IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

TAYARI S. VANZANT
Staff Sergeant (E-5),
United States Air Force,
Appellant.

USCA Dkt. No. 24-0182/AF

Crim. App. Dkt. No. ACM 22004

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REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES

OTHER MATERIALS

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FOR THE ARMED FORCES

UNITED STATES,	)	**REPLY BRIEF**
Appellee	)	
v.	)	
	)	
TAYARI S. VANZANT	)	
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Appellant	)	USCA Dkt. No. 24-0182/AF
	)	

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

THE AIR FORCE COURT OF CRIMINAL APPEALS HAD JURISDICTION TO REVIEW APPELLANT'S CASE.

It is undisputed that the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (FY23 NDAA), enacted on December 23, 2022, significantly expanded appellate jurisdiction of the courts of criminal appeals (CCAs) under Article 66(b)(1)(A) and limited review by the Judge Advocates General under Article 69. Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582-84 (2022). The statute itself, both in the language used and the procedural requirement for a judgment before the CCA or Judge Advocate General can act on the appeal, dictates what pre-enactment judgments fall under the expanded Article 66, UCMJ, review. *Id.* The plain reading of § 544 states specifically when the expanded Article 66 provisions do not apply. *Id*. Additionally, convicted service members can only submit matters

to a CCA or Judge Advocate General in a case where a court-martial judgment has already occurred. *See generally*, Article 69, UCMJ (2018 or 2022). Thus, the statute's provisions concerning the inapplicability of the expanded Article 66, UCMJ, jurisdiction demonstrate that these changes apply to judgments that occurred prior to its enactment if they do not fall under one of the specified categories of inapplicability. *United States v. Mieres*, 84 M.J. 682 (C.G. Ct. Crim. App. 2024). It follows, then, that pending pre-enactment judgments like SSgt Vanzant's were not excluded from the expansion of direct review under Article 66, UCMJ. The meaning of this statute is also viewed through its broader context. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). This context of the FY23 NDAA demonstrates Congress' intent to expand the CCAs' appellate review and supports the conclusion that Congress intended to include cases such as Staff Sergeant (SSgt) Vanzant's in the expanded jurisdiction under Article 66(b)(1)(A) when it only excluded from the amendment's reach two categories of cases, both of which featured pre-enactment judgments that had already started down the path of final judicial review. *See* Pub. L. No. 117-263, §544(d), 136 Stat. at 2583-84.

Under § 544, the Air Force Court had jurisdiction over SSgt Vanzant's case based on the plain reading of the statute. This plain meaning of the statute is developed within the original brief, and will not be re-stated here. Appellant's Br. at 10-16, December 9, 2024. This Court need not rely on congressional intent, but

it further supports the plain reading of the text—that the Air Force Court had jurisdiction over SSgt Vanzant's case. The jurisdiction of the Air Force Court is further supported by the existing provisions of the Uniform Code of Military Justice (UCMJ). Moreover, the Government should be precluded from adopting inconsistent positions under the principle of judicial estoppel, and the changes to the CCA's jurisdiction under Article 66, UCMJ, do not implicate constitutional concerns.

1. The plain meaning of the statute, within the broader statutory context of the FY23 NDAA, demonstrates Congress's intent to extend jurisdiction to cases such as Staff Sergeant Vanzant's.

Within § 544 of the FY23 NDAA, Congress expressly provided for the inapplicability of changes to Articles 66 and 69, UCMJ. *See* Pub. L. No. 117-263, § 544, 136 Stat. at 2582-84. The changes do not apply to two categories of service members with convictions prior to enactment—those who had submitted matters under the old scheme either to the CCA or to TJAG. *Id.* Therefore, the statute's changes plainly apply to all other pending pre-enactment judgments. *See Mieres*, 84 M.J. at 685-86.

Limiting convicted service members' right to appeal solely to an Article 65(d) review, Answer at 49, where SSgt Vanzant, and other similarly situated to him are afforded only a cursory review, is also inconsistent with the broader statutory context of the FY23 NDAA, expanding convicted service members' access to the CCA.

