IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In re HVZ, *Petitioner* v. United States *Respondent* And TECHNICAL SERGEANT MICHAEL K. FEWELL, USAF *Real Party in Interest*	BRIEF OF AMICI CURIAE UNITED STATES NAVY SPECIAL VICTIMS' COUNSEL AND COAST GUARD SPECIAL VICTIMS' COUNSEL PROGRAMS IN SUPPORT OF PETITIONER/APPELLANT BRIEF Crim. App. Dkt. No. 2023-03 USCA Dkt No. 23-0250/AF

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INTEREST OF AMICI CURIAE AND RELEVANCE OF MATTERS ASSERTED IN BRIEF

Amici United States Navy Victims' Legal Counsel (VLC) Program and United States Coast Guard Special Victims' Counsel (SVC) Program provide eligible crime victims with a dedicated attorney to help them understand the investigation and military justice process, guard their legal rights and interests, and obtain additional support in accessing resources that may assist in their recovery. This includes representing victims as they assert their Article 6b, UCMJ rights at courts-martial and, when necessary, on appeal.

The Air Force Judge Advocate General has certified issues before this Court asking for its interpretation of the scope of the term "military authorities." The certified issues will have broad-reaching ramifications for the statutory rights of all clients serviced by the Amici in trial courts, the respective Service Courts of Criminal Appeals, and this Court. Currently, Amici's respective Service Courts of Criminal Appeals do not interpret medical records housed at military treatment facilities (hereinafter "MTF") as being in the possession, custody, or control of "military authorities" and subject to discovery rules under Rule for Court-Martial (RCM) 701, as the Air Force Court of Criminal Appeals (AFCCA) did here. As such, Amici have an interest in the outcome of this Court's opinion.

The matters asserted in this brief are relevant to the disposition of this case. The litigation landscape for production of mental health records from MTFs is

inconsistent and frequently results in invasions of victims' right to privacy. Some military judges apply RCM 701 while others apply RCM 703. Moreover, denying victims legal standing to assert their privacy interests in their medical records at the trial court level would negatively impact victims across all branches of service in ensuring their privacy rights are respected and observed.

STATEMENT OF STATUTORY JURISDICTION

Under Article 67, UCMJ, this Court has jurisdiction over "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General . . . orders sent" to this Court. 10 U.S.C. § 867(a).

ISSUES PRESENTED

Amici address the following issues certified before this Court:

> I. DID THE MILITARY JUDGE ERR WHEN HE DETERMINED THAT H.V.Z.'s DOD HEALTH RECORD WAS IN THE POSSESSION, CUSTODY, OR CONTROL OF MILITARY AUTHORITIES PURSUANT TO R.C.M. 701(a)(2)(A) AND R.C.M. 701(a)(2)(B)?
>
> II. DID THE MILITARY JUDGE ERR WHEN HE DID NOT CONSIDER H.V.Z.'S WRITTEN OBJECTION TO PRODUCTION OF HER DOD HEALTH RECORD AS HE FOUND SHE DID NOT HAVE STANDING NOR A RIGHT TO BE HEARD?

SUMMARY OF ARGUMENT

The first issue Amici address is the impact an expansive view of "military authorities" would have on service providers—including Amici. Amici are uniformed Service Members assigned to a military unit but are ethically bound to

provide legal services to military members free from outside influence. JAGINST 5803.1E, Encl. 1 ¶ 7, Rule 1.7 *Conflict of Interest: General Rule (*Jan. 20, 2015). An overly-expansive definition of the term "military authorities" will undermine their independence – and that of similarly-situated military service providers. Likewise, an overly-expansive definition will almost certainly deter Service Members in need from seeking mental health treatment.

Amici address the AFCCA's overly-restrictive interpretation of victims' right to be heard at the trial level under Article 6b, UCMJ. The statute's plain language, the context in which it must be read, and public policy all support allowing victims to be heard on any issue arising under Article 6b.

Article 6b(a)(9) clearly incorporates victims' constitutional right to privacy and, as a result, recognizes a Due Process right to be heard before their constitutional right to privacy is violated. Next, the context in which Article 6b must be read suggests a right to be heard at trial. For example, nothing in Article 6b limits its application at the trial level. While Article 6b(a)(4) lists specific hearings in which a victim may be heard, nothing in its language suggests those hearings are *to the exclusion* of other trial-level hearings. Such a reading would render many of the rights listed in Article 6b(a) mere surplusage and would create a situation in which victims may see their rights violated before ever having the opportunity to be heard. Finally, denying victims standing at the trial level leads to

inefficiency and inadequate hearings. Limiting victims' right to be heard to writs strips them of the ability to create a record while confining their case to a court required to rule solely on the record. It also creates unnecessary delay – requiring appellate court involvement in issues which could be adequately considered on the trial level.

