IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Sergeant (E-5) **THOMAS M. ADAMS** United States Army Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20130693 USCA Dkt. No. 20-0366/AR

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

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Granted Issue

WHETHER THE 2016 AMENDMENTS TO ARTICLE 43, UCMJ, RETROACTIVELY MADE THE STATUTE OF LIMITATIONS FIVE YEARS FOR INDECENT LIBERTIES AND SODOMY OFFENSES CHARGED UNDER ARTICLES 134 AND 125, RESPECTIVELY.

Statement of the Case

On January 19, 2021, appellant filed the Final Brief on Behalf of Appellant.

On February 19, 2021, the government filed its Final Brief on Behalf of Appellee.

This is appellant's Reply.

Argument

While the government pays lip service to textualism, its arguments are textbook "purposivism." Unlike textualists, "purposivists" use extratextual sources "such as the overall tenor of the statute, patterns of policy judgments made in related legislation, the 'evil' that inspired Congress to act, or express statements found in the legislative history" to interpret the meaning of statutes. John Manning, WHAT DIVIDES TEXTUALISTS FROM PURPOSIVISTS? 106 Colum. L. Rev. 70, 71-72 (2006). Purposivists assume that courts can adjust the written text to capture "what Congress would have intended had it expressly confronted the apparent mismatch between text and purpose." *Id*. at 72.

Perhaps because the plain language of the statute does not support its arguments, the government resorts to purposivist arguments throughout its argument, admonishing this Court consider policy appeals and murky legislative history. Scholars refer to many of the cases the government cites in its brief, such as *Public Citizen*[1] and *American Trucking*[2], as the high-water marks of purposivism. *Id*. at 87, n. 8. (Appellee's Br. 13-14, 30-31).

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[1] *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989).

[2] *United States v. American Trucking*, 310 U.S. 534 (1940). This case in particular has been described as "the landmark case in the overthrow of the plain meaning rule." WHAT DIVIDES TEXTUALISTS FROM PURPOSIVISTS? 106 Colum. L. Rev. 70, at n. 61 (quotation omitted).

But the tide has gone out for purposivism. Under the modern textualist approach, which this Court and the Supreme Court have fully embraced, the government's naked policy appeals must give way to the statute's unambiguous language. Here, the text is clear: other than the specifically enumerated child abuse offenses listed in §5225(d) of the National Defense Authorization Act of 2017[3], the statute of limitations was retroactively made five years. In light of that plain language, the error in this case is also patently obvious: appellant's offenses are not listed in §5225(d), meaning the statute of limitations had expired before the summary court-martial convening authority (SCMCA) received them in 2017.

1. The retroactive nature of the amendment is unambiguous.

The government's argument opens by asserting that the NDAA 2017's amendments to the statute of limitations were not retroactive, and that the statute of limitations in effect at the time of the alleged offense therefore applies. (Appellee's Br. 15-27). The government's claim that the amendments are not retroactive is not based on any statutory text, but its assertion that the statute should be interpreted that way because the purpose of the amendments was to "continue [Congress's] painstaking efforts to increase protections for children." (Appellee's Br. 19). It is not surprising that the government veers immediately

[3] National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), Pub. L. 114-328; 130 Stat. 2000 (2016).

towards purposivism, because that is all it has. Congress spoke clearly and unambiguously when it provided that the amendments to what constituted a "child abuse offense" were retroactive and applied "to the prosecution of any offense committed *before*, on, or after the date of enactment" of §5225. NDAA 2017, §5225(f).

The government also seeks to cast §5225(d)'s amendments to the definition of "child abuse offense" as non-substantive changes, simply because that subsection is entitled "Conforming Amendments." In effect, the government asks this Court not to apply the changes Congress made under that provision because of its title. Of course, provisions can have substantive effect even if they are labeled as a "conforming amendment." *See Asociacion de Empleados de Area Canalera v. Pan. Canal Comm'n*, 329 F.3d 1235, n. 3 (11th Cir. 2003) (citing *Harris v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980), *Dir. Of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 324 (2001)). After all, "a statute is a statute, whatever its label." *United States v. R.L.C.*, 503 U.S. 291, n. 5 (1992). As this Court noted, "[c]atchlines or section headings. . .are not part of a statute. They cannot vary its plain meaning and are available for interpretive purposes only if they can shed light on some ambiguity in the text." *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008) (emphasis added) (citing *Bhd. Of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947)). Here, Congress expressly

and unambiguously provided in §5225(f) that the amendments in §5225(d) about what constitute child abuse offenses had immediate substantive retroactive effect.

