IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

SAMUEL H. SMITH,
Airman First Class (E-3),
United States Air Force,
Appellant

USCA Dkt. No. 23-0207/AF

Crim. App. Dkt. No. ACM 40202

REPLY BRIEF ON BEHALF OF APPELLANT

DANIEL CONWAY
Civilian Appellate Defense Counsel
Daniel Conway and Associates,
Attorneys-at-Law
20079 Stone Oak Parkway,
Suite 1005-506
San Antonio, TX 78258
210-934-8265 (UCMJ)
conway@militaryattorney.com
www.mcmilitarylaw.com
USCAAF Bar Number 34771

Counsel for Appellant

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-2807
trevor.ward.1@us.af.mil
USCAAF Bar Number 37924

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

RULES AND OTHER AUTHORITIES

Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Airman First Class (A1C) Samuel H. Smith, the Appellant, hereby replies to the Government's Answer concerning the granted issues, filed on November 6, 2023.

ARGUMENT

I. APPELLANT'S CONVICTION FOR BREACH OF THE PEACE IS UNCONSTITUTIONAL

A. The Government asks this Court to engage in an ad hoc balancing of relative social values and costs to assess the constitutionality of A1C Smith's conviction for breach of the peace. The Supreme Court has been clear that ad hoc balancing tests are not permissible for free speech analyses.

The Government argues that this Court should balance the social value of A1C Smith's words with the Government's interest in order and morality. Ans. at 19-20. For this proposition, the Government relies on *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). Ans. at 19-20. But the Government misreads *Bose Corp*. The extracted quote from the Government's answer is the Court's explanation for *why* an unprotected category of speech—libel—is not protected. *Bose Corp.*, 466 U.S. at 504. After this extracted quote, the Court went on to use the categorical approach, explaining how the underlying conduct fell within the unprotected category of libel. *Id*. To be sure, at no point in the *Bose Corp.* decision did the Court espouse an ad hoc balancing test for free speech analyses.

Since at least *Chaplinsky v. New Hampshire*, the Supreme Court has used a

categorical approach to assess Free Speech issues. 315 U.S. 568, 571-72 (1942); *see also Counterman v. Colorado*, 143 S. Ct. 2106, 2113-14 (2023) (explaining that "[t]hese historic and traditional categories are long familiar to the bar," and have been so since 1791). Only speech falling within a specific category of unprotected speech may be criminalized, and "[t]hese categories must be 'well-defined and narrowly limited' in light of the serious consequences that flow from carving out speech from ordinary First Amendment protections." *Counterman*, 143 S. Ct. at 2119 (Sotomayor, J., concurring) (quoting *Chaplinsky*, 315 U.S. at 571).

In fact, the Supreme Court has explicitly rejected the use of balancing tests for free speech:

> The First Amendment's guarantee of free speech does not extend *only* to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgement by the American people that the benefits of its restriction on the Government outweigh the costs. Our Constitution *forecloses any attempt to revise that judgement simply on the basis that some speech is not worth it*.

United States v. Stevens, 559 U.S. 460, 470 (2010) (emphasis added); *see also Counterman*, 143 S. Ct. at 2113-14. If *Stevens*'s mandate was not clear enough, two years later the Supreme Court instructed that it "has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage [based on] an ad hoc balancing of relative social costs and benefits.'" *United States v. Alvarez*, 467

U.S. 709, 717 (2012) (quoting *Stevens*, 559 U.S. at 470) (alterations in original).

The Government asks this Court to engage in a "starling and dangerous" ad hoc balancing of social benefits and costs.[1] The Supreme Court has rejected this approach to the First Amendment on numerous occasions. This Court should, likewise, reject the Government's "dangerous" suggestion.

B. This Court should not apply the "dangerous speech" test to this case. However, should this Court do so, A1C Smith's words are nevertheless protected.

The Government invites this Court to use the "dangerous speech" test to uphold A1C Smith's conviction. Ans. at 22-24. However, the Government's reliance on this outdated, abrogated, 100-year-old test is misguided and contrary to Supreme Court precedent. As such, this Court should decline to use the "dangerous speech" test. However, should this Court apply that test, A1C Smith's words are nevertheless constitutionally protected.