Compare Pub. L. No. 117-263, §544, 136 Stat. at 2582-84 (where Congress granted all service members convicted by a general or special court-martial the right to appeal to the applicable CCA) *with* JA at 059 (documenting the limited review provided under Article 65(d)). The Government's position asserting finality upon completion of an Article 65, UCMJ, review and the applicability of the new Article 69, UCMJ, to SSgt Vanzant and other similarly situated convicted service members would effectively retroactively revoke the possibility of review by the CCA, which was previously available to them under Article 69(b)-(d), UCMJ, before that statute was amended in 2022. Previously, SSgt Vanzant, and others similarly situated to him, would have been able to apply to The Judge Advocate General (TJAG) for relief, and eventually reach the CCA under Article 69, UCMJ. *See* Article 69(b)-(d), UCMJ, 10 U.S.C. § 869(b)-(d) (2018).[1] Under the new provisions of Article 69, UCMJ, SSgt Vanzant and other similarly situated service members convicted by a special or general court-martial could not access the CCA because the only reviewable action for cases that were reviewed under Article 65, UCMJ, is a determination of whether the waiver of withdrawal of direct appeal was invalid under the law. Article 69(a)(2) and (c)(2), UCMJ, 10 U.S.C. §§ 869(a)(2), (c)(2).[2]

[1] This version of Article 69 is reprinted in appendix 2 of the 2019 *MCM*.
[2] This version of Article 69 is reprinted in appendix 2 of the 2024 *MCM*.

That is the only scenario under which a Judge Advocate General may now refer a special or general court-martial case to a CCA.

The Government's interpretation of § 544 flies in the face of the broader statutory context of the expansion of convicted service members' ability to reach the CCA. Section 544 was enacted to expand service members' access to judicial appellate review. The Government's interpretation of section 544 would extinguish a large class of service members' access to judicial appellate review, which would be antithetical to that section's purpose.

Moreover, Congress could have excluded cases like SSgt Vanzant's, but chose not to. *See* Pub. L. No. 117-263, §544(d), 136 Stat. at 2583-84. As stated above, because an entry of judgment is required before any action by a CCA or TJAG, and Congress excluded two categories of cases with pre-enactment judgments, these changes must apply to other pending pre-enactment judgments. *See Mieres*, 84 M.J. at 685-86. Congressional intent is not hard to decipher here. In *Mieres*, the Coast Guard Court reasoned that these aspects of the statutory framework provided it with jurisdiction over a case in the same procedural posture as this one. The court observed:

> Had Congress intended otherwise—such as that the amendments apply only to judgments entered on or after its enactment date—we can expect it would have simply said so. Or it could have remained silent on applicability, which may have had the same effect. Instead, Congress explicitly chose to limit pre-enactment applicability only when the

> accused, prior to enactment, submitted matters under the old scheme either to the CCA or to TJAG.

Mieres, 84 M.J. at 685 (internal citations and quotations omitted).

A review of the National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136, 261-62 (2023), in contrast to section 544 of the FY23 NDAA, cements the proposition that Congress did not intend to exclude SSgt Vanzant from the latter's reach. What the FY24 NDAA demonstrates is that Congress can and will set specific parameters as to applicability and inapplicability of effective dates when it deems such limitations appropriate. Pub. L. No. 118-31, § 533(b)(1)-(3), 137 Stat. at 261-62. The FY24 NDAA changes even addressed the issue of finality of decisions before the effective date of the changes to an appellant's ability to reach the Supreme Court. *Id.* at § 533(b)(3), 137 Stat. at 262. In contrast, in section 544 of the FY23 NDAA, Congress made the changes to Article 66 and 69, UCMJ, inapplicable to only two categories of pre-enactment judgments. 136 Stat. 2395 § 544(d).

