IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Captain (O-3)
ZACHARY R. BRAUM
United States Air Force,
Appellant.

BRIEF OF *AMICUS CURIAE*
WAKE FOREST UNIVERSITY
SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
IN SUPPORT OF APPELLANT

Crim. App. Dkt. No. ACM 40434

USCA Dkt. No. 25-0046/AF

BRIEF OF *AMICUS CURIAE* WAKE FOREST UNIVERSITY SCHOOL OF LAW APPELLATE ADVOCACY CLINIC IN SUPPORT OF APPELLANT

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

September 23, 2025

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**Admission to Bar of this Court pending*

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INTEREST OF AMICUS CURIAE

Continuously directed by the undersigned counsel since 2006, the Wake Forest University School of Law Appellate Advocacy Clinic is a clinical course for third-year law students who completed a prerequisite appellate advocacy course.

The Clinic represents five to ten clients per school year. Students handle every aspect of the representations, including oral argument. Fifty-eight students have argued in appellate courts under the undersigned counsel's supervision, including forty-six in our home Circuit, the Fourth. The Clinic regularly represents criminal defendants on direct appeal and prisoners on appeal from denied habeas claims that challenged their convictions or their conditions of confinement. Several of the Clinic's cases have involved denied discovery and other discovery related issues, including digital evidence searches. Especially relevant here, the Clinic has filed more than twenty amicus briefs, including seventeen in the Supreme Court of the United States and several others in federal circuits and state appellate courts.

The Clinic is interested in this particular case because the first issue presents an unsettled legal question involving a defendant's discovery rights. In part, the Clinic will address this Court's decision in *United States v. Secord*, No. 24-0217, 2025 WL 2217281 (C.A.A.F. July 30, 2025), which was decided after the parties' briefs were filed. Finally, the Clinic is interested because a third-year law student may have the opportunity to argue, an unparalleled learning experience.

ISSUE PRESENTED

Can the Government properly refuse to disclose relevant, non-privileged data in its possession, custody, and control on the basis that the witness who provided the data gave limited consent with respect to its use? If not, is relief warranted?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

SUMMARY OF ARGUMENT

The discovery issue presented should be reviewed *de novo* because it involves the interpretation of an R.C.M. provision.

R.C.M. 701(a) has a plain, unambiguous meaning. It plainly requires the Government to permit inspection of all relevant, non-privileged items in its "possession, custody, or control." There is no "legal" modifier in the plain test. Legal dictionary definitions support this plain meaning. The specific and broader contexts of R.C.M. 701(a) support the plain textual meaning. The Rule's intent is to promote full discovery to the maximum extent possible, and another subsection of R.C.M. 701 explicitly provides exceptions that do not apply here. The broader context includes that military defendants are often granted greater rights and protections than those of civilian defendants.

The Court should apply the plain, unmodified meaning of "possession, custody, or control" because it would not lead to an absurd result in this case or in the future. Here, the data in question includes highly relevant text messages between the Government's main witness and Appellant. The witness's concern about revealing details regarding her friends' lives—and similar concerns in future cases—could be addressed via in camera review. Moreover, the rights of criminal defendants are long-established, while the right to privacy the Government relies on is not as well-defined, especially as to cell phone data. Because the Government had a complete copy of the cell phone's data, the witness either lacked an objective expectation of privacy or had a lowered expectation of privacy. Furthermore, the unusual facts of this case are unlikely to recur. Whether to amend R.C.M. 701(a) to add a "legal" qualifier or otherwise address discovery of cell phone data is ultimately a policy question that should be left to the Joint Service Committee. A ruling in favor of Appellant on this first issue would promote fair play, while a ruling to the contrary could promote gamesmanship.

ARGUMENT

On the facts of this case, a witness's limited consent is not proper grounds for the Government's refusal to disclose a relevant, non-privileged phone extraction within its possession, custody, or control.

Standard of Review

The parties' descriptions of the standard of review for this appeal disagree in some respects. *See* Appellant's Br. 9; Appellee's Br. 12.