The Court should not accept the government's attempt to elevate the spirit or purpose of the law above its plain and unambiguous language. As the Supreme Court recently reaffirmed, interpreting a statute contrary to its plain language in order to avoid policy consequences it finds undesirable (or to give effect to a policy a litigant believes Congress intended) is "an invitation no court should ever take up." *Bostock v Clayton Cty.*, 140 S. Ct. 1731, 1753 (2020).

2. The government's interpretation of what constitutes a "child abuse offense" is novel, unprecedented, and unsupported by Article 43's plain language.

What constitutes a "child abuse offense" under Article 43 is just as unambiguous as the retroactivity provision. Congress enumerated a list of offenses under the Code by name and punitive articles that receive an expanded statute of limitations. Article 125 sodomy and Article 134 indecent liberties are not among that list.

The government proposes a definition of "constitutes" in an attempt to manufacture an ambiguity, but closer analysis shows that this definition actually undermines its own argument. (Appellee's Br., 25-26). Appellant's commission of sodomy and indecent liberties between 2003 and 2005 does not "make up…form [or] compose" an offense in violation of Article 120, 120b, or any other

enumerated offense. They "make up…form [or] compose" only offenses in violation of Articles 125 and 134. Quite simply, appellant's alleged crimes do not constitute a violation of Article 120, 120b, or any other enumerated offense, as Article 43 requires, *because they could not then (and cannot now) violate any of the enumerated child abuse offenses*.

Essentially, the government argues Article 43 is written in a way to create an elemental or factual analysis to determine what is a covered "child abuse offense." Congress knows how to define a covered offense by the elements it is composed of, and it frequently does so. *See, e.g.*, 18 U.S.C. §921(a)(33)(A)(ii) (2018) (defining a "misdemeanor crime of domestic violence" to be an offense that "has, *as an element*, the use or attempted use of physical force, or the threatened use of a deadly weapon. . ."") (emphasis added). Congress also knows how to define a covered offense by cross-reference to a particular criminal violation. *See, e.g.*, 8 U.S.C. §1101(a)(43)(E)(i) ((2018) (defining the term "aggravated felony" to mean, *inter alia*, "an offense described in section 842(h) or (i) of title 18, United States Code."). Plainly, Article 43 is an example of the latter. The statute being clear, this Court's inquiry is at an end.

There is an irony in the government's brief as it seeks to bend and stretch the unambiguous text. While extolling the virtues of clarity, certainty, and "preventing surprise" in statutes of limitations, the government's case-by-case elemental or

factual analysis actually would *inject* the very confusion and uncertainty into the statute of limitations the government warns against. Instead of the current practice of simply cross-checking the name of the offense and punitive article listed on the charge sheet against the enumerated child abuse offenses Congress listed in Article 43—a process so simple any layperson could do it—the government's proposed interpretation would inevitably engender uncertainty and litigation as litigants try to figure out whether a charged offense could be brought under an enumerated offense. This defies the ordinary presumption "that clarity is an objective for which lawmakers strive when enacting such provisions." *United States v. Briggs*, 141 S. Ct. 467, 471 (2020) (citing *United States v. Lovasco*, 431 U.S. 783, 789 (1977), *Artis v. District of Columbia*, 138 S. Ct. 594, 607-608 (2018)).

3. The government has not met its burden of showing the outcome is not merely odd or unexpected, but "preposterous" or "so gross as to shock the general moral or common sense."

