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

UNITED STATES Appellant v. Staff Sergeant (E-6) **DANNY L. MCPHERSON** United States Army Appellee	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 20180214 USCA Dkt. No. 21-0042/AR

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

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES Appellant v. Staff Sergeant (E-6) **DANNY L. MCPHERSON** United States Army Appellee	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 20180214 USCA Dkt. No. 21-0042/AR

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

Certified Issue

DID THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS ERR WHEN IT DISMISSED THE SPECIFICATIONS IN CHARGE I ON THE GROUNDS THAT THE STATUTE OF LIMITATIONS HAD EXPIRED?

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ]; 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

Statement of the Case

On March 13, 2018, a military judge sitting as a general court-martial convicted Staff Sergeant (SSG) Danny L. McPherson (appellee), contrary to his pleas, of six specifications of indecent acts with a child, in violation of Article 134, UCMJ, 10 U.S.C. § 834; two specifications of aggravated sexual contact with a child, in violation of Article 120(g), UCMJ; 10 U.S.C. § 920; and one specification of assault consummated by battery, in violation of Article 128, UCMJ; 10 U.S.C. § 928. (JA 36–39, 86–87)[1]. The military judge sentenced appellee to 28 years of confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. (JA 88). The convening authority approved the sentence as adjudged. (JA 34).

On September 28, 2020, the Army Court set aside the findings of guilty to Charge I and its specifications (Indecent Acts with a Child) after finding these specifications time-barred from prosecution because of Congress's 2016 amendments to Article 43, UCMJ; 10 U.S.C. § 843. *United States v. McPherson*, 2020 CCA LEXIS 350, at *41 (Army Ct. Crim. App. Sept. 28, 2020). The Army

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[1] The military judge acquitted appellee of one specification of aggravated sexual contact, three specifications of assault consummated by battery, and one specification of sexual abuse of a child, in violation of Article 120(g), UCMJ (2008), and Articles 128 and 120b, UCMJ (2012), respectively. (JA 36–39, 86–87)

Court reassessed appellee's sentence to 15 years of confinement, reduction to the grade of E-1, and a dishonorable discharge. *Id.* at *41–42.

On November 3, 2020, the Judge Advocate General of the Army certified the instant case to this court pursuant to Article 67(a)(2), UCMJ. (JA 1–2).

Summary of the Argument

The Army Court correctly decided this case. Appellee's prosecution for indecent acts with a child was time barred because Congress's 2016 amendments to Article 43, UCMJ, altered the statute of limitations for these offenses, reducing it to five years. The plain language of the 2016 legislation that amended Article 43, analyzed under the appropriate canons of statutory construction, compel this conclusion. Furthermore, based on two of this Court's recent decisions—*United States v. Mangahas* and *United States v. Briggs*—the military judge erred by failing to advise appellee of his right to assert a statute of limitations defense, and that error was plain. *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018); *United States v. Briggs*, 78 M.J. 289 (C.A.A.F. 2019), *rev'd on other grounds* 2020 U.S. LEXIS 5989 (2020).

Statement of Facts

On March 13, 2018, a military judge convicted appellee of six specifications of indecent acts with a child, KR. (JA 36–39, 86–87). All alleged conduct occurred between May 1, 2004 and December 31, 2004. (JA 36–39). The

summary court-martial convening authority received the charge sheet at 1059 hours on March 27, 2017. (JA 36–39).

DID THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS ERR WHEN IT DISMISSED THE SPECIFICATIONS IN CHARGE I ON THE GROUNDS THAT THE STATUTE OF LIMITATIONS HAD EXPIRED?

Standard of Review

The applicability of a statute of limitations is a question of statutory interpretation, which this Court reviews de novo. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008) (citing *United States v. Falk,* 50 M.J. 385, 390 (C.A.A.F. 1999)); *Mangahas*, 77 M.J. at 222.

Law

In all statutory construction cases, appellate courts begin—and most often end—with the language of the statute. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end."); *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 (2020) ("This case begins, and pretty much ends, with the text of Section 1915(g)."); *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2018) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). This is so because "courts must give effect to the clear meaning of statutes as written and questions of statutory interpretation should begin and end with

statutory text, giving each word its ordinary, contemporary, and common meaning." *United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018) (internal quotation marks omitted) (citing *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017)). "The plain language will control, unless use of the plain language would lead to an absurd result." *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007). Courts may not alter a statute's reach "by inserting words Congress chose to omit." *Lomax*, 140 S. Ct. at 1725 (citing *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1906 (2019)).

A. The History of Article 43

In 1986, Congress amended Article 43, UCMJ, for the first time since its enactment thirty years earlier. National Defense Authorization Act for Fiscal Year 1987 (NDAA 1987), Pub. L. No. 99-661, § 805, 100 Stat. 3816, 3908 (1986); *see generally* Act of Aug. 10, 1956, ch. 1041, 70A Stat. 51. This amendment expanded the statute of limitations from three to five years for all offenses committed on or after enactment of the statute. NDAA 1987, § 805(b)(1); *compare* 10 U.S.C. § 843 (1988) *with* 10 U.S.C. § 843 (1982). The only exceptions to this five-year limit were: (1) absence without leave in a time of war; (2) missing movement in a time of war; and (3) any offense punishable by death. NDAA 1987, § 805(a).