Review of an alleged discovery violation is a two-pronged analysis. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). The Court first "determine[s] whether the information or evidence at issue was subject to disclosure or discovery[.]" *Id*. If the Government failed to disclose such information, the Court then "test[s] the effect of that nondisclosure on the appellant's trial." *Id.* "Where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request … the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt." *Id.* at 327. The nature of the issue dictates the applicable standard of review under each of these two inquiries. *See id.* at 326.

The Court reviews a military judge's decision on a defendant's discovery request for abuse of discretion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015). A military judge necessarily abuses his discretion when he is incorrect about an applicable law or bases his decision on an improper application of the law, irrespective of whether his factual findings are at issue on appeal. *Roberts*, 59 M.J. at 326. Critically in this case, "interpretation of provisions of the R.C.M. are questions of law that this court reviews de novo." *United States v. Dean*, 67 M.J. 224, 227 (C.A.A.F. 2009) (reviewing R.C.M. 705 interpretation); *Secord*, 2025 WL 2217281, at *3 (reviewing R.C.M. 701(a)(2)(A) interpretation).

Law and Analysis

A. R.C.M. 701(a) should not be interpreted to include the modifier "legal" before "possession, custody, or control."[1]

The R.C.M. is interpreted according to "[o]rdinary rules of statutory construction." *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008). This Court first looks at "the text of the statute" to ascertain whether it is ambiguous. *United States v. Tucker*, 76 M.J. 257, 258 (C.A.A.F. 2017). Ambiguity "is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *United States v. Strong*, 85 M.J. 58, 64 (C.A.A.F.) (quoting *United States v. Schmidt*, 82 M.J. 68, 76 (C.A.A.F. 2022) (Ohlson, C.J., concurring in the judgment)), *reconsideration denied*, 85 M.J. 145 (2024), *and cert. denied*, 145 S. Ct. 1434 (2025). The Supreme Court has made clear that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v.*

[1] The Air Force Court of Criminal Appeals assumed error on this issue and only analyzed whether such error caused prejudice to Appellant. JA at 009.

Germain, 503 U.S. 249, 253-54 (1992). Further, "[w]ords are to be understood in their ordinary, everyday meanings." *Id.* (citation omitted).

If text is unambiguous, "a court may not look beyond it [and] must give effect to its plain meaning." *United States v. Clark*, 62 M.J. 195, 199 (C.A.A.F. 2005) (quoting *United States v. McGowan*, 41 M.J. 406, 413 n.4 (C.A.A.F. 1995)). Thus, there is a general prohibition against courts "read[ing] into statutes words that aren't there." *Romag Fasteners, Inc. v. Fossil, Inc.*, 590 U.S. 212, 215 (2020); *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994) ("Courts are not free to read into the language what is not there, but rather should apply the statute as written."). This is true except in the rare instances where application of the plain language "leads to an absurd result." *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) (quoting *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012)).

In this case, as discussed below, both the plain meaning of R.C.M. 701(a) and its context do not support reading "legal" into the text, and declining to read "legal" into the text would not lead to an absurd result.

1. The unambiguous text of R.C.M. 701(a) does not modify "possession, custody, or control."

The language in R.C.M. 701(a) that obligates the Government to disclose to the defense items within its "possession, custody, or control" in R.C.M. 701(a) is unambiguous and is not modified by "legal."

Possession, custody, and control have ordinary meanings that do not center around legality. When R.C.M. 701 was first promulgated in 1984, the fifth edition of Black's Law Dictionary defined "possession" as "[t]he detention and control … of anything which may be the subject of property[.]" *Possession*, Black's Law Dictionary (5th ed. 1979).[2] It also defined "control" as entailing the "[p]ower or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee." *Control*, Black's Law Dictionary (5th ed. 1979). "Custody" was defined as "[t]he keeping, guarding, care, watch, inspection, preservation or security of a thing, [with it] being within the immediate personal care and control of the [custodian]." *Custody*, Black's Law Dictionary (5th ed. 1979).

