IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellant,

v.

ZACHARY C. ROCHA
Airman (E-2),
United States Air Force,
Appellee.

USCA Dkt. No. 23-0134/AF

Crim. App. Dkt. No. ACM 40134

APPELLEE'S ANSWER

SPENCER R. NELSON, Maj, USAF
Appellate Defense Attorney
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 West Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4773
Email: spencer.nelson.1@us.af.mil

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Attorney
U.S.C.A.A.F. Bar No. 37738
Appellate Defense Division
1500 West Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4777
Email: samantha.golseth@us.af.mil

Counsel for Appellee

INDEX

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

SUPREME COURT CASES

COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

SERVICE COURTS OF CRIMINAL APPEALS CASES

FEDERAL COURT CASES

RULES AND OTHER AUTHORITIES

CERTIFIED ISSUE

WHETHER THE PRESIDENTIALLY-ENUMERATED ARTICLE 134, UCMJ, OFFENSE OF INDECENT CONDUCT PROVIDED APPELLEE WITH CONSTITUTIONALLY-REQUIRED FAIR NOTICE THAT COMMITTING SEXUAL ACTS WITH A CHILD SEX DOLL WAS SUBJECT TO CRIMINAL SANCTION.

INTRODUCTION

The "most basic of due process's customary protections is the demand of fair notice." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring) (citation omitted). This is in part because of "the crown's abuse of 'pretended' crimes." *Id.* at 1223. Indeed, vague laws and lack of fair notice "allow[] policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

Buried in a footnote, the Government conceded that Amn Rocha's doll was not "banned by federal or state laws." United States' Brief in Support of the Certified Issue [hereinafter App. Br.] at 39-40 n. 12. Knowing that no law prohibited Amn Rocha's conduct, the Government opened its Brief by misciting to a Fourth Circuit dissent to wrap itself in the "fundamental norms of decency and morality that cannot be transgressed if that society is to function in a healthy and productive manner." App. Br. at 1-2 (citing to *United States v. Whorley*, 550 F.3d 326, 346 (4th

Cir. 2008) (Gregory, J., dissenting).[1] In other words, the Government believes Amn Rocha's conduct was "grossly vulgar and obscene." App. Br. at 2.

Despite not being able to name one law, policy, or court case that banned Amn Rocha's private sexual conduct or his doll, the Government knows obscenity "when [they] see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The Government has seen it in this case. *Mirabile visu*! Unfortunately, however, not everyone else can see it. The Air Force Office of Special Investigation (OSI) agents who seized Amn Rocha's doll, questioned, "Well, is it against the *MCM*? Is it against the policy[?]" Joint Appendix (JA) at 42. Despite claiming "[a]ny reasonable person" would know that Amn Rocha's conduct was indecent, not one, but two, OSI agents failed to see the criminality. JA at 2. The Air Force Court of Criminal Appeals (Air Force Court) went further:

> The Government has not identified—and we ourselves have not found—anything in the *MCM*, federal law, military case law, military custom and usage, military regulations, or even state law that criminalized the *type of conduct for which Appellant was convicted*.

JA at 11 (emphasis in original) (citing to *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003)).

[1] In an uncanny similarity to this case, the dissent said he would have dismissed 19 counts against the appellant because the "cartoons did not portray actual children, a requirement of 18 U.S.C. § 1466A(a)(1)." *Whorley*, 550 F.3d at 343 (4th Cir. 2008) (Gregory, J., dissenting).

The test for constitutional fair notice "does not turn on whether we approve or disapprove of the conduct in question." *United States v. Warner*, 73 M.J. 1, 3 (C.A.A.F. 2013). Indeed Article 134 "is not such a catchall as to make every irregular, mischievous, or improper act a court-martial offense." *United States v. Sadinsky*, 34 C.M.R. 343, 345 (C.M.A. 1964). Despite these declarations, the Government is trying to turn what it believes to be a moral violation into a criminal violation. However, Amn Rocha was "entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

Contrary to the Government's contentions, the Air Force Court did not misapply fair notice jurisprudence. JA at 3. Additionally, the "President does not have the authority to decide questions of substantive criminal law" and his enumerations or explanation of offenses are not "binding" on this Court. *United States v. Fosler*, 70 M.J. 225, 231 (C.A.A.F. 2011). This Court should affirm the Air Force Court's decision in order to rebuff the Government's "personal predilections" to criminalize Amn Rocha's solitary, private sexual activity that took place in his dorm. *Smith*, 415 U.S. at 575.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[2] This Honorable Court has jurisdiction to review this case pursuant to the Judge Advocate General of the Air Force's certification under Article 67(a)(2), UCMJ.

STATEMENT OF THE CASE

The Appellant's Statement of the Case is correct.

STATEMENT OF FACTS

The Dorm Inspector: "I Didn't Know if it was Illegal or Not"

In May 2019, the Mountain Home AFB commander ordered a morale and welfare inspection for the dorm rooms on base, including Amn Rocha's room. JA at 213. The purpose of the inspection was to look for "illegal substances, paraphernalia, unauthorized alcohol, contraband, unauthorized personnel, and weapons." *Id*. OSI trained those conducting the inspection on proper execution and they were present during the inspection to assist or answer questions. JA at 34, 39, 40.

While inspecting Amn Rocha's room, TSgt L.M. found a lifelike doll on Amn Rocha's bed. JA at 35. The inspectors could not see the doll from the front door of the dorm room or even as they entered the hallway in Amn Rocha's dorm

[2] All references to the UCMJ, the Military Rules of Evidence, and the Rules for Courts-Martial [R.C.M.] are to the *Manual for Courts-Martial* (2019 ed.) unless otherwise noted.

room. JA at 35, 41. The inspectors could not see the doll until they got to within three to four feet of it because it was "hidden" on the bed underneath a blanket and a body pillow. JA at 36, 39, 44. The doll was fully clothed, did not have hair, and investigators could not initially determine its gender. JA at 42, 45. The doll was made out of silicone, had realistic skin tones, was an anatomically correct female, and was approximately three or four feet tall. JA at 42, 100-01.

The second inspector who saw the doll "didn't know if it was illegal or not," so he had OSI come into Amn Rocha's room to "review" it. JA at 37.

OSI's Response: "I Did not Know if it was Against any MCM*, if it was Against a Rule"*

When Agent J.L. saw the doll in Amn Rocha's dorm room, he called the legal office because a sex doll was "kind of something outside of the realm that [he'd] encountered before." JA at 80. Agent J.L. spoke with the Chief of Military Justice about the doll he found in Amn Rocha's dorm room. JA at 196. When that call ended, another Agent, J.J., called the same Chief of Military Justice about the sex doll. *Id*. Agent J.J. was not sure "if [the doll] was against any *MCM*, if it was against a rule." JA at 42. His first thought was whether the doll was illegal or not. *Id*. He further wondered, "Well, is it against the *MCM*? Is it against the policy, is like what -- I've never come across a child doll like that so I did not know what we could or could not do." *Id*. In other searches, Agent J.J. found devices that people used to masturbate, but he typically did not seize or collect them as evidence. JA at 43.

The OSI Interview: "It's Embarrassing"

Amn Rocha spoke to OSI agents about, *inter alia*, his sex doll and sexual habits. JA at 86. Amn Rocha never took the doll outside of his dorm room and never spoke to anyone about it. JA at 101, 106. Amn Rocha most likely suffered from depression and he had been hospitalized for suicidal ideations. JA at 183. His default emotion was sad. JA at 115. He did not fit in at work. JA at 53. Amn Rocha was lonely and would talk to the body pillows on his bed. JA at 102. After a while, he got sad talking to them. *Id*. Amn Rocha's decision to buy a doll was an "emotional" one, to give him something that is "like a person [to] take care of," and to give him a sense of belonging. JA at 139. He also wanted something that was "more than just a cup with some sponges" to masturbate with. JA at 138. However, he did not think of the doll as a "sex" doll per se. JA at 150.

Amn Rocha never specifically looked for a *child* doll. JA at 149. Rather, he looked for a mini-sex doll because he lived in the dorms and he needed something that would not take up a lot of space. JA at 138. Amn Rocha explained that from a "logical point of view…you can't really do much with a -- like life size, fully fledged, adult sized doll, you know, it's very bulky, it's hard to move." JA at 98. Amn Rocha purchased a doll from a website that did not describe the doll as a child, but it was apparent from the pictures that the doll looked like a child. *Id*. Amn Rocha had the doll shipped to a colleague who lived off base because the website would

not ship the doll to a P.O. Box and he thought it would be better not to have the doll shipped to a military installation. JA at 53, 90. The colleague brought the package to base and gave it to Amn Rocha approximately two to three weeks before the dorm inspection. JA at 54, 117.

