

No. 25-742

IN THE
Supreme Court of the United States

ZHUO H. ZHONG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

The Petition asks this Court to resolve two statutory interpretation questions regarding the scope of appellate review. The first question is whether Congress’s amendment to Article 67, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867, allows the Court of Appeals for the Armed Forces (CAAF) to hold that a conviction is factually insufficient. The second question is whether Article 66, UCMJ, 10 U.S.C. § 866, grants courts of criminal appeals, including the Air Force Court of Criminal Appeals (Air Force Court), the authority to correct an unconstitutional firearms ban annotated after entry of judgment.

In opposing certiorari on factual sufficiency review, the Government commits the same error as the CAAF by concluding that the language in an amended statute means the same thing as different language in the previous statute. *Compare* U.S. Br. 9–14, *with United States v. Csiti*, 85 M.J. 414, 417–19 (C.A.A.F. 2025). “When Congress acts to amend a statute, [this Court] presume[s] it intends its amendment to have real and substantial effect.” *Stone v. INS*, 514 U.S. 386, 397 (1995) (first citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); and then citing *Moskal v. United States*, 498 U.S. 103, 109–11 (1990)). Despite this presumption, the Government highlights the long-standing constraint that the CAAF’s review is limited to matters of law and cannot include factual sufficiency review. U.S. Br. at 10–11. This argument strips the amendment of significance. The Government’s interpretation of the amendment means that the statute imparts only an already well-established principle. This Court’s review is necessary to give Congress’s change to the statute actual effect

in military courts.

The Government's opposition to certiorari for the review authority of an unconstitutional firearms prohibition also seeks to limit appellate review in contravention of an enabling statute. In Petitioner's case, this prohibition is indicated on the First Indorsement, a document signed by the staff judge advocate after the military judge executes the Entry of Judgment. Pet. App. 25a. It is therefore part of the processing of the court-martial that comes after judgment is entered into the record, placing it within the ambit of the Air Force Court's authority to grant appropriate relief under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2). The Government's argument denies this authority by attempting to place the First Indorsement in a status that neither becomes part of the Entry of Judgment nor comes after it. U.S. Br. 14–17. This Court should grant certiorari to ensure the legal determinations indicated on the First Indorsement receive the full scope of appellate review allowed by the plain text of the statute.

I. Congress's amendment to Article 67, Uniform Code of Military Justice, altered the scope of the Court of Appeals for the Armed Forces' review authority.

Congress amended Article 67, UCMJ, 10 U.S.C. § 867, by adding a new subsection—(c)(1)(C)—that addresses the CAAF's review of a court of criminal appeals' determination as to the factual sufficiency of the findings. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(c), 134 Stat. 3388, 3612 (2021); *contrast* 10 U.S.C. § 867(c)(1) (2024) (including three subsections), *with* 10 U.S.C. § 867(c)(1) (2018)

(including only two subsections). Adding a new subsection is more than a stylistic or nonsubstantive change, and it is therefore “presumed to entail a change in meaning.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 256 (2012).

The Government attempts to discount the import of the change in meaning brought about by this statutory amendment by claiming that it is “extremely unlikely” that Congress would make this change “without expressly saying so.” U.S. Br. 12. The problem with this argument is that Congress did say so in 10 U.S.C. § 867(c)(1)(C). That subsection allows the CAAF to act “with respect to . . . the findings as set forth in the entry of judgment, as affirmed, dismissed, set aside, or modified by the Court of Criminal Appeals as incorrect in fact under [the factual sufficiency review statutory provision].” 10 U.S.C. § 867(c)(1)(C) (referencing 10 U.S.C. § 866(d)(1)(B)).

The Government further minimizes this statutory change by arguing that it merely “codified the CAAF’s practice of reviewing legal questions arising from the [Air Force Court’s] factual determinations.” U.S. Br. 13. But the Government does not offer any suggestion as to why a 2021 amendment would simply codify the CAAF’s existing review authority. Adding a new subsection describing when the CAAF may act would have been unnecessary if Congress only wanted the CAAF to exercise the same authority that it already had under the preexisting statute and applicable precedents. The reasonable conclusion is that Congress added a new subsection to this statute to give the CAAF a different authority. *See* SCALIA & GARNER, *supra*, at 256 (“[A] change in the language of

a prior statute presumably connotes a change in meaning.”)

The absence of any different authority is why the Government’s and the CAAF’s interpretations render subparagraph (c)(1)(C) meaningless. The Government contends that this is an erroneous view because subsection (c)(1)(C) has meaning in that it allows the CAAF to review a court of criminal appeals’ factual sufficiency determination for legal error. U.S. Br. at 11–12. This contention neglects the statutory history, mistakenly reading the statute as if it should be interpreted in a vacuum. *See Snyder v. United States*, 603 U.S. 1, 12 (2024) (assessing statutory history and concluding that it would be strange to interpret an amended statute as having the same meaning that it had before the amendment). Since Article 67, UCMJ, already allowed the CAAF to review factual sufficiency determinations for legal error, reading subsection (c)(1)(C) as allowing the same thing makes it meaningless because it keeps the meaning of the statute the same as it was before the amendment.

