IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

SCOTT A. MEAKIN,
Lieutenant Colonel (O-5), USAF
Appellant.

Crim. App. No. 38968

USCA Dkt. No. 18-0339/AF

REPLY BRIEF

MARK C. BRUEGGER, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34247
Air Force Legal Operations Agency
Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.c.bruegger.mil@mail.mil

ALLEN S. ABRAMS, Maj, USAF
Senior Defense Counsel
U.S.C.A.A.F. Bar No. 35282
Air Force Legal Operations Agency

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(210) 652-5163

Counsel for Appellant

Pursuant to Rules 19(a)(7)(B) and 34(a) of this Court's Rules of Practice and Procedure, Lieutenant Colonel Scott Meakin, the Appellant, hereby replies to the government's brief concerning the granted issue, filed on December 13, 2018.[1]

Argument

The government's position is relatively simple: Appellant committed unbecoming conduct by engaging in obscene speech. (Gov. Br. at 6-7, 9-10, 12-18). From the government's perspective, the consensual and private nature of Appellant's messages is irrelevant (Gov. Br. at 27-30), as is the location from which the speech was effected (Gov. Br. at 23-26). The government further posits that Appellant's conduct would have been unbecoming had he merely uttered indecent language to another in the privacy of his own home (Gov. Br. at 23) or emailed *himself* the charged indecent messages (Gov. Br. at 25). Viewing this case through such myopic lenses erroneously ignores the circumstances under which Appellant communicated his private speech, and encourages this Court to establish a dangerous precedent with far-reaching constitutional implications. To

[1] Per Rule 34(a), the due date for this Reply was Sunday, December 23, 2018. This Court was closed December 24-25, 2018.

avoid these pitfalls, this Court should instead hold that, under the particular circumstances of this case, Appellant's private, consensual, and anonymous communications did not represent conduct unbecoming an officer and gentleman.

A. Contrary to the government's intimations, there is no binding precedent that controls this Court's resolution of this case.

The government correctly notes "the Supreme Court has never found First Amendment protection when obscenity is transmitted to others." (Gov. Br. at 10) (citing *Roth v. United States*, 354 U.S. 476, 481-85 (1957); *Alberts v. California*, 354 U.S. 476, 481 (1957)). However, Supreme Court precedent in this regard has generally been limited to commercial actors distributing or advertising their products to consumers. *See*, *e.g.*, *Roth*, 354 U.S. 476 (finding no protection for defendant who mailed obscene circulars, advertising, and a book); *United States v. Reidel*, 402 U.S. 351 (1971) (finding no protection for defendant who advertised the sale of obscene booklets in a newspaper and later mailed the booklet to an undercover inspector); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (finding no protection for the exhibition of obscene materials in an "adult" theater); *Kaplan v. California*, 413 U.S. 115 (1973) (finding no protection for "adult"

bookstore proprietor who sold obscene books); *cf. United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (noting that the right to receive obscenity does not extend to distributing materials to the public, nor to importing obscene materials for either private use or public distribution).[2] The Supreme Court has yet to address whether the government can regulate private, non-commercial messages between consenting parties.

Military precedent is similarly devoid of direction, although this Court has previously granted review on the underlying issue at stake here:

> WHETHER INDECENT LANGUAGE COMMUNICATED BY CONSENTING ADULTS IS CONSTITUTIONALLY PROTECTED BY THE RIGHT TO PRIVACY.

United States v. Moore, 38 M.J. 490, 492 (C.A.A.F. 1994). Ultimately, however, this Court did not decide *Moore* on the issue of consent because the charged language was not between two consenting adults; rather, it was "part and parcel of an abusive, degrading, extortionate, adulterous relationship" by an Air Force officer in a long-term relationship over the course of his career with a woman who ultimately found his advances

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[2] Notably, even these cases provoked vigorous dissents. *See Roth*, 354 U.S. 476 (three dissenting justices); *Reidel*, 402 U.S. 351 (two dissenting justices); *Paris Adult Theatre I*, 413 U.S. 49 (four dissenting justices); *Kaplan*, 413 U.S. 115 (three dissenting justices); *Thirty Seven Photographs*, 402 U.S. 363 (three dissenting justices).

unwelcome. *Id*. at 491-93. Another private speech case cited extensively in the government's brief, *United States v. Hartwig*, 39 M.J. 125 (C.A.A.F. 1994), also fails to address *consensual* communications between parties.