---

[1] The Government further contends that "speech used to commit a crime is not protected and therefore criminalized." Ans. at 15. This circular argument for unprotected speech is even more dangerous than their reliance on ad hoc balancing. By the Government's logic, any statute that criminalizes speech is constitutional because the speech is a crime and, therefore, not protected. The Government goes on to apply this circular argument to this case, stating that A1C Smith's words "were a vehicle to breach the peace," and, because of this "the Constitution offered them no protection." Ans. at 21. If the Court adopts the Government's position, no speech which the Government regulates as criminal would be afforded First Amendment protection.

1. Origin of the "dangerous speech" doctrine in the military.

In 1919,[2] the Supreme Court decided the *Schenck* case. *Schenck v. United States,* 249 U.S. 47 (1919). *Schenck* was an incitement case.[3] *Id.* at 48-89; *see also Debs v. United States*, 249 U.S. 211, 212 (1919). The Supreme Court reasoned that speech can be constitutionally regulated so long as the underlying words and circumstances created "a clear and present danger" that "bring about the substantive evils that Congress has a right to prevent." *Schenck*, 294 U.S. at 52.

The clear and present danger—or dangerous speech—test was used, intermittently, for incitement cases until the Court's decision in *Brandenburg*, 395 U.S. at 450-54 (Douglas, J., concurring). In the intervening years, however, the dangerous speech test was subject to significant critique. *Id*. at 452, 454 ("[w]hen one reads the opinions closely and sees when and how the 'clear and present danger' test has been applied, great misgivings are aroused."). One of the most vocal critics included Justice Holmes, who authored the *Schenck* majority opinion. *Id.* at 452;

---

[2] This was 20 years before the Supreme Court adopted the categorical test for unprotected speech which courts use today. *See, e.g.*, *Chaplinsky*, 315 U.S. at 571-72 ("There are certain well defined and narrowly limited classes of speech, the prevention and punishment of [is permitted]."); *see also Counterman*, 143 S. Ct. at 2114-14 ("These historic and traditional categories are long familiar to the bar.").

[3] The Espionage Act of June 15, 1917, made it a crime to incite, or attempt to cause and incite, "insubordination, disloyalty, mutiny and refusal of duty in the military." *Debs*, 249 U.S. at 212. Incitement and fighting words are two separate categories of unprotected speech. *Compare Brandenburg v. Ohio*, 395 U.S. 444 (1969), *with Chaplinsky*, 315 U.S. 568.

Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (criticizing the "clear and present danger test" as unworkable, since "every idea is incitement").

In *Brandenburg*, the Supreme Court abrogated the dangerous speech doctrine in favor of the current test for incitement: speech is unprotected as incitement only if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447; s*ee also Denver Area Educ. Telecomms Consortium, Inc. v. FCC*, 518 U.S. 727, 778 (1996) (Souter, J., concurring) ("[T]he clear and present danger [test] of *Schenck* . . . evolved into the modern incitement rule of *Brandenburg*."). As the Fifth Circuit noted earlier this year:

> [I]n concluding that [appellant's] post was unprotected speech, the district court applied the *wrong* legal standard. While *Schenck* . . . ha[s] never been formally overruled by the Supreme Court, the "clear and present danger" test applied in those cases was subsequently limited by the incitement test announced in *Brandenburg*.

Bailey v. Iles, 78 F.4th 801, 808 (5th Cir. 2023) (emphasis added). The Fourth Circuit, too, has explained that the "clear and present danger" test was "[d]evoid of any such limiting criteria," resulting in the unconstitutional restriction of a wide array of otherwise protected speech. *United States v. Miselis*, 972 F.3d 518, 532-33 (4th Cir. 2020), *cert denied*, 141 S. Ct. 2756 (2021).

Despite this backdrop, just two years before *Brandenburg* abrogated the clear and present danger doctrine, the Court of Military Appeals (C.M.A.) adopted it.

United States v. Howe, 37 C.M.R. 429, 437-38 (C.M.A. 1967). In *Howe*, an officer was convicted for using contemptuous words against the President of the United States, in violation of Article 88, UCMJ, 10 U.S.C. § 888. *Id.* at 437. The C.M.A. held that, under the limited circumstances of the Vietnam War, contemptuous words uttered by an officer constituted a clear and present danger to a substantive evil: that is, discipline within the armed services. *Id.* at 438.

