

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,	)	UNITED STATES'
<i>Appellant</i>	)	REPLY BRIEF
	)	
v.	)	Crim. App. No. S32776
	)	
Staff Sergeant (E-5)	)	USC Dkt. No. 26-0221/AF
HANNES MARSCHALEK	)	
United States Air Force	)	22 September 2026
<i>Appellant.</i>	)	

UNITED STATES' REPLY BRIEF

REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 38037

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

BRIAN H. ADAMS, Lt Col, USAF
Director
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34551

MORGAN R. CHRISTIE, Maj, USAF
Director of Operations
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36170

INDEX OF BRIEF

TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. PREEMPTION CAN BE WAIVED BECAUSE IT IS A FAILURE TO STATE AN OFFENSE AND IS NOT A QUESTION OF SUBJECT-MATTER JURISDICTION.....	1
A. Neither Article 134 nor the <u>MCM</u> make preemption jurisdictional.	1
B. The basis of preemption is that it fails to state an offense, which is not a question of subject-matter jurisdiction.....	4
1. Military courts treat preemption as failure to allege the required elements of the earlier enumerated offense.....	4
2. <u>Forbes</u> correctly analyzed preemption as failure to state an offense.	5
3. This Court has had no opportunity to overrule <u>Robbins</u> or <u>Jones</u>	6
C. Cases prior to <u>Cotton</u> and the current version of R.C.M. 907(b) are of limited relevance to whether preemption can be waived.	7
D. Conclusion.	8
II. APPELLEE WAIVED PREEMPTION BY OPERATION OF LAW AND THROUGH THE PROVISION IN HIS PLEA AGREEMENT THAT REQUIRED HIM TO WAIVE ALL MOTIONS WAIVABLE UNDER THE RULES FOR COURTS-MARTIAL.....	9

A. Appellee waived preemption by operation of law under R.C.M. 910(j).	9
B. Appellee also waived preemption through the waive all waivable motions provision in his plea agreement.	10
C. The military judge’s colloquy did not address preemption, and the military judge did not incorrectly advise Appellee regarding what motions would be waived by his guilty plea.	10
D. This Court must resolve whether preemption is waivable before it can decide whether Appellee waived the issue of preemption or which standard of review should be applied to the question of preemption.	13
III. APPELLEE’S CONVICTED OFFENSE WAS NOT PREEMPTED, OR HE WAS NOT PREJUDICED BY PREEMPTION.	14
A. There is no evidence of congressional intent for indecent exposure to preempt indecent conduct in this case.	14
B. Appellee’s offense of indecent conduct was not composed of a residuum of the elements of indecent exposure.	15
C. Appellee was not prejudiced by a conviction for indecent conduct that he offered in this plea agreement.	17
CONCLUSION	20
CERTIFICATE OF FILING AND SERVICE	21
CERTIFICATE OF COMPLIANCE WITH RULE 24(b).	22

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

<u>United States v. Cotton</u> , 535 U.S. 625 (2002).....	4, 5, 6, 7
--	------------

COURT OF APPEALS FOR THE ARMED FORCES

<u>United States v. Avery</u> , 79 M.J. 363 (C.A.A.F. 2020).....	5, 8
---	------

<u>United States v. Bradley</u> , 68 M.J. 279 (C.A.A.F. 2010).....	10, 11, 12
---	------------

<u>United States v. Bench</u> , 82 M.J. 388 (C.A.A.F. 2022).....	9
---	---

<u>United States v. Day</u> , 83 M.J. 53 (C.A.A.F. 2022).....	10, 11, 12
--	------------

<u>United States v. Dusenberry</u> , 49 C.M.R. 536 (C.M.A. 1975).....	10, 11, 12
--	------------

<u>United States v. Erickson</u> , 61 M.J. 230 (C.A.A.F. 2005).....	7
--	---

<u>United States v. Gleason</u> , 78 M.J. 473 (C.A.A.F. 2019).....	15
---	----

<u>United States v. Grijalva</u> , 84 M.J. 433 (C.A.A.F. 2024).....	2, 3
--	------