There was never a time Amn Rocha pictured the doll as a real child. JA at 142. However, Amn Rocha named his doll, watched TV with it, and would brush its hair. JA 94. He clothed the doll and talked to it. JA at 94, 114. He would pose the doll around his room, giving it a book to read, so he could pretend it was reading. JA at 142. Sometimes he would put the doll in his bed and other times he would put it in a chair with a blanket. JA at 99. Although the doll came with speaker and a vibrator, he "threw it on [his] desk because [he] didn't need [it]," but he turned it on, then "off immediately after having a good laugh." JA at 120. The doll did not get physically dirty, but Amn Rocha would maintain its silicone by putting baby powder on it. JA at 100-01. Amn Rocha developed "some sort of connection" with the doll, but it did not feel "like a real connection." JA at 110. Amn Rocha felt that all this was "embarrassing" and that if someone saw the doll in his room they would "get some weird idea." JA at 94, 110.

Amn Rocha was reluctant to tell OSI about his masturbation habits and the doll, but OSI insisted. JA at 105-06, 112, 116. At the time of the dorm inspection, Amn Rocha was 20 years old, had strong sexual urges, and would get erections. JA

at 177, 109. These erections would get "annoying" so he would try to get blood flowing to other parts of his body or he would masturbate so the erections would go away. JA at 108-09.

Amn Rocha: "I Don't Know Exactly What the Problem is"

OSI pressed Amn Rocha on a statement he made that "it's not good to have something like that [sex doll] on a military base." JA at 90. OSI asked, "why?" and Amn Rocha ultimately ended up saying, "But I can understand why the doll would not be good because that is representative of a real life human being." *Id.* OSI asked, "And so what's the problem with that?" *Id*. Amn Rocha responded, "I don't know exactly what the problem is." *Id*. Later OSI asked Amn Rocha "What do you think is wrong with that [having a doll], I guess. What do you think our perspective would be?" JA at 97. Amn Rocha responded that an outside perspective would see it as "really weird." JA at 98. OSI said "And why is weird wrong? Is there anything wrong with weird?" *Id*. Amn Rocha only responded with "it's a doll of a child." *Id*.

Amn Rocha: "I Can't see Myself Doing That to an Actual Child"

Amn Rocha admitted that he kissed and cuddled the doll. JA at 107. He also admitted sticking his penis inside its vaginal and anal opening on three separate occasions. JA at 114-17. However, he said, "I was never like, damn that looks kind of good. It's really weird, I think. It's not really -- the purpose is not really like, oh, yeah, look at that sexy butt." JA at 114. He said that since it is a doll masturbating

with it "won't hurt, right." JA at 111. It is unclear whether Amn Rocha meant it would not physically hurt or that it was not wrong, but he followed up saying that he "couldn't imagine doing that to an actual person." *Id*. Amn Rocha never ejaculated inside the doll. JA at 120. He explained that using the doll to masturbate actually made him sad, "Because I thought to myself, what if this was a life, what if this was real, and, yeah, it's sad, so I stopped. I felt dirty." JA at 140. He stated, "I can't see myself doing that to an actual child." *Id*.

Amn Rocha: "I Think Child Pornography is Actual Child Abuse"

Amn Rocha stuck his penis inside the doll on two more occasions because of the "fact that it was just a doll." *Id*. However, the experience "turned real" and Amn Rocha "had to stop." JA at 141. Amn Rocha said, "I felt bad because I did like it up until [the] point where I started thinking about if it were like, say, somebody's daughter and I kind of felt like disgusted with myself, you know… It was more like, if this was my daughter, I wouldn't have somebody doing this, I would kill them." *Id*. Amn Rocha clarified that he never pictured the doll as a real child and he was never into it as if the doll were a real child. JA at 142. When asked, he said he never viewed pornography during these experiences: "No. In the first place, I don't really like actual pornography. And I think child pornography is actual child abuse… And it kind of seems strange that I have, basically what is a child sex doll, yet that being said, I think child pornography with a real child involved is just disgusting." *Id*.

The Air Force Court Opinion

The Air Force Court recognized and addressed the Government's argument on enumeration:

> [T]he Government notes that the offense of indecent conduct is an enumerated offense under Article 134, UCMJ, in the Manual for Courts-Martial. However, the fact that it is enumerated as an offense does not end the inquiry into whether Appellant was provided constitutionally required notice that his conduct was criminally indecent.

JA at 11. The Air Force Court then quoted this Court's guidance that "Presidential enumeration of offenses is 'merely indicating various circumstances in which the elements of Article 134, UCMJ, could be met.'" *Id*. at n. 17 (citing to *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010)). The Air Force Court found that nothing "in the *MCM*, federal law, military case law, military custom and usage, military regulations, or even state law that criminalized" Amn Rocha's conduct. JA at 11. (citing to *Vaughan*, 58 M.J. at 31). Responding to the Government's claim that Amn Rocha actually knew his conduct was wrong, the Air Force Court found, "As no source provided fair notice, it is improbable Appellant could have had actual notice." JA at 12.

Prior to its analysis, the Air Force Court devoted two sections of its discussion on law to "indecency." JA at 6, 9 ("Elements" and "Indecency"). It started by listing the elements of Indecent Conduct under Article 134 and defining "indecent." JA at 6. The Air Force Court noted that "The President did not describe any particular

conduct that would meet [the] definition" of "indecent." *Id.* It then traced the history of the enumeration of "indecent acts with another." JA at 9. It explained the changes to the enumerated offense throughout the years, but also what remained consistent with the enumerated offense. *Id*. Throughout its law section, it cited to this Court's case law, its own case law, and to sister service cases. JA at 9-10. It noted this Court's guidance that "the enumerated offense of indecent acts with another . . . [does not] reach the wholly private moral conduct of an individual." JA at 9 (citing *United States v. Castellano*, 72 M.J. 217, 222 (C.A.A.F. 2013)).

The Air Force Court also discussed *United States v. Merritt*, 72 M.J. 483 (C.A.A.F. 2013), where this Court found the appellant did not have fair notice for the Article 134 charge of "viewing of child pornography." JA at 8. The Air Force Court recognized that Amn Rocha's statements to OSI could be viewed as "consciousness of guilt." *Id.* However, it found that Amn Rocha was trying "to keep his activity with his doll a wholly private matter. Put another way, Appellant was not concealing a crime but instead was concealing his 'weird' actions." *Id*. It noted this Court's language in *Merritt* that "the fact that a servicemember may be ashamed of certain conduct is not sufficient by itself to equate to due process notice that the conduct was subject to criminal sanction." *Id*. (citing 72 M.J. at 487). As such, even feeling "bad" or "disgusted" was "weak evidence to support knowledge that his activities were criminal." *Id.*

SUMMARY OF THE ARGUMENT

As far back as 1952, this Court directed that Article 134 is not intended to "regulate the wholly private moral conduct of an individual." *United States v. Snyder*, 4 C.M.R. 15, 19 (C.M.A. 1952). This is true "regardless of the moral censure to which this activity ([fornication]) might be subject." *United States v. Johanns*, 20 M.J. 155, 159 (C.M.A. 1985). The Supreme Court followed with cases that prohibited the Government from intruding into a person's home to make a person's "private sexual conduct a crime" and to prevent a person from satisfying "his intellectual and emotional needs in the privacy of his own home." *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). Amn Rocha's conduct falls within these protections which means that *fair* notice could not issue.

Despite the constitutional protections at issue, the Government argued that fair notice analysis is a "straightforward procedure" and as long as the conduct is within the President's enumeration, "the inquiry is over." App. Br. at 15, 28. This is true even though there was no state law, federal law, or case law that prohibited Amn Rocha's conduct. App. Br. at n. 12. The Government, however, misread both Supreme Court and this Court's case law to reach its reductive conclusion. Although the Government conceded that the enumerated offense of Indecent Conduct is "not part of the statutory language," it still gave the enumeration the full force of the law

in its analysis. Even though this Court has never limited its Article 134 analysis to the President's non-binding statements, the Government claimed that the Air Force Court erred "when it departed from this procedure." App. Br. at 16.

The result of this lack of notice and the Government's discounting of constitutional guarantees, is that Amn Rocha learned his conduct was prohibited only "when the prosecutor [came] calling." *Percoco v. United States*, __ S. Ct. __, No. 21-1158, slip op. at *30 (May 11, 2023) (Gorsuch, J., concurring). It now also argues "any reasonable person" would have known Amn Rocha's conduct was indecent and obscene. App. Br. at 2. Although the Government clearly sees what it believes is obscene conduct, it fails to recognize that even Supreme Court justices—the consummation of reasonableness—see "the tough individual problems of constitutional judgment involved in every obscenity case." *Jacobellis*, 378 U.S. at 188. Furthermore, this Court has stated fair notice "requires something more than the notice provided by the service discrediting words" of the terminal element. *United States v. Saunders*, 59 M.J. 1, 8 (C.A.A.F. 2003). Given that "reasonableness is judged against the backdrop of the law at the time of the conduct," it is difficult to see how a reasonable person could turn a blind eye to the constitutional guarantees and ignore the lack of law prohibiting Amn Rocha's conduct. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

ARGUMENT

THE PRESIDENTIALLY-ENUMERATED ARTICLE 134, UCMJ, OFFENSE OF INDECENT CONDUCT DID NOT PROVIDE APPELLEE WITH CONSTITUTIONALLY-REQUIRED FAIR NOTICE THAT COMMITTING SEXUAL ACTS WITH A CHILD SEX DOLL WAS SUBJECT TO CRIMINAL SANCTION.