Contrary to the Government’s claim, the CAAF did not need a new statutory provision to enable its review of a lower court’s interpretation of the new legal standard. U.S. Br. at 13. The existing statute already allowed for this, and the CAAF’s precedents made it clear that it would review factual deficiency determinations “for the application of ‘correct legal principles.’” *United States v. Clark*, 75 M.J. 298, 300 (C.A.A.F. 2016) (quoting *United States v. Leak*, 61 M.J. 234, 241 (C.A.A.F. 2005)). Adding subsection (c)(1)(C) presumptively changed that existing authority. *Stone*, 514 U.S. at 397. The text of the statute provides for a review of the *findings* as affirmed, dismissed, set aside, or modified under the

factual sufficiency review provision, not a lower court's interpretation of the legal standards. 10 U.S.C. § 867(c)(1)(C). When read in conjunction with statutory history, this text grants factual sufficiency review authority to the CAAF. *See Snyder*, 603 U.S. at 10–12 (interpreting a statute by considering the text first, then the considering the statutory history).

By adding a new subsection to the statute, Congress established a review authority that differs from the already established authority. The narrow interpretation advanced by the Government and the CAAF disregards this change, thwarting Congress's effort to alter CAAF's authority and preventing Petitioner from receiving the full scope of appellate review allowed by the statute. This discrepancy undermines one of three categorical grants of appellate review authority, 10 U.S.C. § 867(c)(1)(A)–(C), and will affect all future appellants who challenge the factual sufficiency of findings. Ensuring that service members receive the full protection of factual sufficiency review is particularly important because, as the CAAF has observed, factual sufficiency review helps offset a court-martial defendant's lack of a core constitutional right enjoyed by criminal defendants in every other U.S. state and federal court: the right to be convicted only upon a unanimous verdict. *United States v. Anderson*, 83 M.J. 291, 299 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024). These factors underscore the necessity of this Court's review.

II. The Air Force Court of Criminal Appeals can correct errors in the first indorsement to the entry of judgment because they are processing errors that occurred after judgment was entered.

The Air Force Court has the authority to grant appropriate relief for errors in Petitioner's First Indorsement because those errors were part of "the processing of the court-martial after judgment was entered into the record." 10 U.S.C. § 866(d)(2). The Government errs in its opposing assertion that the First Indorsement is entered into the record simultaneously with the Entry of Judgment. U.S. Br. 15–16. The paragraph in the regulation cited by the Government shows that the First Indorsement follows the Entry of Judgment. *Id.* at 16 (citing Dep't of the Air Force Instr. 51-201 ¶ 20.41); Pet. App. 25a. This paragraph states, "*After* the [Entry of Judgement] is signed by the military judge and returned to the servicing legal office, the [Staff Judge Advocate] signs and attaches to the [Entry of Judgment] a first indorsement . . ." Pet. App. 25a (emphasis added). The First Indorsement is sequenced after the Entry of Judgement, and the two are separated by the ministerial task of returning the Entry of Judgment to the servicing legal office. *Id.* These are separate, not simultaneous, steps in the processing of the court-martial.

Even if the Government's argument about the relationship between the Entry of Judgment and the First Indorsement were correct, it would create another avenue for the Air Force Court to review the firearms prohibition on the First Indorsement. The Government asserts that the Entry of Judgment includes "an updated indorsement noting any

criminal indexing requirements.” U.S. Br. at 4–5. It then goes on to note that “[e]rrors in the entry of judgment may be corrected as specified in Rules for Courts-Martial [(R.C.M.)] 1111(c) and 1112(d).” *Id.* at 5, 18. But R.C.M. 1111(c) and 1112(d) both allow the Air Force Court to correct the Entry of Judgment, either directly, R.C.M. 1111(c)(2), or by returning it to the military judge for correction, R.C.M. 1112(d)(2). If, as the Government asserts, the First Indorsement were included in the Entry of Judgment, then the Air Force Court would have the authority to act on the First Endorsement as part of its authority to correct the Entry of Judgment.

The Government fails to appreciate this implication, maintaining that the CAAF “correctly recognized that neither it nor the [Air Force Court] has statutory authority to review the indorsement that accompanied petitioner’s judgment.” U.S. Br. 14. Petitioner maintains his argument that the correct authority for the Air Force Court to fix errors in the First Indorsement is 10 U.S.C. § 866(d)(2) because they are processing errors after judgment was entered into the record. But this alternate possibility for the Air Force Court to exercise authority over the First Indorsement underscores the flaw inherent in the Government’s position. The Government would have the First Indorsement exist in a proverbial no-man’s land where it is included in the Entry of Judgment but not a part thereof, accompanying the Entry of Judgment without coming after it. By creating this nebulous status, the approach championed by the Government would allow the legal determinations on the First Indorsement to evade judicial review during the direct appeal of the court-martial.

