IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40202
	)	
Airman First Class (E-3)	)	USCA Dkt. No. 23-0207/AF
SAMUEL H. SMITH	)	
United States Air Force	)	6 November 2023
Appellant.	)	

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

INTRODUCTION

What was once a peaceful gas station in the middle of the Mojave Desert quickly turned turbulent and violent. On 11 January 2020, Ms. AB was working at the AM/PM gas station. It was business as usual. Everyone working that night was calm, cool, and collected. Ms. AB often saw the same customers entering the store to pay for their gas or grab whatever they needed from the store. But, because of Appellant, the night of 11 January 2020 was unlike any other evening at the AM/PM gas station.

At around 7:45 p.m., the gas station was quiet when Appellant entered the scene. He became enraged when he could not purchase cigarettes right away because Ms. AB was on her break.

As Appellant continued to rant and berate Ms. AB, one of her frequent customers, Mr. MJ, told Appellant that Ms. AB was just doing her job, and she did a pretty good job at that. Appellant did not take this too kindly. Appellant told Mr. MJ to stay out of this if he did not want to get hurt. Appellant eventually left the gas station store, but his erratic behavior did not stop there. It only escalated.

Outside the gas station, Appellant told another customer, Mr. PF, that he was upset at Ms. AB and used profane language to describe his experience with her. Appellant drove off, but soon after, Mr. PF saw Appellant, who had now parked his car in front of the store, yelling and cursing. It was a loud argument between Appellant and patrons. Appellant then yelled out the car window and – referring to Mr. MJ, the gentlemen who had defended Ms. AB inside the store – told Ms. AB, "tell that pretty boy mother f'er in there he needs to watch his ass, there's some hard-hitting guys in the street." Ms. AB told Appellant "to get the [f**k] out of [her] parking lot." (JA at 104.)

Within a matter of seconds, Appellant brandished his firearm at Ms. AB. At once, Appellant's friend, who sat on the passenger side, pushed down the gun and asked Appellant "what the hell" he was doing. Appellant then immediately sped away and finally left the gas station. What had been a calm environment had turned turbulent and violent, and Appellant's loud, profane, and violent threat impinged upon the peace and good order to which the AM/PM gas station's

customers and employees were entitled. Appellant had no constitutional right to disturb the previously peaceful gas station with his violent threat, and he was rightly convicted for breaching the peace.

ISSUE PRESENTED

WHETHER APPELLANT'S CONVICTION FOR BREACH OF PEACE, BASED EXCLUSIVELY ON SPEECH, IS LEGALLY INSUFFICIENT AND UNCONSTITUTIONAL WHERE, INTER ALIA, ALL PARTIES AGREE THE CHARGED SPEECH DID NOT CONSTITUTE "FIGHTING WORDS."

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is correct.

STATEMENT OF THE FACTS

Appellant's Crime for Breach of the Peace

A panel of members found beyond a reasonable doubt that Appellant breached the peace in violation of Article 116, UCMJ (Article 116). (JA at 112.) The charge and its specification stated that Appellant "did at or near Moapa, Nevada, on or about 11 January 2020, cause a breach of the peace by using the following provoking language toward [AB], to wit: 'Tell that pretty boy in there

that there are some hard hitting people in these streets, and he better watch his back,' or words to that effect.'" (JA at 40, 112.)

On the night of the crime, Appellant and his friend, Mr. AL, stopped at the AM/PM gas station at Glendale Nevada (JA at 109.) On this night, Ms. AB was working at the AM/PM store as a cashier. (JA at 45.) It was a calm night at the gas station before Appellant arrived. (JA at 59.) Ms. AB first encountered Appellant as she was on her way out of the store to go on break. (JA at 48.) That night Ms. AB was working alongside an 18-year-old named Bailey. (JA at 50.) No one under the age of 21, in the state of Nevada, can sell cigarettes, so Bailey could not sell cigarettes. (Id.)

Ms. AB went on her break around 7:45 p.m. (JA at 51.) As Ms. AB was walking toward the door to take a break, she saw Appellant enter the store and said, "if you're trying to buy cigarettes [Bailey] can't sell them to you." (JA at 73.) The store was "calm enough for [her] to be able to go outside and have [her] break." (JA at 59.) During her break, Ms. AB's brother and sister walk into the store. (JA at 68.) Ms. AB's coworker came outside while Ms. AB was on her break and asked Ms. AB if she could come inside so she could sell Appellant cigarettes. (JA at 78.)

Appellant remained in the store the entire time Ms. AB was on her break. (JA at 79.) When she returned, Appellant began "yelling about how

unprofessional" she was. (Id.) Ms. AB tried to explain to Appellant that her coworker was too young to sell cigarettes. (Id.) Still Appellant kept "going on telling [Ms. AB] how unprofessional [she] was. And ranting and raving because [she] wouldn't come in off [her] break sooner to sell him cigarettes." (JA at 68.) Ms. AB explained that Appellant remained at the counter and continued "just going on and on about how unprofessional [she was] and he was very unhappy about the situation, you know, saying he's never had to deal with this before and just complaining about how unprofessional [she was]. He'll be calling people and speaking – just ranting and raving." (JA at 82.) At first, Ms. AB was trying to be very polite to explain the rules. (JA at 83.) But Appellant kept "going on and on, [and] finally [Ms. AB] had it and told Appellant that she "can't break [the rules]." (Id.)