Standard of Review

This Court reviews matters of statutory interpretation and fair notice de novo. *United States v. McAlhaney*, __ M.J.__, No. 22-0170, 2023 CAAF LEXIS 165, at *4 (C.A.A.F. Mar. 24, 2023); *Saunders*, 59 M.J. at 6. Amn Rocha is cognizant that he told the Air Force Court that the standard of review was plain error since Trial Defense Counsel did not *explicitly* raise the issue of fair notice at trial. JA at 158 (citing to *Warner*, 73 M.J. at 3); 198-205. This Court should still use the de novo standard for three reasons. First, de novo is the correct standard; a then-appellant cannot change the proper standard of review for this Court or bind it to an incorrect one.

Second, the Air Force Court determined, *sua sponte*, that de novo review was appropriate because Amn Rocha made the "constitutional claim at the trial level" that the specification failed to state an offense. JA at 7, 10. Because failure to state an offense and fair notice are related, Amn Rocha preserved his constitutional claim, and on appeal, he was "not limited to the precise argument made below." JA at 7, 10 (citing *Citizens United v. Federal Election Commission*, 558 U.S. 310, 330-31

(2010)). To justify a de novo standard of review, the Air Force Court cited to *Saunders* where this Court reviewed failure to state an offense and fair notice de novo. JA at 7; 59 M.J. at 6. Because the Air Force Court viewed both issues as constitutional, the Government's arguments are inapposite that the appellant in *Saunders* probably raised the issue of fair notice at the trial level while Amn Rocha did not.

Third, when the Government certified this case, it changed the scope of the original issue in question. The issue is no longer whether Amn Rocha was on notice; rather, the issue is the scope of the "presidentially-enumerated" offense under Article 134 and whether it alone can provide fair notice. This is a question of statutory interpretation, necessitating de novo review. *Cf. United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020) (explaining that this Court reviews de novo whether an Article 134 offense is preempted because it is a question of statutory interpretation); *United States v. Hays*, 62 M.J. 158, 162 (C.A.A.F. 2005) ("The interpretation of 'solicitation' under Article 134 is a question of law, which we review de novo.").

Law and Analysis

Supreme Court jurisprudence, this Court's case law, and an analysis of the history and tradition of masturbation show that Amn Rocha's sexual activity in his dorm was constitutionally protected. As such, *fair* notice could not issue.

A. Private Masturbation with an Inanimate Doll is Constitutionally Protected; Therefore, "Fair" Notice Could not Issue

Lawrence, *Stanley*, and an analysis of history and tradition all show that private masturbation in the home, with or without an object, is constitutionally protected. That is even the case in the military environment because there is no evidence that his conduct was prejudicial to good order and discipline or service discrediting. This is especially true because the only reason the Government found out about Amn Rocha's conduct was from inspectors rifling through his bed.

a. Lawrence v. Texas *Protected Amn Rocha's Private Masturbation*

"Liberty protects the person from unwarranted government intrusions into a dwelling or other private places…Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Lawrence*, 539 U.S. at 562 (emphasis added). In striking down a statute criminalizing consensual, same-sex sodomy, and overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court said that *Bowers* failed to "appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward…." *Id*. at 567. Having framed the issue as one of liberty, the Supreme Court said, "absent injury to a person or abuse of an institution the law protects" a state or court should not attempt to define the meaning of a relationship or set its boundaries. *Id*. It also noted that historical references showed an "emerging awareness that liberty gives

substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id*. at 572. The Supreme Court recognized aggravating factors that could have changed its analysis: 1) minors; 2) persons who might be injured or coerced or relationships were consent might not be easily refused; and 3) public conduct or prostitution. *Id.* at 578. Because of a lack of aggravating factors, the Court held:

> The State cannot demean their [Petitioners] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.

Id. at 578 (quotations and citations omitted).

United States v. Marcum applied *Lawrence* to the military context. 60 M.J. 198 (C.A.A.F. 2004). This Court in *Marcum* held that an as-applied constitutional analysis with a *Lawrence* issue requires the consideration of three additional questions: 1) was the conduct covered by the liberty interest in *Lawrence*?; 2) did the conduct involve behavior outside the analysis in *Lawrence*?; and, 3) are there other factors "relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?" *Marcum*, 60 M.J. at 206-07.

The Air Force Court correctly noted that Amn Rocha's case "had none of" the aggravating factors outlined in *Lawrence*. JA at 10-11. Although it did not explicitly conduct a *Marcum* analysis, in reaching its conclusion on the aggravating factors, it

cited to *Marcum* and *United States v. Goings*, 72 M.J. 202, 206-07 (C.A.A.F. 2013). The Air Force Court's analysis correctly reflected that *Lawrence* and *Marcum* show that Amn Rocha's conduct was constitutionally protected.

First, Amn Rocha's masturbation fit squarely within the liberty interest of *Lawrence* (a consensual sexual activity in the privacy of his dwelling). Second, none of Amn Rocha's conduct was outside of the enumerated prohibitions in *Lawrence* (*actual* minors; persons who might be injured, coerced, or who are situated in relationships where consent might not easily be refused; public conduct; prostitution; or whether the government must give formal recognition to any relationship that a homosexual persons seek to enter). Amn Rocha did not injure a person or abuse an institution the law seeks to protect. Congress has not outlawed child sex dolls, indicating that their use does not abuse an institution that the law seeks to protect. Finally, there were no additional factors *relevant solely in the military environment* that affected the nature and reach of the *Lawrence* liberty interest. Amn Rocha's conduct was private, legal masturbation, with a legal doll. There was no military connection and, but for the unit's inspection of Amn Rocha's private dwelling, no one would have known about the legal sex doll.

b. Stanley v. Georgia *Protected Amn Rocha's Private Masturbation*

With facts that are similar to Amn Rocha's case, the Supreme Court held that "private possession of obscene matter cannot constitutionally be made a crime."

Stanley, 394 U.S. at 559. In that case, agents searched Stanley's home for evidence of illegal bookmaking. *Id.* at 558. The agents found no evidence of that crime, but did find rolls of film that they watched, determining that the films were obscene. *Id.* Stanley was charged and convicted. *Id.*

In reversing his conviction, the Court noted that although a state may have an interest in regulating obscenity, that interest "cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material." *Id.* at 564. The Court stated that the Constitution protects the right to receive information and ideas and this "right to receive information and ideas, *regardless of their social worth*, is fundamental to our free society." *Id.* (citation omitted) (emphasis added). The Court emphasized the fact that the obscene material was in the privacy of Stanley's home, giving the case "an added dimension." *Id.* The Court underscored that it is a fundamental right "to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Id.*

The Court then pivoted to abstract rights that the Constitution protects, such as "the pursuit of happiness;" "feelings;" "pain, pleasure and satisfaction;" and "emotions and sensations." *Id.* (citation omitted). The Court stated that Stanley was asserting his right "to satisfy his intellectual and *emotional needs* in the privacy of his own home." *Id*. at 565. (emphasis added). Despite Stanley's "right to satisfy his…needs," the state wanted to protect him from "the effects of obscenity." *Id.*

Stated more bluntly than Justice Marshall's euphemistic implications, *Stanley* was also about the right to have a masturbatory aid, even if the state deemed it to be obscene. This Court seemed to agree when it said, "images viewed *for sexual gratification* do not necessarily lose their First Amendment protection." *United States v. Byunggu Kim*, __ M.J. __No. 22-0234, 2023 CAAF LEXIS 292, at *7-8 (C.A.A.F. May 5, 2023) (emphasis added); *see also* Calvin Massey, *The Constitution in a Postmodern Age*, 64 WASH & LEE L. REV. 165, 188 (2007) ("*Stanley v. Georgia*, in which the Court held that persons have a right grounded in both privacy and free expression to possess obscene material in their own home, erased any lingering doubt about the sufficiency of the interest of preventing self-pollution."); William N. Eskridge, Jr, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2241 (2002) ("Justice Marshall's opinion interpreted the First Amendment to mean that 'a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch,' or (apparently) what masturbatory fantasies he could secretly entertain."); Dale Carpenter, *Gay Rights After* Lawrence v. Texas*: Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1170 n. 70 (2004) ("As for (hypothetical) laws against masturbation, it is hard to see how a person has a right to possess masturbatory aids in the home, but cannot put them to their intended use."); Mary Anne Case, *Donorsexuality After* Dobbs*,* 2022 U CHI LEGAL F 101,

114 (2022) ("*Stanley v. Georgia*, involving protection for obscene films used in the home as masturbatory aids….").