There was no need to address finality nor to particularize the effective date for purposes of these changes in the FY23 NDAA. The cases to which the changes to Article 66, UCMJ, could apply would be discernable based on the effective date of the statute (by default, date of enactment) alongside the express categories of pre-enactment judgments excluded from these changes—any case that had already started down the final path with review by TJAG under Article 69, UCMJ, or which

had already reached the CCA. *Id.* Thus, based on the plain reading of the statute and the then-existing path for further judicial review, all convicted service members whose judgments were not final would be able to avail themselves of these changes, as long as they had not already sought review by TJAG under the 2019 statute or had a matter pending before the CCA. *Id.* Finality did not need to be addressed. The category of cases which were final under the 2019 statutory scheme no longer had a path through TJAG to the CCA either because the timeline to appeal to TJAG had passed or they had already exhausted that appellate right. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012).

Thus, while the Government avers Congressional intent was one to limit convicted service members similarly situated to SSgt Vanzant, such a reading is inconsistent with both the plain reading of the statute and the broader statutory context.

2. Completion of Article 65(d), UCMJ, review does not end the appellate process and Article 69, UCMJ, applications are not collateral attacks on the judgment.

"[A] defendant's conviction is not final as a matter of law until he exhausts the direct appeals afforded to him, and, until that exhaustion, he is entitled to the full breadth of due process available." *Fields v. Wharrie*, 672 F.3d 505, 515 (7th Cir. 2012). The Supreme Court has also held that the triggering event for finality of a judgment is the final appellate court review or when the Supreme Court denies

certiorari, or the timeline to petition for relief under those avenues expires. *Gonzalez*, 565 U.S. at 150.

In keeping with *Fields* and *Gonzalez*, when determining if a review is a direct appeal or collateral attack (defined as coming after the appellate process is extinguished), the focus is whether direct review is complete, *Gonzalez*, 565 U.S. at 150, not the procedural process to get to an appellate court. *See generally Fields*, 671 F.3d at 515; *see also Gonzalez*, 565 U.S. at 150. At the time of the changes to Article 66 and Article 69, UCMJ, SSgt Vanzant still had a path to the CCA available to him through Article 69(d), UCMJ (2018). Despite the UCMJ referring to cases which go directly to the CCA as "direct appeals," that does not render Article 69(a)-(d) appeals through TJAG collateral attacks. Rather Article 69, UCMJ provided a conduit to the CCA to exercise appellate review under Article 66, UCMJ. And a "direct appeal" in the military context continues at least through the respective CCA review. *United States v. Hawkins*, 73 M.J. 605, 612 (A. Ct. Crim. App. 2014).

Moreover, nothing in an Article 65(d), UCMJ, review restricted SSgt Vanzant's right to appeal to the CCA, and his appellate review had not been exhausted. Rather, before section 544's enactment, SSgt Vanzant simply had an additional procedural step required to access the CCA after Article 65(d), UCMJ, review—an application through TJAG. *See* Article 69(a), UCMJ (2018). Prior to the FY23 NDAA, Article 65(d) review functioned as the first and potentially final

review, but whether an appeal was deemed "final" after Article 65(d), UCMJ, review was dependent on whether the convicted service member applied for further review under Article 69, UCMJ. *See id*.

The view of TJAGs' authority under Article 69, UCMJ, by Article III courts in a pre-Military Justice Act of 2016 context is not dispositive here. *See McKinney v. White*, 291 F.3d 851, 855 (D.C. Cir. 2002); *see also Curci v. United States*, 577 F.2d 815, 818 (2d Cir. 1978). As the Air Force Court rightly observed, JA at 011, neither case analyzed the operative effects of Article 69 following the Military Justice Act of 2016 amendments, which in addition to providing for TJAG review, also provided an independent path for appellants to reach the CCA. *See* Article 69(a)-(d), UCMJ (2018). This distinction is critical because upon the Military Justice Act of 2016's effective date, Article 69(a) review by TJAG became a procedural path for the convicted service member to continue direct appellate review, distinct from prior versions of the statute, and the one analyzed in *Curci* and *McKinney*. *See Curci*, 577 F.2d at 818 (where the 1969 version of the statute was analyzed and which did not have an independent path the convicted service member could initiate to what was then the Court of Military Review); *McKinney*, 291 F.3d at 855 (citing *Curci*).