Similarly, the current edition of Black's Law Dictionary defines "possession" as (1) "[t]he fact of having or holding property in one's power; the exercise of dominion over property" and (2) "[t]he right under which one may exercise control over something to the exclusion of all others[.]" *Possession*, Black's Law Dictionary (12th ed. 2024). "Custody" is "[t]he care and control of a thing or person for inspection, preservation, or security," while "control" is an "exercise [of] power or influence over" something. *Custody*, Black's Law Dictionary (12th ed. 2024); *Control*, Black's Law Dictionary (12th ed. 2024).

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[2] The Supreme Court and this Court have relied on Black's Law Dictionary. *See, e.g.*, *Lackey v. Stinnie*, 145 S. Ct. 659, 667 (2025); *Van Buren v. United States*, 593 U.S. 374, 382 (2021); *Strong*, 85 M.J. at 64-65.

As part of the Manual for Courts-Martial, the R.C.M. is reviewed by the Joint Service Committee yearly. *See* 32 C.F.R. § 152.1 (2025). It follows that the drafters knew of the ordinary meanings of "possession, custody, or control" at the time of initial drafting and of their definitions every year since the Rule's promulgation. Thus, the use of three distinct words, all with broad definitions, indicates that the drafters intended for a wide range of conditions to trigger the Government's discovery obligations.

If the drafters had intended in 1984 or since to limit the scope of discovery in R.C.M. 701, they had multiple options. For example, instead of using "or," they could have used "and" to require all "possession, custody, AND control." As this Court recently stated, however, the language in R.C.M. 701(a) is "disjunctive" and means that a cell phone's data need only be "*either* within the Government's 'possession,' within the Government's 'custody,' or within the Government's 'control'" to trigger discovery obligations. *See Secord*, 2025 WL 2217281, at *3 (emphasis in original, referring to and agreeing with appellant's argument).

The drafters could also have explicitly included a modifier such as "legal" or "lawful" in R.C.M. 701(a). In fact, Black's Law Dictionary now recognizes the term "lawful possession" as a distinct subset of "possession," defining it as (1) "[p]ossession based on a good-faith belief in and claim of ownership" and (2) "[p]ossession granted by the property owner to the possessor." *Possession*, Black's

Law Dictionary (12th ed. 2024). Similarly, "legal custody" is now a distinct subset of "custody" with three meanings: two relate to family law and one refers to law enforcement "detention of a person." *Custody*, Black's Law Dictionary (12th ed. 2024). Notably, there is no definition of "legal custody" that relates to evidence or discovery, nor is there any definition for "legal control." *See Control*, Black's Law Dictionary (12th ed. 2024).

Reading in a "legal" modifier would drastically alter the plain meaning of these words as understood both when R.C.M. 701(a) was first written and today, because "legal" is not part of the ordinary meaning of "possession, custody, or control." Tellingly, the military judge's opinion cited no authority in support of adding the word "legal." *See* JA at 543-44. Moreover, if the term "legal" were read into the Rule, then—consistent with the series-qualifier canon—this Court would have to apply "legal" to each of possession, custody, and control. The absence of any definition of "legal custody" or "legal control," however, would render such a reading impractical.

Moreover, when this Court considered the application of R.C.M. 701(a) to cell phone data in July of this year, it did not modify "possession, custody, or control" by adding in any "legal" modifier. *See Secord*, 2025 WL 2217281, at *3-4. This Court instead analyzed under the facts of that case whether the Government had “possession, custody, or control” over data that was password-protected and with which “the Government had no access of any kind.” *Id.* at *4.

Applying the definitions from either edition of Black’s, the Government had, at a minimum, custody and control of the complete phone extraction. The Government had control over the data as evidenced by its exertion of power to oversee the data and had custody as it had care and control of the extraction and was charged with preserving and securing it. The Government concedes that the data was within its physical custody, as the military judge also concluded. *See* Appellee’s Br. 26; JA at 543. Similarly, applying the dictionary definitions cited on page 23 of its brief, the Government had “possession, custody, or control” over the data. OSI took control of the data—the extraction was obtained and protected through the authorities’ exercise of restraint and influence. And by taking charge and control of the evidence, it was also within OSI’s possession and custody. *See Secord*, 2025 WL 2217281, at *6 (Maggs, J., dissenting) (agreeing, based on “the general tenor” of dictionary definitions, with Appellant’s argument that CID had “custody” of cellphone data).

