

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

UNITED STATES

Appellant

v.

Hannes MARSCHALEK

Staff Sergeant (E-5)

United States Air Force

Appellee

**BRIEF ON BEHALF OF
APPELLEE**

Crim. App. Dkt. No. ACM S32776

USCA Dkt. No. 26-0221/AF

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

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CERTIFIED ISSUES

- I. Can an accused waive a claim of preemption under Article 134, UCMJ?
- II. Did appellee waive his preemption claim through either his unconditional guilty plea or the waive all waivable motions provision in his plea agreement, or both?
- III. If appellee did not waive his preemption claim, was the Article 134, UCMJ, offense to which appellee pleaded guilty, preempted by Article 120C, UCMJ, under a plain error standard or otherwise?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (Air Force Court) had jurisdiction over this matter pursuant to Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3).¹ This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

RELEVANT AUTHORITIES

In relevant part, Article 120c, UCMJ, 10 U.S.C. § 920c, provides:

b. *Elements.*

(6) *Indecent exposure.*

- (a) That the accused exposed his or her genitalia, anus, buttocks, or female areola or nipple;
- (b) That the exposure was in an indecent manner; and

¹ Unless otherwise noted, all references to the UCMJ and the Rules for Courts-Martial (R.C.M.s) are to the version in the *Manual for Courts-Martial, United States* (2019 ed.) (MCM).

(c) That the exposure was intentional.

In relevant part, Article 134—(Indecent conduct), *MCM*, pt. IV, para. 104, provides:

b. *Elements.*

(a) That the accused engaged in certain conduct;

(b) That the conduct was indecent; and

(c) That under the circumstances, the conduct of the accused . . .

(ii) was of a nature to bring discredit upon the armed forces.

In relevant part, Article 134, UCMJ, 10 U.S.C. § 934, provides:

a. *Text of statute.*

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court. As used in the preceding sentence, the term “crimes and offenses not capital” includes any conduct engaged in outside the United States, as defined in section 5 of title 18, that would constitute a crime or offense

not capital if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of title 18.

c. Explanation.

(5) Limitations on Article 134.

(a) *Preemption doctrine.* The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent—there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121.

STATEMENT OF THE CASE

Appellee generally accepts the Government's statement of the case.

STATEMENT OF FACTS

A. The parties transmuted violations of Article 120c, UCMJ, into a violation of Article 134, UCMJ.

The original charging scheme in this case addressed two types of alleged misconduct: (1) standing outside with Appellee's penis exposed to the public, and (2) standing outside while masturbating in view of the public. JA 71, 73. The allegations that Appellee stood outside with his penis exposed to the public were charged as violations of Article 120c, UCMJ. *Id.* The allegation that Appellee masturbated in view of the public was charged as a violation of Article 134, UCMJ. *Id.*

On October 20, 2023, Appellee and the Special Court-Martial Convening Authority entered into a plea agreement. JA 74–78. In the agreement, the parties transformed the original charging scheme. JA 74. Under the new charging scheme, Appellee would: 1) enter a plea of *not guilty* to the allegation of masturbating in view of the public; and 2) plead *guilty* to standing outside naked in view of the public. *Id.* Rather than pleading guilty to the latter misconduct under Article 120c, UCMJ, as originally charged, Appellee would plead guilty to this misconduct under Article 134, UCMJ. *Id.*

B. Appellee restricted the scope of what issues were waived in his plea agreement.

The plea agreement between Appellee and the Convening Authority addressed what motions would be waived. JA 75. The plea agreement did not contain a standard ‘waive all waivable motions’ provision.² Instead, Appellee only agreed to waive “motions that may be waived in accordance with legal precedent, public policy, and the Rules for Courts-Martial.” *Id.* During the providence inquiry with Appellee, the military judge reiterated that 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 164.

The military judge then explained to Appellee that “certain motions are waived, or given up, if [his] defense counsel does not make the motion prior to entering [his] plea.” JA 165. The military judge further explained to Appellee that “[s]ome motions, . . . such as motions to dismiss for a lack of jurisdiction, . . . can never be given up.” *Id.*

C. The Air Force Court held that Appellee’s conviction under Article 134, UCMJ, was preempted by Article 120c, UCMJ.

Appellee raised four issues on appeal. JA 2–3. One issue was whether his conviction under Article 134, UCMJ, was barred by the preemption doctrine

² The Government’s brief erroneously asserts that Appellee agreed to waive all waivable motions. Gov. Br. at 12.

because the misconduct is covered by Article 120c, UCMJ. *Id.* The Government contended that Appellee waived the issue of preemption by pleading guilty. JA 6.