The C.M.A. used the clear and present danger test for another Vietnam era case, *United States v. Priest*, 45 C.M.R. 338, 340 (C.M.A. 1972), albeit this time for a case concerning incitement. *Id.* at 342 ("The statements . . . require little interpretation. [They are] a call to violent revolution against our Government."). Appellant was ultimately convicted for making disloyal statements. *United States v. Priest*, 44 C.M.R. 118, 119 (C.M.A. 1971). In upholding the conviction, the C.M.A. stated that "[t]he proper standard for the governance of free speech . . . is still found, we believe, in Mr. Justice Holmes's historic assertion in *Schenck*." *Priest*, 45 C.M.R. at 344. The court then concluded that the appellant's speech created a danger to good order and discipline. *Id.* at 345 ("For a member of the armed forces to encourage the kinds of action this accused did sharply conflicts with conventional concepts of good order and discipline.").

In *United States v. Hartwig*, this Court explicitly expanded the application of the clear and present danger test to all military speech. 39 M.J. 125, 128 (C.A.A.F.

1994). Without additional explanation, this Court held that "the 'clear and present danger' standard applies to speech by military members." *Id*. Notably, this Court did not address why it was adopting an outdated incitement standard for non-incitement offenses.[4]

This Court continued to apply this incitement analysis to non-incitement cases in *United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996). However, in *Brown*, this Court tacitly recognized that *Brandenberg*, not *Schenck*, was the controlling test for incitement. *Id.* (applying the clear and present danger test while noting that the applicable "definitions" come from *Brandenberg*). This Court in *Brown* went on to explain that the "test in the military is whether the speech interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops." *Id.* (citations omitted).

In *United States v. Wilcox*, this Court seemingly continued to apply the clear and present danger test. 66 M.J. 442, 449 (C.A.A.F. 2008). However, this Court in *Wilcox* recognized, for the first time, that when the accused's speech falls outside of the narrowly defined categories of unprotected speech—including fighting words—that speech is protected. *Id.*

This Court in *Wilcox* went on to articulate a three-factor test for assessing the

---

[4] In *Hartwig*, the appellant was charged with conduct unbecoming an officer and a gentleman for a private, although sexually suggestive, letter that he wrote to a 14-year-old girl. *Hartwig*, 39 M.J. at 126.

constitutionality of an Article 134, UCMJ, 10 U.S.C. § 934, conviction. First, courts assess whether the speech falls within an unprotected category; if it does, then the analysis can end, because the speech is not afforded First Amendment protection. *Id.* at 449. If the speech is protected, courts must move to the second factor: whether there is a connection between the speech and the military mission.[5] *Id.* at 449-50. When speech is both protected and does not have a connection to the military mission, then the criminal prosecution is barred by the First Amendment. *Id.* at 449-50. Courts only move to the third factor when the speech is both protected and there is a connection between the speech and the mission. *Id.* at 450. This third factor requires courts to balance "the essential needs of the armed services and the right to speak out as a free American." *Standage*, 526 F. Supp at 83 (quoting *Priest*, 45 C.M.R. at 344).

To be sure "members of the military are not excluded from the protection

---

[5] While not explicit in the *Wilcox* decision, this factor may concern only whether the elements of an offense are met (in this case, an Article 134, UCMJ, offense) rather than looking to whether there is a link between the speech and the mission. *See Wilcox*, 66 M.J. at 448-49; *see also United States v. Raper*, 75 M.J. 164, 170-71 (C.A.A.F. 2016) (applying the three-factor test to another Article 134, UCMJ, case); *cf. Standage v. Brathwaite*, 526 F. Supp 3d 56, 82 (D. Md. 2020) ("Next the court determines whether the elements of the offense were satisfied."). However, this makes little sense. The canon of constitutional avoidance dictates that courts should avoid resolving constitutional questions if the case can be resolved in another manner. *Rescue Army v. Mun. Ct. of Las Angeles*, 331 U.S. 549, 568 (1947). If the Government fails to prove the elements of the offense, then courts should ordinarily resolve the case without addressing the constitutional question. *Wilcox*, 66 M.J. at 452 (Baker, J., dissenting).

granted by the First Amendment." *Parker v. Levy*, 417 U.S. 733, 758 (1974). As the *Wilcox* Court recognized, the First Amendment protects servicemembers speech so long as it does not "interfere[] with or prevent[] the orderly accomplishment of the mission or present[] a clear danger to loyalty, discipline, mission, or morale of the troops." *Wilcox*, 66 M.J. at 448.

