No. 22-636

In the
Supreme Court of the United States

S.S.,
Petitioner,
v.

UNITED STATES, *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF OF PROTECT OUR DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MAYA M. ECKSTEIN
Counsel of Record
HUNTON ANDREWS KURTH LLP
Riverfront Plaza,
East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8788
meckstein@huntonAK.com

Counsel for Amicus Curiae

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

TABLE OF CONTENTS

Page:

TABLE OF CONTENTS i

TABLE OF AUTHORITIES...................................... ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT.......................... 1

ARGUMENT 2

I. Sexual Assault Continues to Plague Our Nation's Finest.................................... 3

A. The Department's Recent Reports on Sexual Assault in the Military Demonstrate that Much Progress Remains to Be Made............. 3

B. Military Sexual Trauma Creates Mental-Health Risks for Service-members 7

II. The CAAF's Decision Hinders the Department's Efforts to Eradicate Sexual Assault Within the Military 10

A. The Psychotherapist-Patient Privilege Is Necessary to Facilitate Effective Mental-Health Treatment 10

B. The CAAF's Decision Undercuts the Protections Afforded by Military Rule of Evidence 513 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s):

CASES

Albuquerque Rape Crisis Ctr. v. Blackmer,
120 P.3d 820 (N.M. 2005) 13

Barrett v. Vojtas,
182 F.R.D. 177 (W.D. Pa. 1998).......................... 13

H.V. v. Kitchen,
75 M.J. 717 (C.G. Ct. Crim. App. 2016) 16

In re B,
394 A.2d 419 (Pa. 1978) 12, 13

In re Zuniga,
714 F.2d 632 (6th Cir. 1983)............................... 12

Jaffee v. Redmond,
518 U.S. 1 (1996)........................... 2, 10, 12, 14-19

Kinsella v. Kinsella,
696 A.2d 556 (N.J. 1997) 13

Lora v. Bd. of Ed. of City of N.Y.,
74 F.R.D. 565 (E.D.N.Y. 1977) 12

Stark v. Hartt Transp. Sys., Inc.,
937 F. Supp. 2d 88 (D. Me. 2013) 16

State v. Percy,
548 A.2d 408 (Vt. 1988) 13

Stein v. Bowman,
38 U.S. (13 Pet.) 209 (1839)................................ 11

Taylor v. United States,
222 F.2d 398 (D.C. Cir. 1955)....................... 12, 16

Trammel v. United States,
445 U.S. 40 (1980).................................. 10, 11, 14

United States v. Bryan,
339 U.S. 323 (1950) 10

Upjohn Co. v. United States,
449 U.S. 383 (1981) 11, 18

STATUTES

Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1631(a), (d), 124 Stat. 4137, 4433-4434, as amended, National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 549I, 135 Stat. 1541, 1729 (codified at 10 U.S.C. § 1561 note) 4

COURT RULES

Fed. R. Evid. 501 14

Mil. R. Evid. 513 .... 1, 2, 15-17

Mil. R. Evid. 513(a) 15, 16

Mil. R. Evid. 513(b)(1) 16

Mil. R. Evid. 513(b)(2) 15

S. Ct. R. 37.2 1

OTHER AUTHORITIES

Christopher B. Mueller, et al., *Evidence*
(6th ed. 2018) 14

Coreen Farris, et al., RAND Nat'l Def. Rsch. Inst., *Physical and Psychological Health Following Military Sexual Assault*
(2013) 8, 9, 18

David W. Louisell, *The Psychologist in Today's Legal World: Part II*,
41 Minn. L. Rev. 731 (1957) 13

Indep. Rev. Comm'n, U.S. Dep't of Def., *Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military* (2021) 4-7, 17, 18

Kristy N. Kamarck & Barbara Salazar Torreon, Cong. Rsch. Serv., R44944, *Military Sexual Assault: A Framework for Congressional Oversight* (2021) 3, 5, 6, 18

Laura P. Chen, et al., *Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systematic Review and Meta-analysis*, 85 Mayo Clinic Proc. 618 (2010) 8