With their yearly review of the R.C.M., the drafters have ample opportunity to amend R.C.M. 701 and limit the scope of discovery by altering the terms or adding a legality limitation. Because the drafters have not done so, this Court should presume that the drafters have said in R.C.M. 701 what they mean—that anything within the government's possession, custody, or control is discoverable. *See Germain*, 503 U.S. at 253-54.

2. **<u>The specific and broader contexts of R.C.M. 701(a) show that "legal" should not be read into it.</u>**

The context of the Rule shows that the drafters clearly intended to grant broad discovery. *See* R.C.M. 701 Discussion (noting that the aim of the Rule is to provide for "broad disclosure of information" and to "eliminate pretrial gamesmanship, minimize pretrial litigation, and reduce the potential for surprise and delay at trial"). In the Analysis of R.C.M. 701, the drafters state that "[t]he rule is intended to promote full discovery to the maximum extent possible," explicitly recognizing that the obligations are "broader … than is required in Federal practice." *Manual for Courts-Martial, United States*, Analysis of the Rules for Courts-Martial app. 21 at A21-33 (2012 ed.). Moreover, R.C.M. 701(a) employs a mere relevance standard, a much lower discovery bar than the *Brady* standard. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (only requiring disclosure of evidence when it is both material and exculpatory). Consistent with this broader context, the drafters' use of the unmodified "possession, custody, or control" should be read to include any items meeting those definitions, without reading in the term "legal."

Another subsection of R.C.M. 701 is also instructive. R.C.M. 701(f) provides explicit exceptions for when discovery is not required, even evidence within the Government's "possession, custody, or control." R.C.M. 701(f) exempts from discovery information that is "protected from disclosure by the Military Rules of Evidence" and "notes, memoranda, or similar working papers" constituting attorney work product. With R.C.M. 701(f) providing exceptions to R.C.M. 701(a), the Court should not read in an unwritten one.

Finally, considering the broader context of the R.C.M. and military rules as a whole, it follows that the drafters did not act irrationally in omitting a legality requirement from "possession, custody, or control" in R.C.M. 701(a). Military defendants are often granted broader rights and protections than those generally granted to civilian defendants. For instance, military defendants have "more exacting" speedy trial rights under Article 10 of the UCMJ than granted under the Sixth Amendment. *United States v. Mizgala*, 61 M.J. 122, 125-26 (C.A.A.F. 2005). Similarly, under R.C.M. 506(c), military defendants' right to counsel are "broader than those available to their civilian counterparts." *United States v. Watkins*, 80 M.J. 253, 258 (C.A.A.F. 2020) (quoting *United States v. Spriggs*, 52 M.J. 235, 237 (C.A.A.F. 2000)). Additionally, Article 31 of the UCMJ grants military servicemembers "more expansive" protections "than those required by *Miranda*." *United States v. Finch*, 64 M.J. 118, 128 (C.A.A.F. 2006) (Gierke, C.J., concurring in part and dissenting in part). Moreover, in military cases, there is a more stringent standard than in civilian cases for military counsel to provide "'a reasonable, racially neutral explanation' for a … challenge of a minority member of a court-martial." *Id.* at 129.

Given the abundance of ways in which military defendants are granted greater rights and protections than civilian defendants, this Court should not narrow an unambiguous provision and read in a requirement that the drafters did not include.

Thus, based on a textual and contextual analysis, the term "legal" should not be read into R.C.M. 701(a).

