No. 15-

IN THE

Supreme Court of the United States

CHRISTOPHER S. SCHLOFF,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was found guilty of abusive sexual contact for using a stethoscope to make contact with a another Soldier's breasts. Article 120(g)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920(g)(2) defines "sexual contact" and states: "Touching may be accomplished by any part of the body." The preceding subsection (g)(1) defines a "sexual act" as penetration by "any part of the body or by any object," while subsection (g)(2) does not mention objects. The question presented is:

Whether sexual contact as defined under 10 U.S.C. § 920(g)(2), includes object-to-body contact?

PARTIES TO THE PRCOCEEDING AND RULE 29.6 STATEMENT

The parties appearing here and below are Christopher S. Schloff, the petitioner named in the caption, and the United States. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher S. Schloff respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 74 M.J. 312 (C.A.A.F. 2015), and reprinted in the appendix, Pet. App. 1a-8a. The unpublished opinion of the United States Army Court of Criminal Appeals is reproduced at Pet. App. 9a-16a. Under Article 39(a), UCMJ, 10 U.S.C. § 839(a), the military judge held a hearing outside the presence of the members; an excerpt from the hearing transcript is reproduced at Pet. App. 17a-25a. The military judge's unpublished ruling, which dismissed Schloff's abusive sexual contact charge for failure to state an offense, is reproduced at Pet. App. 26a-27a.

JURISDICTION

The court of appeals entered its judgment on July 16, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

10 U.S.C. § 920 Art. 120. (g)(1) states:

Sexual Act — The term "sexual act" means—

(A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the vulva or anus or mouth, of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

10 U.S.C. § 920 (g)(2) states:

Sexual Contact — The term "sexual contact" means—

(A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or

(B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.

Touching may be accomplished by any part of the body.

STATEMENT OF THE CASE

The appeals court in this case rejected an important presumption of statutory interpretation: "[W]hen 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

10 U.S.C. § 920 covers "rape and sexual assault generally" through four narrowly defined individual crimes. Although there are four different crimes, there are only two actus rei: "sexual act" and "sexual

contact." Schloff was charged with abusive sexual contact under § 920(d), an offense that requires "sexual contact," as defined in § 920(g)(2). There is no mention of object-to-body contact in the text of subsection (g)(2); however, the term "object" is specifically mentioned in the immediately preceding subsection (g)(1), which defines the term "sexual act" as penetration "by any part of the body or by any object."

Ignoring the context of the statute, the appeals court held that the definition of "sexual contact" in § 920(g)(2) includes object-to-body contact. The majority's approach not only overlooked the disparate language between subsections—contravening *Russello*—it also rendered the final clause of subsection (g)(2) superfluous by relying solely on a dictionary definition and "real life experience."

Nothing in this case counsels against the straightforward application of *Russello*. And while this case represents an error in a specialized court, it is an error of great import. An estimated 60% of the Army's courts-martial include sexual assault charges under § 920. Further, the result of the error here means that sexual assault charges—carrying a mandatory requirement of registration as a sex offender upon conviction—will be brought in cases like this one where no such charge is permissible in the first instance. This case presents an opportunity for the Court to exercise its supervisory authority and reinforce interpretive rules that are designed to respect the language Congress has enacted.

I. STATUTORY FRAMEWORK

For almost a decade, Congress has defined "sexual act" and "sexual contact" in adjacent subsections of the same statute. The definition of "sexual act" enacted in 2006 included "the penetration, however

slight, of the genital opening of another by a hand or finger or *by any object*, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person." 10 U.S.C. § 920(t)(1)(b) (2007) (emphasis added). "Sexual contact" required an "intentional touching" but did not mention objects. *Id.* at § 920(t)(2).