Leslie Miles, et al., Brigham Young Univ. Coll. of Nursing, *Mental Health Treatments for Adolescent/Adult Victims of Sexual Assault: Systematic Literature Review and Recommendations* (2020) 8-10

Mem. from Lloyd Austin, U.S. Sec'y of Def., to Senior Pentagon Leadership, et al., Re: Immediate Actions to Counter Sexual Assault and Harassment and the Establishment of a 90-Day Independent Review Commission on Sexual Assault in the Military (Feb. 26, 2021) 4

Manual for Courts-Martial, United States (2002 ed.) 15

Michelle A. Mengeling, et al., *Post-Sexual Assault Health Care Utilization Among OEF/OIF Servicewomen*,
53 Med. Care S136 (2015) 10

Nicole A. Short, et al., *Health Care Utilization by Women Sexual Assault Survivors after Emergency Care: Results of a Multisite Prospective Study* (2021) (author manuscript), published at
38 Depression & Anxiety 67 (2021) 9

Rep. No. 45, *Group for the Advancement of Psychiatry*
92 (1960) 11, 12, 17

Rules of Evidence for United States Courts and Magistrates,
56 F.R.D. 183 (1972)............................... 11, 12, 17

Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*,
66 Va. L. Rev. 597 (1980) 12, 17

Tara E. Galovski, et al., *State of the Knowledge of VA Military Sexual Trauma Research*,
37 J. Gen. Intern. Med.,
Supp. 3, S825 (2022)................................ 3, 5-9, 19

U.S. Dep't of Def., *Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2021*
(2022) 3-7

U.S. Dep't of Def., *Instruction No. 6490.08* (Aug. 17, 2011), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649008p.pdf (last visited Jan. 3, 2023) 17

U.S., Dep't of Def., *Department of Defense (DoD) Fiscal Year 2021 (FY21) Annual Report on Sexual Assault in the Military: Personnel and Readiness*, https://www.sapr.mil/sites/default/files/public/docs/reports/AR/FY21_Annual_Report_on_Sexual_Assault_in_the_Military_Briefing_Deck.pdf (last visited Jan. 3, 2023) 18

INTEREST OF *AMICUS CURIAE*[1]

Protect Our Defenders is dedicated to ending rape and sexual assault in the military. It honors, supports, and gives voice to survivors of military sexual assault and sexual harassment—including service-members, veterans, and civilians assaulted by members of the military. Protect Our Defenders works for reform to ensure survivors and service-members are provided a safe, respectful work environment and have access to a fair, impartially administered system of justice. Protect Our Defenders routinely participates as *amicus curiae* in legal proceedings that implicate the ability of service-members to obtain effective mental-health treatment to heal from rape and sexual assault.

SUMMARY OF THE ARGUMENT

The problem of sexual assault in the military is neither new nor secret. It is a problem with profound negative impacts on the mental health of our troops and one that the Federal Government has strived to address, by increasing both accountability for the perpetrators and aid for the victims. Despite these efforts, the violence is far from over.

One important protection for those who have experienced sexual assault is the psychotherapist-patient privilege. Codified in Military Rule of Evidence 513, the privilege allows victims of sexual assault to advance the process of healing by providing

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of *amicus curiae*'s intent to file this brief under this Court's Rule 37.2.

them the ability to speak freely to a therapist, without fear that their discussions may be disclosed in a case arising under the Uniform Code of Military Justice over the patient's or psychotherapist's objection. As this Court recognized in *Jaffee v. Redmond*, 518 U.S. 1 (1996), the similar privilege in federal-court proceedings (which inspired Rule 513) is essential to ensuring effective mental-health treatment, especially when litigation is on the horizon.

The precedential decision by the Court of Appeals for the Armed Forces below, if left undisturbed, threatens to vitiate this important protection. The court held that "diagnoses and treatments contained within medical records" are not, themselves, communications covered under Rule 513. Pet. App. 3. This precedent mounts a new obstacle in the ongoing battle to end sexual violence amongst service-members.

This Court should grant the petition for a writ of certiorari.