In sum, Article 6(b) not only creates rights for victims, but also incorporates constitutional rights on which victims unquestionably have a right to be heard at the trial level. Interpreting it any other way renders Article 6(b) a mere policy statement and creates inefficiencies at the trial and appellate levels.

ARGUMENT

I. INTERPRETING "MILITARY AUTHORITIES" AS ENCOMPASSING VIRTUALLY ALL DOD ENTITIES WILL CHILL VICTIM PARTICIPATION IN THE MILITARY JUSTICE SYSTEM AND ERODE LONGSTANDING PRINCIPLES OF PRIVACY AND PRIVILEGE.

A. If the lower court's ruling is adopted, it will put privileges of all military service providers at risk – including VLC, SVC, & criminal defense attorneys.

Amici in this case are uniformed attorneys who rely on privileged communications to provide confidential legal services to their clients. Applying the term "military authorities" so broadly as to include any "unit within the United States [military]" or "agency of the United States within DoD" would undermine legal privileges and put VLC/SVC files at risk of disclosure and, as a result, hamstring their ability to effectively advocate for their clients. *In re HVZ*, No.

2023-03, 2023 CCA LEXIS 292, at *13 (A.F. Ct. Crim. App. July 14, 2023), Attachment I to Cert. at 115 (citing *In re AI*, 2022 CCA LEXIS 702 (A.F. Ct. Crim. App. 2022)).

A cursory review of Rule for Courts-Martial 701(a)(2)(A) suggests that the President copied it almost wholesale from Fed. R. Crim. Proc. 16(a)(1)(E), which binds Department of Justice (DOJ) prosecutors. However, unlike the DOJ, the Department of Defense (DoD) provides all the services one might find in a small city. While DoD's primary mission is to defend the United States and her interests abroad, it also runs a hospital system, a court system, abuse prevention services, childcare services, and even adult recreation services. In civilian society, a mix of private entities and government departments unaffiliated with law enforcement provide these services. In contrast, virtually all the people staffing the DoD versions of these services are DoD employees and many are uniformed Service Members. Often, these service providers use the same information technology systems to store their data. Like their civilian counterparts, these DoD service providers cannot function without some degree of independence from "military authorities." For some (like attorneys) independence is an ethical duty. *See, e.g.*, JAGINST 5803.1E, Encl. 1 ¶ 7, Rule 1.7 *Conflict of Interest: General Rule* (Jan. 20, 2015). This is why military attorneys, chaplains, psychotherapists, and victim advocates all enjoy the protection of evidentiary privileges.

Privileges by themselves provide only a thin shroud of protection ensuring service provider independence. *See United States v. Mellette*, 82 M.J. 374, 380 (C.A.A.F. 2022) ("Although M.R.E. 513(a) prevents a witness from being required to disclose the substance of the communications between a patient and a psychotherapist, it does not extend to all evidence that might reveal a patient's diagnoses and treatments."). Like the medication and diagnosis records in *Mellette*, many of these service providers' records are not privileged, or even work product. For example, this Court has noted that even an attorney's interview notes are not automatically excluded from discovery under the work product doctrine. *United States v. Vanderwier*, 25 M.J. 263, 268 (C.M.A. 1987). Even when courts do make efforts to protect privileged materials, those materials may still be inadvertently disclosed, causing irreparable harm to the relationship between the service-provider and the client. *See e.g., B.M. v. United States*, 83 M.J. 704 (N-M. Ct. Crim. App. 2023).

Service providers, particularly attorneys, are only truly independent when they can represent their clients without conflicts of interest. *See e.g., United States v. Gilmet*, No. 23-0010, 2023 CAAF LEXIS 564 (C.A.A.F. Aug. 3, 2023). If this Court were to place privileged files belonging to military entities in the constructive possession of Trial Counsel, as AFCCA seemed to endorse, it would no longer be in a client's interest for service providers to store notes and files

within DoD systems. Service providers would then have a conflict of interest: Their own professional interest would favor storing files as required under DoD rules, but their clients' interest would be better served storing those files outside of a DoD system of records to protect them from unwarranted disclosure.