As indicated by the government, the Air Force Court of Criminal Appeals (CCA) has upheld convictions involving private, indecent speech. (Gov. Br. at 28-29). However, the CCA's non-binding decisions provide little value for resolving the present case. For example, *United States v. Gill*, 40 M.J. 835 (A.F.C.M.R. 1994), involved a Staff Sergeant who made private, indecent communications to two fellow airmen. Although not specifically addressed in the CCA's analysis, nor mentioned in the government's brief (Gov. Br. at 28), the Staff Sergeant's communications were "unwanted" and, in some cases, made after he was asked to stop. *Gill*, 40 M.J. at 836-37. Conversely, *United States v. Maxwell*, 42 M.J. 568, 580 (A.F. Ct. Crim. App. 1995), *reversed on other grounds*, *United States v. Maxwell*, 45 M.J. 406, 426 (C.A.A.F. 1996), involved private and anonymous email communications between consenting parties. Although the CCA denied the appellant's contention that such messages are protected by the First and Fifth Amendments, the CCA provided little insight for its rationale. *Maxwell*, 42 M.J. at 580. Instead, it rested on

Moore for its conclusion that "the First Amendment does not afford protection to indecent language under the circumstances of this case." *Id.* (citing *Moore*, 38 M.J. 490). Again, however, *Moore* did not involve *consensual* communications and thus should not have controlled the CCA's opinion.

In the federal circuits, there is a dearth of cases involving convictions for private, obscene speech between consenting parties. However, in *United States v. Whorley*, 550 F.3d 326 (4th Cir. 2008), the Fourth Circuit upheld a conviction for, *inter alia*, receiving and sending e-mails describing sexual conduct with children. Akin to the present case, the charges in *Whorley* related to text only messages and did not identify any actual victims.[3] *Id.* Nevertheless, the Court rejected facial and as applied constitutional challenges to 18 U.S.C. § 1462, which prohibited obscene materials in commerce, and concluded that while an individual may *possess* obscene materials within the home, the Supreme Court has afforded no

[3] A significant factual difference between *Whorley* and the present case is the physical locations where the communications were effected. In *Whorley*, the appellant utilized a computer in a public resource room of the Virginia Employment Commission. *Whorley*, 550 F.3d at 330. Here, appellant utilized his private computer from the privacy of his own home. (JA at 337-38).

correlative right to *receive* obscene materials. *Whorley*, 550 F.3d at 332 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969); *Reidel*, 402 U.S. at 354-55; *United States v. Orito*, 413 U.S. 139, 141 (1973); *Thirty-Seven Photographs*, 402 U.S. at 376)). The Court further opined that "the traditional formulations of obscenity . . . have never depended on the form or medium of expression." *Whorley*, 550 F.3d at 335. Consequently, it rejected the appellant's argument that his text-only e-mails were "pure speech" and thus could not be obscene. *Id.* at 335 (citing *Miller v. California*, 413 U.S. 15, 24 (1973); *Kaplan*, 413 U.S. at 119)). The Court's decision, however, was not without dispute.

Among *Whorley*'s three-member panel, Chief District Judge Jones concurred despite sharing "disquiet" regarding the conviction for sending and receiving the e-mails in question. *Id.* at 343. Circuit Judge Gregory also concurred in part, but strongly dissented regarding the charged e-mails. *Id.* at 343-53. Noting the frequency with which literature depicts sex between children and adults (*id.* at 348-49), and the fact that the charged e-mails were fantasies without a proximate connection to the actual abuse of any child (*id.* at 348, 350), Judge Gregory found that 18 U.S.C. § 1462, as applied to the appellant, "criminaliz[ed] protected speech

and 'is a stark example of speech suppression.'" *Id*. at 350 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002)).

Like the majority's opinion in *Whorley*, Judge Gregory's dissent is clearly non-binding on this Court. However, his rationale and warnings are instructive:

> Today, under the guise of suppressing obscenity -- whatever meaning that term may encompass -- we have provided the government with the power to roll back our previously inviolable right to use our imaginations to create fantasies. It is precisely this unencumbered ability to fantasize that has allowed this nation to reap the benefits of great literary insight and scientific invention. The Constitution's inviolable promise to us is its guarantee to defend thought, imagination and fantasy from unlawful governmental interference regardless of whether such thoughts, imaginings, or fantasies are popular with the masses. It is in these moments that our grip on the rule of law and our fidelity to constitutional values is tested.