While this Court has not addressed whether Article 65(d) review renders a case final, nor whether review under the post-Military Justice Act of 2016 version

of Article 69, UCMJ, is a collateral attack, there are cases that provides insight into those questions. In *United States v. Parino-Ramcharan*, after an Article 65(d), UCMJ, review was conducted on the appellant's case, the appellant applied to TJAG for relief under Article 69, UCMJ, and eventually appealed the decision of the Air Force Court to this Court. *See United States v. Parino-Ramcharan*, 84 M.J. 445 (C.A.A.F. 2024). This Court's treatment of the appeal in *Parino-Ramcharan* demonstrates that Article 65(d), UCMJ, review does not equate to finality of the appellate process, other than with respect to the effective date of sentences. *See Parino-Ramcharan*, 84 M.J. at 451-52, *see also* Article 57, UCMJ (where Article 65(d) review renders the appellate process final within this section dealing with the effective date of sentences). This Court ultimately made a decision on the merits of the case and denied relief, illustrating this appeal was not merely a collateral attack. *Parino-Ramcharan*, 84 M.J. at 451-52. Similarly, in *Mieres*, the Coast Guard Court of Criminal Appeals acted on the merits of the case notwithstanding completion of Article 65, UCMJ review. *Mieres*, 84 M.J. at 685, 689. The Navy-Marine Corps Court of Criminal Appeals similarly determined it had jurisdiction to act on the merits of a case that had undergone Article 65, UCMJ review. *See United States v. Hirst*, 84 M.J. 615, 627 (N-M. Ct. Crim. App. 2024) (finding jurisdiction notwithstanding Article 65, UCMJ review); *see also United States v. Hirst*, No.

NMCCA 202300208, 2024 CCA LEXIS 372, *2 (N-M. Ct. Crim. App. Sept. 9, 2024) (where the court issued a decision on the merits of the case).

Moreover, the Government's focus on the finality of the appellate process under Article 57, UCMJ, is misplaced. *See*, *e.g.*, Answer at 22. First, the provisions of Article 57, UCMJ, should be evaluated within the context of that section of the code, which addresses the effective date of sentences. Article 57(c)(1), UCMJ. The directive to evaluate finality based on the effective date of sentences comes from the text itself. *See id.* ("Appellate review is complete *under this section* [on effective dates of sentences] when—" (emphasis added)). While Article 57(c)(1) and (2), UCMJ, provide that appellate review is complete under this section upon review under Article 65, UCMJ, and that completion of appellate review constitutes a final judgment as to the legality of proceedings, this is not dispositive of the issue here. This provision in the code existed prior to the changes in the FY23 NDAA, and the Government's view that the appellate process was extinguished with Article 65(d) review conflicts with the then-existing path to the CCA, this Court, and potentially the Supreme Court under Article 69, UCMJ. *See* Article 69(a)-(d), UCMJ (2018). SSgt Vanzant could have applied to TJAG for relief and TJAG could have modified or set aside, in whole or in part, the findings and sentence in a court-martial. Article 69(a), UCMJ (2018). And a declination by TJAG to provide such relief would have been reviewable by the CCA upon application by the convicted service member.

Article 69(d)(1)(B), UCMJ (2018). If the CCA had chosen to review the case, further review would have been available before this Court. And had this Court chosen to review the case, further review would have been available before the Supreme Court.

The conclusion that Article 57(c)(1)-(2), UCMJ, does not render an appeal final with the completion of Article 65(d), UCMJ, review is reinforced by this Court reaching a decision on the merits of the case in *Parino-Ramcharan* despite completion of Article 65(d), UCMJ, review in that case. *Parino-Ramcharan*, 84 M.J. at 451-52. Moreover, when the Coast Guard Court of Criminal Appeals evaluated finality in the scope of Article 65, UCMJ, review, it did not do so under Article 57, UCMJ. *See Mieres*, 84. M.J. at 685-86. Similarly, when the Navy-Marine Corps Court of Criminal Appeals analyzed finality in determining jurisdiction post-Article 65, UCMJ review, it did so under Article 76, UCMJ. *Hirst*, 84 M.J. at 627.

