No. _____

IN THE

Supreme Court of the United States

ZACHARY R. BRAUM,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JOSHUA L. LOPES
Counsel of Record
ANNE M. DELMARE
United States Air Force
Appellate Defense Division
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
joshua.lopes@us.af.mil

Counsel for Petitioner

QUESTION PRESENTED

In this case, the Government obtained digital evidence from a complaining witness that exceeded the scope of her consent. The prosecutors withheld this evidence from the defense even though it was favorable and specifically requested. The U.S. Court of Appeals for the Armed Forces (CAAF) assumed the Government erred by withholding the evidence but found the error was harmless beyond a reasonable doubt. Before making its decision, the CAAF did not review the contents of the withheld discovery.

The question presented is:

Whether an appellate court may conclude that a discovery violation was harmless beyond a reasonable doubt without reviewing the withheld evidence and assessing its impact on the defendant's right to a fair trial.

PARTIES TO THE PROCEEDING

Petitioner is Captain Zachary R. Braum. Respondent is the United States.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

The following is a list of all proceedings related to this case within the meaning of Rule 14.1(b)(iii):

- *United States v. Braum*, No. 25-0046/AF, U.S. Court of Appeals for the Armed Forces (reconsideration denied on June 3, 2026).

- *United States v. Braum*, No. 25-0046/AF, U.S. Court of Appeals for the Armed Forces (judgment entered April 8, 2026).

- *United States v. Braum*, No. ACM 40433, U.S. Air Force Court of Criminal Appeals (judgment entered October 10, 2024).

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INTRODUCTION

This case presents an important question concerning the proper harmless-error framework when an appellate court assumes that the Government withheld relevant, non-privileged evidence from the defense. The issue implicates the direct conflict between a witness's Fourth Amendment privacy interests and an accused's right to a fair trial when the Government possesses and withholds a complete extraction of the witness's cellphone.

Critically, the question is likely to recur in military criminal cases involving limited-consent cellphone extractions. Moreover, the CAAF is fractured on this question, having issued three separate opinions reflecting three irreconcilable analytical approaches.

The facts are straightforward. During a criminal investigation, the complaining witness gave law enforcement limited consent to access location-related data from her cellphone. Law enforcement then obtained a complete forensic extraction of the phone. When the defense requested the full extraction under R.C.M. 701(a)(2)(A)—which requires the Government to permit inspection of data "within the possession, custody, or control of military authorities"—the trial judge denied the motion. He acknowledged that the data was in the Government's "physical" possession but ruled that R.C.M. 701 required "legal" possession—a qualifier he conceded was "not stated" in the rule but found "necessarily implied."

The resulting appellate proceedings produced no resolution. The majority opinion at the CAAF expressly declined to decide whether the trial judge

erred, instead assuming error and finding it harmless. The concurrence concluded R.C.M. 701 applied to the data, rejecting the trial judge's reasoning, but held the Fourth Amendment prohibited disclosure regardless. The dissent would have set aside the findings and sentence, concluding the Government failed to meet its heavy burden under the harmless-beyond-a-reasonable-doubt standard.

This Court's review is warranted because the harmless-error analysis applied below is inconsistent with this Court's precedents and creates a framework that will insulate discovery errors from meaningful appellate review. The decision leaves unresolved a recurring and important question regarding the Government's discovery obligations and a victim's privacy rights that no lower court has definitively answered, and the analytical framework applied below creates an irreconcilable tension between a servicemember's discovery rights and a witness's privacy interests.

OPINIONS BELOW

The opinion of the U.S. Air Force Court of Criminal Appeals (AFCCA) is unreported. It is available at *United States v. Braum*, 2024 CCA LEXIS 419, 2024 WL 4458537 (A.F. Ct. Crim. App. Oct. 10, 2024). It is available at *United States v. Braum*, 86 M.J. 472 (C.A.A.F. 2026).