During this argument, a line of customers began to grow behind the cashier counter. (Supp. JA at 136.) One of the customers, Mr. MJ, told Appellant, "[m]an, don't talk to her like that, she is just doing her job. She is doing a damn good job." (Supp. JA at 127.) Appendant responded and stated, "Stay out of this, man, you don't want to get hurt." (Id.) Mr. MJ was the "pretty boy" Appellant referred to in the charged language. (JA at 105, 106; Supp. JA at 127.) Appellant threatened Mr. MJ because Mr. MJ defended Ms. AB, and this upset Appellant. (JA at 105, 106; Supp. JA at 127.)

Appellant eventually left the store. (JA at 83.) Ms. AB confirmed that no one struck Appellant. (Id.) She did not strike Appellant or threaten him at any time. (JA at 84.) Shortly after, Ms. AB walked out of the store to walk her mom, brother, and sister back to their vehicle. (JA at 86.) As she was walking, Appellant "pulled up on [her]." (JA at 87.) Ms. AB said, Appellant "pulled up at the edge of where the parking lot is, and yells to [her], tell that pretty boy mother f'er in there he needs to watch his ass, there's some hard-hitting guys in the street." (JA at 87, 103-104.) Several customers, including Ms. AB's brother, were in the area when this happened. (JA at 90.) Ms. AB continued to describe:

> So when [Appellant] pulls up parallel to the store to me and he yells, hey tell that pretty boy in there, he needs to watch his ass. There are some hard hitting guys in the street. I kind of chuckled at him told him to leave my store and not come back, and at this point, [Appellant] pulls out a gun and tries to point it to me and the passenger in the vehicle like kind of grabs his arm and was like what the hell are you doing?

(JA at 92.)

> At that moment, [Appellant] pulls a gun from his right side, in between him and the passenger, pulls it up and goes to point it. And the passenger is like, pushes down like the what the hell are you doing. And they speed off out of my parking lot.

(JA at 94.). These events all occurred within 20-30 seconds. (JA at 95.) Ms. AB later clarified that she told Appellant "to get the [f**k] out of [her] parking lot" and that is when Appellant pulled his gun out. (JA at 104.) Ms. AB then immediately

called her boss. (JA at 96.) Ms. AB planned to call 911 but hung up and called her boss instead. (JA at 96.).

Mr. PF, an owner of a plumbing company, was at the AM/PM gas station on the evening of 11 January 2020. (Supp. JA at 115.) Mr. PF needed gas and pulled up behind Appellant's vehicle, which was parked at a gas pump. (Supp. JA at 116.) Mr. PF stated that he saw Appellant walk out of the gas station and then "went up to his car and started rummaging through his car." (Supp. JA at 117.)

> Once [Appellant] went up there, I had been waiting there for about 10 minutes to fuel my truck. And [Appellant] wasn't fueling up. [Appellant] didn't have the gas hose in his car or anything. So, when [Appellant] went up and proceeded to rummage through his car, and I waited for a minute. And then I got out of my truck and I said, hey bud, can you move your car out of the way. I've been waiting to fuel up. And [Appellant] proceeded to tell me the story of what was going on inside the store.

(Supp. JA at 118.) Appellant told Mr. PF that he was trying to buy cigarettes and was upset about having to run his debit card twice. (Id.) Mr. PF explained that Appellant was "disturbed. He was you know, cursing, calling the lady in the store names, you know, using profane language." (Id.) When asked if Appellant seemed angry, Mr. PF said, "Oh yeah." (Id.)

Appellant moved his vehicle and Mr. PF began pumping gas. (Supp. JA at 119.) While the gas was pumping, Mr. PF went inside the gas station where his family was looking for items. (Id.) Mr. PF explained the next sequence of events:

> As I walked into the store, [Appellant] pulled in front of the doors of the convenience store, so I went – I walked at an angle to go into the store. As I passed the car, [Appellant] was having an argument with some people outside the store. I look over into [Appellant's] car, and that is when [Appellant] raised the firearm, out of the seat.
>
> They were at a high volume. [Appellant] was still upset. The people in front of the store were upset at him. [Appellant] was upset at the people in the store. It was a joint cursing conversation that was going on. And that's obviously what drew my attention is when he started yelling out the window of the car. I drew my attention over to [Appellant], and that is when I see the gun come out of the seat.

(Supp. JA at 120.)