Congress next amended Article 43 in 2003 to increase the statute of limitations for child abuse offenses. National Defense Authorization Act for Fiscal Year 2004 (NDAA 2004), Pub. L. No. 108-136, § 551, 117 Stat. 1392, 1481 (2003). This amendment increased the statute of limitations for such offenses to the alleged victim's twenty-fifth birthday, and—for the first time—provided an enumerated list of offenses, identified both by section of the statute and by article. NDAA 2004, § 551 (b)(2)(A). The offense of "indecent acts or liberties with a child in violation of section 934 of this title (article 134)" was specifically enumerated as a "child abuse offense." NDAA 2004, § 551 (b)(2)(B)(v).

The next change to Article 43 came in January 2006, when Congress again amended the statute. National Defense Authorization Act for Fiscal Year 2006 (NDAA 2006), Pub. L. No. 109-163, § 553, 119 Stat. 3136, 3264 (2006). Here, Congress changed the statute of limitations for child abuse offenses to "the life of the child or within five years after the date on which the offense was committed . . . ." NDAA 2006, § 553(b)(1). Congress also amended portions of the definition of a "child abuse offense" for purposes of Article 43, electing to continue to designate those offenses by section of the statute and article number. NDAA 2006, § 553(b)(2). In addition to these amendments to the definition, Congress added an entirely new category of "child abuse offense": an "act that involves abuse of a person who has not attained the age of 18 years and would constitute an offense

under chapter 110 or 117, or under section 1591, of title 18." NDAA 2006, § 553(b)(3).

Congress's next substantive[2] amendment to the statute came in 2012, when it changed the listing of statute sections and articles listed in Article 43 (b)(2) to comport with changes it made elsewhere in the code. National Defense Authorization Act for Fiscal Year 2012 (NDAA 2012), Pub. L. No. 112-81, § 514(d)(1), 125 Stat. 1298, 1410 (2011). In so doing, it deleted the offenses of indecent assault and indecent liberties with a child from those offenses covered by Article 134, and added Articles 120a, 120b, and 120c (along with their corresponding statutory sections) to the definition of "child abuse offense." NDAA 2012, § 541(d)(1). Notably, for the first time in its long history of amending Article 43, Congress stated these changes "apply with respect to offenses committed on or after such effective date," thereby explicitly declining to make the changes retroactive. NDAA 2012, § 541(f).

In 2013, Congress ostensibly recognized that Article 43, as it stood after the 2012 amendment, was internally inconsistent. *See* National Defense Authorization

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[2] Congress amended the relevant sections of Article 43 twice between 2006 and 2012. The first occasion was to correct an erroneous reference to "article 126" in the context of sodomy, and a second time to remove an errant semicolon. *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1071(a)(4)(A), 120 Stat. 2083, 2398 (2006); Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1075(b)(14), 124 Stat. 4137, 4369 (2011).

Act for Fiscal Year 2014 (NDAA 2014), Pub. L. No. 113-66, § 1703, 127 Stat. 672, 958 (2013). This was so because after the 2012 amendment, Article 43(a) stated that rape and rape of a child could be tried at any time without limitation, but Article 43(b)(2)(A)(i) implemented a five-year limitation on, among others, offenses violating Article 120 and 120b. 10 U.S.C. § 843 (2012). To correct this error, Congress added rape or sexual assault and rape or sexual assault of a child to the list of offenses that could be tried without limitation. NDAA 2014, § 1703(a). To make its intent clear, Congress also clarified in the definition of "child abuse offense" that the five-year statute of limitations applied to all enumerated offenses *except* those it had just added to Article 43(a). NDAA 2014, § 1703(b). At the conclusion of this amendment, Congress again made the changes effective for offenses committed on or after the effective date, thereby explicitly declining to make the changes retroactive. NDAA 2014, § 1703(c).

On December 22, 2016, the definition of "child abuse offense" contained in Article 43(b)(2)(B)(i-v) read as follows:

> (B) In subparagraph (A), the term 'child abuse offense' means an act that involves abuse of a person who has not attained the age of 16 years and constitutes any of the following offenses:
>
> > (i) Any offense in violation of section 920, 920a, 920b, or 920c of this title (article 120, 120a, 120b, or 120c), unless the offense is covered by subsection (a).
> >
> > (ii) Maiming in violation of section 924 of this title (article 124).

> (iii) Forcible sodomy in violation of section 925 of this title (article 125).
>
> (iv) Aggravated assault or assault consummated by a battery in violation of section 928 of this title (article 128).
>
> (v) Kidnaping, assault with intent to commit murder, voluntary manslaughter, rape, or forcible sodomy, or indecent acts in violation of section 934 of this title (article 134).