JURISDICTION

The AFCCA had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. The CAAF had jurisdiction pursuant to Article 67, UCMJ, 10 U.S.C. § 867. The CAAF entered its judgment on April 8, 2026. Petitioner, Captain Braum, filed a timely

petition for reconsideration on April 17, 2026, which was denied on June 3, 2026. The Chief Justice of the United States Supreme Court granted Capt Braum's application for an extension of time to and including October 31, 2026. This Court's jurisdiction rests on 28 U.S.C. § 1259(3).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .."

Article 46, UCMJ, 10 U.S.C. § 846, provides in relevant part: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."

R.C.M. 701(a)(2)(A) provides in relevant part:

Upon request of the defense, the Government shall permit the defense to inspect:

(i) Any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within

the possession, custody, or control of military authorities, and the item is relevant to defense preparation.

R.C.M. 703(e)(1) provides: "Each party is entitled to the production of evidence which is relevant and necessary."

STATEMENT OF THE CASE

1. Background of Capt Braum's relationship with the complaining witness and subsequent allegations.

Capt Braum met BE, the complaining witness, on an online dating application in November 2019. App. at 32a. Soon after they began dating their relationship quickly progressed. *Id.* BE characterized the early relationship as "sweet and romantic," and her two children from former relationships soon developed a connection with Capt Braum as he assumed a prominent role in their lives. *Id.*; Trial Tr. at 764-765, 798. On June 6, 2020, Capt Braum and BE became engaged to marry. Trial Tr. at 557.

In May 2020, Capt Braum and BE discussed "spic[ing] up [their] life in the bedroom." App. at 33a. On various occasions between May and June 2020, they engaged in bondage, discipline, sadism, and masochism (BDSM) involving a ball gag, anal plugs, a bullwhip, and suffocation. App. at 4a; *id.* at 33a-34a. BE later claimed these activities were nonconsensual, but she remained with Capt Braum despite these incidents because she thought he was otherwise charming and sweet. *Id.* at 34a.

On July 12, 2020, Capt Braum and BE had a dispute that turned into a physical altercation when Capt Braum took BE's phone away from her and

pushed her away. *Id.* at 35a. After the altercation, Capt Braum eventually packed his belongings, left the home, and ended the engagement. Trial Tr. at 682-683, 741. The next day, BE talked to a family friend who worked for a local civilian law enforcement agency, and an investigation ensued. App. at 36a.

2. Law enforcement obtained a complete extraction of the complainant's cellphone but obtained consent to access only location data.

On July 29, 2020, BE met with the Newton Police Department (NPD) and the Air Force Office of Special Investigation (OSI) to discuss her allegations against Captain Braum. App. at 5a, 36a. During this meeting, BE repeatedly referred to her cellphone to answer questions. *Id.* at 5a. This led law enforcement to ask whether she would consent to a digital extraction of her phone. *Id.*

BE consented to the extraction but limited her consent to location data only. *Id.* at 37a. Investigators explained to BE that the entire contents of the phone would be downloaded but that the Government's search would be limited to location-related information in accordance with her consent. *Id.* BE agreed and investigators then extracted the data from her phone. *Id.*; *id.* at 5a. The officer copied the complete extraction to a flash drive that the police retained as evidence. *Id.* at 5a.

3. The Government refused to disclose the full extraction to the defense.

Pretrial, the Government disclosed the location data to the defense and informed defense counsel that the extraction contained more than location data. *Id.* The Government refused to turn over the complete

extraction because BE's consent was limited. *Id.* The defense moved to compel the Government to produce the entire extraction under R.C.M. 701(a)(2) because the extraction was in the Government's physical "possession, custody, or control," or in the alternative, to produce the entire extraction under R.C.M. 703(e)(1) as it was "relevant and necessary" to Captain Braum's defense. App. at 5a-6a.