ARGUMENT

In recent years, Congress and the Executive Branch's Department of Defense (the "Department") have made it a top priority to root out sexual assault in the Armed Forces. The Department has documented both its successes and the long road that remains ahead. The Court of Appeals for the Armed Forces' (the "CAAF") decision below, which gutted the evidentiary privilege for communications between a sexual-assault victim and her psychotherapist, erects a formidable barrier to the Department's mission to make sexual assault amongst service-members a relic of the past.

I. Sexual Assault Continues to Plague Our Nation's Finest

"*[P]ersistent and corrosive*." That is how the Department recently described the problem of sexual assault within the Armed Forces in Fiscal Year ("FY") 2021. U.S. Dep't of Def., *Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2021*, at 3 (2022) [hereinafter FY21 Report] (emphasis added). New reporting from the Department bears out the diagnosis. And studies from the Department of Veterans' Affairs (the "VA") demonstrate that the consequences are not merely physical, but mental, too. See Tara E. Galovski, et al., *State of the Knowledge of VA Military Sexual Trauma Research*, 37 J. Gen. Intern. Med., Supp. 3, S825 (2022) [hereinafter VA Study].

A. The Department's Recent Reports on Sexual Assault in the Military Demonstrate that Much Progress Remains to Be Made

1. "Congressional efforts to address military sexual assault … have intensified over the past two decades" as a result of "rising public concern about incident rates and perceptions of a lack of adequate response by military leaders." Kristy N. Kamarck & Barbara Salazar Torreon, Cong. Rsch. Serv., R44944, *Military Sexual Assault: A Framework for Congressional Oversight* 2 (2021) [hereinafter CRS Report]. Since 2004, those efforts have culminated in "over 100 provisions intended to address some aspect of the problem." *Id.* at 2-3.

The Executive Branch, too, has taken initiative. Since 2010, there have been more than ten Department Inspector General engagements "to

review and improve prevention and response," and more than 50 Secretary of Defense-directed initiatives, just to name a few measures. Indep. Rev. Comm'n, U.S. Dep't of Def., *Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military* 12 (2021) [hereinafter IRC Report]. As one example, Secretary of Defense Lloyd Austin recently established an Independent Review Commission ("IRC") to bring in relevant "outside views and ideas." Mem. from Lloyd Austin, U.S. Sec'y of Def., to Senior Pentagon Leadership, et al., Re: Immediate Actions to Counter Sexual Assault and Harassment and the Establishment of a 90-Day Independent Review Commission on Sexual Assault in the Military 1 (Feb. 26, 2021). And pursuant to statute, the Secretary annually appraises Congress of the Department's progress through his report "on the sexual assaults involving members of the Armed Forces … during the preceding year." Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1631(a), (d), 124 Stat. 4137, 4433-4434, as amended, National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 549I, 135 Stat. 1541, 1729 (codified at 10 U.S.C. § 1561 note).

Notwithstanding strong efforts from the Legislative and Executive Branches, and the Department's mission "to develop a culture free from sexual assault," FY21 Report 3, the Department may be further from that goal now than just a few years ago.

2. The FY21 Report revealed that sexual assault remains a "persistent challenge" in all of the service branches. FY21 Report 7. The Department received 8,866 reports of sexual assault in FY 2021, a 13%

increase over the 7,816 reports received in FY 2020. FY21 Report 3, 6. More than 8% of active-duty women, and 1.5% of active-duty men reported unwanted sexual contact within the last year. *Id.*

The number of reports has increased over time. Despite a "statistically significant *reduction* in sexual assault prevalence from 2014" through 2016 "and a 10-year low in Service members who experienced sexual assault in the past year," "these gains did not last." IRC Report 12. Instead, 2018 saw an estimated *44% increase* for sexual assault among female service-members. *Id.* The Department's statistics show a marked rise from FY 2007 through FY 2020. FY21 Report, App. B, at 21.[2]

Junior enlisted members and those under the age of 25 face the highest risk of unwanted sexual contact. FY21 Report 13; CRS Report 68. The rate in FY 2021 was 12.9% for junior women and 2.4% for junior men. FY21 Report 13. Other service-members who experienced sexual assault at a disproportionate rate include "sexual minorities" and transgender service-members. VA Study S826; CRS Report 68-69. Indeed, "gay and bisexual men experience sexual assault at a rate nine times higher than heterosexual men in the military." IRC Report 11.

