial—created by statutory delegation under Article 36(a) and presumed to be "uniform insofar as practicable" under Article 36(b)—and that Congress used the same meaning of "reported offenses" extant for more than forty years of practice in the military justice system. *See United States v. McDonald,* 78 M.J. 376, 380 (C.A.A.F. 2019); *Tyler,* 81 M.J. 108.

Similarly, the President enacted R.C.M. 301(c) to implement Article 24a, and courts may presume he acted consistent with the longstanding meaning of "reported offenses" under the Manual and precedent. R.C.M. 301(c) directs that raw "reports of covered offenses" shall be initially directed not to the immediate commander—but instead to the special trial counsel, under R.C.M. 303A, to determine if the offense is "covered, known, or related." Nothing in the President's new Rule suggests that the "report of covered offenses" is anything other than an initial, summary, "taking the temperature" of crimes that the raw

information might include. Indeed, that is consistent with longstanding military "reported offenses" practice.

This Court should hold that "reports of offenses" and "reported offenses" are, consistent with longstanding practice, raw reports received by "any person" that might indicate possible offenses. This construction is consistent with the fact that neither Congress nor the President changed any rule altering the meaning of the term "reported offense."

d. "Covered offense" is a smaller subset of "reported offenses," and not coextensive with the other subsets of "reported offenses": "related offenses" and "other offenses."

i. This Court can presume Congress intended separate meanings for "covered offense" and "reported offense."

Once the special trial counsel has received the initial report of misconduct under R.C.M. 301(c) and R.C.M. 303A, Article 24a grants special trial counsel "exclusive authority to determine if a reported offense is a covered offense" and, if it is, to "also exercise authority over any offense that the special trial counsel determines to be related to the covered offense" as well as "any other offense alleged to have been committed by [the same] person." Art. 24a(c)(2)(A); Art. 24a (c)(2)(B).

As in *Tyler*, this Court should "presume that Congress and the President were aware of" the process for handling "reported offenses" under R.C.M.s 301

and 303 and should "further presume that they intended" Article 24a (and its implementing Rules) to operate the same way. 81 M.J. at 113. So, under Article 24a, the special trial counsel is an alternate and parallel initial disposition authority when "any person" reports potential offenses that might include one of the listed "covered offenses."

In *Loughrin v. United States*, the Court compared two provisions of a federal bank fraud statute to determine whether appellant could be convicted of bank fraud for submitting forged checks to a Target store even if he only intended to defraud Target and not "the banks on which the . . . checks had been drawn." *Loughrin v. United States*, 573 U.S. 351, 354–55 (2014) (comparing 18 U.S.C. §§ 1344(1) and 1344(2)). The Court reasoned that because § 1344(1) explicitly required the intent "to defraud a financial institution" but § 1344(2) did not, the Court would "presume that Congress intended a difference in meaning." *Id*. at 356–58.

Here, as with the statutory scheme at issue in *Loughrin*, Congress used multiple terms to describe "offenses"—"reported," "covered," "known," and "related." Art. 24a. And, as in *Loughrin*, the statutory scheme shows each has a separate meaning.

ii. Under the statutory scheme, a "covered offense" is the narrowest category of "offenses."

If special trial counsel has authority to initially "determine if a reported offense is a covered offense," it follows that "covered offenses" are a smaller

subset of "reported offenses." And if "reported offense" retains its meaning as discussed *supra*, then the special trial counsel may reach a variety of conclusions after initially exercising authority: the suspected offense may be exclusively a "covered offense;" it might turn out to be a non-covered offense; or it might include both.

"Known" and "related" offenses likewise include more offenses than the list of Article 1(17) covered offenses. First, Congress's description of "known" and "related" does not limit the terms to specific statutory violations. Second, the "known" and "related" categories represent an expansion of the special trial counsel's otherwise narrow jurisdiction, triggered *only* after the special trial counsel determines that a "reported offense" includes a "covered offense." Art. 24a(c)(2)(B).

