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

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

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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) had jurisdiction to review this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

On May 4 and July 6-9, 2021, Airman First Class (A1C) Samuel H. Smith was tried by officer and enlisted members at a general court-martial at Creech Air Force Base, Nevada. Joint Appendix (JA) at 42, 44. A1C Smith plead not guilty to all charges and specifications; the members returned a mixed verdict. JA at 43, 112. A1C Smith was convicted, contrary to his pleas, of one charge and specification of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one charge and two specifications of communicating a threat, in violation of Article

[1] All references to the punitive articles, UCMJ, the Rules for Courts-Martial (R.C.M.) and Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (hereinafter 2019 *MCM*), unless otherwise noted.

115, UMCJ, 10 U.S.C. § 915; one charge and specification of breach of the peace, in violation of Article 116, UCMJ, 10 U.S.C. § 916; and one charge and specification of aggravated assault with a dangerous weapon, in violation of Article 128, UCMJ, 10 U.S.C. § 928. JA at 112.

The military judge sentenced A1C Smith to be reduced to the grade of E-1, forfeit all pay and allowances, to be confined for 18 months, and a bad conduct discharge. JA at 113. The convening authority took no action on the findings or sentence. JA at 41.

On May 5, 2023, the Air Force Court set aside A1C Smith's conviction for aggravated assault with a dangerous weapon, in violation of Article 128, UCMJ, as factually and legally insufficient. JA at 27. The Air Force Court then found A1C Smith guilty of the "lesser included offense of simple assault with an unloaded firearm," in violation of Article 128. JA at 27. Thereafter, the Air Force Court reassessed A1C Smith's sentence, reducing it from 18 months to ten months, but did not modify any other part of his sentence. JA at 28. A dissenting judge would have found A1C Smith's Article 116, UCMJ, conviction for breach of the peace legally insufficient. JA at 33-34.

STATEMENT OF FACTS

The offenses stem from an altercation that occurred at a Nevada gas station on January 11, 2020. A1C Smith and AL—who, at the time, was a fellow active duty

Airman—were driving in A1C Smith's car when they stopped at the gas station. JA at 107-08. AB, a civilian, worked at the gas station as a cashier. JA at 45. A1C Smith entered the gas station to purchase cigarettes, but AB was outside on a smoke break. JA at 47-68. After her break, AB came back into the store and stood behind the register to service customers. JA at 47-68. At this point, A1C Smith and AB argued about the delay in service. JA 47-68.

Following this argument, A1C Smith returned to his vehicle. JA at 87-91. At some point later, AB left the store and came outside where A1C Smith encountered her again and the two began a conversation. JA at 87-91. During this conversation, A1C Smith stated "tell that pretty boy in there he needs to watch his ass, there's some hard hitting guys in the street."[2] JA at 94. AB "chuckled at [A1C Smith]" and told him to "get the hell out of my store."[3] JA at 94. After A1C Smith and AL left the gas station, AB called the owner of the store and law enforcement to report the interaction. JA at 96.

In relevant part, on September 30, 2020, the Government charged A1C Smith with "breach of the peace by using the following provoking language toward [AB],

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[2] AB testified to various versions of this statement, the substance of which remained the same except for the addition of profanity. For example, in some versions, AB testified that A1C Smith told her to "[t]ell that pretty boy mother fucker in there he needs to watch his ass, there are some hard hitting guys in the streets." JA at 104.

[3] Similar to the foregoing statement, AB also testified as to various versions of her verbal response. In some versions, for example, AB testified that she responded with telling A1C Smith to "get the fuck out of my parking lot." JA at 104.

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.

The reference to the "pretty boy in there" apparently concerned a male customer, identified only as "Mickey." JA at 65, 105. At the time A1C Smith made the statement, Mickey was inside the gas station. JA at 105-06. A1C Smith was outside, in his car. JA at 105-06. As such, Mickey was not in a position to hear the words spoken by A1C Smith. Mickey was not called to testify at trial.

AB testified that Mickey was a customer at the gas station on the night in question, and that she had known him in that capacity for some time. JA at 65, 67, 102, 105-06. There was no evidence before the factfinder that AB and Mickey had any relationship other than that of patron-cashier at this gas station. Further, while AB testified that there were other people in the vicinity of A1C Smith's car at the time he made the charged statement, no other individual testified that they actually heard the charged words.