<u>United States v. Humphries</u> , 71 M.J. 209 (C.A.A.F. 2012).....	4, 5, 6, 7, 13
---	----------------

<u>United States v. Kick</u> , 7 M.J. 82 (C.M.A. 1979).....	5, 15
--	-------

<u>United States v. McGriff,</u> 78 M.J. 487 (C.A.A.F. 2019).....	7
<u>United States v. Norris,</u> 8 C.M.R. 36 (C.M.A. 1953).....	5
<u>United States v. Raya,</u> 45 M.J. 251 (C.A.A.F. 1996).....	19
<u>United States v. Robbins,</u> 52 M.J. 159 (C.A.A.F. 1999).....	5, 6

SERVICE COURTS OF CRIMINAL APPEALS

<u>United States v. Harrower,</u> 2018 CCA LEXIS 46 (A.F. Ct. Crim. App. Jan. 26, 2018).....	8
<u>United States v. Jones,</u> 66 M.J. 704 (A.F. Ct. Crim. App. 2008)	6
<u>United States v. Poynor,</u> 2018 CCA LEXIS 367 (A.F. Ct. Crim. App. May 2, 2018).....	8

OTHER COURTS

<u>Forbes v. Phelan,</u> 153 F.4th 73 (D.C. Cir. 2025).....	4, 5, 6, 7
<u>Imperator Realty Co. v. Tull,</u> 127 N.E. 263 (N.Y. 1920).....	18
<u>Nassau Tr. Co. v. Montrose Concrete Prods. Corp.,</u> 436 N.E.2d 1265 (N.Y. 1982).....	18

STATUTES

10 U.S.C. § 818.....	2, 3
10 U.S.C. § 819.....	2, 3

10 U.S.C. § 845	17
10 U.S.C. § 920c	<i>passim</i>
10 U.S.C. § 934.....	<i>passim</i>

OTHER AUTHORITIES

Department of Defense Instruction 1325.07, <i>Administration of Military Correctional Facilities and Clemency and Parole Authority</i> (11 March 2013)	19
Department of Defense Manual for Courts-Martial; Proposed Amendments, 77 Fed. Reg. 64,865-64,866 (23 Oct 2012).....	14
RCM 907	4, 5, 6, 7, 8
RCM 910.....	9, 11, 12

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,	)	UNITED STATES' REPLY
<i>Appellant</i>	)	BRIEF
	)	
v.	)	Crim. App. No. S32776
	)	
Staff Sergeant (E-5)	)	USC Dkt. No. 26-0221/AF
HANNES MARSCHALEK	)	
United States Air Force	)	22 September 2026
<i>Appellee.</i>	)	

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

Pursuant to Rule 19(b)(3) of this Honorable Court's Rules of Practice and Procedure, the United States replies to Appellee's Answer (App. Br.) to the United States' brief in support of the certified issues (Gov. Br.).

ARGUMENT

I.

**PREEMPTION CAN BE WAIVED BECAUSE IT IS A
FAILURE TO STATE AN OFFENSE AND IS NOT A
QUESTION OF SUBJECT-MATTER
JURISDICTION.**

A. Neither Article 134 nor the MCM makes preemption jurisdictional.

Article 134 contains no negative language limiting a court-martial's jurisdiction. Instead, Article 134 expands court-martial jurisdiction by making additional conduct cognizable by a court-martial. Appellee argues that Article

134’s initial phrase “[t]hough not specifically mentioned in this chapter” limits the court-martial’s jurisdiction to hear offenses brought under it. (App. Br. at 15-16.) But Appellee misunderstands the origin of a court-martial’s jurisdiction.