3. Simultaneously, the rate of reporting has decreased as compared to FY 2018, FY21 Report 6,

---

[2] In FY 2021, the Department changed metrics for estimating the number of service-members who experienced sexual assault. The Department has not yet made any "scientific comparisons" between the FY 2021 method and the method used in prior years. FY21 Report, App. A, at 12. This brief accordingly refrains from drawing any original statistical inferences involving FY 2021.

inhibiting the Department's ability to fully understand and solve the problem. See CRS Report 66 (observing that "under-reporting of sexual assault continues to be an issue"). In FY 2006, 1 out of 14 service-members who experienced sexual assault reported the incident to a Department authority. FY21 Report 11. Between FY 2016 and 2018, the rate improved to 1 in 3. *Id.* at 6-7. But in FY 2021, the rate dipped to 1 out of 5. *Id.* at 6, 11.

According to the IRC:

> There are many reasons survivors of sexual assault never report, and some of them are not unique to military culture. But there are aspects of military life that make the experience of sexual assault and the decision to report even more challenging. Military units are small by design: Service members generally live, eat, and work in the same area, and because of this closeness, spend their off-hours together. This creates a small universe for the average junior enlisted Service member—the very person who is at the highest risk for sexual assault and sexual harassment.

IRC Report 10; see VA Study S826 (noting that the military "context … complicates later help-seeking").

Normal reactions to experiencing a sexual assault—*e.g.*, interpersonal betrayal, victim-blaming, etc.—are "compounded" in the military context "by perceptions of institutional betrayal." VA Study S825. Service-members who have experienced sexual assault at the hands of a colleague may fear "reprisal if they speak openly of their experiences, including the possibility of additional violence, demotions, …

unwanted job reassignments[,] … ostracism by colleagues, isolation from peers, loss of support, and disruptions in unit cohesion." *Id.* at S826. And unlike most civilian victims, these service-members must "continue to work and live side by side with [the] perpetrator, and potentially rely on [the] perpetrator" to save their lives. *Id.*

"[A]bout one in five victims (19 percent)" who used the Department's Safe Helpline—a "crisis support service specially designed for members of the [Department] community affected by sexual assault"—in FY 2021 "perceiv[ed] one or more barriers to reporting their incident" to the Department. FY21 Report, Add. D, at 1, 4. Many of these barriers "reflected a lack of confidence in the system, including concerns about not being believed (35 percent), the report not being kept confidential (30 percent), and ostracism (25 percent)." *Id.* at 4.

B. Military Sexual Trauma Creates Mental-Health Risks for Service-members

The IRC emphasized in its recommendations to the Department the importance of providing "access[] [to] behavioral health care" for service-members who experienced sexual assault. IRC Report, App. E, at 24. At the request of the IRC, researchers within the VA compiled "an overview on the definition and prevalence of" military sexual trauma ("MST") and "the range of adverse consequences associated with MST, including mental and physical health outcomes, functioning, and well-being." VA Study S825; see *id.* at S826 ("MST is the term used by the VA to refer to experiences of sexual assault or sexual harassment during a period of military service."). MST, the

researchers concluded, leads to a multitude of "mental health impact[s]." *Id.* at S825.