Viewed in proper context and applying the *Loughrin* Court's presumption that "Congress intended a difference in meaning" for each category, "covered" offenses are the narrowest category of offense mentioned in Article 24a. *Loughrin*, 573 U.S. at 358. Reading the term as a specific list of statutory violations is consistent with the statutory scheme. The special trial counsel's authority to "determine if a reported offense is a covered offense" is not a grant of authority unilaterally to amend the definition of "covered offense" Congress provided in

Article 1(17), but is rather a grant of authority to determine whether the special trial counsel has authority over the "reported offense" in the first instance.

e. A narrow reading of "covered offense" is consistent with the provisions of Articles 1(17) and 24a and longstanding practice under the Rules for Courts-Martial and military precedent, and would avoid surplusage.

"The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Yates v. United States*, 574 U.S. 528 (2015). *Cf. United States v. Sager,* 76 M.J. 158, 162 (C.A.A.F. 2017) (declining to interpret Article 120 in manner that would render words "mere surplusage"). For example, in *Loughrin*, the court concluded that if one subsection of 18 U.S.C. § 1344 required the intent "to defraud a financial institution," another "would [be] render[ed] . . . superfluous" because "it would apply only to conduct already falling within" the first subsection. *Loughrin*, 573 U.S. 351, 357–58.

As in *Loughrin*, Even with a narrow reading, a special trial counsel remains the only actor under the Code that can prefer or refer charges that include the statutory offenses listed in Article 1(17). A narrow reading of "covered offense" gives effect to the terms "reported offense" and "covered offense," rather than making them duplicative or rendering one surplusage. Because if this Court were to find that "reported offenses" or "reports of a covered offense" are in all cases coextensive with "covered offenses"—then Article 1(17)'s limited list of "covered

offenses" would be rendered incomplete, if not meaningless. Even with a narrow reading, a special trial counsel remains the only actor under the Code that can prefer or refer charges that include the statutory offenses listed in Article 1(17).

The proper narrow reading of "covered offense" leaves open the possibility, consistent with over forty years of rules and precedent governing initial "reported offenses," that a "reported offense": (1) may not end up being a covered offense; (2) may only include covered offenses; or, (3) may include covered offenses *and* one or more "related offenses" or "other offenses." Appellant's claims that a narrow reading of Article 24a renders the terms "exclusive," "reported offense," and "covered offense" inoperative are simply incorrect. (Supp. Pet. at 29.)

2. Reading "covered offense" as a straightforward list of statutory violations is consistent with this Court's precedent.

This Court has declined to read similar language in Articles 19 and 43 expansively. In *United States v. McPherson*, the court considered Article 43's statute of limitations carve-out for "child abuse offense[s]," which Article 43(b)(2)(B) defines as an act "that constitutes . . . [a]ny offense in violation of" six listed offenses: Articles 120, 120a, 120b, 120c, 130, and 128. 81 M.J. 372 (C.A.A.F. 2021); Art. 43(b)(2)(B) (2016).

The United States argued that Congress's inclusion of the word "constitutes" meant that an indecent liberties charge under Article 134 fell within the "child abuse offense" exception "because, if committed [a few years later]" the acts

themselves would have been chargeable under Article 120b—one of the enumerated offenses. *McPherson*, 81 M.J. at 379. But the *McPherson* court declined to read the statute to include the words "*would* constitute," noting that "the charge sheet accused [a]ppellee of violating Article 134, UCMJ, an entirely different article." *Id*.

The Article 1(17) definition of "covered offense" comprises a list of statutory violations—much like the Article 43 definition of "child abuse offense" in *McPherson*. 81 M.J. at 378. In fact, the definition of "covered offense" is narrower than the definition of "child abuse offense" because it does not include the arguably-broadening word "constitutes." *Compare* Article 1(17), UCMJ; 10 U.S.C. § 801(17) *with* Article 43(b)(2)(B), UCMJ; 10 U.S.C. § 843(b)(2)(B). Because the list of offenses in Article 1(17) does not include Article 128, specifications alleging a violation of Article 128 are not and cannot be "covered offense[s]."[5]

The court also rejected the United States' arguments for a more expansive approach to Article 19 in *United States v. Henderson*, 59 M.J. 350 (C.A.A.F. 2004). There, the United States conceded Article 19 only gave special courts-

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[5] In general, "[o]nly where a provision includes a residual clause or other language indicating that an enumerated list is nonexclusive should a court infer that Congress did not intend a list of this nature to be exhaustive." *McPherson*, 81 M.J. at 386 (Ohlson, C.J. dissenting).

martial jurisdiction over "noncapital offense[s]" but argued that the appellant's guilty plea to a lesser-included non-capital offense should stand because "the lesser-included charge was . . . implicitly referred to the special-court martial when the convening authority referred the capital charge." *Id*. at 352. The court rejected this argument because "the lesser-included charge . . . was never formally referred." *Id*. at 354. In other words, the court looked to the charge referred—not to the "underlying misconduct." (*Cf.* Supp. Pet. at 22.)