The AFCCA's analysis of whether patient records held by the MTF are within the "possession, custody, or control of military authorities," started and ended with the fact that the unit in charge of the MTF was, "a unit within the United States Air Force." *HVZ*, 2023 CCA LEXIS 292, at *13. Adopting and affirming an analysis that casts a wide net for all "units" under a military Service has the potential to severely degrade the independence of military service providers and to de-legitimize the military justice system itself. As this Court wrote in *United States v. Salyer*, Government "...access [to a judge's personnel files], were it condoned by appellate courts, would strike at the heart and soul of an independent military judiciary." 72 M.J. 415, 426 (C.A.A.F. 2013).[1] The Navy VLC and Coast Guard SVC Programs, the various military Defense Service Offices, and military Trial Judiciaries are all military "units." If this Court adopts the AFCCA's broad interpretation of RCM 701, it is not difficult to imagine a scenario in which a

[1] While the *Salyer* court wrote that "the Government used its custody of the military judge's official personnel file to search that personnel file," it did not mention any discovery rules at all – let alone the "possession, custody, or control" standard under R.C.M. 701. *Salyer*, 72 M.J. at 426.

defense counsel asks trial counsel to scour the files of other defense attorneys representing co-accused in search of non-privileged (and non-work product) interview notes and affidavits. Similarly, we could see a slight twist on the *Salyer* facts in which a defense attorney initiates the search by asking trial counsel to scour the military judge's personnel file for evidence of bias citing some rumor about the judge's personal life which might bear on bias or perception. Recognizing the limited scope of the term "military authorities" in the Manual for Courts-Martial is essential to preserving the independence of military attorneys and other military service providers.

B. The lower court's opinion creates an impossible choice for military-affiliated victims – privacy or accountability, but not both.

A myopic focus on the technical issue of whether "military authorities" includes MTFs obscures the cold truth – that treating MTF patient records as prosecutorial files will deter Service Members from seeking mental health services. Such a chilling effect on seeking mental health services will negatively impact the lives of Service Members and the military's readiness. Approximately 75 percent of survivors of sexual assault suffer from Post-Traumatic Stress Disorder (PTSD) about one month later. *See* University of Washington Medicine, *News Release: 75% of sexual assault survivors have PTSD one month later*, University of Washington Medicine Newsroom (July 20, 2021), https://newsroom.uw.edu/news/75-sexual-assault-survivors-have-ptsd-one-month-later. The Department of

Veterans published an article noting that, "[e]xperiences of sexual assault during military service are associated with PTSD to a degree that is comparable to, or larger than, the likelihood of a PTSD diagnosis associated with severe combat exposure …" Amy Street, PhD, Chris Skidmore, PhD, Lisa Gyuro, BA and Margret Bell, PhD, *Military Sexual Trauma*, U.S. Department of Veterans Affairs National Center for PTSD, https://www.ptsd.va.gov/professional/treat/ type/ sexual_trauma_military.asp (last visited Sept. 21, 2023). It is no surprise, then, that one third of women who are raped contemplate suicide. RAINN, *Victims of Sexual Violence: Statistics*, www.rainn.org, https://www.rainn.org/statistics/ victims-sexual-violence, (last visited Sept. 21, 2023).

Subjecting mental health records to disclosure under RCM 701 will exacerbate a stigma already present in the military. It is well-documented that military members avoid seeking mental health treatment. In fact, the Military Health System and the Defense Health Agency assert that "approximately 60-70 percent of military personnel who experience mental health problems do not seek mental health services." Military Health System and Defense Health Agency, *Barriers to Care*, www.health.mil, https://www.health.mil/Military-Health-Topics/Centers-of-Excellence/Psychological-Health-Center-of-Excellence/ Psychological-Health-Readiness/Barriers-to-Care (last visited Sept. 22, 2023). Patients who are worried about their privacy may be less likely to seek treatment.

See e.g. Jagdish Varma, et. Al. *Addressing Confidentiality and Privacy Barrier to Mental Health Help-Seeking amongst University Students: An Experience*, 44 Indian J. Psych. Med. 94-95 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9022923/. The Supreme Court recognized this phenomenon in *Jaffee v. Redmond*, when it wrote, "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." 518 U.S. 1, 10 (1996); *see also In re Hope Coalition*, 977 N.W.2d 651 (Minn. 2022) (noting the connection between privacy and confidentiality and willingness to seek help).