The Air Force Court held that Appellee did not waive his preemption claim by pleading guilty and relied on this Court's decision in *United States v. Robbins*, 52 M.J. 159, 160 (C.A.A.F. 1999) (holding that the preemption issue was not waived by appellant's guilty plea), and its own published decision in *United States v. Jones*, 66 M.J. 704, 706 (A.F. Ct. Crim. App. 2008) (holding that preemption claims are not waived by an appellant's guilty plea), *rev. denied*, 2008 CAAF LEXIS 1402 (C.A.A.F. 2008). JA 6. Understanding that the controlling legal precedent held that preemption claims were not waived by a guilty plea, the Government requested the Air Force Court to overturn its holding in *Jones*. JA 6, 10. The Air Force Court declined to overturn its precedent. *Id.*

Addressing the merits of the preemption claim, the Air Force Court held that Appellee's conviction was barred by the preemption doctrine. JA 3. The Air Force Court found that the creation and development of Article 120c, UCMJ, "indicates Congress intended to cover indecent exposure in a complete way under Article 120c." JA 8–9. The Air Force Court further concluded that the Article 134, UCMJ, offense, of which Appellee was convicted, was composed of a residuum of elements of indecent exposure under Article 120c, UCMJ. JA 9. The Court noted

that the Government conceded the first two elements were “similar” and that the only difference between the two offenses is the mens rea and terminal element. *Id.*

The Air Force Court concluded that Appellee’s conviction violated the preemption doctrine. JA 10. The Air Force Court accordingly set aside the findings of guilty and dismissed the charge and its specification without prejudice. JA 3.

SUMMARY OF ARGUMENT

Appellee did not waive his preemption claim by pleading guilty. Appellee’s plea agreement contained a specific, unique plea term that only waived “motions that may be waived in accordance with current legal precedent, public policy, and the Rules for Courts-Martial.” JA 75. This plea term limited the scope and mechanics of appellate review to the legal precedent in effect when Appellee pleaded guilty—October 25, 2023. JA 67, 75.

The Government concedes that the existing legal precedent holds that preemption claims are not waived by pleading guilty; that is why the Government’s primary argument at the Air Force Court was to overturn *Jones*, 66 M.J. at 706, JA 6, 10 (both the majority and the concurring opinions declining to overturn *Jones*’s holding that preemption claims are not waived by pleading guilty). The Government now requests this Court to overturn *Jones*. Gov. Br. at 34 (*Jones* “should be abrogated.”)

But it will not matter in this case if this Court overturns the current precedent and holds that preemption claims are waivable. Appellee's unique plea provision restricted his issue waiver only to issues that were waivable under the legal precedent at the time he pleaded guilty. JA 75. Because the binding precedent, as the Government concedes, at the time of his guilty plea held that preemption claims were not waivable, Appellee's preemption claim was preserved for appellate review. Consequently, the Government's arguments concerning certified Issue I are not relevant to any issue necessary to decide this case.

Concerning certified issue III, this Court, like the Air Force Court, should find that Appellee's conviction violated the preemption doctrine. JA 3. Appellee was convicted of standing naked in public. JA 67–68. The Government now attempts to distinguish “overall nakedness” from indecent exposure, Gov. Br. at 47. However, the following demonstrate that Appellee's conviction violated the preemption doctrine: 1) Appellee's conduct was originally charged as a violation of Article 120c, UCMJ; 2) a comparison of the elements between indecent exposure in violation of Article 120c, UCMJ with the offense Appellee was convicted of; and 3) the creation of Article 120c itself.

This Court should affirm the Air Force Court's decision to set aside the finding of guilty.

ARGUMENT

I. The legal precedent at the time of Appellee’s court-martial held that preemption claims are not waivable. Even if this Court overturns this precedent and holds that preemption claims are waivable, Appellee’s preemption claim is preserved because his plea agreement limited his waiver to “current legal precedent.” Therefore, this Court does not need to decide certified issue I.

