IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Mark J. GRIJALVA,
Machinery Technician
Third Class (E-4)
United States Coast Guard,

Appellant

REPLY ON BEHALF OF APPELLANT

Ct. Crim. App. Dkt. No. 1482

USCA Dkt. No. 23-0215/CG

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

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I.

A. Congress intended Article 117a to occupy the field of the nonconsensual broadcast and distribution of consensually taken intimate images, irrespective of the victim's status.

Congress enacted Article 117a[1] to protect adult victims of a broader demographic—beyond just servicemembers—provided the conduct has a clear military nexus. Despite this, the Government argued before the Coast Guard Court of Criminal Appeals ("CGCCA"), as it did at trial,[2] that Congress did not intend Article 117a to protect civilian victims:

- Appellant's actions of distributing nude pictures *of a civilian* fell outside Article 117a's scope.[3]
- . . . Congress did not seek to cover the class of wrongful distribution of intimate visual images of civilians with Article 117a . . . .[4]
- . . . Congress did not intend Article 117a to occupy the field of nonconsensual distribution of intimate visual images as related to civilian victims.[5]
- *Article 117a's legislative history shows Congress only intended to criminalize the nonconsensual sharing of intimate visual images of servicemembers in response to the "Marines United" scandal. Appellant shared intimate visual images of a civilian*.[6]

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[1] JA at 0107 (10 U.S.C. § 917a (2018)).
[2] *See* JA at 0075, 0078-82 (Appellate Ex. 35).
[3] Appellee's Br. (dated Feb. 27, 2023 [sic]) at 12.
[4] *Id*. at 16.
[5] *Id*.
[6] *Id*. at 17 (emphasis in original).

- Appellant's conduct fell outside this scope because he shared intimate visual images of a civilian.[7]

These arguments persuaded the CGCCA to adopt the Government's position.[8] The court found that the "specific statutory purpose" for enacting Article 117a was only "to target the sharing/broadcasting of intimate images of *servicemembers and veterans* . . ."[9] Examining Congress' decision to incorporate a military nexus element into Article 117a, the court viewed "this addition as also strengthening the argument that Congress did not intend to cover civilian victims or preempt use of Article 134[10] for such victims."[11] The court then rejected Appellant's argument that Article 117a was intended to and does cover civilian victims, asserting that the legislative history "refutes any such intent" that "Article 117a would cover both military and civilian victims."[12]

Now recognizing the error of the CGCCA's view, which its own arguments caused, the Government asserts before this Court, for the first time, that Article 117a *can be* applied in cases involving civilian victims, when a military nexus exists:

> Congress not intending for the statute to cover civilian victims does not mean that when there is a civilian victim and a direct and palpable

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[7] *Id*. at 23.
[8] JA at 0003-04 (*United States v. Grijalva*, 83 M.J. 669, 673 (C.G. Ct. Crim. App. 2023)).
[9] JA at 0004 (*Grijalva*, 83 M.J. at 673) (emphasis added).
[10] JA at 0108 (10 U.S.C. § 934 (2018)).
[11] *Id.*
[12] *Id*.

> military nexus exists that Article 117a, UCMJ, cannot be used to prosecute a servicemember.[13]

This new position stands in stark contrast to the erroneous, victim-centric approach the Government successfully persuaded the CGCCA to adopt, thereby splitting the circuits,[14] which Appellant asks this Court to address.[15]

1. The Government should be held to its original position that the charged Article 134 offense was not preempted because Article 117a cannot be used in cases involving civilian victims.

Judicial estoppel prevents parties from doing exactly what the Government is doing—adopting a legal position that contradicts a prior one—in order to ensure the integrity of the judicial process.[16] When assessing whether to invoke this doctrine in a specific case, courts generally consider three factors:

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[13] Appellee's Br. at 21.

[14] *Compare* JA at 0003-04 (*Grijalva*, 83 M.J. 673) *with* JA at 0116 (*United States v. Jones*, No. ACM 40226, 2023 WL 3720848, at *5 (A.F. Ct. Crim. App. May 30, 2023)).

[15] The Government also invites this court to find that the CGCCA did not rule out the application of Article 117a in cases involving civilian victims. This invitation, however, contradicts the plain language of the CGCCA's opinion.

[16] *See United States v. Schmidt*, 82 M.J. 68, 80 (C.A.A.F. 2022) (Maggs, J., concurring) (citing 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4477 (2d ed. 1992 & Supp. 2021) ("Absent any good explanation, a party should not be allowed to gain an advantage by litigating on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory."); *United States v. Muwwakkil*, 74 M.J. 187, 191-92 (C.A.A.F. 2015) (declining to consider an argument made on appeal that was not raised with the military judge at trial); *United States v. Augspurger*, 61 M.J. 189, 193 (C.A.A.F. 2005) (Crawford, J. concurring in the result) ("Judicial estoppel would bar the prosecution in this case from advocating at this Court a position inconsistent with that of the trial prosecutor . . . .").

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position . . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.[17]

All of these factors weigh in favor of applying judicial estoppel here.

First, as previously discussed, the Government's current position in this case contradicts its earlier assertion. Second, the Government successfully persuaded the CGCCA to accept its earlier assertion. And third, allowing the Government to selectively change its position and present inconsistent arguments at this stage of the proceedings would give it an unfair advantage. Indeed, but for the Government's now-abandoned previous argument, the CGCCA may well have determined that Article 117a preempted the Article 134 charge at issue and ruled in Appellant's favor, in which case Appellant would have no need to seek review by this Court.