Service Members seeking treatment for medical ailments *must* either seek that treatment at a MTF or report the treatment on their annual Periodic Health Assessment questionnaire. DD Form 3024, *Annual Periodic Health Assessment* (Aug. 2021), https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd3024.pdf. Either way, a Service Member who wants treatment must create a record at a MTF. The lower court's opinion places victims of sexual assault in an untenable situation. If a Service Member or military beneficiary is sexually assaulted and then experiences symptoms of PTSD—a 75 percent likelihood—the choice becomes: (1) receive treatment and place those records in the possession, custody, and control of military authorities who have disclosure obligations or (2) forego treatment for a deadly diagnosis to preserve the right to privacy and dignity.

Combined with this Court's decision in *Mellette*, placing patient records in the constructive possession of trial counsel will effectively unwind the protections courts, legislatures, and the President have painstakingly built around the patient-psychotherapist relationship. Prosecutors, sensing a duty to search for non-privileged information under R.C.M. 701(a)(2), will seek out all the non-privileged patient records they can find. If the victim is lucky, the MTF will transmit only the non-privileged information. However, *B.M.* illustrates just how difficult this may be. 83 M.J. 704. Once in possession of the records, trial counsel will immediately disclose any diagnosis or medication that could "impact the complaining witness' ability to remember or perception" - a boilerplate description that applies to a multitude of psychiatric diagnoses and medications. Attachment I to Cert. at 51. Because courts continue to apply the so-called "Constitutional exception," any such diagnosis occurring after the assault is likely to trigger an *in camera* review for statements made about the assault itself. *B.M.*, 83 M.J. 704. On the thinnest of justifications, the judge may then turn over provider summaries of behavioral therapy appointments, ultimately leading to cross-examination of the victim based on facts her provider (and the law) promised would remain confidential. *Id.*

As Victims' Legal Counsel, we are obligated to inform our clients of this likely course of events as they weigh whether to seek treatment or whether to participate in a criminal investigation. This will almost certainly lead victims

desperately in need of mental health treatment to forego treatment to avoid the pain of a cross-examination focused on their innermost "emotions, memories, and fears." *Jaffee*, 518 U.S. at 10. Simply put, treating patient records as prosecutorial files will create a chilling effect on victims' willingness to seek mental health treatment and to participate in the military justice system. Consequently, it will impact the readiness of the U.S. Armed Forces.

II. VICTIMS HAVE STANDING AND A RIGHT TO BE HEARD AT TRIAL ON MATTERS WHERE THEIR CONSTITUTIONAL AND STATUTORY RIGHTS ARE AT STAKE. THE MILITARY JUDGE ERRED IN HOLDING OTHERWISE.

The Military Judge erred, as a matter of law, in ruling that Petitioner did not have standing to be heard on the Defense's motion to compel her medical and mental health records. This Court reviews questions of law de novo. *Mellette*, 82 M.J. at 383.

Victims have standing and a right to be heard at trial for two reasons. First, Article 6b(9), UCMJ grants victims standing to assert their constitutional Due Process and privacy rights at court-martials. Second, public policy considerations weigh in favor of granting victims standing at trial. Adopting the lower court's reasoning that Article 6b rights can only be enforced by a writ to an appellate court would prevent victims from making a record at trial and hinder their ability to adequately represent their interests on appeal.

A. Congress granted victims standing to assert their Constitutional Due Process and privacy rights at courts-martials under Article 6b(9).

1. The plain language of Article 6b(9) grants victims standing to be heard at trial.

Statutory construction begins with a look at the plain language. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989). "When the statute's language is plain, the sole function of the courts—at least where the disposition required by the test is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

Article 6b, UCMJ, "[a] victim of an offense under this chapter has the following *rights*." 10 U.S.C. § 806b (2021) (emphasis added). One of those rights is, "[t]he right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter." Article 6b(9), UCMJ. "Privacy . . . is a basic right." *Time, Inc. v. Hill*, 385 U.S. 374, 414-15 (1967) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring) (explaining "'the right of privacy is a fundamental personal right, emanating from the totality of the constitutional scheme under which we live.'"). "One element of privacy has been characterized as the individual interest in avoiding disclosure of personal matters." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (internal quotations and citations omitted).