And if the *Henderson* convening authority did not "implicitly refer[]" a noncapital lesser-included offense when it "referred the capital offense," then this Convening Authority could not have "implicitly referred" a "covered offense" when it referred a lesser-included offense. *Henderson*, 59 M.J. at 352. In sum, reading Article 1(17) narrowly is consistent with this Court's approach to similar statutory language.

E. Reading "covered offense" more broadly requires inserting language into the statute.

This Court has declined to add language to a statute where Congress has omitted it. *See United States v. Kearns*, 73 M.J. 177, 181–82 (C.A.A.F. 2014). For example, in *Kearns*, the court rejected the appellant's contention that the statutory language "with intent that the [minor] engage . . . in any sexual activity" required the Government to "prove that his 'dominant,' 'predominant,' 'significant,' or 'efficient and compelling' reason for transporting [the victim]

across state lines was to engage in criminal sexual activity" because those "are not terms found in the text" of the statute at issue. *Id*. at 180–82.

Here, the definition of "covered offense" includes conspiracies, solicitations, and attempts, but it omits lesser included offenses[6] and "underlying misconduct." 10 U.S.C. § 1(17); (Supp. Pet. at 22). Likewise, Article 24a grants the special trial counsel authority to "determine that a reported offense is a covered offense"—not to determine it is "*only* a covered offense." Art. 24a. As in *Kearns*, this court should decline to add language Congress left out.

F. This Court should not consider legislative history because the language of the statutory scheme is clear. If the Court does consider the legislative history, it will find that Congress intended a narrow definition of "covered offense" and has already rejected the broader definition Appellant suggests.

Courts "presume that a legislature says in a statute what it means and means in a statute what it says." *McPherson*, 73 M.J. at 395 (internal citation and quotation marks omitted). They do not "allow[] ambiguous legislative history to muddy clear statutory language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011).

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[6] Appellant cites *Blockberger* and *Teters* to argue a lesser included offense is the "same offense" as the greater offense. (Supp. Pet. at 24.) But courts have not treated lesser offenses as the "same offense" when addressing the Code's restrictions on referral. *See, e.g., Henderson*, 59 M.J. 350 (referral of greater specification did not implicitly refer lesser included offense where greater offense was jurisdictionally barred).

When Congress considered whether and how to create the special trial counsel, it weighed input from a variety of stakeholders—including the 90-day Independent Review Commission on Sexual Assault in the Military.[8] The Independent Review Commission was a group appointed by the Secretary of Defense to "conduct[]" a ninety-day "'independent, impartial assessment' of the military's current treatment of sexual assault and sexual harassment." IRC Report at 3.

The Commission made a variety of "cross-cutting recommendations" including the establishment of a "special victims prosecutor." IRC Report, Appendix B. In a section entitled "Defining Special Victim Crimes" the Commission recommended a three-category approach: (1) "Specified Offenses;" (2) "Trait of Victim;" and (3) "Intent of Offender." IRC Report, Appendix B at 9–10. The first category was a list of statutory violations; the second was based on the victim's age, disability, or relationship to the offender; and the third included hate crimes and hazing. *Id*. Representatives of the Commission testified before

[8] The Findings and Recommendations of the Independent Review Commission on Sexual Assault in the Military: Hearing Before the Subcomm. on Mil. Pers. of the H. Comm. on Armed Servs., 117th Cong. 117–38 I (2021) (IRC Hearing); Indep. Rev. Comm'n on Sexual Assault, Report, Hard Truths and the Duty to Change: Recommendations from the Ind. Rev. Comm'n on Sexual Assault in the Mil. (Jul. 2, 2021) (IRC Report).

Congress. IRC Hearing. Representative Anthony Brown asked about the categories:

> Mr. BROWN. . . . So, as I asked earlier with Dr. Hicks, and others have identified some areas where the DOD is not accepting some of the recommendations, the one that seems to trouble me the most has to do with the special-victim categories. And the IRC, you had three categories. One was offenses; the second was the trait of victim; and number three was the intent of the offender. It is my understanding that the Department is willing to accept[9] category one and only category one. Is that accurate?
>
> Ms. TOKASH. Yes. That is our understanding, sir.