3. <u>Declining to read "legal" into R.C.M. 701(a) would not lead to an absurd result.</u>

Arguments that a result is absurd shall fail "if 'Congress could rationally have made such a' reading [of] the law." *United States v. McPherson*, 81 M.J. 372, 380 (C.A.A.F. 2021) (emphasis omitted) (quoting *Int'l Primate Prot. League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 84-85 (1991)). Consequently, even when a court believes that application of text's plain meaning "will lead to a harsh result," it may not "attempt to soften the clear import of Congress's chosen words." *United States v. Locke*, 471 U.S. 84, 95 (1985); *see also id.* ("[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do.").

Here, interpreting R.C.M. 701(a) to require the Government to disclose data in its possession, custody, or control despite a witness's limited consent is rational and not absurd. The R.C.M. provides a mechanism for considering a witness's limited consent that is more appropriate than an outright refusal by the Government to disclose relevant material.

Under R.C.M. 701(g), military judges retain the "authority to regulate discovery generally" and may exempt otherwise-discoverable evidence following in camera review. *Manual for Courts-Martial, United States*, Analysis of the Rules for Courts-Martial app. 21 at A21-35 (2012 ed.); *see* R.C.M. 701(g) (permitting the military judge to limit disclosure through a protective or modifying order following in camera review). In camera review is the preferred practice when military judges are faced with balancing a witness's privacy rights and the Government's broad discovery obligations under R.C.M. 701. *See United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999) ("To ensure a good balance between an accused's right to a fair trial, judicial efficiency, and confidentiality considerations, the military judge has such tools as *in camera* reviews, and protective or modifying orders at his disposal."); *United States v. Briggs*, 48 M.J. 143, 145 (C.A.A.F. 1998) ("The preferred practice is for the military judge to inspect the medical records *in camera* to determine whether any exculpatory evidence was contained in the file prior to any government or defense access."); *United States v. Rivers*, 49 M.J. 434, 437

(C.A.A.F. 1998) ("Where a conflict arises between the defense search for information and the Government's need to protect information, the appropriate procedure is '*in camera* review' by a judge." (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 61 (1987))).

As this Court has made clear, military judges are encouraged to exercise their discretion under R.C.M. 701(g) for the benefit of defendants and witnesses alike. In a rare case such as this in which the Government has possession, custody, or control over some items belonging to a witness, has limited consent to search some of them, and believes the witness may have privacy rights as to some or all of the remaining items, the Government can seek in camera review.[3]

B.E. testified that her primary concern in disclosing more than location data was the possible exposure of her friends' lives. JA at 321. Had the military judge conducted an in camera review in this case, he could have limited the scope of discovery or ordered redactions to honor both B.E.'s desire to protect her friends' privacy and Appellant's rights to discover items in the Government's possession, custody, or control. Conversely, the military judge's reading of "legal" into the text of R.C.M. 701(a) undermined the President's grant of discretion to the judiciary to determine what rights are superior in a given case. Indeed, requiring "legal"

[3] Although defense trial counsel may have declined to request an in camera review in this particular case, *see* JA at 549, an in camera review might be possible on remand in this case or in any similar future cases.

possession allowed the military judge to deny a discovery request on the basis of a witness's possible privacy interests alone, without ever examining the documents sought and ignoring Appellant's interests altogether. This result subverts the drafters' intent to limit the circumstances under which discoverable material may be excluded outside of the explicit exceptions in R.C.M. 701(f) or in the absence of in camera review.

Reading in "legal" would have implications at the appellate level as well. In camera review ensures that courts are supplied with all the materials necessary to conduct an informed review on appeal. *See Briggs*, 48 M.J. at 145 ("Once reviewed, the military judge makes a ruling either allowing access to both sides, or denying access and resealing the records as an exhibit for appellate review."). The military judge's obligation to seal and attach undisclosed documents ensures that parties are not prejudiced by an incomplete appellate record. *See Abrams*, 50 M.J. at 364 (remanding the case because of the military judge's failure to append a witness's medical records following an in camera review and decision not to disclose them). Moreover, reading in "legal" and enabling military judges to make decisions on discoverability without any review all but ensures that documents relevant to appellate consideration would not be included in the record. Hence, not only does a plain language approach preserve R.C.M. 701's procedural protections at the trial level, it also maintains the integrity of the record and promotes the fair administration of justice.