10 U.S.C.A. § 843(b)(2)(B)(i-v) (2016).

On December 23, 2016, Congress once again waded into Article 43. *See* National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), Pub. L. No. 114-328, § 5225, 130 Stat. 2000, 2909–10 (2016). This time, Congress made the largest substantive change to the Article since the 1986 amendments. *See generally* NDAA 2017, § 5225. This amendment eliminated clauses (i) through (v) of subsection (b)(2)(B) and replaced them with new language. NDAA 2017, § 5225(d). The new sections read:

> (B) In subparagraph (A), the term 'child abuse offense" means an act that involves abuse of a person who has not attained the age of 16 years and constitutes any of the following offenses:
>
> > (i) Any offense in violation of section 920, 920a, 920b, 920c, or 930 of this title (article 120, 120a, 120b, 120c, or 130), unless the offense is covered by subsection (a).
> >
> > (ii) Maiming in violation of section 928a of this title (article 128a).

> (iii) Aggravated assault, assault consummated by a battery, or assault with intent to commit specified offenses in violation of section 928 of this title (article 128).
>
> (iv) Kidnapping in violation of section 925 of this title (article 125).

NDAA 2017, § 5225(d). Congress then made these changes retroactive, stating they "shall apply to the prosecution of any offense committed *before*, on, or after the date of the enactment of [§ 5225] if the applicable limitation period has not yet expired." NDAA 2017, § 5225(f) (emphasis added).

B. Retroactivity

As a general rule, "an accused is subject to the statute of limitations in force at the time of the offense." *Mangahas*, 77 M.J. at 222 (citing *Toussie v. United States*, 397 U.S. 112, 115 (1970)). As part of this general rule, subsequent amendments to the statute of limitations are presumed to not apply because "there is both a presumption against retroactive legislation and a presumption in favor of repose." *Briggs*, 78 M.J. at 293 (citing *INS v. St. Cyr*, 533 U.S. 289, 316 (2001); *United States v. Habig*, 390 U.S. 222, 227 (1968)). Naturally, this presumption is negated if the subsequent amendment contains express language from Congress directing retroactive effect, subject to the limits of the Ex Post Facto Clause. U.S. CONST. art. I, § 9, cl. 3; *Briggs*, 78 M.J. at 293 (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988)); *Lopez de Victoria*, 66 M.J. 67 (citing

Bowen, 488 U.S. at 208–09; *Greene v. United States,* 376 U.S. 149, 160 (1964); *United States v. Magnolia Petroleum Co.,* 276 U.S. 160, 162–63 (1928)).

When previously faced with questions of retroactive applicability of a statute of limitations, this Court has looked to the express language of the text of Article 43. *Lopez de Victoria*, 66 M.J. at 73–74. In *Lopez de Victoria*, the government charged Sergeant (SGT) Lopez de Victoria in 2006 for indecent acts with a child that allegedly occurred in 1998 and 1999. *Id*. at 71. Accordingly, at the time of the alleged offenses, the statute of limitations was five years. 10 U.S.C. § 843(b)(1) (1994). However, between the date of the alleged offenses and the date of charging, Congress amended Article 43 to permit charging of indecent acts or liberties offenses until the alleged victim turned twenty-five years old. NDAA 2004, § 551 (b)(2)(A). Based on this change, the government asserted its charging of SGT Lopez de Victoria was not time barred. *Lopez de Victoria*, 66 M.J. at 68.

This Court did not agree. *Id.* at 74. It began by noting that Congress has the authority to make a statute retroactive, and then looked to the statute to determine whether Congress intended the 2003 amendment to apply retroactively. *Id.* at 72–73. Finding no such language, it "concluded that the 2003 amendment did not apply based on the general presumption against retroactive legislation, the general presumption in favor of liberal construction of criminal statutes of limitation in favor of repose, and the absence of any indication of congressional intent to apply

the 2003 amendment retrospectively." *Briggs*, 78 M.J. at 293 (citing *Lopez de Victoria*, 66 M.J. at 74).

This Court again wrestled with a similar question somewhat recently in *United States v. Briggs*. *Id.* at 293. There, this Court first acknowledged that "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Id.* at 293 (quoting *Bowen*, 488 U.S. at 208). Then this Court applied a similar analysis to that which it used in *Lopez de Victoria,* holding the 2006 amendment to Article 43 did not apply retroactively and holding the government's arguments to the contrary were "foreclosed by [the Court's] analysis in *Lopez de Victoria*." *Id.* at 294–95.

C. Plain Error

To establish plain error, appellant must show "(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018). "Plain error is assessed at the time of appeal." *Briggs*, 78 M.J. at 295 (citing *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be plain at the time of appellate consideration." (internal quotation marks omitted) (citation omitted)).