4. The trial judge denied the motion based on a "legal possession" requirement not found in the rule.

In ruling on the motion to compel the phone extraction evidence, the trial judge began with the R.C.M. 701(a)(2) argument and observed that the "issue turns on whether physical possession, custody, or control suffices [under R.C.M. 701(a)(2)(A),] or if 'legal' possession, custody, or control, though not stated in [R.C.M.] 701(a)(2)(A), is necessarily implied." App. at 4a. The trial judge determined it was the latter. *Id.* He acknowledged the Government was in physical possession of the data but concluded that R.C.M. 701 required "legal" possession—a requirement he conceded was "not stated" in the rule but found "necessarily implied" to protect BE's Fourth Amendment rights. *Id.* at 6a.

Turning to R.C.M. 703(e)(1), the trial judge concluded the defense had not established the evidence was relevant and necessary, reasoning that the defense already had access to messages and pictures from Captain Braum's own phone. *Id.* at 7a.

5. At trial, BE unfairly used her withheld text messages as both a shield and a sword by continuing to refuse disclosure while accusing the defense of deleting and cherry-picking evidence.

At trial, Capt Braum did not contest that he and BE had engaged in BDSM activities. App. at 23a. Rather, he argued that the sexual acts were consensual or at least that he reasonably believed they were consensual. *Id.* In support of this position, the defense introduced material from Capt Braum's cell phone demonstrating BE's willing involvement to the acts. *Id.* For example, BE sent Capt Braum explicit images depicting women in sexually submissive positions with a man. *Id.* Further, when Capt Braum texted a reference to a Snapchat photo by saying, "I didn't see that snap coming," BE texted back, "I got tired of waiting, I wanted to try the butt plug." *Id.* Additionally, BE's own Amazon account reflected the purchase of an "anal hook," a stuffed leather gag, "butt plugs," and rope. *Id.* at 23a-24a. In fact, BE texted Appellant a screenshot of the Amazon listing for the anal hook on the same day of the purchase. *Id.* at 24a. And when Appellant made a reference in a text message to using the back door to BE's home, BE texted back that her "back door" was for "hooks and clubs only." *Id.* In addition, the defense produced BE's former best friend who testified that BE had a reputation for not being truthful. *Id.*

Captain Braum possessed ninety-one pages of text exchanges from his own phone in which BE sent pictures of women in bondage, sexual paraphernalia, and messages indicating willing participation in such activities. App. at 5a. When the defense confronted BE with the material from Appellant's cell phone, BE

sought to deflect the questions and to minimize the import of the material by claiming that the text messages being shown to her were "choppy and cherry picked," things were "missing" "incomplete" and "misleading," and she "felt like there was a lot of deleted messages throughout." App. at 24a; Trial Tr. at 589, 854, 858, 887-88.

The full extraction was thus necessary, at minimum, to corroborate these messages and contradict BE's trial testimony that she never requested or sought BDSM activities with Captain Braum, and relatedly, did not purchase sex toys or BDSM items to engage in said activities. App. at 6a; Trial Tr. at 862, 864-866.

6. Deprived of the opportunity to challenge BE's testimony concerning the allegedly "incomplete" text messages, Capt Braum was convicted of charges related to the BDSM incidents.

A general court-martial composed of officer members convicted Captain Braum of three specifications of rape, three specifications of sexual assault, one specification of abusive sexual contact, three specifications of domestic violence, and one specification of reckless operation of an aircraft in violation of Articles 120, 128b, and 113, UCMJ, 10 U.S.C. §§ 920, 298b, 913. App. at 4a. Captain Braum was sentenced to nine years of confinement, forfeiture of all pay and allowances, dismissal, and a reprimand. *Id*. at 23a.

7. The AFCCA assumed error and found exclusion of evidence to be harmless.

The AFCCA declined to determine whether R.C.M. 701 required disclosure. App. at 8a. Instead, the court assumed the trial judge erred and held any nondisclosure was harmless beyond a reasonable doubt because the defense already had pictures of text message exchanges between Captain Braum and BE. *Id*. at 42a.