A. Standard of review.

This Court reviews de novo whether an accused has waived an issue. *United States v. Malone*, 86 M.J. 297, 301 (C.A.A.F. 2026) (citing *United States v. Harborth*, 85 M.J. 469, 475 (C.A.A.F. 2025)).

B. The legal precedent at the time of Appellee’s plea held that preemption claims were not waived by pleading guilty.

As then-Chief Judge of the Air Force Court recognized in his concurring opinion below, “at the time of [Appellee’s] court-martial, the law had recognized the principle of preemption for decades.” JA 11. “In addition, the holding of *Jones* that a claim of preemption ‘cannot be waived by either a plea or failure to object’ had been the law for over 15 years.” (quoting *Jones*, 66 M.J. at 706). JA 11.

The Air Force Court’s precedent is that preemption claims are not waived by pleading guilty. *Jones*, 66 M.J. at 706. *Jones* is published precedent from the Air Force Court that was binding over Appellee’s case at the time he pleaded guilty. JA 10. *See* A.F. Ct. Crim. App. R. 30.3 (published opinions serve as precedent). The Air Force Court has adhered to *Jones* multiple times since it was decided in

2008. See *United States v. Dominguez-Sandoval*, No. ACM 40084, 2022 CCA LEXIS 203, at *16 (A.F. Ct. Crim. App. 31 Mar. 2022); *United States v. Bailey*, No. ACM 39052, 2017 CCA LEXIS 639, at *5–6 (A.F. Ct. Crim. App. 26 Sep. 2017), *rev. denied*, 77 M.J. 206 (C.A.A.F. 2018); *United States v. Costianes*, No. ACM 38868, 2016 CCA LEXIS 391, at *4 (A.F. Ct. Crim. App. 30 Jun. 2016); *United States v. Hill*, No. ACM 38848, 2016 CCA LEXIS 291, at *4 (A.F. Ct. Crim. App. 9 May 2016).

This Court has never overruled *Jones* and denied the petition to review *Jones*. *Jones*, 2008 CAAF LEXIS 1402. Furthermore, this Court’s precedent in *Robbins*, on which the Air Force Court relied in *Jones*, affirmatively holds that a preemption claim is not waived by an appellant’s guilty plea. 52 M.J. at 160. The Government tries to modify the holding of *Robbins* by limiting its application only to offenses that were improperly assimilated under Clause 3 of Article 134, UCMJ. Gov. Br. at 33. But the *Robbins* opinion does not state that it is limited only to Clause 3 offenses. *Robbins*, 52 M.J. at 160. Instead, this Court applied the same preemption test for Clause 3 offenses that it does for Clause 1 and 2 offenses. *Id.* at 160–61. Moreover, despite its references to intervening appellate decisions, the Government conceded during oral argument at the Air Force Court that *Robbins* is still good law. JA 12.

The United States Supreme Court has never held that preemption claims in the context of Article 134, UCMJ, are waivable. While the Government relies on Supreme Court decisions related to defective indictments, Gov. Br. at 17, none of these decisions address preemption claims under Article 134, UCMJ. “Overruling by implication is disfavored.” *United States v. Toverchavez*, 78 M.J. 458, 465 (C.A.A.F. 2019) (quoting *United States v. Pack*, 65 M.J. 381, 383 (C.A.A.F. 2007); citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

Accordingly, the legal precedent at the time Appellee pleaded guilty was that preemption claims are not waived by pleading guilty. *Robbins*, 52 M.J. at 160; *Jones*, 66 M.J. at 706.

C. Appellee’s plea agreement only waived issues that were waivable under the existing legal precedent. A change in case law cannot be applied to expand what issues he waived.

The Government repeatedly claims that the plea agreement in this case contains a “waive all waivable motions” provision. Gov. Br. at 2, 12, 14, 38, 41, 42. Similarly, the phrasing of certified Issue II presupposes that the plea agreement contained a “waive all waivable motions” provision. These claims are misleading.

Paragraph 2c of Appellee’s plea agreements states, “I agree to waive all motions that may be waived in accordance with current legal precedent, public policy, and the Rules for Courts-Martial.” JA 75. The Government does not contend that Appellee’s waiver provision is ambiguous. *See generally* Gov. Br.