Argument

As the Supreme Court recently noted, "one principal benefit of statutes of limitations is that typically they provide clarity, and it is therefore reasonable to presume that clarity is an objective for which lawmakers strive when enacting such provisions." *United States v. Briggs*, 2020 U.S. LEXIS 5989, at *8 (2020) (internal citations omitted) (citing *United States v. Lovasco*, 431 U.S. 783, 789 (1977); *Artis v. District of Columbia*, 138 S. Ct. 594, 607–08 (2018)). This admonition, coupled with a plain reading of the statute, leads to the following conclusion: Congress's 2016 amendments to Article 43 clearly and unambiguously removed all Article 134 offenses, including indecent acts, from the list of offenses subject to an extended statute of limitations, and Congress intended for that change to apply retroactively.

A. The statutory analysis begins—and ends—with the plain language of the statute.

This Court and the Supreme Court have repeatedly rejected arguments that add or remove language from the text of an unambiguous rule or statute. *United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020) (citing *Lomax,* 140 S. Ct. at 1725 (explaining that courts "may not narrow a provision's reach by inserting words Congress chose to omit"); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("If uncertainty does not exist, . . . [t]he regulation then just means what it means—and the court must give it effect, as the court would any law."); *Star Athletica*, 137 S.

Ct. at 1010 (stating that it is a "basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written")). To do so runs afoul of the textualist approach to statutory interpretation and "the norm that courts adhere to the plain meaning of any text—statutory, regulatory, or otherwise." *Id.* at 235 ("Any suggestion that we should interpose additional language into a rule that is anything but ambiguous is the antithesis of textualism.") (citing references omitted); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) ("The text is clear, so we need not consider this extra-textual evidence.").[3]

1. The plain language of § 5225(f) expressly and unambiguously directs retroactive application—and therefore applies to appellee's case.

The text of the 2016 amendments to Article 43 make one thing abundantly clear: Congress intended these amendments to apply retroactively "to the

[3] Both this Court—and the Supreme Court—recognize that textualism is the proper method of statutory interpretation. Between January 31, 2006, and June 29, 2009, the majority of Supreme Court Justices "referenced text/plain meaning and Supreme Court precedent more frequently than any of the other interpretive tools." Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 251 (2010); *see also Bergdahl*, 80 M.J. at 235 (citing NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 132 (2019) ("The text of the statute and only the text becomes law. Not a legislator's unexpressed intentions, not nuggets buried in the legislative history, and certainly not a judge's personal policy preferences."); Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) ("The text of the law is the law."); Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes, at 8:28 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation ("We're all textualists now.")).

prosecution of any offense committed before, on, or after the date of the enactment of [§ 5225] if the applicable limitation period has not yet expired." NDAA 2017, § 5225(f) (emphasis added). Because this language is clear and unambiguous, it is subject to only one logical interpretation: that NDAA 2017, § 5225's amendment applied to the prosecution of every crime, regardless of when it was committed. As such, this Court should reject—as it has so many times in the past—an interpretation that stands inapposite to the plain language of the statute and effectively removes the word "before" from the text.

Yet the government suggests this Court do precisely that. (Appellant's Br. 9). Although it pays lip service to a proper plain meaning analysis, the government spends the next six pages discussing what *it* believes Congress meant to do—not what the statute actually says. (Appellant's Br. 9–15). Nowhere in the government's analysis of retroactivity does it spend *any* time discussing the most relevant—indeed, the *only* relevant—question: what the text of the statute contains. (Appellant's Br. 9–15).

Notably, the government never asserts NDAA 2017, § 5225(f) is ambiguous. Instead, in place of a plain meaning analysis, the government purports to look at the statute "[h]olistically," analyzing its "expression of Congressional intent." (Appellant's Br. 10, 12, 13). In so doing, the government ignores the plain language of the text, instead focusing on "evidence of legislative intent."

(Appellant's Br. 10–14). Both this Court and the Supreme Court has previously rejected this exact type of argument. *Freeman v. Quicken Loans, Inc*., 566 U.S. 624, 637 (2012) ("Vague notions of statutory purpose provide no warrant for expanding [the disputed statutory] prohibition beyond the field to which it is unambiguously limited . . . ."); *United States v. Mooney*, 77 M.J. 252, 257 n.4 (2018) ("[R]egardless of how opaque the rationale for a statute might be, the plain language meaning must be enforced and is rebutted only in 'rare and exceptional circumstances.'") (quoting *Ardestani v. INS*, 502 U.S. 129, 135 (1991)). Because the plain language of § 5225(f) is not ambiguous and clearly applied the 2016 amendments "to the prosecution of any offense committed before, on, or after the date of the enactment of [§ 5225] if the applicable limitation period has not yet expired," this Court need spend no time down the labyrinth-like rabbit hole the government constructs in its brief.[4]

The core of the government's problem is Congress's use of the word "before" in the phrase "before, on, or after the date of the enactment." NDAA

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[4] The government hinges its argument on the headings of the 2016 amendments. (Appellant's Br. 12). But in *Lopez de Victoria* this Court rejected a near-identical argument regarding the title to a prior amendment to Article 43, where it held "[c]atchlines or section headings such as this 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.*" 66 M.J. at 73 (emphasis added) (citing *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R.,* 331 U.S. 519, 528–29 (1947)). Here, because there is no ambiguity in the text, the headings are irrelevant to the task of interpretation.