The modern textualist approach has not disregarded the absurdity doctrine completely. But given its natural tension with giving effect to the unambiguous language of the statute, its use is cabined only to the most extreme and rare cases. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 460-461 (2002) ("Respondents correctly note that the Court rarely invokes [the absurd results test] to override unambiguous legislation."). As the Fifth Circuit recently described it, "[t]he absurdity bar is high, as it should be. The result must be *preposterous*, one that 'no

reasonable person could intend.'" *Tex. Brine Co. L.L.C. v. Am. Arbitration Ass'n., Inc.*, 955 F.3d 483, 486 (5th Cir. 2020) (emphasis added) (quoting Antonin Scalia & Bryan Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 237 (2012)).

To what extent does legislative history or the stated purpose of the legislation play a role in defining whether an outcome is absurd? For the government, it is decisive. (Appellee's Br. 29-30). For textualists, it has little bearing. In *Barnhart*, 534 U.S. at 460-461, the Supreme Court rejected the application of the absurdity doctrine, even where the congressional record only contained statements from senators indicating they did *not* intend the demonstrably odd outcome from the statute's unambiguous text. *See* 534 U.S. at 468-469 (Stevens, J., dissenting) (noting that the only legislators who spoke about the provision on the record indicated they did *not* intend the outcome the Supreme Court reached). In disregarding the importance of legislative history, the majority noted its reticence to upset the plain language of the statute, particularly when the statute as a whole was the product of significant legislative activity and compromise. *Id*. at 461-162.

More recently, in *Bostock*, the Supreme Court held that Title VII protections of the Civil Rights Act of 1964 applied to transgender and homosexual employees, even though it was clear no legislator in 1964 ever intended or even imagined that

interpretation of "on the basis of. . .sex." 140 S. Ct. at 1754. In fact, the legislator who added "sex" to the list of protected classes apparently did so hoping it was a poison pill to kill the legislation, not because he or any other legislator in 1964 intended the prohibition of sex discrimination to apply to homosexuals or transsexuals. 140 S. Ct. at 1776-1777 (Alito, J., dissenting). Yet, the Supreme Court made clear that when the text is unambiguous, legislative history and other extratextual considerations are "irrelevant." 140 S. Ct. at 1751. Where the text is unambiguous, using the absurdity doctrine to "back door" in policy arguments, legislative history, or other extratextual considerations (as the government seeks to do) only undermines the very foundation of textualism.

The Military Justice Act of 2016, like the statutory scheme in *Barnhart*, was a significant piece of legislation that undoubtedly involved compromise and negotiation before final passage. This Court cannot know what every legislator was thinking when he or she voted to approve the bill. To properly account for the legislative process and unstated views of individual legislators, invoking the absurdity doctrine is inappropriate where there is at least a "rational" basis for the odd outcome. *See Tex. Brine Co.*, 955 F.3d at 486. Even if the result in this case is odd or unexpected, it is hardly "brazen" to suggest, consonant with the longstanding presumption in favor of repose of statutes of limitations, that some legislators intended the sun to set on some offenses that have not been on the books

in years. Or, since "clarity is an objective for which lawmakers strive when enacting" statutes of limitations, *Briggs*, 141 S. Ct. at 471, that some legislators were willing to accept anomalies like this in the name of providing a uniform, well-ordered, and straightforward statute of limitations.

The absurdity doctrine is a high bar and only rarely applicable. The government cannot meet the bar of showing the outcome is "propsterous" because there are rational reasons for this outcome. Accordingly, resort to the absurdity doctrine is not appropriate in this case.

4. The government's reliance on *Miller* is misplaced.

Quoting *United States v. Miller*, 38 M.J. 121, 124 (C.A.A.F. 1993), the government argues that the Savings Clause of Article 43(g) applies because the "the critical question posed by Article 43 is whether the sworn charges and specifications were timely received, not whether the same piece of paper that contains those charges at the court-martial was the same piece of paper that conveyed those charges to the summary court-martial authority." (Appellee's Br. 40).