Camera footage of the inside of the gas station showed Appellant walking in at minute 3:51. (Supp. JA at 136.) From minute 11:50-14:44 in the video, Ms. AB sold cigarettes to Appellant, customers began gathering around the cashier counter. (Supp. JA at 136.) The video portrayed Ms. AB and Appellant having the argument that Ms. AB described in her testimony, as well as Mr. MJ and Appellant arguing with one another. (Id.) The argument between Ms. AB and Appellant cannot be heard on the video. But the encounter between Mr. MJ and Appellant can be heard on the video from the 1:25 - 1:55 minute mark. (Supp. JA at 136.) Mr. MJ was the gentleman who told Appellant that Ms. AB was just trying to do her job. Appellant then told Mr. MJ to "stay out of this, man, you don't want to get hurt." (Supp JA. at 127, 136.) The video also displayed Mr. MJ walking away

angrily at minute 1:40 after Appellant threatened Mr. MJ. (Supp. JA at 136.) At minute 1:45, Ms. AB told Appellant, "if you have issues, you can take it up to somebody else" or words to that effect. (Supp. JA at 136.)[1] Mr. MJ was also the person Appellant referred to in the charged language as "pretty boy." (JA at 105; Supp. JA at 127.)

The Military Judges Instructions

At trial, the military judge instructed the members on the elements of breach of the peace as follows:

> (1) That on or about 11 January 2020, at or near Moapa, Nevada, the accused caused an act of a violent or turbulent nature by using the following provoking language toward [Ms. AB], to wit: "Tell that pretty boy in there that there are some hard hitting people in these streets, and he better watch his back," or words to that effect; and
>
> (2) That the peace was thereby unlawfully disturbed.

(Supp. JA at 134.) In discussing the term "breach of the peace," the military judge explained:

> A breach of the peace is an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. It consists of acts or conduct that disturb the public tranquility or impinge upon the peace and good order to which the community is entitled. Engaging in an affray and unlawful discharge of firearms in a public street

[1] The video footage on Prosecution Exhibit 9 is not in chronological order. The first four minutes contain audio. The rest of the surveillance footage does not contain any audio and replays minutes 1:00-4:00 in the sequence of events as they occurred.

> are examples of conduct which may constitute a breach of the peace. Loud speech and unruly conduct may also constitute a breach of the peace by the speaker. A speaker may also be guilty of causing a breach of the peace if the speaker uses language which can reasonably be expected to produce a violent or turbulent response and a breach of the peace results.

(Supp. JA at 135.) The military judge also defined "turbulent" as "noisy, boisterous, or violent disturbances." (Supp. JA at 135.) Trial defense counsel did not object to the military judge's instructions on Article 116. (Supp. JA at 129, 133.)

SUMMARY OF THE ARGUMENT

Appellant's conviction for breach of the peace under Article 116 was constitutional and legally sufficient. The right of free speech is not absolute. The Supreme Court defined unprotected speech as communications that have limited or no "social value as a step to truth and that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Bose Corp. v. Consumer's Union, 466 U.S. 485, 504 (1984) (internal citation omitted). Appellant's charged language, "tell that pretty boy in there that there are some hard hitting people in these streets, and he better watch his back," or words to that effect, had no social value, and any benefit that may have been derived from the language was "clearly outweighed by social interest and morality." *See* id.; (JA at 87.)

Appellant's primary focus on the "fighting words" doctrine is misguided. Even if Appellant's charged language did not constitute fighting words, his speech was nonetheless unprotected as under the Bose definition or as dangerous speech. In United States v. Brown, 45 M.J. 389 (C.A.A.F. 1996) and United States v. Wilcox, 66 M.J. 442 (C.A.A.F. 2008), this Court recognized dangerous speech as an unprotected category of speech. Dangerous speech is words that create a clear and present danger that will bring about the substantive evils that Congress has the right to regulate. Clear and present danger also encompasses speech "directed to or inciting or producing imminent lawless action [and] likely to incite or produce such action." Wilcox, 66 M.J. at 448 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)). Appellant's angry demeanor and violent threat created a clear and present danger of a violent confrontation at the AM/PM gas station, especially given that his words provoked cursing from Ms. AB, which in turn led to Appellant brandishing a firearm.

Appellant has the burden to prove that, as applied to him, Article 116 was unconstitutional. Under the plain error review, Appellant must point to particular facts in the record that prove why his interests should overcome Congress' and the President's determinations that his conduct be proscribed. United States v. Goings, 72 M.J. 202, 205 (C.A.A.F. 2013). Appellant has not articulated why his speech is protected in light of Bose. Appellant also failed to point out any facts in the record

showing that his conduct was not dangerous speech. Nor has Appellant explained why he deserved the right to yell and threaten civilians at a gas station. For these reasons, Appellant failed to articulate why his interests should overcome Congress' and the Presidents' determinations that his conduct be proscribed.