2017, § 5225(f). Therefore, in order for the government to succeed, it needs this Court to find that word meaningless surplusage and excise it from the 2016 amendment, leveraging one of the government's foggy notions of legislative intent to override the plain language of the statute. Therefore, the government implicitly invites this Court to ignore one of the most basic canons of statutory construction: the Surplusage Canon. This canon mandates "every word and every provision be given effect. . . . None should be ignored." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012). Accordingly, the government's approach fails for two reasons.

First, the word "before" cannot be meaningless. *United States v. Butler*, 297 U.S. 1, 65 (1936) ("[W]ords cannot be meaningless, else they would not have been used."); *Torres v. Lynch*, 136 S. Ct. 1619, 1628 n.8 (2016) ("[O]ur ordinary assumption [is] that Congress, when drafting a statute, gives each provision independent meaning."). Because "the legislator is presumed to, as in fact he does, choose his words deliberately intending that every word shall have a binding effect," this Court is not free to simply ignore—or assign no meaning to—any of the words in NDAA 2017, § 5225(f), including the word "before." Ernst Freund, *Interpretation of Statutes*, 65 U. PA. L. REV. 207, 218 (1917).

Second, if this Court accepts the government's invitation to ignore the word "before," it would violate another canon of statutory construction—the Associated

Words Canon—that holds "[a]ssociated words bear on one another's meaning." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 (2012); *S. D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) ("[W]ords grouped in a list should be given related meaning") (quoting *Dole v. United Steelworkers of America,* 494 U.S. 26, 36 (1990)). In NDAA 2017, § 5225(f), the word "before" does not appear alone; indeed, it appears with the words "on" and "after," as well as the phrase "date of . . . enactment." As a result, it must be evaluated in concert with the entire sentence in which it resides.

Based on the foregoing, the only interpretation that gives meaning to *all* the words of NDAA 2017, § 5225(f) is the plain-meaning, common sense one. Section 5225(f) means precisely what a reasonable reader would think: the provisions of NDAA 2017, § 5225 apply to offenses committed any time prior to the date of enactment, on the date of enactment, or after the date of enactment.

This logical, plain-meaning result is supported by yet another canon of statutory construction: the Prior-Construction Canon. That canon stands for the proposition that "[i]f a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort . . . they are to be understood according to that construction." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012); *Hecht*

v. Malley, 265 U.S. 144, 153 (1924) ("In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment."). Here, the Supreme Court has previously interpreted the *exact phrase* "before, on or after" the date of enactment from other statutes. *See*, *e.g.*, *Martin v. Hadix*, 527 U.S. 343, 355 (1999) (holding this phrase "explicitly" applied a statute to pending cases, i.e. those cases arising before the date of enactment), *St. Cyr*, 533 U.S. 289, 318–19 & n.43 (holding Congress's use of "before, on, or after" language "to indicate unambiguously its intention to apply specific provisions retroactively.").

Contrary to the government's implication, the task before this Court is to interpret the words Congress chose in NDAA § 5225(f)—not to engage in a holistic public policy discussion about the merits of retroactive application of the statute. By applying plain meaning to the plain language of NDAA 2017, § 5225(f), coupled with the Supreme Court's prior interpretation of identical statutory provisions, only one result follows: NDAA 2017, § 5225 applied to *all* offenses retroactively, including those at issue in appellee's case.

2. The plain language of § 5225 expressly and unambiguously redefined "child abuse offense"—and that definition does not include indecent acts under Article 134.

Assuming retroactive application of NDAA 2017, § 5225, the balance of this case turns on the question of whether indecent acts with a child constituted a "child

abuse offense" after the enactment of § 5225. This is not a difficult question, for the plain language of the statute provides a list of offenses that meet this definition—and appellee's alleged crimes are not on it.

It is difficult to imagine a more precise way for Congress to delineate what constitutes a child abuse offense and what does not. In NDAA 2017, § 5225(d), Congress clearly delineated eight separate sections of the United States Code (and, for good measure, also delineated by punitive article) that meet the definition of a child abuse offense for the purpose of Article 43. Indecent acts with a child—indeed, Article 134 offenses as a whole—is not included on this enumerated list.