2. The Government asks this Court to apply an outdated and abrogated standard to this case. This Court should decline to do so.

The dangerous speech doctrine was adopted by this Court's predecessor two years before the test was abrogated in *Brandenburg*. The Supreme Court has not used this test since, and its evolution ended with *Brandenburg* in 1969. *See, e.g.*, *Denver Area Educ. Telecomms Consortium, Inc.*, 518 U.S. at 778; *Bailey*, 78 F.4th at 808; *Miselis*, 972 F.3d at 532-33. Even before the test was abrogated, it was the subject of consistent critique by members of the Supreme Court, to include its author Justice Holmes.[6] *Brandenburg,* 395 U.S. at 452; *Gitlow*, 268 U.S. at 673.

Not only is the dangerous speech doctrine antiquated and the subject of vast criticism, its proper application, if any, is limited to the unprotected category of incitement. *Schenck*, 294 U.S. at 48-49; *Debs*, 249 at 212; *cf. Brandenburg*, 395 U.S. at 447. To be sure, the dangerous speech test provides limited guidance for assessing

[6] The primary concern of these critics was that the clear and present danger test permits the restriction of any nearly all speech which the government seeks to restrict.

other forms of potentially unprotected speech, including child pornography, obscenity, defamation, and, most importantly, fighting words. As such, this Court should decline to apply the dangerous speech test to this case.

3. A1C Smith's speech is nevertheless constitutionally protected under this Court's dangerous speech precedence.

A1C Smith's words nevertheless fall outside of the limited category of "dangerous speech." In nearly every case where this Court or its predecessor has applied the dangerous speech test, there was a direct link between the offending speech and interference with the military mission and good order. *See, e.g.*, *Brown*, 45 M.J. at 395 ("[the] test in the military is whether the speech interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops.")

For instance, in *Howe*, an officer publicly used contemptuous words against the President during the Vietnam War; the C.M.A. held that those words were dangerous because, in the context of the Vietnam war, they would negatively impact discipline in the Armed Forces. 37 C.M.R. at 438. In another Vietnam era case, the appellant published a newsletter calling for desertion from the military, as well as violent revolution against the United States. *Priest,* 45 C.M.R. at 342. Again, the C.M.A. held that the appellant's words interfered with good order and discipline and, therefore, constituted dangerous speech. *Id.* at 344-45.

In modern cases, this Court still connects the dangerous speech doctrine to the

mission. For example, in *Brown*, 45 M.J. 389, this Court reviewed the appellant's conviction for conspiring to organize a strike during the Gulf War. *Id.* at 392. This Court held that the appellant's actions—which included organizing a strike to promote better living conditions in a combat zone—jeopardized the orderly accomplishment of the war fighting mission, and hindered good order and discipline. *Id.* at 392-93, 395.

In this case, there is no evidence that creates a link between A1C Smith's speech and interference with good order, discipline, or the orderly accomplishment of the war fighting mission. In fact, the Government concedes as much in a footnote: "There was no interference with the mission, and [A1C Smith's] crime occurred off base among civilians." Ans. at 22. To be sure, A1C Smith was not organizing a strike in a combat zone, unlike the appellant in *Brown*. Nor was he attempting to interfere with the war fighting mission by calling on his fellow Airmen to desert or otherwise criticize the chain of command during wartime, unlike the appellants in *Howe* and *Priest*. Rather, the offending words were directed to a civilian, AB, who has no links to the military, in contrast to *Priest* and *Brown*. Mickey, too—the person to whom the charged words referenced—is a civilian with no known connection to the military. Unlike the speech in *Howe*, *Priest*, and *Brown*, the words here were not directed to incite disloyalty in the service, or otherwise detract from the military mission.