Under the Fifth Amendment, no person shall be "deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. "[T]he primary thrust of the Bill of Rights is to shield citizens from certain actions by the government. The implication of judicial remedies to provide this shield follows naturally from the declaration of a right." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 409 F.2d 718, 724 (2d Cir. 1969) *overruled on other grounds* 403 U.S. 388 (1971). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

The application of the constitutional right to Due Process is well established whenever government action infringes upon an individual's rights – even when the individual is a third-party witness. *See generally*, *In re Grand Jury Proceedings*, 450 F.2d 199, 200 (3d Cir. 1971). Indeed, this Court has held that a victim being a nonparty to a court-martial does not preclude standing. *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013).

The plain language of Article 6b(9) embeds a victim's constitutional Due Process right to privacy. Article 6b(9) assures the "right to be treated with fairness and with respect for the dignity and privacy of the victim." 10 U.S.C. § 806b(9). By conferring a statutory right to be treated with fairness and dignity with respect to their constitutional right to privacy, victims may avail themselves of their

constitutional right to Due Process in seeking "judicial remedies" when those privacy rights are at risk. *See generally*, *Bivens*, 409 F.2d at 724. Additionally, because a "fundamental requirement of due process" involves being heard "at a meaningful time and in a meaningful manner," Article 6b(9) allows a victim to seek those judicial remedies before a court-martial. *Mathews*, 424 U.S. at 333.

Therefore, the plain language of Article 6b(9) grants victims standing to be heard at a court-martial.

2. Read in context, Article 6b(9) grants victims standing at trial.

"Whether the statutory language is ambiguous 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." *United States v. Spicer*, 71 M.J. 470, 475-76 (C.A.A.F. 2013) (citations and internal quotations omitted). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *United States v. Kelly*, 77 M.J. 404, 406-07 (C.A.A.F. 2018) (citations omitted). Statutory construction is a holistic endeavor. *See United Sav. Ass'n of Tex. v. Timbers of Inland Forest Assoc.*, 484 U.S. 365, 371 (1988). Courts should "avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress." *Beisler v. C.I.R.*, 814 F.2d 1304, 1307 (9th Cir. 1987).

Here, the specific context of Article 6b(9) and the broader context of Article 6b demonstrate that victims have standing at trial for two reasons. First, Congress intended for the right to be "treated with fairness" to encompass victims' due process rights. Second, Congress did not limit a victim's right to be heard within the broader context of Article 6b.

In examining the specific language under Article 6b(9), it is important to note Congress took its language directly from the Crime Victims' Rights Act (CVRA). *See* 18 U.S.C. § 3771(a)(8) (2023) ("right to be treated with fairness and with respect for the victim's dignity and privacy"). During the Congressional session about this specific right under the CVRA, co-sponsor of the act, Arizona Senator Jon Kyl, explained:

> [F]airness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.

150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004). Thus, the Congressional intent behind the specific language under Article 6b(9) was to confer victims with a right to due process and to be heard at a court-martial when their rights are at stake.

Indeed, an opinion from this Court finding victim standing to assert their constitutional due process right to privacy at a court martial would avoid an interpretation of Article 6b(9) that renders it superfluous, and instead, would give

that specific provision effect. *See generally Beisler*, 814 F.2d at 1307; *see also Reeves v. Shinn*, 2021 U.S. Dist. LEXIS 233074 *1, *18 (D. Ariz. 2021) (stating, "[a]lthough concepts such as 'fairness,' 'dignity,' and 'privacy' are admittedly difficult to define with precision, they must mean something.") (citing *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)) (applying "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative") (citation omitted).

Additionally, Congress did not limit a victim's right to be heard under the broader context of Article 6b. It is a rule of statutory interpretation that where "Congress includes particular language in one section of a statute but omits it in another section of the same act, Congress intentionally and purposely intended the disparate inclusion or exclusion." *United States v. McPherson*, 73 M.J. 393, 396 (C.A.A.F. 2014).

Here, the AFCCA interpreted Article 6b(a)(4) as an exclusive list of trial court hearings where a victim may be heard. However, the list under Article 6b(a)(4) only contains hearings in which a victim has a right to provide input or a victim impact statement. A right to be heard at these proceedings can be found nowhere else as there is no common law or constitutional source that would otherwise grant the right to be heard at these proceedings. Therefore, a plain reading of the statute evinces the intent of Congress under Article 6b(a)(4) to

expand the right of victims to be heard at proceedings *beyond* those proceedings where victims may assert their Article 6b and constitutional rights. It is, in essence, additive, not restrictive.