Not only was Appellant's conviction constitutional, but it was also legally sufficient. Appellant's conduct falls under the definition of breach of the peace under Article 116. Appellant's invocation of Article 117's, UCMJ (Article 117) definition of "provoking" is irrelevant, because Article 116 does not require use of the same definition. Appellant's speech caused a breach of the peace. A reasonable factfinder could have found all the essential elements for breach of the peace beyond a reasonable doubt. Appellant's angry actions were followed by a "joint cursing conversation" that ended with Appellant yelling a threat. This provoked Ms. AB to engage in more cursing, which then led to Appellant displaying a gun. Appellant's conduct created an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. (Supp. JA at 120.) Appellant's violent threat disturbed the public tranquility at the gas station and impinged on the peace and good order to which customers and employees were entitled. Thus, Appellant's charged speech breached the peace, and his conviction was legally sufficient. This Court should affirm the lower court's opinion because Appellant's conviction is constitutional and legally sufficient.

ARGUMENT

APPELLANT'S CONVICTION FOR BREACH OF THE PEACE IS CONSTITUTIONAL AND LEGALLY SUFFICIENT.

Standard of Review

This Court reviews issues of legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002). Whether a statute is constitutional as applied is an issue this Court reviews de novo. Goings, 72 M.J. at 205 (citing United States v. Ali, 71 M.J. 256, 265 (C.A.A.F. 2012.))

Plain Error

To determine whether a statute is unconstitutional as applied, this Court conducts a "fact specific inquiry." Goings, 72 M.J. at 205. Still, where an appellant alleges constitutional errors for the first time on appeal, given the "presumption against the waiver of constitutional rights," and the requirement that a waiver "clearly establish[] . . . an intentional relinquishment of a known right or privilege," reviewing courts will often apply a plain error analysis rather than consider the matter waived. Id. (internal citations omitted). Upon plain error review, to prove that a facially constitutional criminal statute is unconstitutional as applied, the appellant must point to particular facts in the record that prove why his interests should overcome Congress' and the President's determinations that his

conduct be proscribed. Id. (citing United States v. Vazquez, 72 M.J. 13, 16-21 (C.A.A.F. 2013); Ali, 71 M.J. at 266)).

Law

First Amendment and Unprotected Speech

The First Amendment protects freedom of speech. U.S. Const. amend. 1. But the "right of free speech is not absolute at all times and under all circumstances." Chaplinsky v. N.H., 315 U.S. 568, 571 (1942). There are well-defined and narrowly limited categories of speech not protected under the constitution. These include lewd and obscene speech, the profane, the libelous, or "fighting" words. Id. This Court provided pertinent background to the First Amendment and freedom of speech in Brown:

> In the civilian community, there are certain categories of speech not protected by the First Amendment: obscenity, Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957); fighting words, Cohen v. California, 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971); and dangerous speech, Chaplinsky v. New Hampshire, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942).
>
> "Fighting words" are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, supra at 572. In order to be fighting words, the words must constitute a direct personal insult. Cohen v. California, supra. Are there fighting words left? In Buffkins v. City of Omaha, Douglas County, Nebraska, 922 F.2d 465, 472 (8th Cir. 1990), the Court held that calling a police officer an "asshole" was not considered fighting words.

> The test for dangerous speech in the civilian community is whether speech presents a clear and present danger. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." Schenck v. United States, 249 U.S. 47, 52, 63 L. Ed. 470, 39 S. Ct. 247 (1919).
>
> In Brandenburg v. Ohio, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969), the Court defined "clear and present danger" as extending to incidents "directed to inciting or producing imminent lawless action . . . likely to incite or produce such action."

45 M.J. at 395.

Generally, speech used to commit a crime is not protected and therefore criminalized. This Court has held that falsely reporting a crime was a false official statement in violation of Article 107, UCMJ. United States v. Jackson, 26 M.J. 337, 379 (C.M.A. 1988). Communicating a threat, under Article 134, UCMJ, is also a crime. United Sates v. Harrington, ___ M.J.____, No. 22-0100/AF (C.A.A.F. 10 August 2023). Lastly, deliberate, or repeated offensive comments of a sexual nature may be evidence of criminal maltreatment under Article 93, UCMJ. United States v. Carson, 57 M.J. 410, 412, 413 (C.A.A.F. 2002). Over decades, this Court has upheld convictions that stemmed from the perpetrator's speech. "The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose." United States v.

Barnett, 667 F.2d 835, 842 (9th Cir. 1982). *See also* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (rejecting the contention that "the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute"); United States v. Rowlee, 899 F.2d 1275, 1278 (2d Cir. 1990) (citation omitted) ("Speech is not protected by the First Amendment when it is the very vehicle of the crime itself."). . In sum, speech used to commit a crime is generally not protected.