Whorley, 550 F.3d at 353.

B. The military does not employ a *per se* ban on indecent speech; the circumstances surrounding the communications are what matter.

The government suggests that Appellant's communication and distribution of the charged e-mails were, standing alone, sufficient to constitute unbecoming conduct. (*See*, *e.g.*, Gov. Br. at 6, 30-31). Indeed, under the government's perspective, a military officer who merely

communicates indecent language would violate Article 133, UCMJ, 10 U.S.C. § 933. (Gov. Br. at 23, 27). While this view appears to mirror that of the CCA, both are erroneous. (*See* JA at 7).

When communications form the underlying conduct for an alleged violation of Article 133, UCMJ, 10 U.S.C. § 933, the specific circumstances surrounding the alleged act are what matter. "Communications which are unbecoming an officer under some circumstances may not be unbecoming under others." *United States v. Norvell*, 26 M.J. 477, 481 (C.M.A. 1988). As charged, the elements of conduct unbecoming an officer and gentleman in this case are:

> (1) That the Appellant wrongfully and dishonorably communicated, in writing, certain indecent language; and
>
> (2) That, under the circumstances, these acts constituted conduct unbecoming an officer and gentleman.

(*See* JA at 5, 33-41). Accordingly, the government needed to prove more than just the communication of indecent language; proof was also required that, under the particular circumstances of this case, the communications constituted unbecoming conduct. The military thus has no *per se* prohibition against indecent speech, as suggested by the government. Consequently, even if this Court disagrees that Appellant's

communications were constitutionally protected, an analysis is still required as to whether the circumstances under which he effected such communications constituted unbecoming conduct. In this regard, Appellant should prevail.

Appellant never identified himself in his communications, nor indicated his association with the Air Force. (JA at 159-60, 357-461). He used a private computer and private email account (JA at 340, 347), and sent his private messages to other private email accounts from the privacy of his home. (JA at 337-38). Although the government correctly notes that some of Appellant's emails were ultimately circulated among law enforcement (Gov. Br. at 30), there is no evidence that he himself engaged in group emails, allowed his one-on-one messages to be forwarded, posted materials in chat rooms or other sites accessible to the public at large, or widely distributed his communications in any way. His email partners also appeared to be consenting adults who were willing to engage Appellant in the charged communications, and there was no evidence that any actual children were victimized.[4] (JA at 160-61, 179). Perhaps most notable,

[4] A potential exception is Appellant's communications with "maggiemos13," who claimed she was fourteen years old. (JA at 437-42).

Appellant littered his communications with falsehoods regarding his personal life, indicating his emails were mere fantasy. (*See*, *e.g.*, JA at 360-61, 378, 395, 408, 446). Appellant actually confirmed this fact when he declined what appeared to be an opportunity to abuse a child, stating that he was "all talk," that he "[j]ust like[d] to talk," and that he "could never" abuse children. (JA at 580). And finally, but for the criminal investigation and subsequent court-martial, there is no evidence that his anonymous communications would have disgraced or dishonored him, or compromised his standing as an officer. Under these particular circumstances, Appellant's communications did not constitute unbecoming conduct.

Conversely, the government believes Appellant committed unbecoming conduct the moment he sent his emails. (Gov. Br. at 24). In fact, the government posits that Appellant would have been guilty of unbecoming conduct for merely uttering his fantasies to others, even within the privacy of his own home. (*Id*. at 23).

These views fly in the face of the rights to privacy and free speech, and would create a dangerous precedent for not just officers, but potentially all military members who are prohibited under Article 134, UCMJ, 10 U.S.C. § 934, from engaging in indecent speech. Indeed, a member could

face charges for discussing sexual fetishes with a paramour in the privacy of their home, or for emailing intimate pictures to a loved one. Given the absurdity of such results, this Court should reject the government's overly broad interpretation of the military's need and authority to regulate speech.