8. The CAAF granted review and affirmed in a fractured decision.

The CAAF granted review on the following issue: "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?" App. at 27a.

Judge Sparks, joined by Judge Maggs, delivered the majority opinion. The majority expressly declined to decide whether the trial judge erred, and, instead, like the court below, it assumed possible error. The majority held that any error was harmless beyond a reasonable doubt, finding the full extraction would have been merely cumulative impeachment evidence. App. at 10a-11a. The majority acknowledged, however, that this case presents "the tension between a victim's constitutional right to privacy and an accused's constitutional right to a fair trial" and "an open and unresolved question of whether, or when, a victim's constitutional privacy rights may supersede an accused's discovery rights and, potentially, his constitutional right to a fair trial." App. at 9a.

Judge Hardy, joined by Judge Johnson, concurred in the judgment but wrote separately to address the merits of the underlying issue. App. at 13a-22a. The concurrence concluded that the trial judge's reasoning was incorrect—R.C.M. 701 did apply because the data was in the Government's possession. App. at 22a. The concurrence noted "the novel legal issue presented by this case: the Government had possession, custody, or control of the data from BE's cell phone, but that data was still protected by BE's Fourth Amendment rights." *Id.* The concurrence also parted ways with the trial judge and agreed with Captain Braum that R.C.M. 701 imposed no legal requirement that the Government have "legal" possession of the extraction. *Id.* The concurrence ultimately concluded that the Fourth Amendment prohibited the Government from disclosing the data. App. at 22a. Applying hierarchy of laws, the concurrence reasoned that when a Rule for Courts-Martial conflicts with the Constitution, the rule must yield. *Id.* The concurrence noted, however, that R.C.M. 703 provides an alternative route via compulsory process if the defense established relevance and necessity. *Id.* at 21a.

Then-Chief Judge Ohlson dissented. App. at 22a-26a. He would have set aside the findings and sentence, concluding the Government failed to meet its "heavy burden" under the harmless-beyond-a-reasonable-doubt standard. App. at 22a. Then-Chief Judge Ohlson emphasized that BE used the withheld evidence at trial as both a "shield"—invoking privacy to block defense access—and a "sword"—claiming the defense's messages were "choppy," "cherry picked," and "misleading" while the only way to rebut those claims was to have her complete version of the

messages. App. at 24a-25a.

At bottom, this case hinged on BE's credibility. *Id.* at 25a. And as the lead CAAF opinion itself conceded, the evidence impeaching BE's credibility was "*substantial in volume and weight*." *Id.* at 11a (emphasis added). Then-Chief Judge Ohlson stated "[i]n essence then, BE was allowed to convey to the panel members that they should discount what the text messages showed about her willing participation in the BDSM activities because the defense was confronting her with a supposedly incomplete set of texts—but the only way the defense could rebut BE's claim was to have access to BE's copy of the text messages, which BE herself blocked." App. at 25a. The Chief Judged stated plainly: "[t]he colloquial term for BE's approach is 'chutzpah'; the legal term for the military judge's denial of the defense motion to compel production of BE's text messages is 'prejudicial.'" *Id.*

The dissent underscored the prejudicial impact of this error, noting that "[b]y pointing to the evidence adduced at trial that amply demonstrated BE's lack of credibility, the lead opinion implicitly acknowledges just how tenuous Appellant's conviction really was." App. at 25a. And "BE used her leverage over the text messages to buffer the impact of the defense's cross-examination. If the military judge had properly allowed the defense to obtain access to BE's version of the text messages, BE's allegations against the defense would have been prevented or rebutted, thereby making the defense's cross-examination of BE even *more* effective." *Id.*

Captain Braum filed a timely petition for reconsideration on April 17, 2026, which the CAAF denied on June 3, 2026. App. at 1a.