Article 116, UCMJ – Breach of the Peace

Under Article 116, the elements of breach of the peace are: a) that the accused caused or participated in a certain act of a violent and turbulent nature; and b) that the peace was thereby unlawfully disturbed. The Manual for Courts-Martial defines breach of the peace as:

> A breach of the peace is an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. The acts or conduct contemplated by this article are those which disturb the public tranquility or impinge upon the peace and good order to which the community is entitled. Engaging in an affray and unlawful discharge of firearms in a public street are examples of conduct which may constitute a breach of the peace. Loud speech and unruly conduct may also constitute a breach of the peace by the speaker. A speaker may also be guilty of causing a breach of the peace if the speaker uses language which can reasonably be expected to produce a violent or turbulent response and a breach of the peace results. The fact that the words are true or used under provocation is not a defense, nor is tumultuous conduct excusable because incited by others.

Manual for Courts-Martial, United States part IV, para. 54.c.(2) (2019 ed.)[2] (MCM).

Article 116 has been a punitive article under the UCMJ since 1969. Language in the President's explanation, "use of vile or abusive words to another in a public place," in the 1969 MCM has been replaced by the current language outlined in the 2019 Manual, part IV, paragraph 54.c.(2). The former language was subject to an overly broad application. Analysis of Punitive Articles, Manual for Courts-Martial, United States A23-14 (2016 ed.) (citing Gooding v. Wilson, 405 U.S. 518 (1972)). Since these changes, no court has found Article 116 unconstitutional.

For Article 116, the model specification in the MCM includes "provoking" as a potential way of charging a breach of the peace. MCM, pt. IV, ¶54.e.(2). But the President has not defined "provoking" in the context of Article 116 for breach of the peace. The definition of "provoking" as articulated under Article 117, "provoking speech or gestures," does not apply to prosecutions under Article 116. *See* MCM, pt IV, ¶55.c.(1). The Manual, part IV, paragraph 55.c.(1) for Article 117 states, "*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

[2] Unless otherwise indicated, all citations to the MCM are to the 2019 edition.

and which a reasonable person would expect to induce a breach of the peace under the circumstances." (emphasis added).

Legal Sufficiency

A conviction is legally sufficient when, "considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Young, 64 M.J. 404, 407 (C.A.A.F. 2007) (quotation and citations omitted). Under this standard of review, this Court must draw every reasonable inference from the evidence in favor of the prosecution. United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). The standard for legal sufficiency is "a very low threshold to sustain a conviction." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019).

Totality of the Circumstances

When evaluating whether Appellant's conviction was constitutional and legally sufficient, this Court must look at the circumstances surrounding the charged language. "Words are used in context. Divorcing them from their surroundings and their impact on the intended subject is illogical and unnatural." United States v. Brown, 65 M.J. 227, 231-32 (C.A.A.F. 2007). In Brown, this Court explained that legal analysis of a threat must consider both the words and surrounding circumstances. Id. Similarly in this case this Court must look at the

charged language and its surrounding circumstances to provide context to Appellant's threatening language that caused a breach of the peace.

Analysis

A. Appellant's charged speech was not constitutionally protected and therefore his conviction under Article 116 was constitutional.

After conducting a fact-specific inquiry, as required under Goings, 72 M.J. at 205, this Court should find that Article 116 is constitutional as applied to Appellant. Appellant's charged language was not constitutionally protected. In Brown, this Court recognized categories of unprotected speech, such as obscenity, fighting words, and dangerous speech. 45 M.J. at 395. Consequently, fighting words are not the only category of unprotected speech. Appellant's focus solely on this category of unprotected speech is misguided.

1. Appellant's charged language, even if not fighting words, was nevertheless unprotected speech under the definition from Bose.

There are well-defined and narrowly limited categories of speech not protected under the Constitution, and in Bose, the Supreme Court defined unprotected speech as:

> [C]ategories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend because they 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"

466 U.S. at 504 (quoting Chaplinsky, 315 U.S. at 572).

Appellant's charged language – "tell that pretty boy mother f'er in there he needs to watch his ass, there's some hard-hitting guys in the street" – did not have any societal value. AFCCA characterized Appellant's words as a "threat," (JA at 32) and indeed, threatening to do harm to Mr. MJ was not "an essential part of any exposition of ideas." *See* Bose, 466 U.S. at 504. And any benefit of Appellant's speech was "clearly outweighed by the social interest in order and morality." See id. Appellant caused a turbulent scene by yelling outside his car at a peaceful gas station, which encouraged others to join a "joint cursing conversation." (Supp. JA at 120.) The fact that he brandished his gun right after making this comment, in essence, told Ms. AB that the "pretty boy" was in present danger of Appellant shooting him. Members of society would have been afraid to pump their gas or buy a snack with their family at the AM/PM gas station the night of Appellant's crime. There was no lawful purpose for Appellant's actions. Appellant had multiple chances to leave the gas station. Instead, he remained at the gas station to stir up more trouble. And any benefit Appellant derived from yelling his threat was clearly outweighed by society's interest in allowing other customers to patronize a gas station in peace, without fear of witnessing loud, violent threats or fear of violence breaking out. Appellant's actions met the definition of unprotected speech, discussed in Bose, and were not constitutionally protected.