"Acute psychological distress ['ASD'] in the aftermath of a reported sexual assault is … common." Coreen Farris, et al., RAND Nat'l Def. Rsch. Inst., *Physical and Psychological Health Following Military Sexual Assault* 6 (2013) [hereinafter RAND Study]. ASD can often lead to longer-lasting post-traumatic stress disorder ("PTSD"), Leslie Miles, et al., Brigham Young Univ. Coll. of Nursing, *Mental Health Treatments for Adolescent/Adult Victims of Sexual Assault: Systematic Literature Review and Recommendations* 5 (2020) [hereinafter BYU Study]—the "most common" mental-health impact of MST, VA Study S827. To be sure, PTSD is a concern for many veterans. But according to the VA researchers, women veterans who experienced MST were nine times more likely to develop PTSD than other women veterans. *Id.*; see RAND Study 6. Men with MST did not show the same increased likelihood of developing PTSD, but "research has also shown that PTSD symptoms may be more severe for men who have experienced MST than women." VA Study S827. MST is also "associated with increased odds of receiving any mental health diagnoses" and "exacerbate[s] pre-existing mental health conditions and increase[s] the severity of mental health disorders including PTSD, depression, substance use disorders, eating disorders, and insomnia." *Id.*; see Laura P. Chen, et al., *Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systematic Review and Meta-analysis*, 85 Mayo Clinic Proc. 618, 618 (2010).

One study of women sexual-assault victims who received care in an emergency room after their

assault revealed that, within the following six weeks, 76% experienced PTSD, depression or anxiety. Nicole A. Short, et al., *Health Care Utilization by Women Sexual Assault Survivors after Emergency Care: Results of a Multisite Prospective Study* 2 (2021) (author manuscript), published at 38 Depression & Anxiety 67 (2021). "Relative to nonvictims, victims of sexual assault are three times more likely to experience depression, 2.8 times more likely to develop problems with alcohol, and three times more likely to attempt suicide." RAND Study 6.

Studies "suggest that the unique aspects of military exposure (e.g., stigma, reporting barriers, institutional betrayal) may amplify distress and increase the likelihood of diagnosable mental illness." VA Study S827. "The nature of military service and its emphasis on loyalty and community may result in service-members experiencing a heightened sense of shock and betrayal when a colleague perpetrates the offense." RAND Study 6. Among military veterans using VA services, "MST is an independent risk factor for suicide mortality." VA Study S827.

Treatment is available and effective for those who experienced MST and endure conditions including PTSD and depression. RAND Study 16. PTSD, for example, can be treated effectively through exposure-based cognitive behavioral therapy, which has been shown effective among female sexual-assault victims. *Id.*; see also BYU Study 13 ("[randomized controlled trials] studies strongly support use of [cognitive-processing therapy] and [cognitive behavioral therapy] for sexual assault trauma and PTSD"). And pharmacological treatments (in addition to therapy) for depression are well established. RAND Study 16. Put simply, "when victims receive effective treatment

after a traumatic event, long-term negative impacts are mitigated, and individual recovery promoted." BYU Study 2.

Yet, many who experience MST do not seek the critical mental-health care they need. One study of 207 service-women who experienced MST showed that only 25% received mental-health care after MST. Michelle A. Mengeling, et al., *Post-Sexual Assault Health Care Utilization Among OEF/OIF Servicewomen*, 53 Med. Care S136, S136 (2015). More than 35% of the women cited concerns about confidentiality as a reason they did not seek mental-health care after they experienced MST. *Id.* at S140, tbl. 4.

II. The CAAF's Decision Hinders the Department's Efforts to Eradicate Sexual Assault Within the Military

A. The Psychotherapist-Patient Privilege Is Necessary to Facilitate Effective Mental-Health Treatment

1. Evidentiary privileges are exceptional in that they serve as "exemption[s]" from the "fundamental maxim that the public has a right to every man's evidence." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)) (ellipsis omitted). Yet privileges are longstanding and accepted because courts have concluded that, on balance, they serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

Take two examples: This Court has described the purpose of the attorney-client privilege—"the oldest of the privileges for confidential communications known to the common law"—as "to encourage full and frank communication between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Similarly, the privilege for confidential marital communications has long been deemed essential "to protect … the confidence of the marital relationship—once described by this Court as 'the best solace of human existence.'" *Trammel*, 445 U.S. at 51 (quoting *Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 223 (1839)).