A general or special court-martial’s jurisdiction to hear cases brought under Articles 80 through 134 of the UCMJ originates in Articles 18 and 19: “[C]ourts-martial have jurisdiction to try persons subject to this chapter for any . . . offense made punishable by this chapter.” 10 U.S. Code §§ 818(a), 919(a). Therefore, if the offense is brought under the UCMJ’s punitive articles, a court-martial has subject-matter jurisdiction. (Gov. Br. at 22-23.) Rather than limiting a court-martial’s jurisdiction, the plain language of Article 134 expands it by allowing the Government to charge offenses even if they were not covered by the earlier enumerated articles. 10 U.S. Code § 934; Gov. Br. at 5-6, 22.

Relying on United States v. Grijalva, Appellee argues Article 134’s initial phrase limits its “scope” because it “restricts its reach only to conduct ‘not specifically mentioned in this chapter.’” 84 M.J. 433, 435 (C.A.A.F. 2024); App. Br. at 16. But “[t]his Court has interpreted this [initial] phrase as prohibiting the charging of *conduct* as an offense under Article 134 . . . if Congress has already codified the *conduct* as an offense in Articles 80 through 132.” Id. (emphasis added). Rather than limiting jurisdiction, Grijalva and Article 134 limit the Government’s use of Article 134 to charge “conduct” that is “already codified” by

earlier offenses. Id. In either scenario, Articles 18(a) and 19(a) would still grant the court-martial jurisdiction to adjudicate the “conduct as an offense” under the UCMJ. Id.; 10 U.S. Code §§ 818(a), 919(a)

Appellee also argues the Manual for Courts-Martial, United States (2019 ed.) (MCM) makes preemption jurisdictional. (App. Br. at 16.) However, the President’s language is not jurisdictional: “The preemption doctrine prohibits *application* of Article 134 to conduct covered by Articles 80 through 132.” MCM, pt. IV, ¶ 91c.(5)(a) (emphasis added). Preemption does not make conduct under Article 134 “[un]punishable” under the UCMJ or remove the court-martial’s “cognizance of” the offense. *See* 10 U.S. Code §§ 818(a), 919(a), 934; *see also* App. Br. at 15. If the court-martial has jurisdiction over the conduct through an earlier enumerated offense, that offense should *apply* instead of Article 134. MCM, pt. IV ¶ 91c.(5)(a) “restricts [Article 134’s] reach,” to the covered conduct, not the jurisdiction of a court-martial to hear the offense. Grijalva, 84 M.J. at 435.

Preemption can make charging under Article 134 an error, but not a jurisdictional one. Neither the language of Article 134 nor the MCM uses preemption to limit a court-martial’s jurisdiction over the conduct at issue. This Court should find that preemption is not a question of subject-matter jurisdiction, and therefore that it can be waived.

B. The basis of preemption is that it fails to state an offense, which is not a question of subject-matter jurisdiction.

Preemption is based in failure to state an offense, and therefore preemption is not jurisdictional. R.C.M. 907(b). Because preemption is failure to state an offense, the jurisdictional analyses from United States v. Cotton, 535 U.S. 625 (2002) and Forbes v. Phelan, 153 F.4th 73 (D.C. Cir. 2025) apply in this case. Appellee argues that Cotton is inapplicable to this case because (1) it addressed jurisdiction regarding facts missing from an indictment; and (2) preemption is more than “missing facts from [sic] indictment.” (App. Br. at 17.) Appellee misunderstands that Cotton, as applied in United States v. Humphries, 71 M.J. 209 (C.A.A.F. 2012), changed how jurisdiction had been treated for over one hundred years. (Gov. Br. at 17-18; 35.) Moreover, Cotton and Humphries apply to the preemption doctrine because, as explained in Forbes and by the service courts, the basis for preemption is that it fails to state an offense.

1. Military courts treat preemption as failure to allege the required elements of the earlier enumerated offense.

Failure to state an offense, a non-jurisdictional objection, exists “where an indictment was found defective for failing to list all *elements* of an offense.” Humphries, 71 M.J. at 212-213 (emphasis added); R.C.M. 907(b). Preemption falls into that category.