Further, the First Amendment does not protect speech used as the vehicle to commit a crime. Giboney, 336 U.S. at 498; Barnett, 667 F.2d at 842; Rowlee, 899 F.2d at 1278. Appellant used his words to menace, threaten, and create a loud disturbance in a previously tranquil environment. Since the words were a vehicle to breach the peace at the AM/PM gas station, the Constitution offered them no protection.

Appellant, under plain error review, has the burden to point to facts in the record to show that his interests should overcome Congress' and the President's determinations that his conduct be proscribed. *See* Goings, 72 M.J. at 202. Appellant has not articulated why his speech was protected, other than arguing that his speech was not "fighting words." Appellant has not provided this Court any indication that his speech had any social value and that therefore he should have been legally allowed to shout violent threats out his car window at a peaceful gas station. After all, the purpose of Appellant's violent outburst was to express his rage that he had to wait a few minutes and scan his card twice to buy cigarettes and that Mr. MJ had the gall to defend the cashier. These are not compelling interests that would weigh in favor of finding Appellant's threats to be constitutionally protected. Under the plain error standard, Appellant fails to meet his burden. *See* id.

2. Appellant's charged language also constituted dangerous speech.

Apart from Appellant's conduct meeting the definition articulated in Bose, Appellant's conduct also constituted dangerous speech. In Wilcox, this Court noted that social and political speech has been recognized as the core of what the First Amendment is designed to protect. 66 M.J. at 446-47. This Court then went on to explain that the right to free speech is not absolute and certain categories of speech, such as dangerous speech, obscenity, or fighting words are not protected under the First Amendment. Id. at 447.

The test for dangerous speech is whether "words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." Id. at 448 (citing Schenck v. United States, 249 U.S. 47, 52 (1919)). Clear and present danger also extends to speech "directed to inciting or producing imminent lawless action [and that is] likely to incite or produce such action." Id. (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).[3]

[3] Both Brown and Wilcox discuss a lower standard for speech that applies in the military context. Speech is unprotected in the military context if it "interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops." Wilcox, 66 M.J. at 448 (citing Brown, 46 M.J. at 395). This lower standard does not apply in this case. There was no interference with the mission, and Appellant's crime occurred off base among civilians.

Appellant's conduct fit the definition of dangerous speech described in Wilcox. First Appellant's conduct created a clear and present danger. Appellant charged language was violent and turbulent and of a nature to bring about a violent confrontation between Appellant and other people at the gas station. Appellant's threat could have easily escalated into more angry verbal exchanges and eventually violence and gunfire, especially when Appellant punctuated his threat by brandishing a firearm. Such a violent confrontation is a "substantive evil[] that Congress has the right to prevent." *See* Schenck, 249 U.S. at 52.

Second, Appellant's speech was directed to incite or produce imminent lawless action – a violent confrontation – and therefore likely to incite or produce such action. Context of what occurred before and right after the charged language is crucial to understand Appellant's intent behind the charged speech. *See* Brown, 65 M.J. at 231-32. Before Appellant told Ms. AB, "tell that pretty boy mother f'er in there he needs to watch his ass, there's some hard-hitting guys in the street," he was very upset at Ms. AB and Mr. MJ ("pretty boy."). He yelled and cursed at Ms. AB because she made him wait to buy cigarettes. (JA at 68.) And then Appellant got upset at Mr. MJ when Mr. MJ told Appellant that Mr. AB was just doing her job. (JA at 105, 106; Supp. JA at 127.) Appellant responded and told Mr. MJ to stay out of it or else he would get hurt. (JA at 105, 106; Supp. JA at 127.) Appellant's anger and charged speech was targeted to get a reaction. In turn, his

conduct was directed to incite a violent confrontation that cumulated in the joint cursing conversation that ultimately breached the peace. *See* Wilcox, 66 M.J. at 448. Finally, Appellant then brandished his firearm. (JA at 94-95; Supp. JA at 120.) A physical fight could have reasonably come into fruition; or even worse a shooting, given that there was a firearm at the scene. Thus, Appellant's speech created clear and present danger that was also very likely to incite imminent lawless action.

Again, Appellant has not met its burden, under the plain error review, of proving that his conduct did not constitute dangerous speech. First, Appellant does not recognize dangerous speech as a category of unprotected speech. Second, Appellant failed to prove why his conduct is constitutionally protected and why he therefore deserved the right to scream threats against Mr. MJ out his car window at Ms. AB. Appellant failed to articulate why his interests should overcome Congress' and the President's determinations that his conduct be criminalized. *See* Goings, 72 M.J. at 202. Thus, Article 116, as applied to Appellant, was constitutional.