IRC Hearing at 45. After the hearing, Congress considered draft legislation which included different definitions of "covered offense." *See* 167 Cong. Rec. H7284 (daily ed. Dec. 7, 2021). One such definition would have included certain violations of Article 128, UCMJ. *S.Amdt.* 4892 to *S.* 1605, 117th Cong. (2021–2022).

Congress ultimately rejected more expansive definitions and instead enacted a narrow definition that closely resembles the first category.[10] *Compare* Art. 1(17)

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[9] This is an apparent reference to Dr. Kathleen Hicks' testimony that "the Department of Defense's approach has seven articles related to sexual misconduct or retaliation and sexual harassment." IRC Hearing at 11.

[10] Appellant cites to the Joint Explanatory Statement. (Supp. Pet. at 32.) The Statement is unhelpful here because it simply recites the language of the statute itself. *Compare* Staff of H. Comm. on Armed Services, 117th Cong., Nat'l Def Authorization Act for Fiscal Year 2022 Legis Text and Joint Explanatory Statement to Accompany S. 1605 P. LAW 117-81, at 1002 (Comm. Print 2021) *with* Article 24a, UCMJ; 10 U.S.C. § 824a.

with IRC Report, Appendix B at 9–10. So, while it is clear the Commission envisioned that a commander's post-deferral authority would be limited to "crimes based on evidence in the case that are completely unrelated to the special victim crimes in the case," it is also clear *Congress* did not share the Commission's vision. (Supp. Pet. at 33.) Congress's will controls.

Besides the obvious rejection of the Commission's recommendation on "covered offenses," the legislative history also reveals tension typical of any legislative body. While Representative Brown expressed disappointment that the Department favored only the first category, Representative Mike Rogers "strongly believe[d] that commanders must retain full authority over all other offenses" and Representative Ronny Jackson expressed concern that "relegating commanders to a lesser role . . . could undermine the foundation of a unit." IRC Hearing at 5, 13. All this demonstrates the final version of Articles 24a and 1(17) represented a legislative compromise with a narrow definition of "covered offense."

G. The absurdity doctrine is inapplicable to this case because the statute is clear, as conceded by Appellant during oral argument in the court below. A rational Congress could have intended a finite list of "covered offenses."

Courts apply the absurdity doctrine by "refus[ing] to apply the literal text of a statute" in "very limited circumstances" when an applying the plain language "would produce an absurd result" "'so gross as to shock the general moral or

common sense.'" *McPherson*, 81 M.J. at 380 (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)).

In *United States v. Hirst*, for example, the court applied the absurdity doctrine where Congress apparently "replaced [a] (d) in the draft legislation with (b) in the codified version of Article 69(c), UCMJ" where "there [was] no plausible purpose for the substitution" and "*everyone*—including the Government" had acted as if "Article 69(c)(1)(A) contained a typo that could be ignored." 84 M.J. 615, 618–20 (N-M. Ct. Crim. App. 2024) (emphasis in original). The *McPherson* court, on the other hand, refused to apply the doctrine where "a rational Congress *could have* intended to enact a five-year period of limitations for Article 134, UCMJ offenses," including indecent liberties. *McPherson*, 81 M.J. at 380 (emphasis in original).

Here, Appellant conceded below that there is no "ambiguity in the statute or the Rules for Courts-Martial." *Kruse*, 2026 CCA LEXIS 13, at *9 n. 25. But even if he had not, this case is much closer to *McPherson*. "[A] rational Congress *could have* intended" to enact a narrow definition of "covered offense." *Id*. After all, the Department requested it and some members of Congress clearly favored leaving more power with the commander. IRC Hearing at 5, 11, 13, 25. And, unlike in *Hirst*, the narrowly-defined category of "covered offense" does not "create[] an elaborate statutory hoax." *Hirst*, 84 M.J. at 619. Instead, as discussed *supra*, it

creates gives effect to each word in the statute. This court should not apply the absurdity doctrine.

In sum, the lower court did not err.

Conclusion

The United States respectfully requests that this Court affirm the decision of the lower court.

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