The “impetus for the preemption doctrine” is to prevent the Government from removing “vital element[s]” from earlier enumerated offense and charging the remaining elements as an offense under Article 134. United States v. Avery, 79 M.J. 363, 367 (C.A.A.F. 2020) (citing United States v. Norris, 8 C.M.R. 36, 39 (C.M.A. 1953); *see also* United States v. Robbins, 52 M.J. 159, 161 (C.A.A.F. 1999) (quoting United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979)). In other words, the “impetus” for the preemption doctrine is to prevent the Government from failing to state an offense by removing elements from a charge and specification. Appellee’s argument bypasses the service courts’ findings that preemption is based in failure to state an offense, and he cannot have it both ways. (App. Br. at 18; Gov. Br. at 30-31.) Appellee cannot argue AFCCA correctly found preemption is jurisdictional while ignoring AFCCA’s repeated finding that preemption is based on failure to state an offense, which it did again in his case. (JA at 5.) Because preemption is failure to state an offense, Cotton, Humphries, and R.C.M. 907(b) apply, and preemption is non-jurisdictional and waivable.

2. Forbes correctly analyzed preemption as failure to state an offense.

Appellee argues that, in Forbes, the D.C. Circuit incorrectly interpreted preemption as “a special or affirmative defense that attacks the sufficiency of the evidence.” (App. Br. at 18.) But preemption argues that the Government should have charged an enumerated Article 80 - 132 offense and cannot satisfy all the

elements of that enumerated offense using a lesser charge under Article 134. Forbes correctly describes this as a “challenge [to the] sufficiency of conduct *described* in the specification to establish the *elements* of the crime;” *i.e.*, failing to state the offense. 153 F.4th at 86.

Furthermore, by arguing Forbes is incorrect, Appellee again ignores the service court’s repeated findings that preemption fails to state an offense. *See* Gov. Br. at 30-31 (listing cases). Because the service courts and Forbes are correct that preemption is failure to state an offense, this Court should find that Cotton, Humphries, and R.C.M. 907(b)(2) apply in this case.

3. This Court has had no opportunity to overrule Robbins or Jones.

Appellee argues that if Cotton had any bearing on preemption, this Court would have overturned Robbins¹ or United States v. Jones, 66 M.J. 704 (A.F. Ct. Crim. App. 2008). (App. Br. at 17.) It is unclear when this Court would have had the opportunity to do so. This Court denied review in Jones, 67 M.J. 204 (C.A.A.F.

¹ Contrary to AFCCA and Appellee’s position, the Government did not concede that Robbins is still “good law.” (App. Br. at 10, 18; JA at 12) (*see* Oral Argument at 55:50, https://afcca.law.af.mil/afcca_audio/cp/marschalek_s32776_-_oral_arg_audio_29_oct_2025_2542474.mp3. Robbins bound AFCCA as superior court precedent, so the Government (1) argued AFCCA did not need to go against Robbins to overturn Jones; and (2) asked AFCCA to ask *this* Court to reconsider Robbins in light of Cotton and Humphries. (Id. at 56:00.)

2008).² This Court only reviews issues before it; this Court does not provide “advisory opinions” (App. Br. at 15); and it does not *sua sponte* declare that a previous holding is abrogated without an applicable case before it.

C. Cases prior to Cotton and the current version of R.C.M. 907(b) are of limited relevance to whether preemption can be waived.

Appellee’s concern that adopting the D.C. Circuit’s approach in Forbes will constitute a “sea change” in the military’s treatment of preemption is unwarranted. (App. Br. at 18.) Appellee argues that preemption is jurisdictional by relying on pre-Cotton cases that took up preemption in guilty pleas. (App. Br. at 19-21.) Pre-Cotton cases addressing preemption are irrelevant to whether preemption is jurisdictional because the Government’s argument today rests on the law as it exists as a result of Cotton, Humphries, and R.C.M. 907(b).