Moreover, there is a practical need for judicial review of the First Indorsement in Petitioner's case, despite the Government's argument to the contrary. U.S. Br. 17–18. Petitioner's case presents a question of the constitutionality of criminal indexing indicated on the First Indorsement. Specifically, Petitioner asserts that the statutory firearms prohibition on the First Indorsement is unconstitutional as applied to him because it violates his Second Amendment rights. U.S. Const. amend. II; *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 19 (2022). Determining the constitutionality of an action applying a statute is a core judicial role. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803). If the Air Force Court and the CAAF lack the authority to review legal determinations on the First Indorsement, then judicial review of the constitutionality of those determinations would be foreclosed during the direct appeal of a court-martial. The constitutional dimension of the underlying error highlights the need for appellate courts to exercise the review authority granted by statute, necessitating this Court's review to clarify the scope of that statutory authority.

III. This Petition is an ideal vehicle to resolve these statutory interpretation questions.

This Petition presents a ready opportunity for this Court to resolve two pressing matters of appellate review authority. The record provides reason to question the factual sufficiency of Petitioner's indecent recording conviction, contrary to the Government's argument. U.S. Br. 14. The video at issue is not in evidence. Pet. App. 9a. While the victim testified that she recognized her own buttocks in the video she saw, there is also evidence that Petitioner previously made consensual recordings of their sexual

activity, leaving the possibility that she saw one of the previous, consensual videos. Pet. App. 8a. The Air Force Court also acknowledged that “the evidence indicated [Petitioner] may have believed he had [the victim’s] consent to being recorded before he made the recording.” Pet. App. 15a. These issues could convince the CAAF that the finding is against the weight of the evidence, even if they did not convince the lower court. Petitioner’s case therefore warrants the factual sufficiency review at the CAAF provided for in subsection (c)(1)(C). 10 U.S.C. § 867(c)(1)(C).

The Government’s argument that Article 67(c)(1)(C) would not necessarily apply to Petitioner’s case because the Air Force Court did not determine that a finding was incorrect in fact is unfounded. U.S. Br. 13–14. This reading of the statute conflicts with its text for two reasons. First, the CAAF cannot be limited to acting only where the lower court determines a finding to be incorrect in fact because this subsection also enables it to act on findings “as affirmed.” 10 U.S.C. § 867(c)(1)(C). Since the lower courts would not affirm a finding that was incorrect in fact, the presence of the “as affirmed” clause indicates that the CAAF’s authority extends to cases without a determination that a finding was incorrect in fact.

Second, the language of subsection (c)(1)(C) is substantially similar to the language of the two subsections preceding it. *Compare* 10 U.S.C. § 867(c)(1)(C), *with* 10 U.S.C. § 867(c)(1)(A)–(B). Subsection (c)(1)(A), for instance, allows the CAAF to act on the findings and sentence “as affirmed or set aside as incorrect in law.” 10 U.S.C. § 867(c)(1)(A). This provision is unaltered from previous versions of the statute. 10 U.S.C. § 867(c)(1)(A) (2018). But the use of the “incorrect in law” language has not stopped

the CAAF from reviewing the legal sufficiency of findings after a lower court affirmed them as being correct in law. *See, e.g., United States v. Navarro Aguirre*, 86 M.J. 43, 52, 54 (C.A.A.F. 2025) (setting aside a previously affirmed finding as legally insufficient). Likewise here, the phrase “as incorrect in fact” does not limit the CAAF’s review authority to only cases in which a lower court found factual insufficiency. The statute enables the CAAF to act in cases, like Petitioner’s, where the lower court affirmed findings as factually sufficient.

Petitioner’s case is also an excellent vehicle to decide the statutory authority of the Air Force Court and the CAAF to review the firearms prohibition indicated on the First Indorsement. Contrary to the Government’s argument, U.S. Br. 17, Petitioner raised this issue before the Air Force Court, triggering that court’s correction authority. Pet. App. 8a; *United States v. Williams*, 85 M.J. 121, 126 (C.A.A.F. 2024) (stating that 10 U.S.C. § 866(d)(2) places the burden on the accused to raise an issue). Raising an issue is sufficient to “demonstrate[] error” and invoke the Air Force Court’s authority, even without a specific argument about which statutory provision provides that authority. 10 U.S.C. § 866(d)(2); *see Williams*, 85 M.J. at 126. And the CAAF specifically granted review of whether the Air Force Court had jurisdiction to provide the requested relief under 10 U.S.C. § 866(d)(2). Pet. App. 4a. Petitioner’s case squarely presents the issue of statutory review authority that

arises in many cases,¹ warranting review by this Court.

CONCLUSION

For the foregoing reasons and those previously stated in the Petition, this Court should grant the Petition.

Respectfully submitted,

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¹ The Government noted that this Court previously denied certiorari on this issue in a petition consolidating thirteen cases for review. U.S. Br. 14 (citing *Schneider v. United States*, No. 25-685, __ S. Ct. __, 223 L. Ed. 2d 519 (Jan. 12, 2026)). A currently pending petition requests certiorari on this issue in an additional case. *United States v. Myslow*, No. 26-0050/AF, 2026 CAAF LEXIS 21, 2026 WL 374024 (C.A.A.F. Jan. 6, 2026), *petition for cert. filed*, No. 25-1148 (U.S. Mar. 31, 2026).