It is against this backdrop, that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley*, 394 U.S. at 565. It is not relevant the obscene materials are "are arguably devoid of any ideological content" or "inimical to the public morality" because the Government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Id.* at 566.

Amn Rocha's case is directly in-line with *Stanley*. The Government searched his private room for contraband, it found his masturbation aid, deemed it to be obscene, charged him, and convicted him. Now, given the absence of law or policy prohibiting his ability to express his "emotional needs in the privacy of his own home," the Government is arguing that Amn Rocha's conduct is against "public morality," a factor the Supreme Court has said is not relevant. This Court should hold that *Stanley* applies to the facts of this case.

c. A History and Tradition Analysis Protects Amn Rocha's Masturbation

Post *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), where the Supreme Court used a history and tradition analysis to overturn *Roe v. Wade*, 410 U.S. 113 (1973), *Lawrence*'s holding, declarations on liberty interests, and

analysis of substantive due process remain. The Court unequivocally declared: "And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Dobbs*, 142 S. Ct. at 2277-78 (emphasis added). Assuming, *arguendo*, the Government or this Court believes an analysis of history or tradition is necessary, such an analysis shows that the United States' tradition was to respect private masturbation—with or without an aid.

History reveals that "masturbation was never made a crime." Geoffrey P. Miller, *Law, Self-Pollution, and the Management of Social Anxiety*, 7 MICH. J. GENDER & L. 221, 222 (2001). Masturbation was viewed as a matter for one's moral conscious and religious beliefs: "[M]asturbation, as a vice practiced against oneself, did not fall within the normal domain of legal regulation…For the law to prohibit masturbation would be to intrude into a realm traditionally reserved for other institutions." *Id.* at 286. To the extent a case did involve masturbation, it "was fairly uncommon" for arguments against masturbation to prevail. *Id.* at 285. As to "sex aids" or masturbating with inanimate objects, "there is no *significant* history or tradition of regulating sex aids such a vibrators and genital massage. In fact, there is a tradition of their legal use, although one coupled with a history of medical misunderstanding and ignorance of women's sexuality." Marybeth Herald, *A*

Bedroom of One's Own: Morality and Sexual Privacy after Lawrence v. Texas, 16 YALE J.L. & FEMINISM 1, 15 (2004) (emphasis added).

There are two critical takeaways from a "history and tradition" analysis: First, the dearth of legal sanctions against masturbation generally, and sex aids specifically, indicates the United States' tradition was to respect—and not criminalize—individual, private masturbation that occurred within the home with, or without, an inanimate object. Not surprisingly, the Supreme Court in *Lawrence* came to this historical and legal conclusion as well: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home….The instant case involves liberty of the person both in its spatial and more transcendent dimensions." *Lawrence*, 539 U.S. at 562. The *Lawrence* Court continued to emphasize the history and tradition of respect for what happens in the privacy of one's home:

> These [(historical)] references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex…
>
> The Texas statute furthers no legitimate state interest which can justify *its intrusion into the personal and private life of the individual*.

Id. at 572, 578 (emphasis added).

The second takeaway from the history and tradition analysis is that it is factually analogous to Amn Rocha's case. There was no law or policy that prohibited Amn Rocha from masturbating in the privacy of his own dorm room. Additionally,

there was no law or military policy prohibiting him from purchasing, possessing, or using an inanimate doll in the privacy of his dwelling. The Government has conceded the legality of the Amn Rocha's doll. App. Br. at 39-40 n. 12. But for the Government intruding into his dorm room, Amn Rocha's conduct would have never been discovered.

Because masturbation was not illegal, owning a sex doll was not illegal, and *Lawrence*'s liberty interest "gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex," this Court should find that fair notice did not issue. 539 U.S. at 572. The Air Force Court correctly found, contrary to the Government's arguments, "As no source provided fair notice, it is improbable Appellant could have had actual notice." JA at 12; *see also* App. Br. at 41. This Court should affirm the Air Force Court's finding that Amn Rocha did not have actual or constructive notice given the Supreme Court's protection of sexual conduct that happens within one's home.

B. Presidential "Enumeration" is Not Law and did not Provide Fair Notice in this Case

The Government's reliance on a presidentially enumerated offense demonstrates the weakness of its case. An enumerated offense is not law and, given the breadth of Indecent Conduct, it must be analyzed in the context of military precedent, something the Government said is "of little importance." App. Br. at 23. Given that nothing criminalized Amn Rocha's conduct, the presidential enumeration

carries little weight in this case, and it can only be limited by "policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

a. The Government Conceded that the Enumerated Offenses are "not Part of the Statutory Language," Which Foils its Argument

The Government recognized that the enumerated offense of Indecent Conduct is "not part of the statutory language of Article 134, UCMJ." App. Br. at 24. The Government reasons, however, that "there is no reason why courts should not treat the President's description of Article 134 offenses as the equivalent of statutory language for purposes of a fair notice analysis." There are two reasons why this Court should not equate a presidential enumeration with the *actual* law as written.

First, "it is beyond cavil" that explanations of "codal offenses are not binding on this Court." *United States v. Gonzalez*, 42 M.J. 469, 474 (C.A.A.F. 1995). "Sample specifications and drafters' analysis are included among these categories and do not purport to be binding." *Fosler*, 70 M.J. at 231; *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017) (the President's "power does not extend to Part IV of the *MCM*…"). This Court "has the ultimate responsibility of interpreting substantive offenses under the UCMJ." *United States v. Mitchell*, 66 M.J. 176, 179 (C.A.A.F. 2008). The President's enumerations and explanations are only persuasive authority that is to be "evaluated in light of this Court's precedent." *United States v. Miller*,

67 M.J. 385, 388 n. 5 (C.A.A.F. 2009); *see also United States v. Bivins*, 49 M.J. 328, 331 (C.A.A.F. 1998) ("As to the punishment criteria which the President decides to establish for the various gradations of Article 134 misconduct, we conclude that rules of statutory construction have no application.").

Second, and most importantly, there is not "any basis for the proposition that the President may create an offense under the Code." *United States v. McCormick*, 30 C.M.R. 26, 28 (C.M.A. 1960). Rather, "Determinations as to what constitutes a federal crime, and the delineation of the elements of such criminal offenses -- including those found in the UCMJ -- are entrusted to Congress." *Jones*, 68 M.J. at 471. This respect for "due process and the separation of powers" means that a court "may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019).

Analyzing fair warning, separation of powers, and the judiciary's role, the Supreme Court aptly said:

> In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. *They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors* and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, *the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again*.

Id. at 2323 (emphasis added).

For these two reasons the Government is wrong when it asserted, "So long as the charged conduct is plainly within the President's descriptions, the inquiry is over." App. Br. at 28. Moreover, the Government began to interchange the "President's descriptions" with the word "statute." App. Br. at 24. Thus, the Government is also wrong when it argued: "if the plain language *of a statute* unmistakably covers an accused's conduct, an appellate court can find the accused had constitutional fair notice, without delving any further into alternate sources of notice." JA at 24 (emphasis added). Indecent Conduct, as enumerated by the President, is not a statute. The Government's citations to federal courts for the proposition of "looking to plain language first, and often to plain language exclusively" is not applicable because federal courts do not have presidentially enumerated offenses (which are not law). JA 22-24.

This Court should accept the invitation set out in *Davis*' to have the Government, or Congress, "try again" on giving Amn Rocha fair notice that his conduct was prohibited. As this Court has stated, and as the Air Force Court correctly noted, the President's enumerations are "not defining offenses but merely indicating various circumstances in which the elements of Article 134, UCMJ, *could* be met." *Jones*, 68 M.J. at 471 (emphasis added).

b. Indecent Conduct is one of the "Sizable Areas of Uncertainty" Parker v. Levy *Mentioned*

Article 134 is "an expansive, flexible, and amorphous prosecutorial tool within the military justice system with no analog in Title 18." *United States v. Rice*, 80 M.J. 36, 41 (C.A.A.F. 2020). It is "exceptionally broad," "intentionally capacious," and "remarkably vague." *Id.* at 41, 42; *United States v. Richard*, 82 M.J. 473, *8 (C.A.A.F. 2022). The true meaning of its language can "defy expectation" and "baffle the examination of the most skilled lawyer." *Richard*, 82 M.J. at *9 (quotations and citations omitted). It would be difficult to argue that of the 17 enumerated offenses, there is one that is broader than Indecent Conduct. It is not only a "sizable area[] of uncertainty" that *Parker v. Levy* foresaw, but it is, arguably, the catchall to the General Article's "catchall." *Parker v. Levy*, 417 U.S. 733, 754 (1974); *Sadinsky*, 34 C.M.R. at 345. It is enumerated, but not demarcated.