As noted above, this Court in *Wilcox* laid out a succinct framework for applying the dangerous speech test. In that case, this Court asked three questions: (1) is the speech categorically unprotected; (2) if protected, is there a connection between the speech and the military mission; and (3) if there is a connection, what is the balanced interest between the speech and the orderly accomplishment of the mission. *Wilcox*, 66 M.J. at 449-50. As this Court held in *Wilcox*, when speech is protected under the categorical analysis, and there is no connection to the military mission (as the Government concedes there is not here), then that speech is protected and any conviction is unconstitutional.

While this Court should not apply the dangerous speech doctrine, A1C Smith's words nevertheless qualify for constitutional protection under the clear and present danger test since there is no evidence showing that the charged words interfered with the war fighting mission or otherwise hindered good order. As such, his conviction is unconstitutional.

C. *Fighting words and breach of the peace under Article 116, UCMJ.*

The Government contends that "fighting words are not required to breach the peace." Ans. at 25. This is correct. In the military, an accused can commit breach of the peace in two ways: through content-based speech or by action (including content-neutral speech, such as yelling or making loud noises). Article 116, UCMJ, 10 U.S.C. § 916; *MCM*, pt. IV, ¶ 54.c.(2)-(3). While the Government can proscribe

conduct as breach of the peace, when the Government regulates words on a content-specific basis as a crime—to include breach of the peace—those words must fall within an unprotected category of speech. Speech which is criminalized by a breach of the peace statute is ordinarily analyzed under the fighting words category.[7]

The Government argues that "it is illogical to conclude that one can only breach the peace by making a direct personal insult or invitation to fisticuffs." Ans. at 25. Again, this is true. There are many ways one's actions could breach the peace. As the Government rightly notes, a breach of the peace could occur through the brandishing of a firearm, unruly conduct, and loudness. But, the Government did not charge any of these acts in this case. Instead, the Government selected a charging scheme that alleged A1C Smith "caused" a breach of the peace by using "provoking language toward [Ms. AB]". There are alternative schemes under Article 116, UCMJ, that the Government could have charged. They did not. Instead, the charging scheme selected by the Government was limited to the category of fighting words.

Indeed, this is an apt opportunity to highlight that the relevant concepts of

---

[7] The Government argued that *some* of the cases cited for this proposition in A1C Smith's initial brief were limited to "whether the definitions of fighting words are narrowly construed to prohibit speech." Ans. at 25. While the Supreme Court did review some of the cited cases for as applied challenges to breach of peace statutes, the Supreme Court used the fighting words category to assess *each* of the convictions. And this makes sense, since no other category of unprotected speech fits the limited application of breach of peace statutes which regulate content-based speech.

"provoking language," "breach of the peace," and "fighting words" are all closely related. As the Supreme Court has stated, "fighting words" are "those which by their very utterance inflict injury or tend to incite an immediate *breach of the peace*." *Chaplinsky*, 314 U.S. at 572 (emphasis added). The concept of provoking a "breach of the peace" is contained within the very definition of "fighting words." Similarly, the phrase "breach of the peace" is included *within the definition* of "provoking" words in Article 117, UCMJ, 10 U.S.C. § 917; *MCM*, pt. IV, ¶ 54.c.(3) ("As used in this article, provoking and reproachful describe those words or gestures which are *used in the presence of the person to whom they are directed* and which a reasonable person *would expect to induce a breach of the peace* under the circumstances.") (emphasis added).

As the Supreme Court has held time and again, when the charged language for a breach of peace statute does not fall within an unprotected category—to include fighting words—than the conviction is unconstitutional.