Part B below provides additional reasons why the statutory interpretation recommended in this amicus brief would not lead to absurd results.

In conclusion, looking at the plain language of R.C.M. 701(a) as well as the specific and broad contexts in which it is situated, it is apparent that the military judge erred in limiting the Rule to items in the Government's "*legal* possession, custody, or control."

B. Holding that the Government improperly refused to disclose the data would protect criminal defendants' rights, not harm cell phone owners' reasonable privacy rights, and promote fair play.

A decision that the Government in this case improperly refused to disclose the data in its possession, custody, or control would recognize the importance of criminal defendants' rights, not lessen privacy rights, and promote fair play.

First, a ruling in favor of Appellant would be consistent with our nation's history of prioritizing defendants' rights in criminal cases. Defendants, and especially military defendants, are entitled to numerous heightened protections, ranging from speedy trial rights to the right to counsel. *See Mizgala*, 61 M.J. at 125-26; *Watkins*, 80 M.J. at 258 (citing *Spriggs*, 52 M.J. at 237); *Finch*, 64 M.J. at 128 (Gierke, C.J., concurring in part and dissenting in part). The rights of defendants have been part of the fabric of our country since its inception. *See*

United States v. Hansen, 59 M.J. 410, 411 (C.A.A.F. 2004) (discussing how defendants' constitutional rights "derive from express constitutional text and for many, if not most Americans, these rights are central to the American perception of criminal justice"); *see also United States v. Rosato*, 11 C.M.R. 143, 144-45 (C.M.A. 1953) (discussing how the right against self-incrimination "has been described as the very essence of constitutional liberty"). The enshrinement of defendants' rights in the Constitution reflects a desire to uphold the protections that had been added to English criminal procedure. *See Brown v. Walker*, 161 U.S. 591, 597 (1896) ("So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that [they clothed] a denial of the right to question an accused person … with the impregnability of a constitutional enactment.").

In contrast to the lengthy history of criminal defendants' rights, the idea of victims' rights did not enter the "social consciousness" of our country until the late 1960s. Marlene Young & John Stein, Office for Victims of Crime, *The History of the Crime Victims' Movement in the United States* (2004), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/OVC_Archives/ncvrw/2005/pg4c.html. In fact, the statute codifying the Victims' Rights Act was not enacted until May 29, 2015, a mere ten years ago. *See* 18 U.S.C. § 3771 (2025). Thus, the rights of victims are not woven into the fabric of our nation in the same way that defendants' rights are enshrined in our governing documents.

In addition to the recent emergence of victims' rights, the right to privacy is undefined. *See Byrd v. United States*, 584 U.S. 395, 405 (2018) ("[T]he Court has not set forth a single metric or exhaustive list of considerations to resolve the circumstances in which a person can be said to have a reasonable expectation of privacy[.]"); *Carpenter v. United States*, 585 U.S. 296, 358 (2018) (Thomas, J., dissenting) ("After 50 years, it is still unclear what question the *Katz* test is even asking. This Court has steadfastly declined to elaborate the relevant considerations or identify any meaningful constraints.").

To add to the undefined nature of the right to privacy, the seminal case regarding searches of cell phones was decided only eleven years ago. *See generally Riley v. California*, 573 U.S. 373 (2014). The unsettled contours of a reasonable expectation of privacy compound the concerns arising from protecting newly-established victims' rights over a criminal defendant's Constitutional rights.

In short, in a clash between a criminal defendant's right to discover relevant evidence before a trial that might take away his liberty and a Government witness's right to keep private some of the data that the witness has provided to the Government, the defendant's right should prevail.

Second, declining to read "legal" into R.C.M. 701(a) should not lesson the reasonable expectation of privacy of cell phone users in the future. Because B.E. understood that the entire contents of the phone would be downloaded, the question should turn on whether she retained a reasonable expectation of privacy in that copy. Whether governmental action constitutes a search depends on whether there was a reasonable expectation of privacy, which requires a subjective expectation of privacy that society is willing to accept as objectively reasonable. *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (citing *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring)).