Against this backdrop, the Government made the brash assertion that it was "of little importance" that the Air Force Court found there was no "military case

law" criminalizing Amn Rocha's conduct. App. Br. at 23 (citing only to federal court cases). *Parker* and this Court's jurisprudence say the opposite—that case law is important. The Supreme Court said that "further content may be supplied" to overcome vagueness concerns where "uncertainty" existed. *Parker*, 417 U.S. at 754. That content could be "less formalized custom and usage" or "military precedents." *Id.* This Court has stated the President's enumerations must be "evaluated in light of this Court's precedent." *Miller*, 67 M.J. at n. 5. Justice Gorsuch explained "the adoption of new laws restricting liberty is supposed to be a hard business." *Sessions*, 138 S. Ct. at 1228 (Gorsuch, J., concurring). This is because:

> Allowing the legislature to hand off the job of lawmaking risks substituting this design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to condem[n] all that [they] personally disapprove and for no better reason than [they] disapprove it.

Id. (quotations and citations omitted). Here, the Government is trying to adopt "new laws" to salvage Amn Rocha's conviction by exploiting Article 134's capaciousness. Because it cannot point to a case on point from this Court prohibiting Amn Rocha's conduct, the Government appears to be condemning Amn Rocha "for no better reason than [its] disapprov[al]" of his conduct. *Id.*

Knowing there is no case law prohibiting the use of sex dolls, the Government pointed to legislative history—for a bill that never became law—to state that sex

dolls "tend to deprave morals with respect to sexual relations." JA at 2.[3] The Government, for the first time, has also cited to state laws that were passed after Amn Rocha's conduct which criminalize possession of sex dolls. App. Br. at 39-40 n. 12. However, the Government's citations cut against them because the Supreme Court has recognized that "the failure of persistent efforts . . . to establish a standard can provide evidence of vagueness." *Johnson v. United States*, 576 U.S. 591, 598 (2015) (quotations and citations omitted).

Given the breadth of the General Article and of Indecent Conduct, this Court should not find that Amn Rocha was on fair notice. This is especially true given the fact that the Government has flagged laws that never passed, or passed after Amn Rocha's conduct, which indicate Indecent Conduct alone was too broad to provide fair notice.

C. The Government Misrepresented this Court's and the Supreme Court's Fair Notice Test, Thereby Maligning the Air Force Court's Opinion

a. Neither the Supreme Court nor this Court has Declared it is Limited to the Language of an Enumerated Offense

To argue that "if the offense is enumerated" then that language governs fair notice, the Government quoted this Court's language in *United States v. McGuinness* that "[w]e need to decide only whether appellant's conduct is plainly within the

[3] For a tracker showing the bill stalled in the Senate, see https://www.congress.gov/bill/115thcongress/housebill/4655/allactions?overview=closed#tabs

terms of the statute." App. Br. at 16, 21-22 (citing 35 M.J. 149, 152 (C.A.A.F. 1992)). The premise of *McGuinness*, however, is a Clause 3 incorporation case, not a presidentially enumerated case. *McGuinness*, 35 M.J. at 152 (appellant was charged "with a violation of a specific penal statute codified as 18 USC § 793(e)"). In fact, the quote the Government relied on referred to 18 U.S.C. § 793(e)—not a presidentially enumerated offense. As such, *McGuinness* is wholly inapplicable to this case.

The Government also quoted *United States v. Lanier* for the proposition that the "touchstone" of fair notice is "whether the statute, either standing alone or as construed" made it reasonably clear the defendant's conduct was criminal. 520 U.S. 259, 267 (1997). At the outset, as previously explained, this guidance is for an actual statute, not a presidential enumeration, so its applicability is questionable.

However, placing the quotation in context undercuts the Government's argument for two reasons. First, immediately preceding the quotation, the Supreme Court specified three "manifestations of the fair warning requirement." *Id.* at 266. The last requirement prohibits courts from applying a "novel construction" of a statute unless the statute or a "prior judicial decision has fairly disclosed [the conduct] to be within its scope." *Id*. Second, the question presented, which constituted the bulk of the Court's analysis, was what standard the Sixth Circuit needed to use when examining "prior decisions." *Id.* at 269. As such, the Court

explicitly endorsed courts looking beyond the language of the relevant statute to judicial decisions to see whether the defendant had fair notice. *Id.* at 271-72 ("[A]ll that can usefully be said about criminal liability under § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, *in the light of pre-existing law* the unlawfulness [under the Constitution is] apparent.") (quotations and citations omitted) (emphasis added).

In *Parker*, the Court stated that a court can look beyond the language of Article 134 when analyzing fair notice and vagueness. It favorably quoted this Court's declaration that "Art. 134 must be judged not in vacuo, but in the context in which the years have placed it…." *Parker*, 417 U.S. at 752 (quoting *United States v. Frantz*, 7 C.M.R. 37, 39 (C.M.A. 1953)). Likewise, to provide fair notice and avoid vagueness, "further content may be supplied…by less formalized custom and usage" and "military precedent." *Id*. at 754. Thus, the Government's argument is incorrect that *Parker* stands for the proposition that fair notice analysis "can begin and end with the plain language of the President's enumerated examples and descriptions in the *MCM*." App. Br. at 25.

In this Court's Indecent Acts jurisprudence, it has not limited itself to the plain language of the presidential enumeration. To determine whether something is indecent "requires examination of all the circumstances, including the age of the victim, the nature of the request, the relationship of the parties, and the location of

the intended act." *United States v. Rollins*, 61 M.J. 338, 344 (C.A.A.F. 2005). Likewise, to resolve a variety of issues, this Court has never limited itself to presidential explanations for other enumerated offenses:

- ***MCM*, pt. IV, para 94** (Check, worthless making and uttering – by dishonorably failing to maintain funds):

  United States v. Falcon, 65 M.J. 386, 389-90 (C.A.A.F. 2008) (looking to case law and public policy to determine that the gambler's defense did not apply to Article 134)

- ***MCM*, pt. IV, para 95** (Child pornography):

  Richard, 82 M.J. at *8-11 (looking to history, the Constitution, and case law to determine what "prejudicial to good order and discipline" means).

- ***MCM*, pt. IV, para 96** (Debt, dishonorably failing to pay):

  United States v. Bullman, 56 M.J. 377, 381 (C.A.A.F. 2002) (analyzing various cases to determine the meaning of "dishonorable").

- ***MCM*, pt. IV, para 97** (Disloyal statements):

  United States v. Wilcox, 66 M.J. 442, 447 (C.A.A.F. 2008) ("Our *jurisprudence* on charged violations of Article 134, UCMJ, involving speech thus recognizes the importance of the *context* of that speech.") (citation omitted) (emphasis added).

- ***MCM*, pt. IV, para 101** (Fraternization):

  Johanns, 20 M.J. at 159 (looking to case law for intent, interpretation, and customs).

***MCM*, pt. IV, para 105** (Indecent language):

United States v. Brinson, 49 M.J. 360, 364 (C.A.A.F. 1998) ("This authority [enumerated elements and definitions], however, does not stand alone in explaining what indecent language is for purposes of Article 134. In this regard, we note that we have previously had occasion to consider the meaning of 'indecent' as a matter of criminal law.").

- ***MCM*, pt. IV, para 107** (Self-injury without intent to avoid service):

United States v. Caldwell, 72 M.J. 137, 140 (C.A.A.F. 2013) (analyzing two cases and explaining that "[n]either case is controlling precedent in the context presented here").

These cases demonstrate that this Court not only looks beyond presidentially provided material, but that it is standard practice to do so. For this Court to turn a blind eye to case law for only the fair notice doctrine would be unorthodox. As such, the Government was wrong when it contended, "So long as the charged conduct is plainly within the President's descriptions, the inquiry is over." App. Br. at 28 (citation omitted).

b. The Government's Logic is Inconsistent with the Language of the Enumerated Offense

The language of enumerated offenses necessarily requires a court to look outside of its text, contrary to the Government's argument. Citing to the *MCM*, the Government agrees that "indecent" is something that is "grossly vulgar, obscene, repugnant to common propriety, tends to deprave morals with respect to sexual relations…."[4] App. Br. at 17. Although the phrase "common propriety" is not

[4] In its Brief, the Government appears to have added the additional phrase "and is clearly prohibited" to the end of the definition. While that phrase certainly proves

defined, a universal understanding of "common" would be belonging to an entire community or nation, while "propriety" would mean conforming to established standards. How would a court determine what is against "common propriety" or established standards? One way would be to look at the laws that "we the people" have passed to govern our conduct. U.S. CONST. pmbl.