2. In proposing the Federal Rules of Evidence, the Judicial Conference Advisory Committee considered codifying several evidentiary privileges that met this high standard. See generally *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183 (1972) (*Proposed Rules*). Proposed Rule 504 would have codified the psychotherapist-patient privilege. *Id.* at 240-241.[3] The psychiatrist, the Committee observed, "has a special need to maintain confidentiality," because "[h]is capacity to help his patients is completely dependent upon their willingness and ability to talk freely," *id.* at 242 (quoting Rep. No. 45, *Group for the Advancement of Psychiatry* 92 (1960))—*i.e.*, to engage in "full and frank communication," *Upjohn*, 449 U.S. at 389. Indeed, "confidentiality is a *sine qua non* for

[3] The proposed rule defined "psychotherapist" as "(A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged." 56 F.R.D. at 240.

successful psychiatric treatment," and a "threat to secrecy blocks success[]." *Proposed Rules*, 56 F.R.D. at 242 (quoting Rep. No. 45).

The Committee's view was not novel. The District of Columbia Circuit had already recognized the "particularly clear and strong" rationale for a psychotherapist-patient privilege. *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955); see also *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983) (following *Taylor*). So too had multiple state legislatures. *Proposed Rules*, 56 F.R.D. at 242 (citing statutes from California, Georgia, Connecticut, and Illinois); see also *In re Zuniga*, 714 F.2d at 639 n.3 (citing statutes). Indeed, by the mid-1990s, "all 50 States and the District of Columbia [would] enact[] into law some form of psychotherapist privilege." *Jaffee*, 518 U.S. at 12; see also Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597, 619-620 (1980) (observing that the psychotherapist-patient privilege "enjoyed greater support" nationwide than the physician-patient privilege).

Courts then and since have recognized the necessity of "an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure." *Jaffee*, 518 U.S. at 10; accord, *e.g.*, *Taylor*, 222 F.2d at 401 ("he lays bare his entire self, his dreams, his fantasies, his sins, and his shame"); *Lora v. Bd. of Ed. of City of N.Y.*, 74 F.R.D. 565, 571 (E.D.N.Y. 1977) (Weinstein, J.) ("confidential personal revelations about matters which the patient is normally reluctant to discuss"); *In re B*, 394 A.2d 419, 425 (Pa. 1978) ("disclosure to the therapist of the patient's most intimate emotions, fears, and fantasies is required"). They saw that this confidence and trust

required a guarantee of insulation from "public revelation of [the patient's] innermost thoughts and feelings that were never meant to be heard beyond the walls of the therapist's office." *Kinsella v. Kinsella*, 696 A.2d 556, 566 (N.J. 1997); accord, *e.g.*, *In re B*, 394 A.2d at 426 ("the patient rightfully expects that such revelations will remain a matter of confidentiality exclusively between patient and therapist"); *State v. Percy*, 548 A.2d 408, 415 (Vt. 1988) (citing "the need of a victim of a sexual assault to seek and receive mental health counseling without fear that her statements will end up in the public record"). And that "without the confidentiality which the privilege provides, many people would simply forego therapeutic treatment" altogether. *Barrett v. Vojtas*, 182 F.R.D. 177, 180 (W.D. Pa. 1998); accord, *e.g.*, *Albuquerque Rape Crisis Ctr. v. Blackmer*, 120 P.3d 820, 825-826 (N.M. 2005).

Indeed, the justification for a psychotherapist-patient privilege is viewed as even stronger than that underlying the physician-patient privilege. See, *e.g.*, David W. Louisell, *The Psychologist in Today's Legal World: Part II*, 41 Minn. L. Rev. 731, 745 (1957) (because there is "hardly any situation in the gamut of human relations where one human being is so much subject to the scrutiny and mercy of another human being as in the psychodiagnostics and psychotherapeutic relationships" it is hard to see how such functions "adequately can be carried on in the absence of a pervading attitude of privacy and confidentiality"). While a physician often treats injuries or illnesses that are observed, diagnosed, and treated by procedures not dependent on patient communications, a psychotherapist must rely almost entirely on disclosures from the client to provide a

diagnosis and treatment. Christopher B. Mueller, et al., *Evidence* § 5.35 (6th ed. 2018).