Appellee also relies on United States v. Erickson , 61 M.J. 230 (C.A.A.F. 2005) because it was published after Cotton and addressed the merits of a preemption argument in a case where the appellant pleaded guilty. (App. Br. at 21.) But Cotton’s applicability may not have been addressed by the parties, and in any event, at that point, R.C.M. 907(b) still said that failure to state an offense could not be waived. The 2005 Erickson decision is therefore of limited relevance

² This Court’s denial of the accused’s petition for review in Jones (App. Br. at 17-18) is irrelevant because “denial of a petition . . . does not suggest that we either agree or disagree with the merits of a lower court’s [decision].” United States v. McGriff, 78 M.J. 487, 487 (C.A.A.F. 2019)).

when analyzing preemption on appeal after the 2016 amendment to R.C.M. 907(b). Appellee’s brief also ignores United States v. Harrower, 2018 CCA LEXIS 46, at *17 (A.F. Ct. Crim. App. Jan. 26, 2018) and United States v. Poynor, 2018 CCA LEXIS 367, at *5 (A.F. Ct. Crim. App. May 2, 2018), where AFCCA reviewed preemption for plain error, and therefore implicitly found the preemption issue was forfeited and not jurisdictional.

Considering the view of preemption across the service courts and this Court’s own opinions, a definitive opinion that preemption is non-jurisdictional will not cause the legal overhaul that Appellee alleges. (App. Br. at 18.)

D. Conclusion

In sum, the “impetus” for the preemption doctrine lies in the concern that the Government might delete a “vital element” from an earlier enumerated to make a charge under Article 134 that fails to state the earlier enumerated offense. Avery, 79 M.J. at 367. Because failure to state an offense is non-jurisdictional and waivable, this Court should find that preemption is also non-jurisdictional and waivable.

II.

APPELLEE WAIVED PREEMPTION BY OPERATION OF LAW AND THROUGH THE PROVISION IN HIS PLEA AGREEMENT THAT REQUIRED HIM TO WAIVE ALL MOTIONS WAIVABLE UNDER THE RULES FOR COURTS-MARTIAL.

A. Appellee waived preemption by operation of law under R.C.M. 910(j).

Appellee ignores that his guilty plea waived preemption by operation of law and focuses solely on the waive all waivable motions provision of his plea agreement. (App. Br. at 9-11.) If this Court finds waiver by operation of law, then this Court need not address Appellee's argument that his "unique" or "specific" waive all waivable motions provision in his guilty plea prevented waiver. (App. Br. at 7; 12.) Appellee did not have to intentionally abandon a preemption claim for waiver to apply. See United States v. Bench, 82 M.J. 388, 393 (C.A.A.F. 2022) ("Waiver [can] occur by operation of law even in the absence of intentional relinquishment").

Because preemption is based in failure to state an offense and would have been a "nonjurisdictional defect," it was waivable by operation of law, and was, in fact, per R.C.M. 910(j), waived by Appellee's unconditional guilty plea. (Gov. Br. at 39-40.)

B. Appellee also waived preemption through the waive all waivable motions provision in his plea agreement

The supposedly “unique” nature of Appellee’s waive all waivable motions provision did not prevent waiver in this case. Appellee agreed to waive all “motions that may be waived in accordance with current legal precedent, public policy, and the Rules for Courts-Martial.” (JA at. 75.) As explained in Issue I, R.C.M. 907(b) made preemption waivable because it is failure to state an offense, and failure to state an offense is a waivable motion. Since preemption was waivable under the Rules for Courts-Martial at the time of Appellee’s plea agreement and trial, Appellee affirmatively waived it through his plea agreement.

C. The military judge’s colloquy did not address preemption, and the military judge did not incorrectly advise Appellee regarding what motions would be waived by his guilty plea.

Relying on Day, Appellee argues that preemption was preserved at trial because the military judge advised Appellee that jurisdictional issues could not be waived. (App. Br. at 13-14; JA at 165.) But unlike in Day, the military judge never incorrectly advised Appellee that preemption or failure to state an offense could not be waived, the latter of which was why there was no waiver in Day. 83 M.J. at 55. Day does not provide Appellee with a basis to argue that he preserved the preemption issue.