This Court has recognized the challenge and the obligation to look at societal standards: "We certainly are not the first jurists to wrestle with the issue of what is indecent or obscene against a constantly changing set of societal mores and values." *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990) (citation omitted). Additionally, with indecency, "[u]nder some circumstances a particular act may be entirely innocent; under other conditions, the same act constitutes a violation of the Uniform Code." *United States v. Holland*, 31 C.M.R. 30, 31 (C.M.A. 1961). The Air Force Court made the point more clearly when it said, "The definition of indecency requires consideration of both the circumstances of the act itself and societal standards of common propriety." *United States v. Burkhart*, 72 M.J. 590, 596 (A.F. Ct. Crim. App. 2013). This Court should recognize and reject the Government's erroneous argument that fair notice lives and dies on the presidentially enumerated language.

Amn Rocha's point since his conduct was not "clearly prohibited," it appears the Government committed a Freudian slip. The phrase is not contained in the *MCM's* definition.

c. The Government Used its Restrictive Reading of Case Law to Misconstrue the Air Force Court's Opinion

The Government cited to *McGuinness* and *Lanier* to argue, "AFCCA's opinion was inconsistent with how this Court has analyzed the question of constitutional fair notice." App. Br. at 21. This argument is not correct because, as stated above, the Government misrepresented or took citations to those cases out of context. In fact, the Air Force Court's opinion aligns with how this Court and the Supreme Court analyze fair notice.

The Government continued that "rather than analyzing whether the plain language of the definition of 'indecent' could provide fair notice, AFCCA focused its attention elsewhere." App. Br. at 28-29. This is incorrect because the Air Force Court *did* analyze the definition of "indecent." JA at 6, 9. Not only did it provide the definition, but it also provided the elements of Indecent Conduct. JA at 6. It then had an entire section of "Law" devoted to "Indecency" in which it traced its history and how this Court and others have applied it. JA at 9. It then analyzed "several hallmarks" of "indecent conduct" under this Court's and the Supreme Court's jurisprudence. JA at 10-11. Thus, the Government missed the mark when it declared that the Air Force Court conducted "no analysis whatsoever as to whether the Manual's definition of 'indecent,' in and of itself could give fair notice." App. Br. at 29.

Without citing to any case, the Government claims the Air Force Court analysis of "indecent conduct" is wrong because:

> When analyzing whether an offense charged under Article 134, UCMJ, provides fair notice, this Court looks outside of the *Manual* only if it first determines the *Manual* is insufficient—e.g., if the plain language of the relevant portions of the *Manual* is ambiguous, otherwise provides insufficient notice, or if the charged offense is not an enumerated offense.

App. Br. at 29. This is sheer *ipse dixit* that this Court should reject. This is especially true given the numerous cases that show presidential explanations are not binding on this Court; nor has this Court limited itself to those explanations when deciding a host of issues.

Not only did the Air Force Court sufficiently analyze indecency, but it also heard the Government's argument loud and clear "that the offense of indecent conduct is an enumerated offense under Article 134, UCMJ." JA at 11. The Court correctly pointed out, however, that "the fact that it is enumerated as an offense does not end the inquiry into whether Appellant was provided constitutionally required notice that his conduct was criminally indecent." *Id.* The Air Force Court did not "focus[] its attention elsewhere." App. Br. at 28-29. Rather, it squarely addressed the Government's argument and rejected it. *Id.* In so doing, the Air Force Court correctly quoted this Court's insight that "Presidential enumeration of offenses is merely indicating various circumstances in which the elements of Article 134,

UCMJ, could be met." JA at n. 17 (quotations omitted) (citing to *Jones*, 68 M.J. at 471).

In another blow to the Government, the Air Force Court said:

> The Government has not identified—and we ourselves have not found—*anything in the MCM*, federal law, military case law, military custom and usage, military regulations, or even state law that criminalized the *type of conduct for which Appellant was convicted*.

JA at 11 (first emphasis added, second in original). The Air Force Court's declaration that it did not find "anything" in the *Manual* also included the definition and elements of Indecent Conduct.

D. Given Supreme Court Jurisprudence, a Reasonable Service Member Using Common Sense Would not Know that Private Masturbation in his Dorm with an Inanimate Doll was Prohibited

Given the non-existence of any law, policy, or case that prohibited Amn Rocha's conduct, this Court should not conduct a "reasonableness" analysis. At least in regard to qualified immunity and fair notice, the Supreme Court stated, "Because the focus is on whether the officer had fair notice that her conduct was unlawful, *reasonableness is judged against the backdrop of the law at the time of the conduct.*" *Kisela*, 138 S. Ct. at 1152 (emphasis added); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) ("Fourth Amendment reasonableness is predominantly an objective inquiry.") (quotation and citation omitted). Because it would be unreasonable to sustain a conviction where no actual law, policy, custom, or usage forbids the underlying conduct, this Court should follow the Air Force

Court's lead and not conduct a reasonableness analysis. However, if this Court disagrees, the Government's arguments on what a reasonable person would understand are unavailing for the following reasons.

a. The Government Ignored the "Critical Significance" of Constitutional Protections that Cover Private, Sexual Conduct in the Home

"When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of critical significance." *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011) (quotation and citation omitted). The Supreme Court has recognized the "tough individual problems of constitutional judgment involved in every obscenity case." *Jacobellis*, 378 U.S. at 188. Despite these declarations from experienced jurists, the Government commented that "any reasonable service member" would know the conduct was prohibited and it would "not be absurd to draw this conclusion." App. Br. at 32.

However, the Government failed to analyze the "critical significance" this Court's and the Supreme Court's precedent would have on a "reasonable" service member. A reasonable service member would know four things. First, that *Lawrence* and *Stanley* protect solitary, sexual expressions that happen within the privacy of one's home. Given that it was perfectly legal to buy the doll in question, a reasonable person would not think that his conduct was illegal. Even assuming the service member thought the doll was obscene *ipso facto*, that service member would know

the Supreme Court has allowed obscene objects within the privacy of one's dwelling. *Stanley*, 394 U.S. at 559.

While the Government cited three cases to prove its point that the conduct was indecent, they are distinguishable: They all involved conduct with another person. App. Br. at 37. None of them were private. None of them dealt with solitary behavior in the confines of one's dwelling.

Second, while Indecent Conduct may be enumerated, a reasonable service member would know that crimes under Article 134 must be prejudicial to good order and discipline or service discrediting. A reasonable service member would not think that masturbation in his dwelling—that no one else knows about—would be prejudicial or service discrediting. This is true even if the service member assumed the conduct was indecent because indecency alone is not enough to criminalize the conduct in question. The Government must prove the terminal element. *Fosler*, 70 M.J. at 225. Additionally, the words alone of the terminal element cannot provide fair notice. *Saunders*, 59 M.J. at 8 ("[F]air notice that one's conduct is subject to criminal sanction *requires something more than the notice provided by the service discrediting words* of element 2 of Article 134.") (emphasis added).

This understanding aligns with this Court's explanation of service discrediting conduct:

> Whether conduct is of a "nature" to bring discredit upon the armed forces is a question that depends on the facts and circumstances of the conduct, which includes facts regarding the setting as well as the extent to which Appellant's conduct is known to others. The trier of fact must consider all the circumstances, but such facts – including the fact that the conduct may have been wholly private – do not mandate a particular result unless no rational trier of fact could conclude that the conduct was of a "nature" to bring discredit upon the armed forces.

United States v. Phillips, 70 M.J. 161, 166 (C.A.A.F. 2011). While this Court found the conviction in *Phillips* to be legally sufficient even though no one knew about the underlying misconduct, the case is distinguishable because it involved contraband: child pornography. *Id*. This definition also refutes the Government's contention that that Air Force Court "compounded its error" when it considered whether Amn Rocha's actions were "in public, or in an open and notorious manner." App. Br. at 35.

Third, a reasonable service member would know that federal, state, and military law does not prohibit private masturbation in one's dwelling—with or without an object. A reasonable service member would know it would be a significant departure for the state or federal government to begin investigating the private masturbation habits of service members.

Fourth, a reasonable service member would know that the doll is not an actual person—child or otherwise. Just like a service member would know that a full-size sex doll is not an adult human being, a reasonable service member would know that a small-sized doll is not a child. Amn Rocha made this connection. When asked

whether he ever pictured the doll "as being a real child," Amn Rocha said "no." JA at 142. On another occasion, he said "It's not a real person, of course." JA at 102.