There is no evidence that any physical altercation actually ensued after A1C Smith made the charged statement to AB. AB did not come to fisticuffs with A1C Smith, nor did any of the onlookers. Instead, AB simply instructed A1C Smith to leave the property and contacted the store owner to report the verbal exchange. JA at 94.

SUMMARY OF THE ARGUMENT

A1C Smith's conviction for breach of the peace is unconstitutional and legally insufficient for three reasons. First, the charged words did not constitute "fighting words." The Supreme Court has delineated a clear and limited set of unprotected categories of speech. When the Government regulates speech outside of these narrow categories, the regulation is presumed unconstitutional. There is only one category of unprotected speech relevant to breach of the peace violations: fighting words. The Supreme Court has made clear that when a breach of the peace statute proscribes speech, the regulated speech must fall within the fighting words exception. When, as here, the proscribed speech does not constitute fighting words, the conviction must be set aside.

Second, A1C Smith's conviction is legally insufficient because the charged language does not meet the definition of provoking words. The President has defined "provoking words" in Article 117, UCMJ, 10 U.S.C. § 917. That definition is in line with the Supreme Court's fighting words definition. When the Government charges an accused with breach of the peace through provoking language, the canon of consistent usage requires that the Article 117, UCMJ, definition apply to it. Because the charged language does not constitute fighting words under the Article 117, UCMJ, definition, A1C Smith's conviction is legally insufficient.

Third, A1C Smith's conviction is legally insufficient because the Government failed to prove the second element of the offense: that the "provoking language" caused a breach of the peace. There is no evidence that the charged words caused a breach of the peace. The only witness arguably impacted by the words, AB, did not become violent or turbulent upon hearing the speech. Instead, she chuckled. This is insufficient to show that there was a breach of the peace.

As such, this Honorable Court should set aside and dismiss the findings of guilt as to the breach of the peace conviction and set aside the sentenced adjudged for it.

ARGUMENT

A1C SMITH'S CONVICTION FOR BREACH OF THE PEACE, BASED EXCLUSIVELY ON SPEECH, IS LEGALLY INSUFFICIENT AND UNCONSTITUTIONAL.

Standard of Review

Issues related to legal sufficiency are reviewed *de novo*. *United States v. Harrington*, No. 22-0100/AF, __ M.J. __, 2023 CAAF LEXIS 577, at *7 (C.A.A.F. Aug. 10, 2023) (citations omitted). Likewise, questions of constitutional law are reviewed *de novo*. *United States v. Goings*, 72 M.J. 202, 205 (C.A.A.F. 2013) (citation omitted).

"Where, as here, an appellant argues that a statute is 'unconstitutional as applied,' [this Court] conduct[s] a fact-specific inquiry." *United States v. Ali*, 71 M.J.

256, 265-66 (C.A.A.F. 2012) (citing *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 289 (1921) ("A statute may be invalid as applied to one state of facts and yet valid as applied to another.")).

Law

First Amendment Framework for Analyzing Unprotected Speech

The First Amendment prohibits the Government from proscribing speech. U.S. Const. amend. 1. "[A]s a general matter, the First Amendment means that the government has no power to restrict expression because of . . . its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). As such, content-based restrictions of speech are presumed unconstitutional. *United States v. Alvarez*, 467 U.S. 709, 716-17 (2012).

However, the Supreme Court has long recognized that certain classes of speech are not protected by the First Amendment. For example, in one of its earliest cases dealing with the issue of incitement, the Court held that when "words are used in such circumstances and are of such a nature to create a clear and present danger" that speech is not protected and is subject to congressional proscription. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

Since *Schenck*, the Supreme Court has defined certain limited and narrow categories of speech which are afforded no protection. *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain *well-defined and*

narrowly limited classes of speech, the prevention and punishment of [is permitted]." (emphasis added)). "These 'historic and traditional categories' are 'long familiar to the bar.'" *Counterman v. Colorado*, 143 S. Ct. 2106, 2113-14 (2023) (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

The categories of unprotected speech include: (1) incitement; (2) obscenity; (3) defamation; (4) speech integral to criminal conduct;[4] (5) fighting words; (6) child pornography; (7) fraud; and (8) true threats. *Alvarez*, 567 U.S. at 717. These classes of speech have often been described by the Court as having "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." *Stevens*, 559 U.S. at 470. However, the Supreme Court has clarified that:

> 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*.