3. When it was time for Congress to consider proposed Rule 504, though, the legislature opted instead (as it did for all proposed privilege rules) for a generally applicable "case-by-case" approach. *Trammel*, 445 U.S. at 47 (citation omitted). Federal Rule of Evidence 501 accordingly instructs federal courts to decide as a matter of common law the existence and scope of evidentiary privileges "in light of reason and experience." This Court subsequently did just that in *Jaffee* and recognized the psychotherapist-patient privilege. 518 U.S. at 9-10.[4] In this Court's words: "The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id.* at 11.

Jaffee further took into account that the "need for treatment" in that case arose from "circumstances that … [would] probably result in litigation." 518 U.S. at 12. The dispute involved a lawsuit brought by an estate against a police officer who had fatally shot the decedent in an allegedly unlawful manner. *Id.* at 4-5. Following the shooting, the officer had "received extensive counseling from a licensed clinical social worker," and it was the social worker's notes during those sessions that the estate sought to access

[4] The Court held that the privilege extended to "confidential communications made to licensed psychiatrists[,] … psychologists," and "licensed social workers in the course of psychotherapy." *Jaffee*, 518 U.S. at 15.

through discovery. *Id.* at 4-6. "[P]articularly when it is obvious" that litigation is imminent, this Court stressed, "patients would surely be chilled" (and thus avoid communicating with the psychotherapist) without a privilege. *Id.* at 12.

4. Influenced by *Jaffee*, and following in part the text of proposed Rule 504, the Joint Service Committee on Military Justice adopted a psychotherapist-patient privilege for cases arising under the Uniform Code of Military Justice. *Manual for Courts-Martial, United States*, at A22-44 to -45 (2002 ed.) [hereinafter *MCM*]; see also Pet. App. 55-56 (opinion of the Navy-Marine Corps Court of Criminal Appeals). Broadly speaking, Military Rule of Evidence 513 grants "patient[s]" the "privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist … if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." Mil. R. Evid. 513(a).[5] The Committee deemed the rule justified "based on the social benefit of confidential counseling recognized by *Jaffee*." *MCM*, at A22-44 to -45 (emphasis added).

It is that "social benefit" that the CAAF's decision in this case threatens to undermine.

---

[5] Rule 513 defines a "psychotherapist" as a licensed or credentialed "psychiatrist, clinical psychologist, clinical social worker, or other mental health professional," or "a person reasonably believed by the patient to have such license or credentials." Mil. R. Evid. 513(b)(2).

B. The CAAF's Decision Undercuts the Protections Afforded by Military Rule of Evidence 513

The CAAF's holding that "a patient's diagnoses and treatments" (and any records revealing the same) fall outside Military Rule of Evidence 513's privilege, Pet. App. 17, guts the psychotherapist-patient privilege of its power to "facilitat[e] the provision of appropriate [mental-health] treatment," *Jaffee*, 518 U.S. at 11, for our service-members.[6] To be sure, records of a diagnosis and treatment are not the same as a patient's "self, his dreams, his fantasies, his sins, and his shame." *Taylor*, 222 F.2d at 401. But neither are they beyond the privilege's scope of concern.

As Judge Maggs explained below, a "person's mental health diagnoses and the nature of his or her treatment *inherently* reveal something of the private, sensitive concerns that led him or her to seek treatment and *necessarily* reflect, at least in part, his or her confidential communications to the psychotherapist." Pet. App. 30 (dissenting opinion) (quoting *Stark v. Hartt Transp. Sys., Inc.*, 937 F. Supp. 2d 88, 91 (D. Me. 2013)) (emphasis added); accord *H.V. v. Kitchen*, 75 M.J. 717, 719 (C.G. Ct. Crim. App. 2016) (endorsing this proposition as "undeniable"). By concluding otherwise, the CAAF set Rule 513 apart from the common-law privilege recognized in *Jaffee* as applied in the lower courts. Pet. 9-13; see also Pet. App. 30-31 (Maggs, J.,

---

[6] Though Petitioner (the patient claiming the privilege in this case) is not a service-member, Rule 513 (and thus the CAAF's interpretation of it) does not distinguish between patients who do and do not serve in the military. Mil. R. Evid. 513(a), (b)(1).

dissenting). The Rule was not created so as to afford a second-class privilege to those with the misfortune of being sexually assaulted by a member of the military rather than by a civilian.