Despite B.E.'s limited consent to the search of her phone, she should not be viewed as having a reasonable expectation of privacy in a government *copy* of the complete extraction. While the Supreme Court has emphasized that cell phones hold an immense amount of data that reveal the "privacies of life," these concerns were acknowledged with respect to the search of an *arrestee's* phone, not the phone of the prosecution's main witness. *See Riley*, 573 U.S. at 403 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Concerns about revealing the privacies of life are diminished when, as in this case, witnesses know law enforcement will download the entire contents of their phones. *See United States v. Lutcza*, 76 M.J. 698, 701 (A.F. Ct. Crim. App. 2017).

Lutzca is analogous. There the defendant consented to a full extraction and search of his phone data, then later revoked that consent. *Id.* at 700. Rejecting the argument that the Government violated his reasonable expectation of privacy, the Air Force Court of Criminal Appeals ruled that "a Government-created *copy* of evidence that was lawfully seized, whether by consent or by a search warrant, does not carry a reasonable expectation of privacy and is not to be suppressed if that copy was created before consent was revoked." *Id.* at 702 (citation omitted). The court reasoned that *Riley* does not preclude such a result because, despite "how[] much private information [a phone] contain[s], that individual nevertheless may consent to reveal that information to investigators." *Id.* at 703.

The Government's act of searching a copy of B.E.'s phone extraction is what makes this case analogous to *Lutzca*. Similar to the defendant in *Lutzca*, B.E. knew that the entire contents of her phone would be downloaded. JA at 534. In *Lutzca*, the defendant's revocation of consent was immaterial to his expectation of privacy in the phone data because the Government was already in the possession of its own, lawfully seized copy. Similarly, B.E.'s limited consent should not control when the Government lawfully seized and, consequently, possessed, a copy of her phone data. Therefore, as with the defendant in *Lutzca*, B.E. lacked a reasonable expectation of privacy in the Government's copy of her data and disclosing the complete phone extraction would not have violated any Fourth Amendment rights.

For this reason, even if "legal" is read into R.C.M. 701(a), the Government had legal possession, custody, or control over its copy of B.E.'s cell phone contents.

A ruling in favor of Appellant would be consistent with this Court's recent decision in *Secord*. In *Secord*, this Court analogized to the "bundle of sticks" concept of property rights and held that the Government did not have possession, custody, or control over cell phone data. The Court noted that the Government:

> had no access of any kind to the cell phone data … did not know for certain whether there was any data on the Appellant's cell phone at all … could not review the data, use the data in its investigation, proffer the data as evidence at trial, or share the data with anyone else.

Secord, 2025 WL 2217281, at *4. The Government's "lone stick," the ability to exclude others from the cell phone data, "was equally shared with Appellant." *Id.*

If the Court were to apply a "bundle of sticks" analysis in this case, the Government knew that B.E.'s cell phone contained data, had discussed the data with her and used some of it in its investigation, and had control over its copy of the cell phone's entire contents, including the ability to access it, while Appellant had only the location data the Government gave him and no other right to any data. The inequity in access to information between the defendant and Government in this case, when the Government *could* access the relevant data, brings the complete extraction within the scope of R.C.M. 701.

Additionally, transmitting information to a third party results in a lowered expectation of privacy. *Smith v. Maryland*, 442 U.S. 735, 748 (1979) (discussing the third-party doctrine); *United States v. Miller*, 425 U.S. 435, 444-45 (1976) (same). More recently, courts have expanded this doctrine to include text messages exposed to telephone carriers. *See United States v. Lattin*, No. ACM 39859, 2022 WL 1186023, at *19 (A.F. Ct. Crim. App. Apr. 20, 2022) (holding that by communicating via text message, the defendant "lost control over the further dissemination of his statements, resulting in a corresponding reduction in his expectation of privacy therein"), *aff'd*, 83 M.J. 192 (C.A.A.F. 2023). While the Government has used the third-party doctrine to argue that *defendants* have a lowered expectation of privacy, the doctrine can be used analogously as to *Government* witnesses. In this case, when B.E. texted Appellant, she exposed those messages to their telephone carriers. Then, when B.E. consented to the phone extraction, she again exposed the data in her phone to others, again lowering her objectively reasonable expectation of privacy. For all these reasons, B.E. lacked an objectively reasonable expectation of privacy in the copy of her phone data.