When Congress revised the statute in 2012, a sexual act could still be accomplished "by any part of the body or *by any object*." 10 U.S.C. § 920(g)(1)(B) (emphasis added). But Congress never added "any object" to the definition of sexual contact in the next subsection. Instead, it defined sexual contact as "any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person." § 920(g)(2)(B). And Congress added a clarifying clause: "Touching may be accomplished by any part of the body." § 920(g)(2).

II. PROCEEDINGS BELOW

A. Court-Martial

A panel of officers sitting as a general court-martial convicted Schloff of abusive sexual contact by pressing a stethoscope to the breasts of another Soldier during a medical examination. Schloff moved both before trial and after the government rested for dismissal of the charges for failure to state an offense. Although the military judge denied both motions, he recognized that the statutory definition of "sexual act" differed from the definition of "sexual contact." Pet. App. 20a. The military judge explained that a Soldier could commit a "sexual act" using "a part of the body or an object," yet Congress "didn't include the language, object, when [it] defined sexual contact and went so far as to specifically define exactly what

– touching could encompass – that being any part of the body." *Id.*

After the announcement of findings, Schloff moved again to dismiss the sexual contact charge. The military judge reserved ruling on this motion until after sentencing, at which time he held that Schloff was correct and dismissed the charge for failure to state an offense. *Id.* at 26a-27a.

The military judge reasoned that the language of § 920(g)(2)—"[t]ouching may be accomplished by any part of the body"—unambiguously limited the offense of sexual contact to the circumstance where "some part of the accused's body touches the alleged victim." *Id.* at 26a. Had Congress desired the crime to include touching with an object, the military judge explained, it could have added "or object" to the end of § 920(g)(2), just as it had included objects in the definition of "sexual act" in the preceding subsection (g)(1). *Id.* at 27a. The government timely filed an appeal under 10 U.S.C. § 862(a).

B. Army Court Of Criminal Appeals

The Army Court of Criminal Appeals reversed the military judge's decision and offered three reasons for its holding. Pet. App. 9a-16a. First, it concluded that § 920(g)(2) does not require direct contact because the statute contemplates touching through the clothing or via another person. *Id.* at 13a. Second, the court analogized the touching required for bodily harm in § 920 to the touching required for bodily harm in § 928, the assault and battery section, which includes touching with an object. *Id.* at 13a-15a. Lastly, the court determined that the clarifying language, "[t]ouching may be accomplished by any part of the body," was permissive, not exclusive. *Id.* at 15a. Schloff timely appealed.

C. Court Of Appeals For The Armed Forces

In a divided 3-2 decision, the court of appeals affirmed. To interpret sexual contact under § 920(g)(2), the majority began with the meaning of the word "touching." Pet. App. 4a. Absent a specific statutory definition, the majority looked to the ordinary meaning of "touch" as it is defined in Merriam-Webster's online dictionary. *Id.* at 5a & n.2. That definition included body-to-body contact as well as contact with "an implement." *Id.* at 5a n.2. Relying on its "[r]eal life experience," the majority further explained that touching for a professional purpose can occur either directly or with implements. *Id.*

The majority rejected Schloff's argument that Congress limited the statutory definition of sexual contact to body-to-body contact. Even though the statute states, "[t]ouching may be accomplished by any part of the body," the majority concluded this provision is permissive rather than exclusive. *Id.* at 6a. The majority did not address any canons of statutory construction because it found no ambiguity in the statute. *Id.*

Judge Stucky, joined by now-Chief Judge Erdmann, dissented. The dissent rejected the majority's reliance on the dictionary definition of touch to conclude that the statute was unambiguous, *id.* at 7a (citing *Yates* v. *United States*, 135 S. Ct. 1074, 1081 (2015)), and also rejected the majority's reliance on "[r]eal life experience," *id.* at 8a. The dissent found that this Court's decision in *Russello* governed and concluded that Congress did not criminalize contact with an object as "sexual contact" under § 920(g)(2). *Id.* (citing *Loughrin*, 134 S. Ct. at 2390).