REASONS FOR GRANTING THE PETITION

I. CAAF left an important and recurring question of military criminal procedure unresolved.

Despite granting review on the precise question of whether R.C.M. 701(a)(2)(A) requires the Government to disclose data it physically possesses, the CAAF's majority opinion expressly declined to answer it. Three judges took three incompatible analytical approaches, leaving military practitioners, trial judges, and service courts without guidance on an issue of fundamental importance to military criminal practice.

The majority opinion assumed error without deciding the question. The concurrence decided the question, concluding R.C.M. 701 applies to data in the Government's physical possession, but held the Fourth Amendment trumps the rule's plain text. The trial judge, whose ruling was left undisturbed, took a third approach: reading an extra-textual "legal possession" requirement into R.C.M. 701. None of these three positions commands a majority decision on the underlying question of whether R.C.M. 701(a)(2)(A) requires the Government to disclose data it physically possesses.

This uncertainty will have immediate and recurring consequences. Cellphone evidence is now central to virtually every military criminal investigation. *See Riley v. California*, 573 U.S. 373, 395 (2014) (recognizing that cellphones are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy"). Law

enforcement routinely obtains consent-based cellphone extractions from witnesses and complainants. *See, e.g., United States v. Allen*, 2026 CCA LEXIS 302 (A.F. Ct. Crim. App. 2026) *rev. denied* 2026 CAAF LEXIS 673, 2026 WL 2641286 (C.A.A.F. Aug. 12, 2026) (No. 26- 0239/AF) (filed July 8, 2026) (denying the defendant's access to a complete digital download of a phone within the government's possession where the witness had provided only limited consent to search). The question of whether, and under what circumstances, the Government must disclose the full contents of those extractions to the defense will continue to arise in case after case.

Indeed, there were pending cases presenting similar issues at the time of the petition for reconsideration. *See, e.g., United States v. Wicks*, No. 26-0062/AR, 2026 CAAF LEXIS 302 (C.A.A.F. Apr. 3, 2026) (granting petition for review on a similar issue), 2026 CAAF LEXIS 548, 2026 LX 318780 __ M.J. __ 2026 WL 2030809 (C.A.A.F. June 24, 2026) (summary affirmance); *Allen*, No. 26- 0239/AF, 2026 CAAF LEXIS 673 (filed July 8, 2026), 2026 CAAF LEXIS 673, 2026 LX 467422__ M.J. __ 2026 WL 2641286 (petition for review denied). The CAAF's refusal to resolve the question guarantees continued inconsistency across the military justice system, undermining a defendant's fundamental right to a fair trial. This Court should grant certiorari to provide the definitive answer CAAF declined to give.

When a court of last resort grants review to decide an important question and then expressly refuses to decide it, the need for this Court's intervention is at its zenith. The plain text of R.C.M. 701(a)(2)(A) uses the word "possession" without qualification. *See United States v. Vargas*, 83 M.J. 150, 155 (C.A.A.F. 2023) (applying the plain meaning of R.C.M. provisions). Whether that unqualified term means what it says—or whether it silently incorporates a "legal possession" gloss—is a question this Court alone can now resolve.

A. The decision below creates an irreconcilable tension between discovery rights and privacy rights, with no mechanism to resolve it.

The fractured decision below produces a structural problem: under the analytical approaches articulated by CAAF, an accused servicemember cannot obtain relevant evidence from a cellphone extraction in the Government's possession when the witness limits consent. Under the concurrence's approach, R.C.M. 701 is triggered by physical possession, but the Fourth Amendment bars disclosure. The accused's only recourse is R.C.M. 703's "relevant and necessary" standard—a higher threshold than R.C.M. 701's "relevant to defense preparation" standard. But that path is a dead end when the defense cannot describe with specificity what the undisclosed data contains—even where, as here, the evidence clearly relates to relevant text messages between the complaining witness and the defendant. The defense's inability to describe the precise contents of evidence it has never seen is the reason it needs the evidence—a classic catch-22.