In fact, the statute does not have language that is normally used to express an intent to restrict a right or make a list exclusive. For example, the language of Article 6b(a)(4) does not say a victim has "the right to be heard at *only* the following"—it says a victim has "the right to be heard at *any of* the following." The word "any" is not restrictive or exclusive language. *See Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/any (last visited 21 Sep 2023) (defining "any" as "one, some, or all indiscriminately of whatever quantity").

Other than Article 6b(d), the rest of Article 6b grants victims' rights and there is no restrictive language. Under paragraph (d), Congress states that Article 6b does not create a cause of action to seek damages. 10 U.S.C. §806b(d). This Court must give weight to Congress' decision to include "particular language in one section of a statute but [omit] it in another section of the same act." *McPherson*, 73 M.J. at 396. Indeed, "Congress intentionally and purposely intended the disparate inclusion or exclusion" of that language in Article 6b to effectuate a victim's right to be heard at trial. *See id.*

3. Federal courts grant standing to third-party witnesses at pre-trial hearings to assert their rights.

Federal courts have granted third-party witnesses standing to assert their rights. For example, in *In re Grand Jury Proceedings*, a witness refused to answer questions at a federal grand jury proceeding because the questions were based on illegally obtained wiretap conversations to which she was a party. 450 F.2d 199, 200 (3d Cir. 1971). Even though the witness was not a party to the criminal case, the Third Circuit held that she had standing. The court found standing because she was "asserting her right as a citizen to vindicate her privilege which protects her from unreasonable searches and seizures, regardless whether she will ever be indicted." *Id.* at 206. Even though the government did not, and had no intention to, file charges against her, the court reasoned, "this is the only time Sister Egan may have the opportunity to move to vindicate her constitutional right to privacy." *Id.* at 212.

The Third Circuit also noted numerous cases permitting witnesses to have standing to invoke protections afforded by constitutional, statutory, or common law privileges. *See, e.g.*, *Hoffman v. United States*, 341 U.S. 479 (1951) (witness invoked Fifth Amendment at grand jury proceeding); *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1920) (third party invoked Fourth Amendment right violation for evidence introduced at grand jury proceeding); *In re Bonanno*, 344 F.2d 830 (2d Cir. 1965) (third-party witness allowed to invoke

attorney-client privilege at grand jury proceeding); *Blau v. United States*, 340 U.S. 332 (1951) (third-party witness permitted to invoke spousal privilege at grand jury proceeding).

Similarly, several district courts interpreting the CVRA's similar language to Article 6b(9) have found that victims have standing to assert their Due Process right to privacy. For example, a Washington district court found that the victim could file a motion to prevent disclosure of private information in a criminal case under the CVRA's right to be treated with fairness and with respect for the victim's dignity and privacy. *See United States v. Thompson*, 2022 U.S. Dist. LEXIS 78644 *1, *5 (W.D. Wash. 2022) (citing *United States v. Madoff*, 626 F. Supp. 2d 420, 425-27 (S.D.N.Y. 2009) (applying "dignity and privacy" provision of CVRA to victims' emails). An Illinois district court denied a defendant's request for a subpoena duces tecum to obtain a victim's school records, juvenile court records, and mental health records, in part, because the victim was not given the opportunity to move to quash or modify the subpoena or otherwise object. *See United States v. Bradley*, 2011 U.S. Dist. LEXIS 30105 at *1 (S.D. Ill. 2011); *see also* R.C.M. 703(g)(3)(C)(ii) (allowing victims to object to subpoena).

The same logic should apply in cases involving victims asserting their Article 6b and substantive Due Process rights. Military judges at the trial court level make rulings directly impacting victims' rights. Recognizing victim standing

to assert those rights in the same proceedings where they are impacted, including pretrial Article 39a sessions, is consistent with federal practice. Moreover, there are no countervailing and compelling governmental interests that would weigh against doing so. Granting victims standing gives the parties and victims equal opportunity to be heard before a military judge, who is best positioned to make findings of fact and conclusions of law on the application of Article 6b rights at trial.