REASONS FOR GRANTING THE PETITION

I. THE APPEALS COURT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

A. In Conflict With *Russello*, The Appeals Court Ignored Disparate Language In Adjacent Statutory Definitions

The court below overlooked a critical distinction between § 920's definition of "sexual contact" and the immediately preceding definition of "sexual act." The court failed to give any weight to the inclusion of "by an object" in the definition of "sexual act" and the exclusion of that phrase in the definition of "sexual contact." This contradicts the rule in *Russello* v. *United States*, 464 U.S. 16 (1983), that Congress is presumed to act purposely when it includes or excludes language in adjacent subsections of the same statute.

The appeals court avoided application of *Russello* by using a rote dictionary definition to conclude that "touching" in the context of § 920(g)(2) is unambiguous. However, "[w]hether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words." *Yates* v. *United States*, 135 S. Ct. 1074, 1081 (2015). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) (citations omitted). *Russello* applies as a necessary tool to determine whether the specific context of the language and the broader context of statute support the interpretation of § 920(g)(2). The decision below contravenes *Russello*.

The relevant text of § 920(g)(1)(B) states that a sexual act can be committed by penetration "by any part of the body or by any object . . . ." However, the next subsection defining sexual contact lacks any reference to objects. § 920(g)(2). Courts must give meaning to the difference in language because "when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." *Loughrin*, 134 S. Ct. at 2390 (quoting *Russello*, 464 U.S. at 23). The relevance of disparate language is heightened when Congress enacts the sections at the same time, see *Bates* v. *United States*, 522 U.S. 23, 30 (1997), which it did for both subsections of § 920(g).

This Court highlighted the importance of disparate language when it applied *Russello* to 18 U.S.C. § 1344, a statute criminalizing bank fraud. See *Loughrin*, 134 S. Ct. at 2390. The first clause of that statute criminalized defrauding a financial institution, while the second clause criminalized a broader range of acts resulting in deprivation of property from a financial institution. *Id.* The Court determined that specific intent to "defraud a financial institution" did not apply to the second clause because Congress included it in the first clause but not the second. *Id.* at 2389-90. A contrary construction "collides" with *Russello*. *Id.*

So too here. Like *Loughrin*, this case requires a straightforward application of *Russello* because Congress included "an object" in one subsection and excluded that language in the next subsection of the same statute. See Pet. App. 8a (Stucky, J., dissenting).

Other courts of appeal have applied *Russello* in similar contexts. For example, the Eleventh Circuit

applied *Russello* when it considered whether a BB-gun qualified for the "dangerous weapon" sentencing enhancement or the more severe "firearm" enhancement. *United States* v. *Koonce*, 991 F.2d 693, 698 (11th Cir. 1993). The court decided only the "dangerous weapon" enhancement applied because it contained language about brandishing an object appearing to be a dangerous weapon, while the firearm enhancement contained no mention of objects appearing to be firearms. *Id.*

The appeals court in this case did not engage in proper statutory construction when it held that object-to-body touching falls within the statutory definition of "sexual contact" even though Congress included the words "by any object" in the preceding subsection but excluded them in § 920(g)(2). The appeals court impermissibly "read an absent word into the statute." *Lamie* v. *United States Trustee*, 540 U.S. 526, 538 (2004). Adding such words is "not a construction of a statute, but, in effect, an enlargement of it by the court." *Iselin* v. *United States*, 270 U.S. 245, 251 (1926). Such enlargement is prohibited even if Congress left out words "presumably by inadvertence." *Id.* Congress could well have written "by any part of the body or by any object," the exact words used in § 920(g)(1)(B), into the clarifying "[t]ouching may be accomplished by" clause in § 920(g)(2). But "[t]he short answer is that Congress did not write the statute that way." *Russello*, 464 U.S. 16, 23 (1983).