Id. (emphasis added). Since *Stevens*, the Court has continued to reject ad hoc balancing tests in other free speech cases. *See, e.g.*, *Alvarez* 567 U.S. at 717 ("this

[4] This refers to speech used to prove that someone intended to bring about some other unlawful action, such as speech inherent in a conspiracy. *See, e.g.*, *Giboney v. Empire Storage & Ice Co*. 336 U.S. 490, 491, 495 (1949).

Court has rejected . . . a free-floating test for First Amendment coverage based on an ad hoc balancing.") (cleaned up) (citation omitted).

Clear and Present Danger Doctrine

In 1919—prior to the Supreme Court's delineation of the unprotected speech categories in 1942, *Chaplinsky* 314 U.S. at 571-72—the Supreme Court decided the *Schenck* case. 294 U.S. 47. *Schenck* was an incitement case.[5] *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 analysis was used, intermittently, for incitement cases until the Court's decision in *Brandenburg v. Ohio*. 395 U.S. 444, 450-54 (1969) (Douglas, J., concurring). In the interloping years, however, the "clear and present danger" 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;

[5] 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.

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 clear and present danger 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, __, 2023 U.S. App. LEXIS 22503, at *9 (5th Cir. Aug. 25, 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).

Fighting words and Breach of the Peace Statutes

"Fighting words" is another category of unprotected speech. *Chaplinsky*, 315 U.S. at 572. Fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen, are as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Chaplinsky*, 215 U.S. 568). In *Texas v. Johnson*, the Supreme Court further refined the scope of fighting words to those that are: (1) a "direct personal insult;" or (2) "an invitation to exchange fisticuffs." 491 U.S. 397, 409 (1989). This Court has echoed this language stating, "In order to be fighting words, the words must constitute a direct personal insult." *United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996) (citing *Cohen*, 403 U.S. 15). To be sure, in today's day and age, the range of statements that are considered "fighting words" is "exceedingly narrow in scope." *State v. Tracy*, 200 Vt. 216, 237 (Vt. 2015).

Under military law, an accused can commit breach of the peace in two ways: (1) by provoking speech; or (2) by some other tumultuous or violent act, such as engaging in a physical altercation. Article 116, UCMJ.[6] Breach of the peace statutes that criminalize provoking words are constitutional only if they are limited to fighting words. *Chaplinsky*, 315 U.S. 568 (upholding a "breach of the peace"

[6] In the present case, only the former category is at issue due to the charging scheme selected by the government.

conviction because the charged speech constituted "fighting words."); *see also Virginia v. Black*, 538 U.S. 343, 359 (2003) (linking the carve-out for words that incite a "breach of the peace" to precedent holding that fighting words are proscribable under the First Amendment); *Gooding v. Wilson*, 405 U.S. 518, 528 (1972) (invalidating a Georgia "breach of the peace" statute as facially unconstitutional because it did not limit the covered speech to fighting words); *Cohen*, 403 U.S. at 24-26 (setting aside the conviction for breach of the peace because the speech was not "directed to the person of the hearer," an element of the fighting words exception); *Bachellar v. Maryland*, 397 U.S. 564, 566, 571 (1970) (setting aside a conviction based on speech at a protest because the speech "was not within the small class of 'fighting words' that, under *Chaplinsky v. New Hampshire*, are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace'"); *Street v. New York*, 394 U.S. 576, 592 (1969) ("Though it is conceivable that some listeners might have been moved to retaliate upon hearing appellant's disrespectful words, we cannot say that appellant's remarks were so inherently inflammatory as to come within the small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'") (quoting *Chaplinsky*, 315 U.S. at 574)); *Matter of S.L.J.*, 263 N.W.2d 412, 417-18 (Minn. 1978) ("Ever since [*Chaplinsky*] . . . offensive speech statutes

have been found to be constitutional only if criminal prosecution is permitted solely for 'fighting words.'") (citations omitted)).