This structural problem permits witnesses to control the scope of a defendant's discovery rights through ex-parte consent agreements with the Government. A witness can allow the Government to take custody of potentially exculpatory evidence and simultaneously wall off defense access by limiting consent. The result is that the Government possesses evidence that cannot be used and that sits in legal limbo, beyond the reach of truth-seeking.

This problem is unique to the military justice system. Unlike civilian defendants who can independently subpoena evidence or seek judicial orders compelling third-party production, military accused depend almost entirely on the Government's cooperation or the trial judge's exercise of R.C.M. 703 authority. *See* 10 U.S.C. § 846 (Article 46, UCMJ) ("equal opportunity to obtain witnesses and other evidence"). When the Government simultaneously takes custody of evidence and refuses to disclose it, the principle of equal access that Article 46 was designed to ensure is violated.

This issue is further compounded by the improper application of harmless error analysis by the appellate courts. By guessing at the contents of the suppressed data that no party or the judge has viewed, and speculating that it would not have altered the outcome of the trial, the courts engage in circular logic that effectively rewards the government for withholding the evidence.

This Court should grant certiorari to resolve the tension between an accused's due process right to discovery and a witness's Fourth Amendment privacy interests. A resolution could take several forms—requiring in camera review, mandating judicial

balancing, or clarifying the scope of R.C.M. 701 itself—but some resolution is necessary to prevent the current no-remedy framework from becoming entrenched.

B. The harmless-error framework applied below is inconsistent with this Court's precedents.

The majority opinion's harmless-error analysis creates a "heads I win, tails you lose" framework that insulates a discovery violation from meaningful appellate review. The lower court acknowledged the weakness of the Government's case, finding that BE's credibility was "substantially" undermined and that the defense had made "inroads in challenging BE's credibility." App. at 9a. But it then treated that very weakness as evidence against prejudice, reasoning that because the defense already had effective impeachment material, "additional impeachment" would be merely cumulative. *Id*. at 12a.

This reasoning inverts the normal prejudice calculus. The majority opinion's framework creates a situation where strong government cases are deemed overwhelming (no prejudice) and weak government cases are deemed already sufficiently impeached (no prejudice). Under this rubric, there can never be prejudice from a discovery violation, regardless of the strength of the Government's evidence.

This framework is inconsistent with CAAF's own precedent. In *United States v. Prasad*, 80 M.J. 23, 31 (C.A.A.F. 2020), the court found prejudice where "the defense's effective cross-examination" of the complaining witness favored a finding of prejudice because the Government's case was "far from overwhelming given the defense's effective cross-

examination." Here, CAAF says the defense had "impeachment evidence—substantial in volume and weight" and effectively cross-examined BE, yet this cuts against prejudice. App. at 11a. The same factual predicate—effective impeachment of the key witness in a weak case—yields opposite results.

Moreover, the majority opinion's prejudice analysis considered only one category of withheld evidence: text messages related to the charged conduct—which the complaining witness contested as a misrepresentation of the text messages and yet still refused to provide access to the messages extracted from her phone. But the defense also identified other categories of data that would be relevant to the charged offenses and likely to be contained on the extraction, including, for example, web browser history of interest in BDSM, videos of the couple flying (directly relevant to the reckless-operation-of-aircraft charge) and images of BE's breasts post-augmentation (relevant to confirming or contradicting alleged injuries). App. Ex. XXXVI at 18; App. Ex. XXXXIX at 4. These categories of evidence are plainly relevant to defense preparation, and yet the majority opinion analyzed prejudice exclusively through the lens of text messages, ignoring the other possible categories entirely. *See United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013) ("Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial"); *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004) ("[T]he appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt.").

Finally, the Government benefited from the

very gaps in the record it caused by withholding the evidence. The majority opinion resolved uncertainty about the contents of the withheld evidence in the Government's favor, speculating that the data would only be "cumulative." App. at 11a. But when the Government withholds evidence, "[t]he appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt." *Roberts*, 59 M.J. at 327. Resolving speculation against the party that caused the informational gap is fundamental to the harmless-error framework. *See Chapman v. Cal.*, 386 U.S. 18, 24 (1967) (the harmless-error rule puts the burden on the beneficiary of the error).