B. The Decision Below Conflicts With At Least Two Other Important Rules Of Statutory Interpretation

The appeals court avoided ambiguity in § 920(g)(2) by purporting to use the "ordinary meaning" of the word "touching" based solely on a dictionary. Pet App. 5a. In doing so, the court committed the same

error requiring reversal in *Yates*—"[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." 135 S. Ct. at 1081–82 (quoting *Robinson*, 519 U.S. at 341).

Although dictionary definitions "bear consideration, they are not dispositive of the meaning of" statutory terms. *Id*. at 1082. In this case, the majority committed an error more egregious than the Eleventh Circuit did in *Yates* because it relied not only on a dictionary, but also "[r]eal life experience," to interpret the terms of the statute. Pet. App. 5a. Statutory interpretation based on judges' real life experience invites speculation about what Congress really meant. However, "[w]e do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1898-1899).

This Court has applied dictionary definitions at appropriate times, as it did in *Sandifer* v. *United States Steel Corp.*, 134 S. Ct. 870 (2014), the case cited below to justify the majority's analysis. But *Sandifer* is inapposite because the statute at issue there had no clarifying or disparate language to aid interpretation. See *id.* at 876 (defining "clothes" in a section of statute about hours worked and collective bargaining agreements). Unlike the statute in *Sandifer*, Congress provided clarifying text to determine whether object-to-body contact amounts to abusive sexual contact under § 920.

Relying on a dictionary definition, the appeals court also rendered the last clause of § 920(g)(2) superfluous. The last clause clarifies the two prior clauses and states that "[t]ouching may be accomplished by

any part of the body." § 920(g)(2). If the ordinary meaning of "touching," as adopted by the appeals court, already includes "contact . . . made either by an object or by a body part," Pet. App. 5a, then the last clause is superfluous. Under the majority's erroneous reading, the clause confuses rather than clarifies.

This Court routinely rejects statutory interpretation "which renders superfluous another portion of th[e] same law." *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330 (2011) (quoting *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (collecting cases)). This is especially true when the surplus words "describe an element of a criminal offense." *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994). In this case, the "surplus" words in § 920(g)(2) describe the scope of criminal touching.

The last clause in § 920(g)(2) warrants extra deference against surplusage because Congress recently added it. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone* v. *I.N.S.*, 514 U.S. 386, 397 (1995). The earlier definition of sexual contact contained no clarifying language related to "touching." See 10 U.S.C. § 920(t)(2) (2007). Congress added the last clause in 2012, but the appeals court gave it no effect.

The government conceded at oral argument that the last clause of § 920(g)(2) "seem[ed] like gratis language" and "may be extra" because, under its interpretation, subsection (g)(2) already included both body-to-body and object-to-body contact. Oral Arg. Recording at 17:15-19:00.[1] That is, however, the in-

[1] Available at: http://www.armfor.uscourts.gov/newcaaf/calendar/201504.htm (last visited Dec. 2, 2015).

terpretation adopted below. The appeals court thus violated "the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Loughrin*, 134 S. Ct. at 2390 (quoting *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000)).

Giving effect to the final clause of § 920(g)(2) is important because it narrows the scope of criminal liability. Under the principle of *expressio unius est exclusio alterius*, the inclusion of one thing implies the exclusion of others. See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 107–11 (2012). Here, Congress included touching "by any part of the body" to clarify the scope of touching that amounts to sexual contact. Because Congress included "any part of the body" and excluded "any object" from the final clause, object-to-body touching falls outside the scope of criminal liability.

Contrary to the majority's analysis, Pet. App. 6a, the use of the permissive term "may" in the final clause is irrelevant. Indeed, this Court applied the *expressio unius* canon to a statute that used the permissive term "may." See *United States* v. *Giordano*, 416 U.S. 505, 513 (1974) (executive assistant was excluded even though the statute provided that "[t]he Attorney General, or any Assistant Attorney General specifically designated by the Attorney General, *may* authorize" an application) (emphasis added).