Instead, the Government elected not to quote or use the exact language of the plea agreement. *Id.* The Government similarly never addresses that Appellee limited his waiver to “current legal precedent.” *Id.* The Government fails to address the precise language of the plea provision because it is case dispositive in Appellee’s favor.

Based on the plain language of Appellee’s plea agreement, the existing precedent at the time of his court-martial controls whether Appellee waived his preemption claim. JA 75. The specific plea agreement provision forecloses this Court from retroactively applying a new decision that preemption claims are waivable to Appellee’s case. *Id.* The binding precedent at the time of Appellee’s court-martial held that preemption claims are not waived by pleading guilty. *Jones*, 66 M.J. at 706. Therefore, regardless of this Court’s decision as to certified Issue I, Appellee’s preemption claim was preserved for appellate review.

D. The military judge’s colloquy confirmed that Appellee only waived issues that were waivable under the current legal precedent.

The Government claims that the military judge did not make “any kind of comment on the record . . . to indicate that a claim of preemption would be preserved for appeal following Appellee’s guilty plea.” Gov. Br. at 40. This is incorrect.

The military judge specifically addressed Appellee’s waiver provision during the providence inquiry. JA 164. The military judge confirmed that Appellee

agreed “to waive all motions that may be waived in accordance with current legal precedent, public policy, and the Rules for Courts-Martial.” *Id.* This colloquy reinforces that Appellee only waived issues that could be waived under the legal precedent existing at the time he pleaded guilty. Because the legal precedent at the time Appellee pleaded guilty held that preemption is not waived by pleading guilty, *see Jones*, 66 M.J. at 706, the plea provision and the military judge’s colloquy establish that Appellee did not waive the preemption issue.

The Government’s reference to the stipulation of fact that the court-martial had jurisdiction over Appellee and the offense, Gov. Br. at 9, is similarly misguided because whether the court-martial had jurisdiction over Appellee or the offense is a question of law that is reviewed de novo. *United States v. Begani*, 81 M.J. 273, 276 (C.A.A.F. 2021) (citing *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020)). This Court is not bound by conclusions of law in the parties’ stipulation of fact. *United States v. Simpson*, 81 M.J. 33, 36 n.3 (C.A.A.F. 2021). Moreover, a “charge or specification shall be dismissed at any stage of the proceedings if the court-martial lacks jurisdiction.” R.C.M. 907(b)(1). Thus, a conclusion as to jurisdiction in the parties’ stipulation of fact cannot affect whether a jurisdictional challenge is reviewable.

The military judge’s colloquy further establishes that the preemption issue was preserved for appellate review because he advised Appellee that “[s]ome

motions, . . . such as motions to dismiss for a lack of jurisdiction, . . . can never be given up.” JA 165. When the military judge gave this advisement to Appellee, the binding precedent held that preemption issues were jurisdictional. *Jones*, 66 M.J. at 706 (holding that “preemption relates to a question of subject-matter jurisdiction of the trial court and thus cannot be waived by either a plea or failure to object”).

Since preemption issues are considered jurisdictional, the military judge’s specific advice that Appellee was not giving up jurisdictional challenges preserves Appellee’s preemption challenge. *See United States v. Day*, 83 M.J. 53, 56 (C.A.A.F. 2022) (holding that the military judge’s advice that failure to state an offense is not a waivable issue preserved the issue for appellate review).

E. Because Appellee did not waive his preemption claim, this Court does not need to resolve certified Issue I.

In certified Issue I, the Government asks this Court to overturn *and Robbins*. Gov. Br. at 14, 22. But, as discussed above, even if this Court overturns *Jones* and *Robbins* and holds that preemption claims are waived by pleading guilty, that holding would not affect the outcome of this case.

Consequently, a decision as to certified Issue I will have no bearing on the outcome of this case. Because deciding certified Issue I would not affect the outcome of this case, this Court should decline to address it and, instead, resolve the merits of the preemption claim. *See e.g. United States v. Pullings*, 83 M.J. 205, 207 (C.A.A.F. 2023) (“Because overruling these precedents would not affect the

outcome of this case, we leave the issue of whether the Court should overrule them for another time”); *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003) (citing *United States v. Clay*, 10 M.J. 269 (C.M.A. 1981)) (this Court generally adheres to the prohibition on advisory opinions).