United States v. Dusenberry, 49 C.M.R. 536 (C.M.A. 1975) and United States v. Bradley, 68 M.J. 279 (C.A.A.F. 2010) are more illuminating with respect

to Appellee's case than Day. In Dusenberry, the military judge discussed with defense counsel which motions would be waived as a result of the guilty plea. 49 C.M.R. at 538. The military judge also confirmed that the accused was pleading guilty voluntarily, and that the accused was not "misled" by trial defense counsel regarding what motions would be waived. Id. Even where the military judge did not "personally and directly advise" *the accused* about a particular motion, the military judge's inquiry "was sufficient" and "the appellant's plea [was] not improvident for lack of understanding as to the waiver of [that] issue." Id. at 539. The Court said, "we find nothing in the comments of either the appellant's counsel or the military judge that indicates an erroneous belief that matters raised by the [] motion would be preserved." Id. at 540.

In Bradley, the accused and trial defense counsel mistakenly believed that a motion was preserved on appeal, despite the military judge twice reiterating that the guilty plea was unconditional and discussing waiver of the motion during the plea colloquy. Bradley, 68 M.J. at 281. This Court found that under R.C.M. 910(a)(2), such issues are only preserved after a guilty plea if the plea was conditional, and "[s]uch a plea cannot be implied." 68 M.J. at 282. This Court also found that the misunderstanding did not render the appellant's plea improvident. Id. at 282-83. The appellant was represented by experienced counsel and there was no allegation of ineffective assistance of counsel or that the

appellant, “(who was getting the benefits of a quite favorable pretrial agreement) did not understand what he was doing.” Id. This Court concluded that the possibility that the appellant thought he was preserving a particular issue through his unconditional guilty plea did not render the plea improvident. Id.

Appellee’s case more closely matches Dusenberry and Bradley than Day. Appellee did not make a conditional guilty plea or express any belief at trial that he was preserving preemption on appeal. The military judge did not incorrectly advise Appellee that a preemption motion would be preserved. Appellee does not now claim on appeal that he agreed to plead guilty based on an understanding that he was preserving the preemption appeal. Nor does he allege ineffective assistance of counsel. (JA at 164-166.) As was the case in Bradley, the possibility that Appellee thought the issue relating to preemption would be preserved despite his unconditional guilty plea would not render his plea improvident. 68 M.J. at 283.

The military judge did not misadvise Appellee regarding what motions would be waived by his guilty plea, nor did Appellee make a conditional guilty plea under R.C.M. 910(a)(2). This Court should find Appellee waived the issue of preemption.

D. This Court must resolve whether preemption is waivable before it can decide whether Appellee waived the issue of preemption or which standard of review should be applied to the question of preemption.

Appellee argues that because this Court could find that he did not waive preemption through his guilty plea, it should decline to review the threshold issue of whether preemption can be waived. (App. Br. at 14-15.) But this invitation is illogical because the questions of whether Appellee actually waived preemption as a matter of law or by agreeing to waive “waivable” motions depends on whether preemption can be waived in the first place.

Furthermore, this Court must answer whether preemption is waivable because it will “affect the outcome of this case:” it determines what standard of review applies to Issue III, which asks whether Appellee’s conviction under Article 134 was preempted. United States v. Pullings, 83 M.J. 205, 207 (C.A.A.F. 2023). If this Court finds that preemption is unwaivable, then this Court must review Appellee’s preemption argument de novo. (See Gov. Br. at 43-44.) However, if preemption is waivable, but Appellee did not waive and merely forfeited the issue, then this Court reviews the issue for plain error. Humphries, 71 M.J. at 213. This Court cannot bypass the threshold question of waivability in Issue I without compromising Issue III’s analysis.

In addition, this Court should answer Issue I because, by certifying the issue, the United States Air Force Judge Advocate General requested that this Court

review this important question, and the issue is likely to recur. Future servicemembers may wish to plead guilty to an offense under Article 134 that might otherwise be preempted, and this Court should resolve whether such a plea is permissible.