Furthermore, a ruling in favor of discovery in this case would not open the floodgates to cell phone searches. This case has a highly unusual confluence of facts that seem unlikely to recur. The facts include (1) highly relevant cell phone texts and other data, (2) between the Government's main witness and the defendant, (3) that the Government has a copy of as part of the complete phone extraction, and (4) that the Government willingly obtained through a limited consent allowing it to use location data it was especially interested in. This Court should resist the old adage that "bad facts make bad law."

Whether to add to R.C.M. 701's plain text to address cell phone data seems to be a policy question best left to the drafters, the Joint Services Committee. *See, e.g.*, *United States v. Stebbins*, 61 M.J. 366, 375 n.72 (C.A.A.F. 2005) ("We invite the Joint Services Committee to consider whether the *Manual* should include standards for the imposition of fines."), *overturned on other grounds by United States v. Mangahas*, 77 M.J. 220 (2018); *United States v. Clark*, 49 M.J. 98, 101 (C.A.A.F. 1998) (Cox, J., concurring) ("I once again invite the Joint Services Committee to consider a rule for post-conviction attacks on courts-martial.").

Third, holding that the Government improperly refused to disclose the data would promote fair play. If the Court holds instead that the Government can refuse to disclose data because it was obtained pursuant to a limited consent, then Governmental gamesmanship could be encouraged in future cases. For example, the Government might reach a plea agreement with one co-defendant, obtain certain data from the co-defendant's cell phone that was helpful to its investigation pursuant to a limited consent, and then refuse to disclose to the second co-defendant other relevant data it had in its possession.

This possibility of gamesmanship is increased due to the reality of fast-paced prosecutorial investigations, including "tunnel vision," which can occur unintentionally. *See generally* Brian Reichart, *Tunnel Vision: Causes, Effects, and Mitigation Strategies*, 45 Hofstra L. Rev. 451 (2016); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291 (2006). Tunnel vision is the result of cognitive biases and leads actors within the criminal justice system "to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion." Findley & Scott, *supra*, at 292, 307. Even when intentional prosecutorial misconduct is not present, tunnel vision can lead to wrongful convictions. Reichart, *supra*, at 452-53.

For example, an investigator believing B.E.'s statements might have concluded early on that Appellant was guilty and as a result agreed to focus only on location data on her cell phone to corroborate location details in her statements, despite obtaining a complete cell phone extraction, and thereafter refuse to permit inspection of relevant data that might cast doubt on other aspects of the statements.

Ultimately, whether tunnel vision was present here is less important than decreasing its likelihood and its ill effects going forward. A ruling that R.C.M. 701 requires the Government to permit the defense to inspect all relevant, non-privileged data within its possession, custody, or control would give defendants a better chance of preventing wrongful convictions and other miscarriages of justice.

CONCLUSION

The military judge improperly read in a requirement of "legal" when interpreting R.C.M. 701(a). Because the Government had "possession, custody, or control" of a copy of the cell phone's contents, the R.C.M. 701(a) standard for permitting inspection was met.

Respectfully submitted,

September 23, 2025 *<u>/s/ John J. Korzen</u>*

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CERTIFICATE OF FILING AND SERVICE

I, John J. Korzen, certify that on September 23, 2025, I transmitted the foregoing by electronic means to the Court, and served it via email to the Government at af.jajg.afloa.filng.workfloa@us.af.mil and to counsel for Appellant at conway@militaryattorney.com and hockenberry@militaryattorney.com.

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CERTIFICATE OF COMPLIANCE WITH RULES 24 AND 37

This brief complies with the type-volume limitation of Rule 24 because it contains 5,973 words and complies with the typeface and type style requirements of Rule 37 because it uses a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

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