Faced with these harmonious authorities from across the Services, the Government's argument instead relies on non-binding, non-authoritative discussion sections supplementing the MCM to support its position. For example, to support its argument that Article 69, UCMJ, review is not part of appellate review within the meaning of Article 76, UCMJ, or Rule for Courts-Martial (R.C.M.) 1209, the Government relied solely on the discussion section of the Rules for Courts-Martial

and reference material. Answer at 23-24. The discussion section accompanying the R.C.M.s is not binding. Rather the Rules themselves control. *See MCM* (2019 ed), pt. I, ¶ 4 (noting the discussion section is supplementary material that does not have the force of law.)*; see also United States v. Chandler*, 80 M.J. 425, 429 n.2 (C.A.A.F. 2021) (noting the provisions of a discussion section to the R.C.M. are not binding).

Given the lack of textual and other CCA support for its position, the Government relies on a provision in the 1969 (rev. ed.) *MCM* to assert that Article 69, UCMJ, review is not a part of appellate review. Answer at 25. This is problematic, because it cherry-picks language about Article 69, UCMJ review and places it within the wrong section of the Manual to support its position. The provision that the Government incorrectly cited as *MCM*, Ch. XI, para. 110A (1969), comes from Chapter XXI, a section dealing with "New trial and related matters," not Chapter XI ("Organization of the court and arraignment of the accused"). *See MCM*, Ch. XXI, para. 110A (1969 rev. ed.) (dealing with new trials). Paragraph 103 of the 1969 (rev. ed.) *MCM* dealt with Article 69 reviews generally. Tellingly, that paragraph was in Chapter XX, "Appellate review—Execution of sentences." The Government focuses on another portion of the 1969 (rev. ed.) *MCM* that dealt with a specific context: Article 69 reviews conducted "after final review." Government Answer at 25, citing (*MCM*, ch. XI [*sic*], para. 110A (1969)). The archetypal example of such a post-finality review is action on a petition for new trial filed under

Article 73. Paragraph 110A's discussion of The Judge Advocate General's powers "after final review" was limited to that specific context and did not extend to the standard application of Article 69 under paragraph 103.

The Government's view of finality is further undercut by the interaction between the FY23 NDAA's expansion of Article 66 jurisdiction in relation to Article 76, UMCJ. As the Coast Guard Court of Criminal Appeals pointed out, nothing in the FY23 NDAA provision that addressed the applicability of the expanded jurisdiction of the CCA under Article 66, UCMJ, altered Article 76, UCMJ. *Mieres*, 84 M.J. at 685-86. The court also interpreted Article 76, UCMJ, to encompass proceedings under Article 69, UCMJ, as one of the avenues to "approve, review, or affirm the findings and the sentence of the court-martial" that is required before the conviction is final. *Id.* Thus, only after Article 69, UCMJ, proceedings were complete or the timeline to apply had passed would an appeal be final under Article 76, UCMJ. *Id.*

While Congress must expressly articulate an intent to make a statute that alters a final judgment by a court apply retroactively, the predicate trigger for that rule is the judgment be final. *See Landgraf v. Usi Film Prods.*, 511 U.S. 244, 277-80 (1994). SSgt Vanzant's appeal was not final with completion of Article 65(d) review. At the time the FY23 NDAA was enacted, his ability to seek TJAG review under Article 69, UCMJ—and through Article 69 review, further review on direct

appeal to the Air Force Court and potentially this Court and the Supreme Court—was intact. Therefore, his appeal was pending at the enactment of the FY23 NDAA and there is no concern about retroactivity and the concerns raised in *Landgraf* are inapplicable.

3. The Government should be precluded from adopting inconsistent positions before this Court in the spirit of judicial estoppel.