When Congress provides an enumerated list, courts presume that list is exclusive unless otherwise stated. *See United States v. Chase*, 135 U.S. 255, 259 (1890); *United States v. Salen*, 235 U.S. 237, 249 (1914); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012) (The Negative-Implication Canon states the expression of one thing implies the exclusion of others). This presumption exists because *if* Congress does not mean for the list to be exclusive, it knows how to—and, indeed regularly does—include a residual clause or language indicating the list is non-exclusive. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (discussing the Armed Career Criminal Act's residual clause); *Public Employees Ret. Sys. v. Betts*, 492

U.S. 158, 173 (1989) (noting Congress's use of words and phrases like "such as" and "any" indicates "enumeration by way of example, not an exclusive listing."). Further, where Congress has provided an exclusive list, courts are not at liberty to add to that list. *Defenders of Wildlife*, 551 U.S. at 671; *see Lomax*, 140 S. Ct. at 1725.

In NDAA 2017, § 5225(a), Congress did not insert a residual clause or any language indicating the list of child abuse offenses in Article 43 was non-exclusive. To the contrary, Article 43, as amended, defines a child abuse offense as an "act that involves abuse of a person who has not attained the age of 16 years *and constitutes any of the following*" enumerated offenses. In so doing, Congress provided unambiguous[5] language that clearly cabins child abuse offenses, for purposes of Article 43, to those offenses listed by statute and article.

Unsurprisingly, the government disagrees. The government avers this court should focus on "the *actus reus* of Appellee's criminal acts, not the article number ascribed to the Charge" to determine Congress's intent. (Appellant's Br. 16). If the Court does so, the government argues, it could conclude appellee's alleged

[5] Even if there was ambiguity in the statute (which there is not), longstanding precedent dictates that any such ambiguity be "liberally interpreted in favor of repose." *United States* v. *Scharton*, 285 U.S. 518, 521–22 (1932); *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971); *Mangahas*, 77 M.J. at 224.

conduct in 2004 *would* "constitute" an Article 120b offense, if charged today. (Appellant's Br. 16–17).

The government's argument focuses not on what the statute *says*, but what the government wishes it meant. This interpretation would read in the conditional verb "would" before "constitutes" in the statute. Yet, once again, courts may not alter a statute's reach "by inserting words Congress chose to omit." *Lomax*, 140 S. Ct. at 1725 (citing *Warren*, 139 S. Ct. at 1906); *Bergdahl*, 80 M.J. 230, 235 ("Interpos[ing] additional language into a rule that is anything but ambiguous" violates the fundamental rule of statutory interpretation); *see Defenders of Wildlife*, 551 U.S. at 671. If Congress had intended this interpretation, it would have inserted that conditional language. It did so in the very next subsection of Article 43, where it further defined a child abuse offense as "an act that involves the abuse of a person who has not attained the age of 18 and *would* constitute an offense" under certain Title 18 offenses. Article 43(b)(2)(C) (emphasis added). "Where Congress includes particular language in one section of a statute but omits it in another section . . . it is generally presumed that Congress acts intentionally and purposely in the disparate . . . exclusion." *United States v. Bowersox*, 72 M.J. 71, 74 (C.A.A.F. 2013). Yet again, the government's interpretation ignores the plain

language of the statute, and with it, the fundamental precept of statutory construction.[6]

3. A plain meaning interpretation of § 5225 and Article 43 does not render an absurd result.

In its last-ditch effort to circumvent the plain meaning of Article 43, the government asserts a literal application of the statute's language would create an absurd result. (Appellant's Br. 17–28). The government's opening salvo is a reiteration of appellee's alleged acts—none of which are actually relevant to the statutory interpretation question before this Court. (Appellant's Br. 17). The severity of appellee's alleged crimes, the government posits, preclude this Court from giving effect to the plain language Congress enacted.

Longstanding precedent establishes that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.,* 530 U.S. 1, 6 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States,* 242 U.S. 470, 485 (1917)))). The absurdity

[6] The irony of the government's varied positions should not be lost on the Court. On one hand, the government wants the court to ignore or excise the word "before" from NDAA 2017, § 5225(f), yet on the other hand, the government asks this court to insert the word "would" into the statute.

doctrine states a "provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 234 (2012). Courts may deviate from the text where "there is *no* sense of a provision—*no* permissible meaning—that can eliminate an absurdity unless the court fixes a textual error." *Id.*

But the absurdity doctrine does not provide courts *carte blanche* to do violence to texts it finds distasteful—or even those it thinks are merely unusual. *Cochise Consultancy, Inc. v. U.S. ex rel. Hunt*, 139 S. Ct. 1507, 1513 (2019) ("[A] result that may seem odd . . . is not absurd.") (quoting *Exxon Mobil Corp. v. Allapattah Services*, *Inc.*, 545 U. S. 546, 565 (2005)). The hallmark of an absurd result is one "no reasonable person could intend." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 237 (2012) (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 414 n.13 (2010) ("Congress may well have accepted such anomalies as the price of a uniform system . . . .")).

The bar for invoking the absurdity doctrine to thwart the plain language of a statute is necessarily a high one. *Id*. Justice Story wrote that the absurdity must be "so monstrous that all mankind would, without hesitation, unite in rejecting the

application." *Id.* (quoting 1 Joseph Story, *Commentaries on the Constitution of the United States* § 427, at 303 (2d ed. 1858)); *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("[T]o justify a departure from the letter of the law . . . the absurdity must be so gross as to shock the general moral or common sense."). This is so because "it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018); *see United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J. dissenting) ("For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."); *Crooks*, 282 U.S. at 60 (citations omitted) ("Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.").