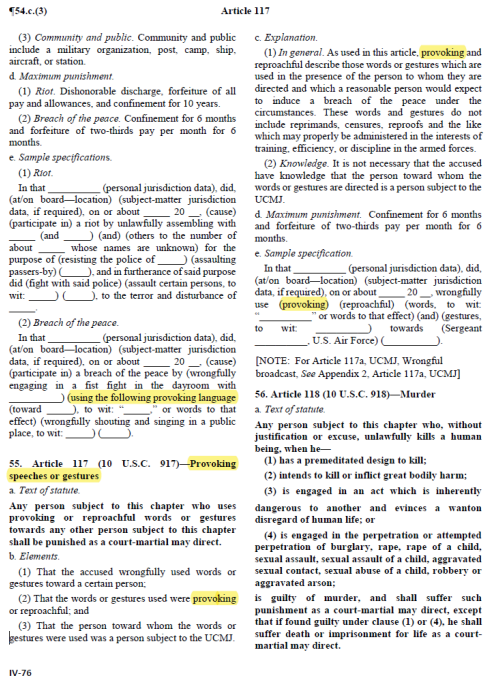
II. PROVOKING WORDS IN ARTICLES 116 AND 117, UCMJ

A. The Government argues that the same word, used in the same context, on the same page of the MCM should be given two different meanings.

When the "same word" is used in related places within the MCM, it generally is given "the same meaning and effect." *United States v. Brown*, __ M.J. __, 2023 LEXIS 734, at *10-11 (C.A.A.F. 2023) (citing *Azar v. Allina Health Servs*., 139 S. Ct. 1804, 1812 (2019) ("This Court does not lightly assume that Congress silently

attaches different meanings to the same term in the same or related statutes.”)). The Government asks this Court to disregard this principle and do exactly the opposite: assume the drafters “silently attache[d] different meanings to the same term in” related prohibitions. *Azar*, 139 S. Ct. at 1812.

The MCM lists the use of “provoking language” as one option for charging Article 116, UCMJ. MCM, pt. IV, ¶ 54.c.(3).[8] On literally the same page, the MCM explains what “provoking” words means under Article 117, UCMJ:



¶54.c.(3) Article 117

(3) *Community and public.* Community and public include a military organization, post, camp, ship, aircraft, or station.

d. *Maximum punishment.*

(1) *Riot.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Breach of the peace.* Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

e. *Sample specifications.*

(1) *Riot.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (cause) (participate in) a riot by unlawfully assembling with _____ (and _____) (and) (others to the number of about _____ whose names are unknown) for the purpose of (resisting the police of _____) (assaulting passers-by) (_____), and in furtherance of said purpose did (fight with said police) (assault certain persons, to wit: _____) (_____), to the terror and disturbance of _____.

(2) *Breach of the peace.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (cause) (participate in) a breach of the peace by (wrongfully engaging in a fist fight in the dayroom with _____) (using the following provoking language (toward _____), to wit: “_____,” or words to that effect) (wrongfully shouting and singing in a public place, to wit: _____) (_____).

55. Article 117 (10 U.S.C. 917)—Provoking speeches or gestures

a. *Text of statute.*

Any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused wrongfully used words or gestures toward a certain person;

(2) That the words or gestures used were provoking or reproachful; and

(3) That the person toward whom the words or gestures were used was a person subject to the UCMJ.

c. *Explanation.*

(1) *In general.* As used in this article, provoking and reproachful describe those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances. These words and gestures do not include reprimands, censures, reproofs and the like which may properly be administered in the interests of training, efficiency, or discipline in the armed forces.

(2) *Knowledge.* It is not necessary that the accused have knowledge that the person toward whom the words or gestures are directed is a person subject to the UCMJ.

d. *Maximum punishment.* Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully use (provoking) (reproachful) (words, to wit: “_____” or words to that effect) (and) (gestures, to wit: _____) towards (Sergeant _____, U.S. Air Force) (_____).

[NOTE: For Article 117a, UCMJ, Wrongful broadcast, *See* Appendix 2, Article 117a, UCMJ]

56. Article 118 (10 U.S.C. 918)—Murder

a. *Text of statute.*

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

IV-76

---

[8] The Government asserts that: “Article 116 itself does not include the word ‘provoking.’ The government simply decided to use that word in the specification.” Ans. at 28. This ignores, however, that the MCM explicitly lists the use of provoking language as one charging option for Article 116, UCMJ. The MCM, of course, is also where the definition of provoking language is found. Indeed, the two are found on the same page of the MCM (page IV-76). This was not, as the Government portrays it, simply a random word choice by the charging authority—it is an explicitly listed option for charging Article 116, UCMJ.