III.

APPELLEE’S CONVICTED OFFENSE WAS NOT PREEMPTED, OR HE WAS NOT PREJUDICED BY PREEMPTION.

A. There is no evidence of congressional intent for indecent exposure to preempt indecent conduct in this case.

Appellee relies on previous indecent exposure convictions under Article 134 and indecent exposure’s subsequent move to Article 120c as evidence of Congress’s intent to cover the class of Appellee’s offense under Article 120c. (App. Br. at 24, 27.) Appellee’s arguments overlook that there is no evidence of congressional intent to occupy the field for this class of conduct. (Gov. Br. at 50-51.) If Congress had wished to occupy the field, the Joint Services Committee on Military Justice could have included the warning that indecent exposure under Article 120c would preempt indecent conduct under Article 134. *C.f.* Department of Defense Manual for Courts-Martial; Proposed Amendments, 77 Fed. Reg. 64,865-64,866 (23 Oct 2012) (warning that sexual offenses against children under Article 120b may preempt indecent conduct under Article 134). It did not, and

without evidence of congressional intent, this Court should find that indecent exposure did not preempt indecent conduct in this case. Kick, 7 M.J. at 85.

B. Appellee's offense of indecent conduct was not composed of a residuum of the elements of indecent exposure.

With Appellee's exceptions and substitutions, his conviction for indecent conduct was not made up of a residuum of the elements of indecent exposure. Appellee's chart demonstrates the immediate difference between the charge of indecent exposure and Appellee's conviction for indecent conduct. (App. Br. at 25, 27.) Appellee pled guilty to standing wholly naked in view of the public. While the Government agrees that indecent conduct under Article 134 does not require an element of intent, neither a public view nor being wholly naked are currently elements of indecent exposure. MCM pt. IV ¶ 63.b.(6).

The Article 134 offense at issue did not charge Appellee with exposure of a specific, singular body part, which would have been all that was required under indecent exposure. Id. Requiring the Government to prove Appellee was naked increased the Government's evidentiary burden rather than reduced it, which is one of the concerns of the preemption doctrine. United States v. Gleason, 78 M.J. 473, 475 (C.A.A.F. 2019).

Indecent exposure under Article 120c also does not require a public view. Compare MCM, pt. IV, ¶ 63.b.(6) with Manual for Courts-Martial, United States, (2000 ed.) (2000 MCM) pt. IV, ¶ 88.b. United States v. Shaffer and United States

v. Graham, upon which Appellee relies, are unhelpful because they applied different elements for indecent exposure under the 2000 MCM than existed under the 2019 MCM. 46 M.J. 94, 97 (C.A.A.F. 1997); 56 M.J. 266, 268 (C.A.A.F. 2002). But even in those cases when indecent exposure contained the element that the exposure be in “public,” an exposure could still be indecent if it took place in “privately-owned homes” or when the accused “ma[kes] certain that an unsuspecting and uninterested member of the general population had no choice but to see him naked” even within a “nonpublic place.” 46 M.J. at 97; 56 M.J. at 268.

Here, Appellee specifically pled guilty by exceptions and substitutions to standing naked *in view of the public*, as opposed to exposing himself to a singular person. (JA at 139.) This increased the Government’s evidentiary burden beyond what would have been required for indecent exposure under Article 120c. There is currently no requirement under indecent exposure under Article 120c that it be in public view. MCM pt. IV ¶ 63.b.(6). As pleaded to, Appellee’s charge of indecent conduct could not be considered a residuum of the offense of indecent exposure when the Government’s evidentiary burden was increased twice over by the phrasing Appellee offered in the plea agreement. (JA at 74.)