II. THE BROAD DEFINITION OF TOUCHING IN THE DECISION BELOW WILL AFFECT THOUSANDS OF MILITARY CASES

If this Court allows the overly broad interpretation of § 920(g)(2) to stand, thousands of military cases will be misguided and prosecuted against the intent

of Congress. This Court's review is warranted to prevent such a broad misapplication of law.

"From fiscal year 2012 to fiscal year 2013, there was an unprecedented 53% increase in victim reports of sexual assault. In fiscal year 2014, the high level of reporting seen in fiscal year 2013 was sustained with 6,131 reports of sexual assault." *Department of Defense Annual Report on Sexual Assault in the Military* (FY 2014).[2] See also Jennifer Steinhauer, *Reports Of Military Sexual Assault Rise Sharply*, N.Y. Times (Nov. 7, 2013) (reporting "3,553 sexual assault complaints" during the first three quarters of fiscal year 2012).[3] Based on these reports, the government convenes hundreds of courts-martial each year with charges brought under § 920. See, *e.g.*, *Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice, October 1, 2013 to September 2014*.[4] There is no evidence that the number of reported sexual assaults or courts-marital will decrease or become less prevalent over time.

This Court has granted certiorari to review decisions from courts with limited jurisdiction, including military cases. *E.g., United States* v. *Denedo*, 556 U.S. 904 (2009). The Court recently granted review of a Federal Circuit decision in which the majority's erroneous interpretation of a statute affected thousands of government contracts with the Department of Veterans Affair around the country. *Kingdomware*

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[2] Available at: http://sapr.mil/public/docs/reports/FY14_Annual/FY14_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf (last visited Dec. 2, 2015).

[3] Available at: http://www.nytimes.com/2013/11/07/us/reports-of-military-sexual-assault-rise-sharply.html

[4] Available at: http://www.armfor.uscourts.gov/newcaaf/annual/FY14AnnualReport.pdf (last visited Dec. 2, 2015).

Techs. v. *United States cert. granted*, (U.S. June 22, 2015) (No. 14-916). The Court should grant this petition because the Court of Appeals for the Armed Forces misinterpreted a statute that will affect thousands of military members.

III. EVEN IF *RUSSELLO* DOES NOT GOVERN, THE APPEALS COURT FAILED TO APPLY THE RULE OF LENITY AS REQUIRED BY DECADES OF THIS COURT'S PRECEDENT

Section 920(g)(2) is grievously ambiguous and the rule of lenity requires that the ambiguity be resolved in Schloff's favor. *Chapman* v. *United States*, 500 U.S. 453, 463 (1991). The definition of "sexual contact" does not mention object-to-body touching, and the statutory ambiguity is compounded by the reference to an object in the previous subsection.

This Court recently reaffirmed its commitment to the long-standing principle that, if "recourse to traditional tools of statutory construction leaves any doubt about the meaning of" a statutory term, the Court will "invoke the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Yates*, 135 S. Ct. at 1088 (quoting *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000), and *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)); see also *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) ("In these circumstances – where text, structure, and [legislative] history fail to establish the Government's position is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."); *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917) (the rule of lenity requires that "before a man can be punished as a criminal . . . his case must be 'plainly and unmistakably' within the provisions of some statute").

IV. THIS CASE IS AN EXCELLENT VEHICLE TO ADDRESS THE QUESTION

Schloff's case is an ideal vehicle for this Court to consider the question presented. The issue was cleanly preserved before trial, after trial, and on appeal. The case is not encumbered by procedural anomalies or alternate grounds of decision. Judge Stucky's dissent, joined by now-Chief Judge Erdmann, ably explained the deficiencies in the majority's approach and articulated the proper rationale for how the case should have been decided. Pet. App. 7a-8a. Thousands of potential military sexual contact cases will be decided erroneously if the majority's interpretation of § 920(g)(2) is allowed to stand. This case is ripe for the Court's review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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