Notwithstanding increased societal acceptance and the Department's commendable "policy … to dispel the stigma of seeking mental health care," U.S. Dep't of Def., *Instruction No. 6490.08*, at 2 (Aug. 17, 2011) (capitals omitted),[7] a service-member's knowledge that her mental-health diagnosis and treatment may be exposed on the public record will inhibit her "willingness and ability to talk freely," *Proposed Rules*, 56 F.R.D. at 242 (quoting Rep. No. 45); see also Saltzburg, *supra* at 620 (noting that some patients "may view a history of mental problems as a character flaw"). Like the police officer's knowledge in *Jaffee* that "the circumstances that g[a]ve rise to [her] need for treatment w[ould] probably result in litigation," 518 U.S. at 12, a victim of sexual assault who has reported the incident reasonably foresees prosecution (and with it, requests for discovery). Even before the CAAF's decision greenlighting such exposure, the IRC found that "stigma" remained "a significant barrier" to treatment for service-members who have experienced MST. IRC Report 40.

The CAAF's narrow interpretation of Rule 513 also exacerbates deficiencies in a justice system in which "[m]ost of the victims the IRC spoke with said they regretted making a report" of sexual assault in the first place. IRC Report 25. The Department reports that "[t]rust in the [m]ilitary [justice] [s]ystem" "to protect your privacy" is lower than it has been for at

---

[7] https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649008p.pdf (last visited Jan. 3, 2023).

least a decade. U.S., Dep't of Def., *Department of Defense (DoD) Fiscal Year 2021 (FY21) Annual Report on Sexual Assault in the Military: Personnel and Readiness* 6;[8] see also Pet. 19-21 (arguing that recent changes to Rule 513 were designed by Congress to enhance privacy protections). Service-members believed that "there was no confidentiality in the process." IRC Report 25; accord CRS Report 36 (summarizing similar findings from a 2004 task force). They "were often shunned and ostracized," and some even recalled "accus[ations]" that they had "l[ied] to harm someone's career or get out of work." IRC Report 25. On the heels of the IRC's recommendation that "ensuring confidentiality should be a primary consideration in implement[ing]" improved victim care, *id.*, App. E, at 25, service-members considering mental-health treatment may now have less hope than before that their struggles will remain private.

The ramifications reach further than individual service-members. See *Jaffee*, 518 U.S. at 11 ("[A]n asserted privilege must also 'serv[e] public ends.'" (quoting *Upjohn*, 449 U.S. at 389 (second set of brackets in original))). Service-members who cannot secure the help they need are more likely to separate from the service prematurely, which leads to extra personnel costs for the military. CRS Report 2. Further, sexual assault against service-members can negatively "impact unit cohesion, stability, and ultimately, mission success." *Id.*; RAND Study 8. This Court pointed out in *Jaffee* that "[t]he entire community may suffer if police officers are not able to

---

[8] https://www.sapr.mil/sites/default/files/public/docs/reports/AR/FY21_Annual_Report_on_Sexual_Assault_in_the_Military_Briefing_Deck.pdf (last visited Jan. 3, 2023).

receive effective counseling and treatment after traumatic incidents." 518 U.S. at 11 n.10. These remarks apply with full force to our troops and require affording Rule 513 its proper scope.[9]

In short, the Department has taken great strides to eradicate the problem of sexual assault within our military ranks. But "even the best of interventions will not be effective" unless "barriers to reporting MST and receiving care" are "removed" from the military-justice system. VA Study S830. At a moment when the Department has signaled its crucial investment in removing those barriers, the CAAF's holding below erected a new one that threatens to stall progress and even push the Department's efforts at fighting sexual violence in the wrong direction.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

/S/ MAYA M. ECKSTEIN
MAYA M. ECKSTEIN
Counsel of Record
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8788
meckstein@huntonAK.com
Jan. 5, 2023

---

[9] For similar reasons, non-party patients must have an adequate means of voicing their objection to disclosure of confidential communications in court-martial proceedings. See Pet. 26-30.