C. This case presents a question of importance broadly affecting the due process rights of all servicemembers.

The decision below does not merely affect this case. It establishes, or more precisely, refuses to disestablish, a framework that will govern military discovery practice for the foreseeable future. The practical consequences are severe.

First, the decision permits the Government to take physical custody of potentially exculpatory digital evidence and then refuse discovery based on a witness's consent limitation. This inverts the purpose of R.C.M. 701, which was designed to ensure the defense has access to evidence in the Government's hands. The rule reflects the military's unique command structure, in which the Government controls most evidence and the defense has limited independent investigatory resources.

Second, the decision creates perverse incentives. Under the regime affirmed below, the

Government benefits from taking custody of a witness's phone—it can search the portion it has consent to access while shielding the remainder from defense scrutiny. A rational Government actor will always prefer a limited-consent extraction over a full-consent extraction, because the former provides investigative value while simultaneously limiting defense access to potentially exculpatory material.

Third, the decision below actively misapplies this Court's digital privacy jurisprudence by transposing constitutional protections meant to shield individuals from government overreach into a mechanism that strips an accused of a fair trial. *See Riley*, 573 U.S. 373; *Carpenter v. United States*, 585 U.S. 296 (2018). While those cases properly recognized the check on Government intrusion into digital privacy, here, the court below erroneously weaponized those doctrines against a criminal defendant. Those precedents established a constitutional boundary between the Government and the individual; they do not dictate that a complaining witness's privacy preferences can be invoked by the prosecution to suppress relevant, non-privileged evidence in the Government's actual possession. By subordinating a servicemember's fundamental discovery rights to a witness's restricted consent, the lower court struck a dangerous, unprecedented balance that this Court has never authorized.

Fourth, the military justice system provides no alternative mechanism comparable to the civilian subpoena power. In civilian practice, a defendant who is denied government-held evidence can serve a trial subpoena on a witness or move for a court order compelling production. In military practice, an accused depends on the Government to comply with

its discovery obligations or the trial judge to compel production under R.C.M. 703. When both avenues fail—as they did here—the accused has no recourse. *See* 10 U.S.C. § 846 (Article 46, UCMJ).

The CAAF has long recognized that servicemembers retain their constitutional rights, including the right to due process and a fair trial. *See United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) ("Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable"); *United States v. Anderson*, 83 M.J. 291, 296 (C.A.A.F. 2023) (citations omitted) (As "a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel.") The decision below leaves those rights without an enforcement mechanism when the Government possesses relevant evidence that a witness has placed beyond the reach of both parties. Because the government bears the burden to prove that the violation is harmless beyond a reasonable doubt, the error is not harmless under these circumstances, as the government cannot meet its burden through speculation about the contents of hidden evidence it has withheld. This Court should grant certiorari to ensure that servicemembers' constitutional, statutory, and regulatory rights to due process and a fair trial are not subordinated to a regime in which no court has definitively resolved the competing interests at stake.

CONCLUSION

The Court of Appeals for the Armed Forces granted review to decide whether the Government may refuse to disclose relevant, non-privileged evidence in its physical possession based solely on a witness's limited consent. It then declined to answer its own question. The result is a fractured decision that permits the Government to take custody of potentially exculpatory digital evidence and simultaneously shelter it from an accused's fundamental discovery rights. It then applies a harmless-error framework inconsistent with this Court's precedents, and it leaves servicemembers without a viable mechanism to obtain evidence essential to their defense.

Accordingly, Captain Braum respectfully requests this Court grant his petition for a writ of certiorari.

Respectfully submitted,

JOSHUA L. LOPES
Counsel of Record
ANNE M. DELMARE
United States Air Force
Appellate Defense Division
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
Joshua.lopes@us.af.mil

Counsel for Petitioner