Judicial estoppel precludes a party from successfully asserting a position in a proceeding and then asserting an inconsistent position later. *See Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996) (approving courts' use of the doctrine to preclude such changes in position). One of the policies underlying the doctrine of judicial estoppel is to prevent internal inconsistencies. *See United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993). Judicial estoppel is an "effective tool for discouraging or preventing [] prosecutorial inconsistency." *United States v. Augspurger*, 61 M.J. 189, 193 (C.A.A.F. 2005) (Crawford, J., dissenting in part and concurring in the result).

There are several divisions within the Government that acted on this case: (1) representatives from the Government's policy division, who provided guidance to the field on the FY23 NDAA changes; (2) the representatives of the Government at the Numbered Air Force, who provided notice to SSgt Vanzant; and (3) The Air Force Government Trial and Appellate Operations Division, who are contesting jurisdiction.

The Government, through their policy division, has interpreted the changes to the FY23 NDAA to apply to cases such as SSgt Vanzant's (and to SSgt Vanzant's in particular) and provided guidance to this Court asserting the same. *See* Amended Article 66, UCMJ, background paper, *https://www.armfor.uscourts.gov/ConfHandout/2023ConfHandout/HaightFerrellTempleBorchersHalsigThreeArt66AmendmentProcessNotes.pdf* (last accessed January 7, 2025). Appendix. The Government's policy division position, as described in this background paper, is consistent with the Numbered Air Force representative's action in this case. Article 65(c)(1) provides, "The Judge Advocate General shall provide notice to the accused of the right to file an appeal under section 866(b)(1) of this title (article 66(b)(1)) . . . ." Such notice was provided to SSgt Vanzant. JA at 060. Following that notice, his case was forwarded to the Air Force Court of Criminal Appeals for docketing. Thus, the Government itself invoked that court's jurisdiction below. Yet, despite being one entity, the Air Force Government Trial and Appellate Operations Division has taken a position before this Court that conflicts with its policy division's general interpretation of section 544 of the FY23 NDAA and its application of that provision in this very case.

Whereas the Air Force Government Trial and Appellate Operations Division now contests SSgt Vanzant's jurisdiction, in *Mieres*—a case in a procedural posture comparable to SSgt Vanzant's—the United States took the position that the Coast

Guard Court had jurisdiction. *Mieres*, 84 M.J. at 684 ("Both parties agree we have jurisdiction over Appellant's case"); *see also* Article 70(b), UCMJ, 10 U.S.C. § 870(b) ("Appellate Government counsel shall *represent the United States* before the Court of Criminal Appeals or the Court of Appeals for the Armed Forces . . . .") (emphasis added). The Air Force Government Trial and Appellate Operations Division, as a representative of the United States, offers a conflicting position from the position the United States already advanced before a Court of Criminal Appeals in *Mieres.* Thus, not only is the Air Force Government Trial and Appellate Operations Division taking a conflicting position from multiple other authoritative Air Force representatives, it is taking a position different from that of the United States. This is the internal inconsistency that judicial estoppel can prevent. *McCaskey*, 9 F.3d at 378.

While jurisdiction is not dependent on the Government's position towards it, this conflicting position of the Air Force Government Trial and Appellate Operations Division should give this Court pause as to the validity of the Division's arguments given both the position of the United States in *Mieres* and the fact that the agents of the Judge Advocate General of the Air Force hold a contrary position and were directed to give appellants like SSgt Vanzant notice of their newly expanded right under Article 66, UCMJ. *See* Article 65(c)(1), UCMJ (directing the Judge Advocate General to provide notice); *and comparing* JA at 060 (where SSgt Vanzant was

given notice of his right to direct appeal), *with* Amended Article 66, UCMJ, background paper (where convicted service members with "gap cases" such as SSgt Vanzant's were directed to be given notice under the new Article 66, UCMJ). The Air Force Government Trial and Appellate Operations Division position in this Court conflicts with its own general policy and actions in this case and, as such, should be given little consideration.