That the statute of limitations might be shortened is hardly odd, let alone "so monstrous" that "all mankind" would unite in rejecting such an outcome. Two reasons support this conclusion. First, there is a longstanding presumption that criminal statutes of limitation are "to be liberally interpreted in favor of repose." *Scharton*, 285 U.S. at 521–22; *Mangahas*, 77 M.J. at 224. As the Supreme Court held over fifty years ago, and again this month, statutes of limitations both provide clarity and protect individuals from having to defend themselves against "overly

stale criminal charges." *United States v. Ewell*, 383 U.S. 116, 122 (1966); *United States v. Briggs*, 2020 U.S. LEXIS 5989, at *8 (2020) (citing *Lovasco*, 431 U.S. at 789; *Artis*, 138 S. Ct. at 607–08). Who more than criminal defendants, should be able to "rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock*, 140 S. Ct. at 1749. This justification alone provides a non-absurd reason why Congress may have reduced the statute of limitations.

Second, Congress may well have accepted anomalies such as this one in the name of providing for a uniform system. *Shady Grove Orthopedic*, 559 U.S. at 414 n.13. As the Supreme Court has recently noted, statutes of limitations are "fundamental to a well-ordered judicial system," and often seek "to achieve a broader system-related goal, such as . . . promoting judicial efficiency." *Artis*, 138 S. Ct. at 607–08; *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008). As a result, Congress may have assessed the need for uniformity—in the *Uniform* Code of Military Justice—as a paramount concern. This provides yet another non-absurd reason for Congress's action.

Because the plain meaning of the statute is not absurd, the government must moor its absurdity argument elsewhere, and chooses to do so in what it divines as Congress's intent. The government asserts there is "pervasive and compelling evidence [that] plainly indicates that Congress did not intend to prematurely

extinguish the ability of the government to bring child sexual molesters to justice." In this singular sentence, the government falls prey to not one, but *three* falsities of statutory interpretation: (1) that the spirit of a statute should prevail over its letter; (2) that the quest in statutory interpretation is to do justice; and (3) that the purpose of interpretation is to discover intent. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 341, 343, 391 (2012).

In its search for Congressional intent to support its conclusion, the government takes the extraordinary step of citing legislative history—in the form of a single senator's statement—from thirteen years earlier and from a different and *unenacted*[7] piece of draft legislation. (Appellant's Br. 24). This legislative history from 2003, the government asserts, is informative to the legislative history of NDAA 2017, § 5225, which should, in turn inform the text regarding both Congress's intent to allow victims to "seek[] justice." (Appellant's Br. 24).

As stated above, "legislative history can never defeat unambiguous statutory text," and therefore it is of "no bearing here." *Bostock*, 140 S. Ct. at 1749. Even if it were, "[l]egislative history . . . is meant to clear up ambiguity, not create it." *Id.* (quoting *Milner v. Department of Navy*, 562 U. S. 562, 574 (2011)). Yet here, the

[7]The resolution to which Senator Nelson's comments related was introduced to the United States Senate in 2003—and promptly went nowhere. S. Res. 326, 108th Cong. (2003) (legislative history available at https://www.congress.gov/bill/108th-congress/senate-bill/326/actions).

government attempts to inject ambiguity, and with it, an absurdity argument using legislative history. Appellee is unaware of any authority to support the use of legislative history from one unenacted and stale piece of draft legislation to support an interpretation of the language of a law passed thirteen years later. As such, this is nothing more than a thinly veiled attempt by the government to make a public policy argument in favor of the result it fancies when the plain language of the statute fails to deliver the outcome it seeks. Public policy is the venue of the legislature, not the courts.

This conclusion is highlighted by the government's next attempt to manufacture absurdity *ex nihilo*. The government turns to expert testimony during appellee's trial to justify why, in its view, Congress's plain language results in absurdity. (Appellant's Br. 25). Few things could be less relevant to a question of statutory interpretation than the testimony of an expert at trial occurring after the enacted statute. And, while this argument provides nothing of a compelling nature to this Court, it does serve to underscore the government's real objective in this case: to enforce public policy it deems best in contravention of the plain language of Congress.

In summary, appellee's request of this Court is simple: apply Congress's words as they are written. The plain language at issue demonstrates Congress expressly and unambiguously applied NDAA 2017, § 5225(f) retroactively, and

redefined "child abuse offenses" to the exclusion of appellee's charge. As such, the terms are plain, and this Court's "job is at an end." *Bostock*, 140 S. Ct. at 1749. No impassioned policy arguments should sway this Court from applying the language as Congress drafted and enacted it.