C. Additional matters.

The government's brief contains various assertions that require correction or, perhaps, clarification. First, while the government addresses Appellant's utilization of *Lawrence v. Texas*, 539 U.S. 558 (2003) to support his privacy interest concerns, its primary focus is on Appellant's First Amendment claims. To be clear, Appellant's contention that his "communications were private and constitutionally protected" (App. Br. at 11), involve both his freedom of speech and fundamental right to privacy (*see* JA at 37, 39, 44; App. Br. at 16, 19-20, 33-38). *Lawrence* addressed the right to privacy through the Fourteenth Amendment's substantive due process; the same underlying liberty interest is applicable to Appellant. *United States v. Marcum*, 60 M.J. 198, 205-07 (C.A.A.F. 2004); *cf. Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (discussing the extension of constitutional protections to asserted rights and liberty

interests).

Next, the government suggests that Appellant has proposed a new test to determine whether speech is protected from punishment under Article 133, UCMJ, 10 U.S.C. § 933. (Gov. Br. at 18). For clarification, Appellant is not proposing any new test. Rather, he referenced four arguments detailing why his charged communications – even if deemed indecent – were otherwise lawful: (1) they did not represent dangerous speech (App. Br. at 22); (2) they were not requests for child pornography (App. Br. at 24); (3) there was no evidence they occurred outside his home (App. Br. at 28); and (4) even if the emails were distributed beyond his home, they were constitutionally protected (App. Br. at 33).

These bases matter because the argument that Appellant's actions were violative of the law on their face is not nearly as patent as the government's brief makes it seem. From a factual perspective, the government contends that Appellant "asked for pictures of the sexual abuse [of children]." (Gov. Br. at 4). However, the language cited by the government to support this contention indicates that Appellant merely asked for pictures of "young" individuals, without reference to any acts contained therein. (*See* JA at 427) (Appellant asked for "pic trade" of

"young" individuals), 443 (Appellant asked for "photo share" of "young" individuals), 455 (Appellant asking for "nudes" of individuals between the ages of 7 and 15). The government similarly argues that Appellant "suggested the other users engage in sexual abuse of children." (Gov. Br. at 4). Once again, however, the government's citations fail to support its argument. (*See* App. Br. at 22-24).

Finally, and perhaps most glaringly, the government attempts to expand Appellant's admissions regarding how his communications with the undercover agent "[made] him sick" from the sole specification to which it related to all of the remaining charged offenses. (Gov. Br. at 16). The government utilizes this admission to conclude that Appellant "gave direct and immutable evidence that he was personally disgraced" by his actions. (*Id*.). This contention is erroneous, however, in that Appellant's admission was not "a blanket statement" pertaining to all of the charged offenses. (*Id*.). Rather, it was made during an interview with law enforcement that was focused on Appellant's communications with the undercover agent. (*See* JA at 266-271). In fact, Appellant only discussed communications with others as having occurred in chat rooms; he was never asked about the emails charged as Specifications 2-17 of the Charge and the sole

specification of Additional Charge.[5] (*See* JA at 136-37 (agent noting that Appellant discussed going "into chat rooms and speak[ing] with people"), 278 (agent responding to Appellant's admissions with "Okay, so and that chat room is completely anonymous?")).

CONCLUSION

Appellant engaged in private, non-commercial, and consensual communications. His communications had no military nexus, were conducted from the privacy of his home, and were not otherwise unlawful. Under the particular circumstances of his case, Appellant respectfully renews his request that this Honorable Court find his conviction for Specifications 1-8 and 11-17 of the Charge, and the Additional Charge and its Specification, legally insufficient.

Respectfully Submitted,

MARK C. BRUEGGER, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34247
Air Force Legal Operations Agency
Appellate Defense Division
1500 Perimeter Road, Suite 1100

[5] None of the charged offenses relate to Appellant's communications within chat rooms. (JA at 33-41).

Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.c.bruegger.mil@mail.mil

ALLEN S. ABRAMS, Major, USAF
Circuit Defense Counsel
U.S.C.A.A.F. Bar No. 35282
Air Force Legal Operations Agency
United States Air Force
1 Washington Cir., Central Circuit - Basement
Joint Base San Antonio-Randolph, TX 78148
(210) 652-5163
E-mail: allen.s.abrams.mil@mail.mil

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of Court on December 26, 2018 and that a copy was served on the Air Force Appellate Government Division electronically on December 26, 2018.

MARK C. BRUEGGER, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34247
Air Force Legal Operations Agency
Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.c.bruegger.mil@mail.mil