Article 116, UCMJ—Breach of the Peace

The elements of breach of the peace under Article 116, UCMJ, are: (1) that the accused caused or participated in a breach of peace; and (2) that the peace was thereby unlawfully disturbed. In this case, A1C Smith was charged with breaching the peace "by using provoking language." JA at 40.

Relatedly, Article 117, UCMJ, also proscribes provoking words. Article 117, UCMJ, refers explicitly to fighting words. After all, the President has defined "provoking words" in a way that comports with the Supreme Court's definition of fighting words. "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." *MCM*, Pt. IV, para. 55.c.(1) (emphasis added).

"A breach of the peace is an unlawful disturbance of the peace by an outwards demonstration of a violent or turbulent nature." *MCM*, Pt. IV, para 54.c.(2).

Analysis

1. *A1C Smith's conviction for breach of the peace is unconstitutional and legally insufficient because the charged speech did not constitute fighting words.*

In a conversation with AB, A1C Smith stated "tell that pretty boy in there he needs to watch his ass, there's some hard hitting guys in the street." A1C Smith was convicted for breach of the peace by using the forgoing words, which the Government alleged were "provoking." To sustain a conviction for breach of the peace through provoking words alone, the Government must have proved that the words fell within a category of unprotected speech. The Government failed to do so. And, as such, A1C Smith's conviction is unconstitutional and legally insufficient.

There is only one category of unprotected speech relevant to breach of the peace violations: fighting words. Since *Chaplinksy*, the Supreme Court made clear that when a breach of the peace statute proscribes speech, the regulated speech must fall within the fighting words exception. When the proscribed speech does not constitute fighting words, the Supreme Court has set aside the accused's conviction. *See, e.g.*, *Gooding*, 405 U.S. at 528; *Cohen*, 403 U.S. at 24-26; *Bachellar*, 397 U.S. at 566, 571; *Street*, 394 U.S. at 586-87.[7]

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[7] To define the scope of the controversy, A1C Smith respectfully requests that the Government concede that provoking language charged under Article 116, UCMJ, must constitute fighting words. Alternatively, if the Government does not agree with this proposition, A1C Smith respectfully requests the Government specify which category – or categories – of unprotected speech could qualify for criminalization

Fighting words is an extremely limited category of unprotected speech. As the Court articulated in *Johnson*, fighting words are those that are: (1) a direct personal insult; or (2) an invitation to fisticuffs. 491 U.S. at 409.

In the present case, the charged language did not constitute fighting words. "Fighting words" must be "personally abusive," and must constitute "a direct personal insult or an invitation to exchange fisticuffs." *Cohen*, 403 U.S. at 20 (citation omitted); *Johnson*, 491 U.S. at 398; *Brown*, 45 M.J. at 395 (citation omitted). A1C Smith's statements to a third party (AB), for indirect transmission to an absent individual (Mickey), do not meet this definition. There is nothing in A1C Smith's words constituting a "personal insult" to AB; his words do not so much as mention her. To the extent they were insulting to the absent male customer (which is by no means clear, as "pretty boy" is a fairly mild schoolyard taunt), they were not "direct," as the referenced individual was not even present. Similarly, the words spoken to AB about an absent third party were not "an invitation to exchange fisticuffs." Clearly, an insult like this (if it was an insult at all) directed at an absent individual cannot constitute "fighting words." Indeed, the Government below never even attempted to argue that the speech in this case fell within the fighting words

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under this charging scheme, and which specific category it contends A1C Smith's speech fit into.

exception. The lower court, too, declined to categorize A1C Smith's speech as fighting words. JA at 31-32.

The Government failed to prove that A1C Smith's speech constituted fighting words and no other category of unprotected speech applies to the charged language. When the Government fails to prove that the charged speech constitutes fighting words in a breach of the peace case, the Supreme Court has been clear: the conviction is unconstitutional under the First Amendment and must be set aside. Therefore, A1C Smith's conviction for the use of the charged words is unconstitutional and legally insufficient.