4. There is no issue for this Court to resolve which implicates constitutional concerns.

While the Supreme Court has examined whether Congress can "retroactively command the federal courts to reopen final judgments," Answer at 39, that issue is not present in this case. SSgt Vanzant's appeal does not implicate any clash between coordinate branches of government. Congress enacted the Uniform Code of Military Justice and authorized the appellate bodies which review actions taken under the Code. *See* U.S. CONST. art. I, § 8, cl. 14 (granting Congress the power to make rules for the government and regulation of the military); UCMJ, arts. 16-18; *see generally United States v. Ortiz*, 585 U.S. 427, 431-32 (2018) (describing congressional authority over military courts to adjudicate charges against service members).

Moreover, this Court should defer to the time-honored presumption that Congress enacts a law with the intent that it be constitutional. *See Reno v. Condon*, 528 U.S. 141, 148 (2000). Further, there was no assumption of the power of the judiciary when Congress expanded the appellate rights of service members and the

CCA saw fit to exercise the jurisdiction that Congress granted it. *See* Answer 39. Moreover, the Supreme Court has accorded Congress great deference in evaluating the constitutionality of an Act of Congress within the context of congressional authority over national defense and military affairs. *See Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981). The Government's constitutional concerns are chimerical.

Congress enacted the provisions within the FY23 NDAA to expand the jurisdiction of the CCAs, and to limit the role of TJAG in appellate review under Article 69, UCMJ. Pub. L. No. 117-263, § 544, 136 Stat. at 2582-84. The statutory amendment was designed to expand the class of service members who could reach the CCA to any with a general or special court-martial conviction. *Id.* Although Congress could have, it did not exclude cases like SSgt Vanzant's, despite expressly carving out two types of pre-enactment judgments that were excluded from the broadened path to CCA review. *Id; see also Mieres*, 84 M.J. at 685. Finally, because Article 65(d), UCMJ, review does not render SSgt Vanzant's appeal final, there are no concerns of retroactivity to address. Jurisdiction is established.

SSgt Vanzant asks this Honorable Court to deny the Government's motion to dismiss and affirm the Air Force Court's decision as to jurisdiction over his appeal.

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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on January 13, 2025 and that a copy was also electronically served on the Government Trial and Appellate Operations Division on the same date.

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CERTIFICATE OF COMPLIANCE WITH RULES 21(b), 24(b) & 37

This brief complies with the type-volume limitation of Rule 24(b) of no more than 6,500 words because it contains approximately 5,363 words.

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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APPENDIX

AMENDED ARTICLE 66, UCMJ

PURPOSE

The Fiscal Year 2023 National Defense Authorization Act (FY23 NDAA) expanded the right to direct appeal under Article 66, UCMJ for members convicted at a Special or General Court-Martial. The DAF is implementing administrative and policy changes to account for this new right.

BACKGROUND

- On 23 December 2022, the President signed the FY23 NDAA, which amended Art. 66, UCMJ. The new Art. 66(b)(1)(A) provides that AFCCA shall have jurisdiction over appeals from all convictions at Special Courts-Martial (SPCMs) and General Courts-Martial (GCMs).

RIGHTS OF THE ACCUSED PRIOR TO 23 DECEMBER 2022

- ***Automatic review*** by AFCCA under Art. 66(b)(3) was (and is currently) triggered if the sentence included death, dismissal, a dishonorable discharge, a bad conduct discharge, or confinement for two years or more.

- ***Direct appeal*** by the accused to AFCCA under Art. 66(b)(1)(A) was available in cases not subject to automatic review, where the sentence extended to confinement for more than six months.

- Cases **not qualifying for automatic review or direct appeal** under Art. 66(b) were reviewed under Art. 65(d) by "an attorney within the Office of The Judge Advocate General or other designated attorney." After completion of Art. 65 review, the accused could apply for TJAG review under Art. 69, UCMJ. That application was required to be submitted "not later than one year after the date of completion of review under Art. 65." The period could be extended by TJAG "for good cause shown."