Based on Appellee’s original appeal to AFCCA, Appellee agreed with this interpretation of the Government’s evidentiary burden on the charged indecent conduct offense regarding his nudity and the public’s view: Appellee argued at

AFCCA that his guilty plea was improvident because “the record leaves substantial doubt as to whether . . . standing in his doorway naked on two separate occasions for 10-20 seconds in public view [] constituted indecent conduct.” (*Brief on Behalf of Appellant*, dated 30 April 2025, at 11-12, 17-18.) Appellee argued that his “brief and fleeting conduct” was insufficient to be considered indecent. (*Id.*) Appellee is using the fact that he stood naked in his doorway for 10-20 seconds in view of the public to argue there is insufficient evidence that his conduct was indecent; that would be a much harder argument to make if the conviction had been for deliberately exposing his penis. (*Id.*) If these difference facts were significant enough to warrant challenging providency on appeal, then they were significant enough to distinguish Appellee’s conviction for indecent conduct from a charge of indecent exposure. The elements of indecent conduct in this case are not a residuum of indecent exposure, and the offense is not preempted.

C. Appellee was not prejudiced by a conviction for indecent conduct that he offered in this plea agreement.

Appellee argues that preemption must be reviewed de novo and, if the offense was preempted, must be set aside as a jurisdictional error. (*See App. Br.* at 22, 29.) He does not argue that he was prejudiced by the alleged preemption error. However, since preemption is not a jurisdictional defect, this Court should assess whether Appellee was prejudiced by acceptance of his guilty plea. Article 45, UCMJ, 10 U.S.C. § 845. Even if Appellee’s Article 134 conviction was preempted

and this was plain and obvious error, it did not “materially prejudice a substantial right” of Appellee. *Id.*

Appellee did not have a substantial right to avoid a conviction for his crimes. Appellee had a right to plead not guilty and to hold the Government to its burden to prove beyond a reasonable doubt to a panel of members that he committed the offenses for which he was charged. It is unequivocal that Appellee waived those rights in this case by unconditionally pleading guilty by exceptions and substitutions to indecent conduct under Article 134. (*See* JA at 74-75, 161-164.)

Appellee’s substantial rights were not violated when the Government accepted Appellee’s plea offer and allowed him to plead guilty to one offense under Article 134. Even if this Court finds the offense was plainly and obviously preempted, Appellee has not suffered prejudice by receiving the exact conviction that he bargained for. To borrow from contract law, Appellee’s argument to set aside his conviction violates “a principle more nearly ultimate than . . . waiver;” he seeks to circumvent “the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong.” Nassau Tr. Co. v. Montrose Concrete Prods. Corp., 436 N.E.2d 1265, 1270 (N.Y. 1982) (quoting Imperator Realty Co. v. Tull, 127 N.E. 263, 266 (N.Y. 1920) (Cardozo, J. (concurring in result))).

This concept is echoed in the invited error doctrine. Appellee “cannot create error and then take advantage of a situation of his own making.” United States v. Raya, 45 M.J. 251, 254 (C.A.A.F. 1996). If there is a preemption issue in this case, it originated with Appellee. The terms of Appellee’s plea agreement originated with him. (See JA at 166.) The charge under Article 134 to which Appellee pled guilty was his own creation designed to reduce his maximum sentence and reduce the possibility of sex offender registration. (JA at 75; see DoDI, 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, 11 March 2013, Incorporating Change 4, 19 August 2020, Appendix 4 to Enclosure 2, para. 1- 2, and Table 6.) Appellee was not prejudiced by the military judge’s acceptance of the very plea Appellee asked to make. Since Appellee was not prejudiced, this Court should find that AFCCA erred in setting aside Appellee’s guilty plea and conviction.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court overturn the decision of the Court of Criminal Appeals.



REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 38037



MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088



BRIAN ADAMS, Lt Col, USAF
Director
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34551



MORGAN CHRISTIE, Maj, USAF
Director of Operations
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36170

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Appellate Defense Division on 22 September 2026.



REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 38037

CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

This brief complies with the type-volume limitation of Rule 24(b) because:

This brief contains 4395 words.

This brief complies with the typeface and type style requirements of Rule 37.

/s/ Regina Henenlotter, Maj, USAF

Attorney for the United States (Appellant)

Dated: 22 September 2026