Therefore, giving victims a right to be heard at trial is what Congress intended in passing Article 6b.

B. Public policy supports standing for victims at pre-trial hearings to enforce their rights.

This Court should hold that victims have standing to be heard before the trial court to ensure the effective exercise of Article 6b rights, to enable the truth-seeking function of the trial court, to enable a victim's ability to enforce their rights on appeal, and to ensure judicial efficiency.

First, requiring victims to seek a writ from the Courts of Criminal Appeals for initial enforcement of their enumerated rights under Article 6b hinders the effective exercise of those rights. Take for example the right to proceedings free from unreasonable delay in paragraph a(7). *See* 10 U.S.C. §806(a)(7). Requiring victims to file a petition for a writ to enforce this right will likely take longer than

the initial delay victims sought to avoid. Because one cannot retrieve time already lost, an interpretation that would only allow victims to be heard on this right at the appellate level effectively undermines the right itself.

Second, granting victims the right to be heard before the trial court will enable the truth-seeking function of the trial process. Trial court judges are given primary responsibility in enabling that truth-seeking function. "When factual issues are involved in determining a motion, the military judge shall state the essential findings on the record." R.C.M. 905(d). Additionally, military judges "must decide any preliminary question about whether a witness is available or qualified a privilege exists, a continuance should be granted, or evidence is admissible." M.R.E. 104. Thus, military judges are the primary recipients of evidence and arguments on matters directly impacting Article 6b rights. This means that the military judge at the trial court level is in the best position to make rulings that balance the various interests at issue among the parties and victim. *See, e.g.*, Article 66(d)(1)(B)(ii)(I), UCMJ (for factual sufficiency reviews, CCAs must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence."). Therefore, victims should be allowed to be heard before the trial court to resolve factual and legal matters implicating their Article 6b rights.

Third, victims should be allowed to be heard at the trial court so they can adequately enforce their Article 6b rights at the appellate level. "[T]he text of Article 66(c), UCMJ, does not permit the CCAs to consider matters that are outside the entire record." *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020). Additionally, a military judge's ruling is reviewed for an abuse of discretion based on the "material before the military judge." *United States v. Lloyd*, 69 M.J. 95, 100 (C.A.A.F. 2010) (finding no abuse of discretion where judge failed to adopt a theory not presented in the motion at the trial level). There is a "general rule that a legal theory not presented at trial may not be raised for the first time on appeal absent exigent circumstances." *Id.*

Requiring victims to assert Article 6b rights for the first time on appeal deprives victims the ability to present evidence on the record for an appellate court's consideration. Moreover, it deprives victims from advancing arguments in response to the parties on the record. Without the ability to present facts or present argument at the trial level, victims may be left with little "material before the military judge" to present on appeal. As a result, victims are constrained in representing their interests and efficiently enforcing their rights at the appellate level. This cannot be the intent of Congress in granting victims an enforcement mechanism before the appellate courts under Article 6b(e), UCMJ.

Lastly, judicial efficiency warrants victims the right to be heard at the trial level. It is more efficient for the trial court judge to hear arguments from the parties and the victim at the same time and in the same proceeding. It is less efficient to bifurcate this process between the Courts of Criminal Appeals and the trial court. This cannot have been the intent of Congress.

CONCLUSION

Amici address two primary issues: Whether this court should regard "military authorities" as an expansive term including almost all DoD records, and whether victims have a right to be heard at the trial court level in defense of the rights listed in Article 6(b). Regarding the first, Amici submit that an expansive view of "military authorities" will undermine the independence of all military service providers – including those who provide medical and legal services. Regarding the second issue, the plain language of Article 6(b), its context, and public policy all favor an interpretation of Article 6(b) that allows victims to be heard at trial in defense of the rights enumerated in the statute.

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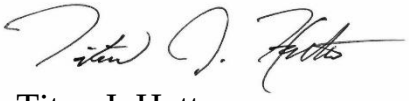

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 22, 2023, the foregoing was electronically filed with the Court and served on the Petitioner, the Appellee, Counsel for the Real Party in Interest, counsel for the Government, the lower court, and other relevant parties via email at the following addresses:

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CERTIFICATE OF COMPLIANCE WITH RULES

This brief complies with the type-volume limitation of Rule 24(c) and Rule 26(f) because this brief contains approximately 5,608 words. This brief complies with the typeface and type style requirements of Rule 37.

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