RIGHTS OF THE ACCUSED AS OF 23 DECEMBER 2022

- Direct appeal by the accused to AFCCA under Art. 66(b)(1)(A) is now available in **all cases in which there was a conviction at a SPCM or GCM** not already subject to automatic review.

- To exercise the right to a direct appeal, the accused must file an application for review with AFCCA within 90 days of receiving notice of the right to do so under Art. 65(c)(1).

FY23 NDAA, SECTION 544 APPLICABILITY STATEMENT

- The amendments to Art. 66 are contained in Section 544 of the FY23 NDAA. Section 544(d), *Applicability*, states the amendments made by that section *shall not apply to*:

  -- (1) Any matter submitted before 23 December 2022 to AFCCA under Art. 66;

  -- (2) Any matter submitted before 23 December 2022 to TJAG under Art. 69.

  The applicability statement is silent as to convictions awaiting completion of Art. 65 review, or which received Art. 65 review but for which the one-year period to apply for TJAG review under Art. 69 had not expired as of 23 December 2022.

- The amended Art. 66(b)(1)(A) applies to all cases in which EoJ occurs on or after 23 December 2022. The text of the revised Art. 66(b)(1)(A) states that it applies to an appeal "from the judgment of the court entered…under Art. 60c(a)."

- The amended Art. 66(b)(1)(A) also applies to cases in which EoJ occurred prior to 23 December 2022, for which Art. 65 review was completed on or after 23 December 2021, and which had not been submitted for TJAG review as of 23 December 2022.

WAY FORWARD: POLICY CHANGE FOR IMMEDIATE DISSEMINATION

- Transition/Gap cases. Transition, or gap cases are GCMs and SPCMs with a conviction, not qualifying for automatic review, currently undergoing Art. 65 review or for which Art. 65 review was completed on or after 23 December 2021 (but which were not submitted for TJAG review as of 23 December 2022).

  -- For these cases, a new notice is sent to the accused, by the responsible GCMCA legal office pursuant to Art. 65(c)(1), informing him/her of the expanded right to file a direct appeal under Art. 66(b)(1)(A). This notice triggers the 90-day period for submission.

- New cases. In addition to the transition cases identified above, the GCMCA legal office will, for all new cases with a conviction at a special or general court-martial, upon receipt of the Record of Trial (ROT) from the base legal office, send an Art. 65(c)(1) notice to the accused, informing him/her of the newly conferred right to file a direct appeal under Art. 66(b)(1)(A), and the 90-day time limit.

- ROT. When sending the Art. 65(c)(1) notice to the accused, the GCMCA legal office simultaneously forwards one copy of the ROT to AF/JAJM (with a copy of the notification and proof of certified mail service), who serves it appellate defense counsel, satisfying Art. 65(b)(2)(A)(i). The GCMCA legal office maintains a copy of the ROT.

  -- If the accused affirmatively waives appellate review under Art. 61 or fails to appeal within the 90-day window, the GCMCA conducts Art. 65 review (if not previously completed) using their copy of the ROT, and sends a notice to the accused when the review is complete, re-informing him/her of the right to file for TJAG review within one year after the conclusion of the previous 90-day window.

  -- If the accused invokes the right to direct appeal under Art. 66, the GCMCA forwards a copy of the ROT to the appellate government division. The GCMCA no longer has responsibility for the case, unless returned for subsequent action as a result of their appeal.

- Transcription. Presently, both Rule for Courts-Martial 1114(a)(1) and DAFMAN 51-203, *Records of Trial*, para. 11.1.1.1 require verbatim transcription when the sentence includes death, dismissal, a punitive discharge, or confinement for more than six months. Summarized transcripts are prepared for all other cases. It is possible, however, AFCCA will require a verbatim transcript to conduct their review for Art. 66 cases not resulting in sentences as listed above.

  -- Unless and until a policy change is implemented, legal offices continue to create ROTs in accordance with RCM 1114, which requires verbatim transcription only when the sentence includes death, dismissal, a punitive discharge, or confinement for more than six months.

     AFCCA currently does perform some functions without verbatim transcription (for example, interlocutory appeals by the government under Article 62).