Unlike the Government's characterization, a truly reasonable person would be aware of the law, the setting of his conduct, and whether it was private. This Court should reject the Government's view of reasonableness because it overlooked the "critical significance" that constitutional protections play in this case. *Hartman*, 69 M.J. at 468.

b. The Supreme Court has Rejected Government Attempts to Label Non-children as Actual Children and this Court Should for Practical Reasons as Well

The Government went to great lengths to convince this Court that the doll in question is either an actual child or so close to actual child, that this Court must legally treat it as a child. App. Br. at 2, 17, 32-34, 38, 40. The Supreme Court has rejected such arguments and this Court should as well. In *Ashcroft v. Free Speech Coal.*, the Court held that images of naked children that were created digitally, and without the use of real children, was protected speech. 535 U.S. 234, 241 (2002). The Court reasoned that "These images do not involve, let alone harm, any children in the production process." *Id.* at 241. Despite the government's contention that "Virtual images…are indistinguishable from real ones…," the Court said the argument and accompanying justifications were "implausible." *Id.* at 254. The Court went on to reject the Government's arguments that since the virtual images "convey

the impression [of children]" and "appear[] to be [children]" the prohibition on such images was acceptable. *Id*. at 257. While *Free Speech Coalition* eponymously dealt with constitutional speech, Amn Rocha's case has countervailing constitutional interests as well.

While Amn Rocha acknowledges that this Court has said that virtual images could fall under the terminal element, "Such inquiry must necessarily be undertaken on a case-by-case basis." *United States v. Mason*, 60 M.J. 15, 19 (C.A.A.F. 2004). In *Mason* and *United States v. Roderick*, the images contained lascivious exhibitions. *Id.* at 19; 62 M.J. 425, 431 (C.A.A.F. 2006). In *United States v. Brisbane*, "the record of trial does not establish whether the photographs contained actual or virtual child pornography," but this Court assumed without deciding. 63 M.J. 106, 116 n. 10 (C.A.A.F. 2006). The doll in this case was not lasciviously displayed—it was an inanimate object "hidden" underneath Amn Rocha's sheets. JA at 36, 39, 44. In *Brisbane*, the appellant showed the images to another person; in *Mason*, the appellant used a government computer to look at the lascivious images; and in *Roderick* the appellant took photos of his own daughters and their friend. Thus, these cases are distinguishable because Amn Rocha's conduct was wholly private with an inanimate objection. Furthermore, objects—even if obscene—can be kept within the home under *Stanley*. 394 U.S. at 559. And although this Court has not applied

Stanley to the military, it should given the arguments throughout this brief. *See Byunggu Kim*, slip op. at *7.

Federal courts have also been reluctant to buy into prosecutors' attempts to argue that a subjective intent is relevant in determining whether something is indecent. *See generally United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999) ("If [an Accused's] subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography."); *United States v. Villard*, 885 F.2d 117, 125 (3d Cir. 1989) ("We must, therefore, look at the photograph, rather than the viewer. If we were to conclude that the photographs were lascivious merely because [Accused] found them sexually arousing, we would be engaging in conclusory bootstrapping rather than the task at hand – a legal analysis of the sufficiency of the evidence of lasciviousness."); *United States v. Steen*, 634 F.3d 822, 829 (5th Cir. 2011) (Higginbotham, P., concurring) ("Congress did not make production of child pornography turn on whether the maker or viewer of an image was sexually aroused…A pedophile may be aroused by photos of children at a bus stop wearing winter coats, but these are not pornographic.").

Against this backdrop of caselaw, the Air Force Court recognized the Government's argument and rejected it:

> The Government argues to this court that Appellant's conduct involved a minor and was public. We disagree. First, the Government claims, "Though Appellant is correct that the sex doll in this case is not an 'actual minor,' . . . Appellant's conduct nonetheless 'involves minors' since he used the doll to simulate sexual acts with actual minors." We disagree. Appellant's conduct was an actual sexual act *with an object that may have simulated a minor but plainly was not an actual minor*. Additionally, internal thoughts and feelings—which in this case did not include Appellant pretending the doll was an actual child during his sexual activity—do not transform the doll into a "minor."

JA at 11-12. The Air Force Court relied on this Court's declaration that "If an accused's subjective reaction to otherwise constitutionally protected images places the images in Article 134's crosshairs, the danger of sweeping and improper applications of the general article would be wholly unacceptable." JA at n. 18 (citing *United States v. Moon*, 73 M.J. 382, 389 (C.A.A.F. 2014)).

If this Court allows the Government's logic to prevail that an inanimate object can be considered a minor, it will turn trial and appellate courts into the morality police. This Court will be essentially determining thought crime by deciding whether a person masturbating with an object could, objectively or subjectively, consider the object to be a minor or be used to simulate sex with a minor. Or, whether a prosecutor could make that determination.

The Government could argue that micro-penises, bullet vibrators, mini dildos, and small anal plugs simulate sex with a minor. Other problematic items include body pillows with scantily clad anime characters on them, baby dolls, stuffed animals, or Barbies if an individual chose to masturbate with them or while looking

at them. This is not rampant speculation either. The OSI agent in Amn Rocha's case had previously found sex dolls and other items that service members use to masturbate with. JA at 43. However, he previously did not seize those items. *Id.*

There may be only one limitation with the Government's logic: The "moment-to-moment judgment of the policeman on his beat" and the "prosecutor[']s and court[']s [ability] to make it up." *Smith*, 415 U.S. at 575; *Sessions*, 138 S. Ct. at 1224 (Gorsuch, J., concurring). This Court should decisively reject the Government's implicit invitation to become the subjective arbiters of what type of private masturbation is constitutionally protected and what type is not protected. Fortunately, *Lawrence* and *Stanley* already answer the question and spare this Court from scrutinizing Airmen's private masturbation: Intimate conduct within the privacy of one's own home is a constitutionally protected liberty interest. 539 U.S. at 578; 394 U.S. 557.

In sum, this Court should not conduct a reasonableness analysis given the lack of case law criminalizing the conduct in question. Even if this Court does, reasonableness must include an awareness of constitutional protections the Supreme Court has found. Additionally, it should include courts' reasoning that an object or image is not a child, regardless of the harm the Government is trying to prohibit.

E. Supreme Court and this Court's Premier Cases on Fair Notice Illustrate the Weakness of the Government's Case

In *Merritt*, this Court held the appellant did not have fair notice that viewing child pornography was a crime. 72 M.J. at 488. When investigated, Merritt confessed, "I am deeply [a]shamed for having even looked at such images even out of curiosity. It is to great horror that have [*sic*] to recall these images that I tried so hard to forget seeing…." *Id.* at 485. Despite objecting on fair notice grounds at trial, the trial court convicted him and the Air Force Court affirmed on the following grounds:

- Argument that it "was well settled that conduct which is not criminal in a civilian setting could be criminalized in the military." *Id.*

- Case law that stated, "[i]t is intuitive that the viewing of child pornography discredits those who do it, as well as the institutions with which those persons are identified." *Id*. (citing *United States v. Medina*, 66 M.J. 21, 27 (2008)).

- Case law that stated, "viewing of these types of images has been subjected to criminal sanction in some states . . . and the Supreme Court has stated that states are authorized to criminalize the viewing of these types of images." *Id.* at 486 (citing *Medina*, 66 M.J. at 27).

- Merritt's confession that he was "deeply a shamed [*sic*] for having even looked at such images." *Id.*

- Manual provisions that criminalized the possession of child pornography. *Id.* at 487.

- Argument that "a number of state statutes which make every conceivable route [Merritt] could take in order to intentionally view child pornography illegal by making actions like control, use, access, enter and receive subject to criminal sanction." *Id.* (quotation omitted).

- The Air Force Court's belief that "various federal circuits have held that the act of viewing child pornography violated the [CPPA], even though viewing was not specifically listed in the statute until 2008." *Id.*

Despite having potential sources of notice that included case law, state law, federal law, a confession of "shame" and "horror," and intuition that "that the viewing of child pornography discredits those who do it," this Court held that Merritt did not have fair notice.

Amn Rocha's case has none of objective sources of notice contained in *Merritt*. As such, the Government is forced to make a *Merritt* 2.0 argument that Amn Rocha's subjective feelings are enough to show he had fair notice. App. Br. at 42. The Government recounts that Amn Rocha said he was "stressed out," "felt dirty," and "kind of felt disgusted with myself;" he conceded the doll was "very inappropriate;" and he "became emotional and broke down crying." App. Br. at 42-43. The Government argued there was "no reason" Amn Rocha should have these thoughts unless "the doll was considered contraband." App. Br. at 42. However, this Court rejected such an argument in *Merritt* and it should reject it again: "the fact that a servicemember may be ashamed of certain conduct is not sufficient by itself to equate to due process notice that the conduct was subject to criminal sanction." 72 M.J. at 487. Notably, the Air Force Court provided a reason why Amn Rocha made these statements: "to keep his activity with his doll a wholly private matter" and to conceal his "weird," but not criminal actions. JA 12.

Moreover, the Government was selective in the statements it took from Amn Rocha's conversation with OSI. He also said:

- "I didn't think of it as a sex doll." JA at 150.
- "I didn't specifically look for child sex dolls…I was looking at mini sex dolls." JA at 149.
- "Real as in like real child, somebody's daughter. No. No." JA at 142.
- "I think child pornography is actual child abuse." *Id.*
- "I think child pornography with a real child involved is just disgusting." *Id.*
- "I was never like, damn that looks kind of good. It's really weird, I think. It's not really -- the purpose is not really like, oh, yeah, look at that sexy butt." JA at 114.
- "It's embarrassing." JA at 94.
- "I don't know exactly what the problem is." JA at 90.