2. A1C Smith's conviction is legally insufficient because the charged language does not meet the definition of provoking words found in Article 117, UCMJ. Article 116, UCMJ, breach of the peace by provoking language, mirrors Article 117, UCMJ, provoking words. As such, the definition for "provoking words" under Article 117, UCMJ, should be applied to Article 116, UCMJ, offenses.

Relatedly, A1C Smith's speech did not meet the *MCM*'s definition of "provoking" words. Therefore, his conviction is legally insufficient.

The speech-related prohibitions of Articles 116 (Breach of the Peace), UCMJ, and 117 (Provoking Words and Gestures), UCMJ, exist within the narrow constitutional exception for fighting words. The President has defined "provoking" words under Article 117, UCMJ, in a manner that tracks point-by-point the definition of fighting words. *Compare Johnson*, 491 U.S. at 409, *with MCM* Pt. IV, 55.c.(1).

When the Government elects to charge an accused with breach of the peace through provoking language, Article 116, UCMJ, mirrors Article 117, UCMJ. In fact, they both refer explicitly to provoking language and, perhaps more importantly, both refer implicitly to fighting words. As such, 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.[8]

A1C Smith's words, "tell that pretty boy in there he needs to watch his ass, there's some hard hitting guys in the street," do not meet the definition of provoking words as defined by the President in Article 117, UCMJ. The Government failed to prove that the words were "used in the presence of the person to whom they [were] directed." A1C Smith was outside and in his car when he uttered the foregoing words. Mickey—the man to whom the words were directed—on the other hand, was inside the gas station. Indeed, within the words themselves, it is clear that the individual to whom they were directed was "in there," meaning inside the store, rather than being present. As such, these words, by definition, were not "used in the presence of the person to whom they [were] directed" as required under the President's definition. To the contrary, A1C Smith was explicitly stating the words

[8] To the extent the Government disagrees with the application of the definition from Article 117, UCMJ, to the elements charged here, A1C Smith respectfully requests it specify what definition "provoking" does have as used here. This word must mean something when used in the context of Article 116, UCMJ, and certainty A1C Smith is entitled to know the definition endorsed by the prosecutorial authority.

to a third party (AB) to be transmitted indirectly to the person to whom they were directed (Micky).

Therefore, because the charged speech failed to meet the relevant definition, A1C Smith's conviction for breach of the peace is legally insufficient.

3. A1C Smith's conviction is legally insufficient because there is no evidence demonstrating that the charged words caused a breach of the peace.

The evidence is further insufficient to satisfy a conviction because the Government failed to prove the second element of Article 116, UCMJ: that the words caused an actual breach of the peace. The Government chose to charge A1C Smith with causing a breach of the peace through certain, provoking words. Based on this charging scheme, the Government was required to prove that A1C Smith's words actually caused a breach of the peace to occur.

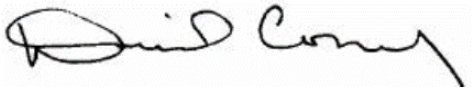
AB's reaction to the words was not to come to fisticuffs, or otherwise become belligerent. Instead, she "chuckled" at the phrase and informed A1C Smith that he should leave the property. This is a far cry from a "disturbance to the public tranquility." Indeed, it is unclear from the record what the actual breach of the peace being alleged is. Clarity cannot be gleaned from the charging language because the Government chose not to plead this element with specificity; instead, it generically pled that A1C Smith had caused a breach of the peace. Nor can clarity be gained by the Government's closing argument, where trial counsel made conclusory but non-specific arguments about the peace being breached. JA at 110-11. In order to define

the scope of the controversy, A1C Smith respectfully requests that the Government specify in its answer what the actual breach of peace being alleged is.

4. Conclusion

A1C Smith was charged with, and convicted for, a crime made up completely of speech, and speech alone. The charged words constituted protected speech and could not constitutionally be the subject of restriction by the Government. A1C Smith's conviction is contrary to the First Amendment. And, as such, A1C Smith's conviction is unconstitutional and 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,
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

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 October 5, 2023.

Respecfully Submitted,

TREVOR N. WARD
Captain, 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 4,886 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
Captain, 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