Since allowing the Government to maintain this revised stance has the potential to undermine the integrity of the judicial process, this Court should invoke judicial estoppel and refrain from considering the Government's new position when assessing Appellant's arguments.[18]

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[17] *Id.* (citing *New Hampshire v. Maine,* 532 U.S. 742, 750-51 (2001)).

[18] Given that the Government successfully advocated for a position adopted at trial and by the CGCCA, a position it has since abandoned, it would have been procedurally consistent for the Government to have sought this Court's order granting review of this issue. Nevertheless, the Government's shift can be

B. This Court should reject the Government's earlier and latest arguments and determine that Article 117a occupies the field of the nonconsensual broadcast and distribution of consensually taken intimate images.

The legislative history of Article 117a demonstrates that Congress intended it to cover a broad range of conduct to protect any and all adult victims (military or civilian), provide the conduct has a military nexus. As the bill's sponsor explained:

> I also want to note that the passage of the PRIVATE Act does not apply to the civilian people in our country. Although 34 States have passed laws to address nonconsensual pornography, their approaches vary widely, and some are very flawed. That is why a Federal law is needed to provide a single, clear articulation of the elements of this crime to ensure that Americans in every part of the country—*civilian and military*—are protected if they are subjected to this heinous abuse.[19]

In context, the statement that the PRIVATE Act does not apply to civilians underscores it does not grant jurisdiction to *prosecute* civilians, not that it is not intended to protect them, as the Government asserts. To the contrary, the final statement is unequivocal in voicing the intent that this Federal law ensure the protection of *both* military *and* civilian victims.

This approach aligns with the concerns later raised by the Department of Justice, in response to which the military nexus element was added to Article 117a to preserve the statute's integrity vis-à-vis potential First Amendment challenges.[20]

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interpreted as a tacit admission that its earlier argument was flawed, effectively conceding the point without formally doing so.

[19] JA at 0142 (statement of Rep. Speier) (emphasis added).

[20] *Id*. at 0217-19.

Thus, in adding this element, Congress retained its original aim of enacting Article 117a to address the entire field of nonconsensual distribution of adult intimate images, regardless of whether the victim is in the military or not.

C. Charge III, Specification 2, is composed of a residuum of elements of Article 117a.

The preemption doctrine is "designed to prevent the government from eliminating elements from congressionally established offenses under the UCMJ, in order to ease their evidentiary burden at trial."[21] The Government effectively concedes its novel Article 134specification eased its evidentiary burden in this case, since "Appellant's use of the photos and distribution could not be connected to a military mission or environment."[22]

The Government further highlights that "the victim was a civilian, the majority of the individuals that received the images were civilians, and Appellant did not purposefully direct the images at a servicemember."[23] However, this argument overlooks the fact that one of the recipients was a servicemember.[24]

The Government also posits, without evidence or explanation, that Article 117a contains a *mens rea* element requiring Appellant to have known the military

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[21] *United States v. Wheeler*, 77 M.J. 289, 293 (C.A.A.F. 2018); *see also United States v. Tucker*, 82 M.J. 553, 563 (C. G. Crim. App. 2022); *United States v. Reese*, 76 M.J. 297, 302 (C.A.A.F. 2017).
[22] Appellee's Br. (Dec. 4, 2023) at 18.
[23] *Id*. at 17-18.
[24] JA at 0038 (R. at 865).

status of the recipients.[25] This interpretation conflicts with this Court's decision in *United States v. Hiser*.[26] In *Hiser*, the appellant uploaded intimate videos onto a public website with no specific intention for them to be viewed by military personnel.[27] But this Court found no such requirement exists, stating the military nexus can be established "regardless of whether the accused specifically directed the images at the military and regardless of how likely the images were to reach the military."[28]

What the Government now acknowledges, in essence, is that it pursued a novel Article 134 specification because it perceived that proving the military nexus element of Article 117a would be challenging.[29] So it eliminated the Article 117a military nexus element and replaced it with the service-discrediting element of Article 134, Clause 2. Charging the case in this manner, in order to ease the Government's evidentiary burden, is exactly what the preemption doctrine exists to prevent. Therefore, this Court should find that in this case, the unenumerated Article 134 offense in Specification 2 of Charge III is preempted by Article 117a.

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[25] Appellee's Br. (Dec. 4, 2023) at 17-18 ("Appellant did not *purposefully direct* the images at a servicemember.") (emphasis added)).
[26] *United States v. Hiser*, 82 M.J. 60 (C.A.A.F. 2022).
[27] *Id.* at *62.
[28] *Id.* at *66.
[29] Appellee's Br. (Dec. 4, 2023) at 17-18.

Conclusion

WHEREFORE, Appellant respectfully requests this Court set aside the findings as to Charge III, Specification 2, and the sentence.

Respectfully submitted,

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Certificate of Filing and Service

I certify that a copy of the foregoing was electronically delivered to the Court and that a copy was electronically delivered to the Appellate Government Division on December 15, 2023.

Certificate of Compliance with Rules 24(c) and 37

The undersigned counsel hereby certifies that: 1) This brief complies with the type-volume limitation of Rule 24(c) because it contains 2,264 words; and 2) this brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

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