Miller is inapplicable. *Miller* addressed whether the statute of limitations stays tolled when the convening authority *withdraws* charges from trial, and then re-refers the charges on a new charge sheet in slightly modified form. *Id*. at 122. In this case, the convening authority *dismissed* the 2012 charges, and referred a

new set of charges that had been preferred and investigated anew in 2017. The distinction between a withdrawal and a dismissal matters. *See, e.g., United States v. Leahr*, 73 M.J. 364 (C.A.A.F. 2014) (dismissal restarts the R.C.M. 707 speedy trial clock, but withdrawal does not); *United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988) (same); *United States v. Mucthison*, 28 M.J. 1113, n. 3 (N.M.C.M.R. 1989) ("the statute of limitations is no longer tolled when charges are dismissed while the contrary is true if withdrawal has occurred"). A withdrawal occurs when the convening authority intends to immediately re-refer the charges to trial. Dismissal, on the other hand, "disposes of those charges," which is why bringing proceedings must restart "as though there were no previous charges or proceedings." Rule for Court-Martial 604 Drafters' Analysis.

Miller's holding—that the charges, not the piece of paper containing the charges, matters for the purpose of tolling the statute of limitations—makes sense in the context of a *withdrawal*, not a dismissal. When charges are withdrawn, the withdrawn charges are still extant or "live," regardless of what piece of paper they are written on. When charges are dismissed, however, they are no longer "live," but rather "disposed of." An entirely new set of charges now exists in their place. Thus, unlike in *Miller*, the convening authority in this case did not simply re-refer the 2012 charges to trial on a different piece of paper. Instead, appellant was tried on a completely new set of charges, that had been preferred and investigated—and

most importantly, received by the SCMCA—for the first time in 2017, *after* Congress made the amendments retroactive.

5. The error is plain because the statutory text is clear.

At the time of the trial and rehearing, no court had yet settled whether the 2016 amendments were retroactive, or whether the offenses for which appellant was charged constituted "child abuse offenses" following the amendments. However, "[e]ven absent binding case law. . . an error can be plain if it violates an absolutely clear legal norm, for example because of the clarity of a statutory provision." *United States v. Abney*, 957 F.3d 241, 252 (D.C. Cir. 2020) (quoting *In re Sealed Case*, 573 F.3d 844, 851 (D.C. Cir. 2009) (internal quotations omitted)). For the reasons set forth above, NDAA 2017 §§5225(d) and (f) are clear and unambiguous: appellant's offenses do not constitute "child abuse offenses" and the changes were retroactive.

This clarity is reflected in the opinions of both lower court opinions that have addressed this issue. In both *McPherson* and the instant case, the lower courts found the amendments were retroactive under the plain language of §5225(f). (JA 012, 295). The lower court in this case even conceded the statute "did not appear ambiguous" on its face, as to whether appellant's offenses constituted "child abuse offenses." (JA 013). They only diverged on the ultimate

outcome because the lower court in this case disregarded the otherwise unambiguous text by invoking the absurdity doctrine.

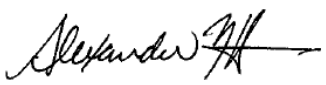
Yet, the lower court's conclusion that the plain language of the text led to an absurd result was the product of its reliance on an extratextual source: legislative intent. The Supreme Court's recent decisions have made clear that extratextual considerations like legislative intent have "no bearing," except when addressing ambiguous statutory language. *See Bostock*, 140 S. Ct. at 1749. And that is so even in cases where the outcome is unexpected or beyond what the legislators may have intended. *See id*. The lower court's erroneous use of a "relic from a bygone era of statutory construction"[4] to arrive at a different conclusion does not make the error any less obvious in this case.

Conclusion

Using unambiguous language, the amendments to Article 43 retroactively made only certain "child abuse offense[s]" defined by punitive articles subject to an extended statute of limitations. The offenses appellant was charged with, sodomy under Article 125 and indecent liberties und Article 134, are quite clearly not on that enumerated list. As a result of the government's choice to *dismiss* the 2012 charges, for which the statute of limitations had been tolled, and bring a new

[4] *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

set of charges that were received by the SCMCA after Congress made the amendments to Article 43, the statute of limitations had expired.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Adams, Crim. App. Dkt. No. 20130693, USCA Dkt. No. 20-0366/AR, was electronically filed with the Court and Government Appellate Division on March 1, 2021.

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