When viewed alongside Amn Rocha's other statements, the quotations that the Government chose are no worse than the confession in *Merritt*. Additionally, the lack of potential sources of fair notice—unlike in *Merritt*—favors Amn Rocha. Thus, on both counts *Merritt* weighs heavily in Amn Rocha's favor. If the appellant in *Merritt* lacked fair notice that viewing child pornography was criminal, the far stronger facts in Amn Rocha's case should lead to the same conclusion.

In 2019, the Supreme Court struck down 18 U.S.C. §924(c) because it "provides no reliable way to determine which offenses qualify as crimes of violence

and thus is unconstitutionally vague." *Davis*, 139 S. Ct. at 2324. This was notable because it had been enacted "33 years" prior and had been used in "tens of thousands of federal prosecutions" *Id.* at 2333 (citing to and quoting Kavanaugh, J., dissenting). In assailing the dissent, the majority underscored the importance of fair notice in our republic:

> And when it comes to the constitutional avoidance canon, the dissent does not even try to explain how using that canon to criminalize conduct that *isn't* criminal under the fairest reading of a statute might be reconciled with traditional principles of fair notice and separation of powers. Instead, the dissent seems willing to consign "'thousands'" of defendants to prison for "years—potentially decades," not because it is certain or even likely that Congress ordained those penalties, but because it is merely "possible" Congress might have done so. *In our republic, a speculative possibility that a man's conduct violated the law should never be enough to justify taking his liberty.*

Id. at 2335 (first emphasis in original, second added). Given that the Supreme Court struck down a statute as unconstitutionally vague that was used in "*tens of thousands*" of criminal cases, this Court should not hesitate in rejecting the Government's arguments since it cannot provide even *one* case that criminalized Amn Rocha's conduct. The Government's arguments that the presidential enumerations provided fair notice to Amn Rocha are akin to a "speculative possibility" that, without more, should not be "enough to justify taking his liberty." *Id.*

F. Several Judicial Doctrines Suggest this Court Should not Find Fair Notice

Given the facts of this case, any one of the following doctrines would be sufficient to affirm the Air Force Court's opinion. However, this Court can and should use all three to do so.

a. Due Process Bars Using a "Novel Construction" of a Statute

Even though clarity about the scope of statute can be provided by a "judicial gloss," due process "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier*, 520 U.S. at 266 (citations omitted). This is not dicta; it is the third of "three related manifestations of the fair warning requirement." *Id*. Since there is no law, policy, or even a "judicial gloss" on point, this Court should prohibit the Government, without more, from using Article 134 to enter the homes of Airmen to scrutinize their private masturbation habits. *Marks v. United States*, 430 U.S. 188, 192 (1977) ("[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids….") (citation omitted).

It is not hyperbole to state that using Article 134 in this way is a significant departure—or "novel construction"—of how the Air Force has previously treated private masturbation in the home. Servicemembers are not on notice of this new use of Article 134. *Jones*, 68 M.J. at 468 (C.A.A.F. 2010) (while people are presumed

to know the law "they can hardly be presumed to know that which is a moving target and dependent on the facts of a particular case").

If Congress wanted law enforcement and prosecutors to supersede *Lawrence* and *Stanley* so they could ogle, and then prosecute, an Airman's private masturbation, it would have said so. *Cf. West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) ("[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims.") (citation omitted); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 528 (2014) (Scalia, J., dissenting) ("Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.") (quotation omitted).

A related problem is "arbitrary enforcement" or the "the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Here, no guidance has been given to law enforcement on what masturbation aids would be indecent or against "common propriety." *MCM*, pt. IV, para 104.c.(1).

OSI agents said they normally do not seize masturbation aids during inspections, but they did so in this case. JA at 43. The failure to "provide such minimal guidelines" is what allows "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (citing *United States v. Reese*, 92 U.S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.")).

b. Military Appellate Courts are "Stewards" and "Checks" Against Over Expansive use of Article 134

One reason the Supreme Court denied Levy's void for vagueness challenge to Article 134 was that it viewed military appellate courts as "stewards" and "checks against its potentially over-expansive use." *United States v. Gleason*, 78 M.J. 473, 476 (C.A.A.F. 2019). Article 134's broad language and "potential for abuse" is balanced by "this Court's duty to constrain it." *Rice*, 80 M.J. at 41 (citation omitted). Given the constitutional issues involved in this case, this Court's observation in *Moon* is applicable: If private masturbation in the home, with or without an object, is placed in "Article 134's crosshairs, the danger of sweeping and improper applications of the general article would be wholly unacceptable." *Moon*, 73 M.J. at 389. The Air Force Court properly recognized its duty as a "steward" and "check"

on Article 134 and set aside Amn Rocha's conviction. This Court should give its imprimatur to the Air Force Court's decision.

c. The Rule of Lenity Applies

The second "fair warning requirement" is the cannon of strict construction, or rule of lenity. *Lanier*, 520 U.S. at 266. The rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id.* Stated differently, "when [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (citation omitted). The rule of lenity applies to ambiguities in the scope and breadth of criminal statutes: "[A]mbiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S. Ct. at 2333.

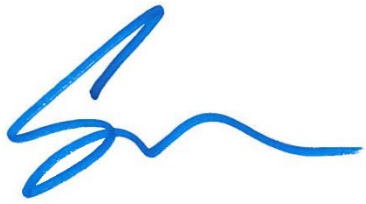
This Court has favorably applied the doctrine in multiple settings, including with Article 134. *United States v. Guerrero*, 28 M.J. 223, 227 (C.M.A. 1989) ("Applying the Supreme-Court-approved rule of lenity, we find Congress intended a single offense to exist on these facts" for obstruction of justice); *United States v. Schelin*, 15 M.J. 218, 220 (C.M.A. 1983) (describing two definitions of "military property" as a "glaring ambiguity" that "must be resolved in favor of the accused"). This Court recently said that the ambiguity must be "grievous" or "substantial."

United States v. Mays, __ M.J. __, No. 23-0001, 2023 CAAF LEXIS 328, at *11 (C.A.A.F. May 18, 2023). The ambiguity in this case meets that threshold. The glaring lack of law prohibiting Amn Rocha's conduct, in combination with Supreme Court case law that says his conduct is constitutionally protected, stands in stark contrast to the President's vague enumeration.

CONCLUSION

Vague statues and a lack of fair notice "threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Davis*, 139 S. Ct. at 2325. This is what happened in Amn Rocha's case. The OSI agents did not know this was a crime, so they called the prosecutor who told them it was. JA at 80, 196. The prosecutor saw the crime of obscenity despite no state law, federal law, case law, or even policy prohibiting a doll or masturbation. Taking the Government's word for criminality, however, is not sufficient. The Government argued that a finding of no fair notice will make it "unduly onerous for the military to prosecute future indecent conduct cases." App. Br. at 3. As "weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." *Kolender*, 461 U.S. at 361. This Court should not deign to the Government's invitation to become its policy maker of last resort and, instead, "invite [it] to try again." *Davis*, 139 S. Ct. at 2323.

WHEREFORE, Amn Rocha respectfully requests this Honorable Court affirm the Air Force Court's decision by finding that he did not have constitutionally required fair notice.



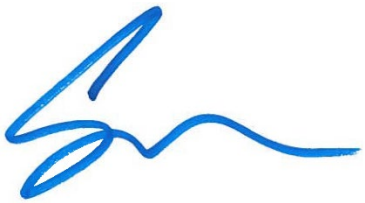
SPENCER R. NELSON, Maj, USAF
Appellate Defense Attorney
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 West Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4773
Email: spencer.nelson.1@us.af.mil

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Attorney
U.S.C.A.A.F. Bar No. 37738
Appellate Defense Division
1500 West Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4777
Email: samantha.golseth@us.af.mil

Counsel for Appellee

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on May 31, 2023 and that a copy was also electronically served on the Government Trial and Appellate Division on the same date.



SPENCER R. NELSON, Maj, USAF
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
Email: spencer.nelson.1@us.af.mil

Counsel for Appellee

CERTIFICATE OF COMPLIANCE WITH RULES 24(b) & 37

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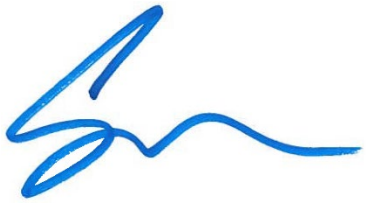

SPENCER R. NELSON, Maj, USAF
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
Email: spencer.nelson.1@us.af.mil

Counsel for Appellee