3. Fighting words are not required to breach the peace under Article 116.

Along with not recognizing other forms of unprotected speech, Appellant asserts that only fighting words – a direct personal insult or invitation to fisticuffs – can breach the peace. (App. Br. at 14-15). That is simply not the case. Appellant cites Gooding, 405 U.S.at 528, Cohen, 403 U.S. at 24-26, Bachellor v. Maryland, 397 U.S. 564, 566, 571 (1970), and Street v. New York, 394 U.S. 576, 586-87 (1969) as authority for this proposition. (Id.) The line of cases that Appellant relies on focuses the analysis on whether the definitions of fighting words are narrowly construed to prohibit speech without being overly broad. *See* Gooding, 405 U.S. at 523. They do not suggest that to breach the peace someone must use fighting words. There are other ways to breach the peace, such as loud speech, unruly conduct, brandishing a firearm, using language that can reasonably be expected to produce a violent or turbulent response. MCM, pt. IV, ¶54.c.(2). Appellant has not shown that a prosecution for breaching the peace under any of these theories of liability would equate to criminalizing protect speech. And finally, it is illogical to conclude that one can only breach the peace by making a direct personal insult or invitation to fisticuffs to another. (App. Br. at 15.) Even an indirect threat relayed to a third party could instigate a violent confrontation and could constitute behavior Congress and the President wanted to proscribe. The question of whether Appellant unlawfully disturbed the peace at the gas station

should not turn on whether his violent threat was made directly to Mr. MJ or to someone else.

Article 116 does not require a servicemember to use fighting words to be guilty of breaching the peace. Appellant has not challenged Article 116 as being facially unconstitutional. Indeed, the definition of breach of the peace is still narrowly construed and not overly broad. Article 116 has been changed to remain constitutional in line with the Supreme Court's decision in Gooding. *See* MCM, A23-14 (2016 ed.) citing Gooding, 405 U.S. at 518. Even if Appellant's charged speech did not constitute fighting words, it was still not constitutionally protected.

In sum, Appellant's threatening speech had no social value and any "benefit" he might have derive from expressing his rage at the gas station was outweighed by societal interest in order and morality. His words also constituted danger speech because they were intended to and were likely to incite imminent lawless action – specifically a violent confrontation at the gas station. They did provoke a profane reaction from Ms. AB, in response to which Appellant brandished a firearm. Under his plain error burden, Appellant has pointed to nothing in the record that establishes why his personal interest in making his threat should overcome Congress's and the President's determination that his conduct should be proscribed. Thus, Appellant's conviction for breach of the peace was constitutional as applied to him.

B. Appellant's language as charged meets the definition of breach of the peace under Article 116 and therefore legally sufficient.

Not only was Appellant's conviction constitutional, but it was also legally sufficient because his misconduct fell within the definition of breach of the peace under Article 116.

1. The definition of "provoking" under Article 117 does not apply to Article 116.

Contrary to Appellant's claims, Article 117's definition of "provoking" does not apply to Article 116. The definition of "provoking" under Article 117 is 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." MCM, pt. IV, ¶55.c(1). Appellant claims that this definition rendered Appellants conviction legally insufficient because Appellant's threat to Mr. MJ was not in the presence of Mr. MJ but instead said in the presence of Ms. AB. (App. Br. at 17.) While the Appellant is correct that his charged language was not said in the presence of Mr. MJ, the definition of "provoking" is still irrelevant because the text of the President's definition of "provoking" under Article 117 makes clear that the definition does not apply to any other article. MCM, pt. IV, ¶55.c.(1). The first words in the definition are "as used in this article," which means that the definition of "provoking" from Article 117 is not a required element of an offense charged under Article 116. Id. Nor is

the word provoking used in the definition of breach of the peace in Article 116. *See* MCM, pt. IV, ¶54.,(2).[4]

Appellant argues that "this Court should use the statutory canon for the presumption of consistent usage and apply the definition for provoking words in Article 117, UCMJ, to Article 116, UCMJ." (App. Br. at 17.) But Article 116 itself does not include the word "provoking." The government simply decided to use that word in the specification. And the President limited his definition of "provoking" to Article 117 only. Thus, the statutory canon of consistent usage does not apply.

2. The ordinary meaning of "provoking" applies in this case.

In the absence of a statutory definition, the ordinary meaning of a word applies. Frontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2177 (2021). Provoking means "causing mild anger." Provoking, MERRIAM WEBSTER DICTIONARY (Online Ed. 2023). The ordinary meaning of the word "provoking" would not require Mr. MJ's presence. It would be sufficient if Appellant's words might serve to incite or provoke *someone*, even if the words were about another person. For example, the average person would

[4] At trial, Appellant indicated he had no objection to the military judge's instructions about breach of the peace in violation of Article 116. (Supp. JA at 129, 133.) Moreover, trial defense counsel did not request a special instruction on the definition of "provoking." (Supp. JA at 132-133.)

consider taunting insults about another person's mother to be "provoking." So too here was it provoking for Appellant to threaten to engage in violence at Ms. AB's gas station, even though the intended target of the violence was not immediately present. Common sense dictates that insult or threats toward absent individuals could easily provoke a turbulent reaction from other people who were present and heard them.