B. Because the language is plain, so too is the error.[8]

As the foregoing illuminates, the question before the Court is not a particularly complicated one. The military judge needed only to read the plain language of the statute to recognize the specifications at issue were time-barred. Further, military judges are presumed to know and follow the law—including alterations to the law that Congress makes on a yearly basis. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). And, as this Court noted in *Briggs*, this is not an issue that should have caught the military judge unawares for at least two reasons. 78 M.J. at 296.

First, the military judge was on notice to pay careful attention to the proper statute of limitations for the offenses at issue because the Rules for Courts-Martial (R.C.M.) so require. This is so because the military judge was required in appellee's trial, as in any trial, to inform the accused of his right to assert the

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[8] Under a plain error analysis, appellee is also required to show material prejudice to his substantial rights. *Briggs*, 78 M.J. at 296. But here, as in *Briggs*, "it requires no speculation to believe that Appell[ee] would have sought dismissal" had he been properly informed of the statute of limitations defense. *Id.*

statute of limitations if it had run. R.C.M. 907(b)(2)(B); *Briggs*, 28 M.J. at 295 ("R.C.M. 907(b)(2)(B) makes the statute of limitations 'part of a case' whenever the accused has a statute of limitations defense and does not appear to know it."). Obviously, any trial in which the alleged offenses occurred fourteen years earlier would have put the military judge on notice that he was required to analyze, and advise, on the statute of limitations.

Second, the ink was still wet on this Court's decision in *Mangahas* during appellee's trial. 77 M.J. 220 (decided February 6, 2018). As such, when appellee went to trial a month later, this Court had just focused an even brighter spotlight on statute of limitations issues, particularly in the context of changes to Article 43. *Id.* This Court applied similar reasoning a year later in *Briggs*, when it held "it was clear and obvious error—at least as assessed in hindsight on appeal, entertaining the fiction that *Mangahas* had been decided at the time of Appellant's court-martial—for the military judge not to inform Appellant of the five-year period of limitation when the sworn charges against him were received by the summary court-martial convening authority in 2014." 78 M.J. 289. Accordingly, if the error in *Briggs* was clear and obvious based on *Mangahas*, then the error in this case—assessed now, at the time of appeal—was every bit as clear and obvious. *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is

enough that an error be plain at the time of appellate consideration." (internal quotation marks omitted) (citation omitted).

Finally, the Army Court's decision makes clear that it set aside the findings as to Charge I regardless of whether the error was plain or not, pursuant to its plenary Article 66 authority to approve only those findings that "should be approved." In footnote 15, the majority states that while it believes the error was plain, its decision did not hinge upon that conclusion, because the Army Court is not constrained by the plain-error doctrine. *McPherson*, 2020 CCA LEXIS 350, at *37 n.15 (citing references omitted). As such, whether the error is plain or not is not dispositive to the question before this Court, because even if the error is not plain, the Army Court apparently exercised its power under Article 66, to dismiss Charge I.[9] Thus, the answer to the certified question turns only on whether Charge I was barred by the statute of limitations, and the plain language of the statute compels the only answer: it was.

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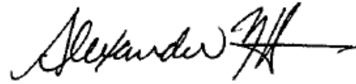
[9] Although the concurring judge disagreed with the majority on the subject of plain error, he too agreed the court had the power to disapprove the findings of Charge I using the Army Court's "unique authority under Article 66, UCMJ, to . . . grant relief." M*cPherson*, 2020 CCA LEXIS 350, at *46 (Salussolia, J., concurring).

Conclusion

Based on the foregoing, appellee requests this Court apply the plain meaning of Article 43 and answer the certified question in the negative.



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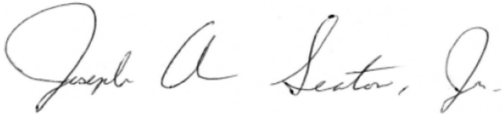

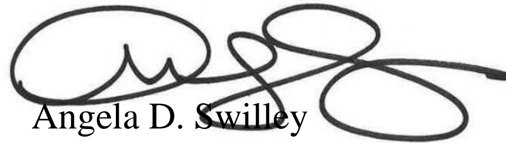

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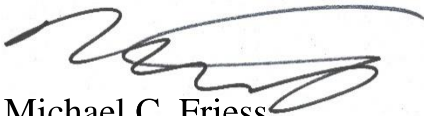

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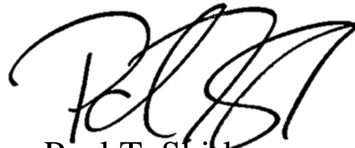

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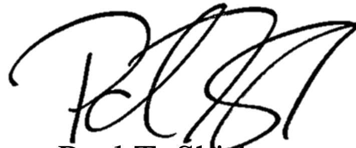
I certify that a copy of the forgoing in the case of *United States v. McPherson*, Crim. App. Dkt. No. 20180214, USCA Dkt. No. 21-0042/AR, was electronically filed with the Court and Government Appellate Division on December 21, 2020.



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