MCM, page IV-76. When Article 116, UCMJ, is charged via the use of provoking language, it closely mirrors Article 117, UCMJ, with the caveat that, unlike Article 117, UCMJ, Article 116, UCMJ, need not involve conduct directed towards another individual subject to the UCMJ. *See* MCM, pt. IV, ¶ 54.c.(3) ("That the person toward whom the words or gestures were used was a person subject to the UCMJ."). Yet the government invites this Court to apply different meanings to the same word, used in the same context, on the same page of the MCM. This Court should decline to do so.

B. The vagueness doctrine and rule of lenity, which are at their strongest in the context of free speech, requires any ambiguity in the meaning of "provoking" to be resolved in favor of A1C Smith.

Finally, to the extent ambiguity remains in the meaning of "provoking" language as used in Article 116, UCMJ, the rule of lenity and the vagueness doctrine require that it be resolved in the appellant's favor. "[T]he rule of lenity's teaching [is] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). "[M]uch like the vagueness doctrine, it is founded on 'the tenderness of the law for the rights of individuals' to fair notice of the law." *Id.* (citations omitted); *see also United States v. Santos*, 553 U.S. 507, 514 (2008) ("This venerable rule . . . vindicates the fundamental principle that no citizen should be held accountable or a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly

prescribed.”).

There is also interplay between the rule of lenity’s application and the free speech implications of this conviction. When, as here, a criminal offense seeks to criminalize speech, the requirements to strictly construe its limits should be applied with even greater exactitude. As the Supreme Court has stated, “Where a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.” *Parker*, 417 U.S. at 752 (citation omitted).

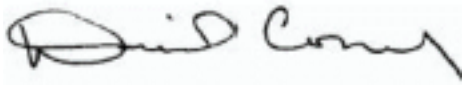
III. A1C SMITH’S CONVICTION IS LEGALLY INSUFFICIENT

The Government argues that A1C Smith’s actions caused a breach of the peace and, therefore, his conviction is legally sufficient. Ans. at 31-33. To support this contention, the Government states that “gas station customers deserve[] to pump their gas and buy their snacks in peace without hearing loud and angry profanity and threats of violence.” Ans. at 32. The Government goes on to say that these actions “shattered” the peace because onlookers experienced loud voices. Ans. at 32.

Despite this explanation, the Government points to no evidence in the record that others believed that A1C Smith’s loud and angry behavior was turbulent or otherwise caused a breach of the peace. And, even if there was such evidence, the Government’s argument would still fail. The Government chose to charge A1C

Smith with a specific charging scheme: breaching the peace with certain provoking words. As Judge Cadotte articulated below, "[A1C Smith] was not charged with using loud speech, or exhibiting unruly conduct; rather, the Government alleged he committed a 'breach of the peace' based solely by speaking the charged provoking language." JA at 36. No one at the gas station besides AB heard the charged words uttered by A1C Smith; and, when AB heard those words, she chuckled. The fact that other people overheard a potentially loud conversation at a gas station does not support the Government's position, because there is no evidence that they were "provoked" by the actual language charged. Therefore, A1C Smith's conviction is legally insufficient.

WHEREFORE, A1C Smith respectfully requests that this Honorable Court set aside and dismiss the findings of guilt as to the Specification of Charge IV and set aside the sentenced adjudged for that specification.



DANIEL CONWAY
Civilian Appellate Defense Counsel
Daniel Conway and Associates,
Attorneys-at-Law
20079 Stone Oak Parkway,
San Antonio, TX 78258
210-934-8265 (UCMJ)
conway@militaryattorney.com
USCAAF Bar Number 34771

Counsel for Appellant

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-2807
trevor.ward.1@us.af.mil
USCAAF Bar Number 37924

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the forgoing was electronically sent to the Clerk of the Court and served on the Government Trial and Appellate Operations on November 16, 2023.

Respecfully Submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-2807
trevor.ward.1@us.af.mil
USCAAF Bar Number 37924

CERTIFICATE OF COMPLIANCE WITH RULES

1. This Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(b) because it contains 5,256 words.

2. This Brief on Behalf of Appellant complies with the typeface style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

Respecfully Submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-2807
trevor.ward.1@us.af.mil
USCAAF Bar Number 37924