Appellant focus on the Government's failure to prove that the words were "used in the presence of the person to whom they [were] directed" is misguided. (App Br. at 17.) His argument relies on definitions from Article 117, rather than Article 116. Appellant's words were provoking in the common sense understanding of that term. They were intended to escalate a tense situation and succeeded in provoking Ms. AB to respond with anger and profanity.

3. Appellant's speech produced a turbulent response and therefore breached the peace.

The government was able to show beyond a reasonable doubt that Appellant's conduct met the definitions that actually are in Article 116. Article 116 defines breach of the peace as "an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature." The acts and conduct proscribed are those which disturb the public tranquility. (Supp. JA 135.) A breach of the peace can be expected if the speaker uses language that could be *reasonably* expected to produce a violent and turbulent response. (Id.)

Appellant's actions breached the peace in violation of Article 116. A calm gas station store became crowded and rowdy. Video footage showed that before Appellant arrived, it was business as usual. While Appellant was arguing with Ms. AB, many customers gathered around the cashier, waited to pay for their items, and could be seen talking to Appellant. (Supp. JA. at 136.) Ms. AB even explained that during this argument at the cashier counter, the customers were defending her. (Supp. JA at 127.)

Appellant's speech produced a turbulent response in that arguments escalated, and Ms. AB, along with other customers, argued with and cursed at Appellant in the parking lot, which culminated in Appellant pulling a gun. (Supp. JA at 120.) During the incident, Appellant told Ms. AB, "tell that pretty boy mother f'er in there he needs to watch his ass, there's some hard-hitting guys in the street." Appellant's speech was inciteful or provoking in the common sense of the word. Appellant had every desire to cause chaos. Appellant knew that Ms. AB and Mr. MJ knew each other. He was upset with Ms. AB and "pretty boy," and the charged language was meant to produce a turbulent reaction from Ms. AB. Appellant's words did cause a turbulent reaction – Ms. AB told Appellant "to get the [f**k] out of [her] parking lot." (JA at 104.) Appellant's words could have reasonably led to a violent confrontation, had his friend not pushed the weapon down and asked him "what the hell" he was doing. All the events caused a

disturbance of the peace and public tranquility at the gas station. Since Appellant's conduct falls within the President's definition of breach of the peace under Article 116, his conviction was legally sufficient.

C. Appellant's conviction for breach of the peace is legally sufficient because the charged language did in fact cause a breach of the peace.

Appellant argues that his charged language did not cause a breach of the peace because Ms. AB's reaction, that she chuckled, did not disturb the public tranquility. (App. Br. at 18.) When "considering the evidence in the light most favorable to the prosecution," a reasonable factfinder could have found this element beyond a reasonable doubt. *See* Young, 64 M.J. at 407.

To support his contention that his words did not cause a breach of the peace, Appellant states that AB chuckled at the phrase and that this is a far cry from a "disturbance to the public tranquility." (App. Br. at 18.) This is not an accurate depiction of what occurred. First, Ms. AB said she "kind of chuckled at [Appellant] telling him to get the hell out of [her] store and not to come back. At that moment, [Appellant] pulls a gun from his right side, in between him and the passenger" in the car. (JA at 94.) Second, Mr. PK said as he was walking to the front of the store, he saw the customers upset with Appellant: "It was a joint cursing conversation that was going on." (Supp. JA at 120.) The results of Appellant's conduct created an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. Appellant's words themselves were

a loud and outward demonstration of his anger towards Ms. AB, which was violent in nature because they threatened one of her customers. Before Appellant's actions, the gas station was calm – business as usual. But once customers, including Appellant, gathered around the store and yelled profane language, this constituted a "disturbance to the public tranquility" and "impinged upon the peace and good order to which the community is entitled." (Supp JA. 135.) After his argument with Mr. MJ, Appellant could have left the gas stationed at once. Even when he drove off initially, he could have left the gas station. Instead, Appellant drove right in front of the store and screamed a threat out his window. Appellant had every intention to disturb the peace.

The other gas station customers deserved to pump their gas and buy their snacks in peace without hearing loud and angry profanity and threats of violence. The gas station employees deserved to work their shifts without having to engage with loud, profane, violence-threatening customers. Appellant's conduct shattered any sense of safety and security they may have had in conducting these every-day tasks. A reasonable factfinder could have easily found beyond a reasonable doubt that Appellant's conduct caused an actual breach of the peace.

In sum, Appellant's speech was a demonstration of a violent and turbulent nature, and the peace was thereby unlawfully disturbed. A reasonable factfinder

could have found all the essential elements for breach of the peace under Article 116 beyond a reasonable doubt.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and find that as applied to Appellant, Article 116, UCMJ, is constitutional and his conviction is legally sufficient. This Court should affirm the decision of the Air Force Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and transmitted by electronic means with the consent of the counsel being served via email to trevor.ward.1@us.af.mil and conway@militaryattorney.com. on 6 November 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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/s/ Vanessa Bairos, Capt, USAF

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