II. If this Court decides certified Issue I, it should hold that preemption implicates the jurisdiction of a court-martial and is not waived by pleading guilty.

A. Standard of review.

This Court reviews the issues of jurisdiction and waiver de novo. *Begani*, 81 M.J. at 276 (citing *United States v. Hennis*, 79 M.J. 370, 374–75 (C.A.A.F. 2020); *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020)).

B. Preemption is a limitation on a court-martial’s ability to take cognizance of an offense. Therefore, it is jurisdictional.

This Court’s decision regarding certified Issue I depends on a plain reading of two phrases in Article 134, UCMJ: “shall be taken cognizance of by a general, special, or summary court-martial” and “[t]hough not specifically mentioned in this chapter.” 10 U.S.C. § 934.

The phrase “shall be taken cognizance of by a general, special, or summary court-martial” establishes the jurisdiction of a court-martial over offenses charged under Article 134, UCMJ. This is because “cognizance” is a “court’s authority and power to try and to determine cases; JURISDICTION.” *Cognizance*, BLACK’S LAW DICTIONARY (11th ed. 2019). The Government agrees that a court-martial’s

jurisdiction over an Article 134, UCMJ, offense comes from the text of Article 134, UCMJ, itself. Gov. Br. at 22 (“Congress provided the scope of a court-martial’s jurisdiction to hear offenses under Article 134 in the plain language of the text”). But the Government errs by ignoring that the phrase granting jurisdiction for Article 134, UCMJ, offenses is restricted by the initial phrase of the statute.

The initial phrase of Article 134, UCMJ, “expressly restricts [Article 134’s] reach only to conduct ‘not specifically mentioned in this chapter.’” *United States v. Grijalva*, 84 M.J. 433, 435 (C.A.A.F. 2024). This phrase is a prohibition against “the charging of conduct as an offense under Article 134, UCMJ, if Congress has already codified the conduct as an offense in Articles 80 through 132, UCMJ.” *Id.* (citing *United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020)).

Taking these two phrases together, the ability of a court-martial to take “cognizance” of—or assert jurisdiction over—an offense charged under Article 134, UCMJ, depends on whether the conduct underlying that offense is already “mentioned in [the UCMJ].” That is the preemption analysis.

The Government’s argument that the “plain language of Article 134, UCMJ, does not contain negative language limiting the jurisdiction of a court-martial” fails because it ignores the initial phrase of the statute. Preemption is intended to be an express limitation on the application of Article 134, UCMJ. *MCM*, pt. IV, ¶ 91.c.(5)(a) (*Limitations on Article 134*). As this Court has recognized, this

“restriction is not new.” *Grijalva*, 84 M.J. at 440 (Hardy, J. concurring). The limitation on the scope of Article 134, UCMJ, has existed for over 100 years. *Id.*

The Government’s arguments that preemption claims are not jurisdictional depend on the Supreme Court’s decision in *United States v. Cotton* and the D.C. Circuit Court of Appeals decision in *Forbes v. Phelan*. Gov. Br. at 23—24; *Cotton*, 535 U.S. 625, 630 (2002); *Forbes*, 153 F.4th 73, 82 (D.C. Cir. 2025). Neither of these cases resolve certified Issue I.

Cotton is unrelated to military preemption claims related to Article 134, UCMJ, offenses. Instead, the issue was “whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals’ vacating the enhanced sentence.” *Cotton*, 535 U.S. at 627. There, the Supreme Court ruled that omitting facts from an indictment did not deprive the court of jurisdiction. *Id.* at 631. Preemption is not a challenge that there are simply missing facts from indictment. Preemption is a prohibition against using Article 134, UCMJ, when the offense is already covered by Articles 80 through 132. *MCM* pt. IV, ¶ 91.c.(5)(a). Furthermore, *Cotton* was decided in 2002. 535 U.S. 625. If *Cotton* decided that preemption claims were waivable, this Court would have overturned its decision in *Robbins*, 52 M.J. at 160, and would have overturned the Air Force Court’s decision in *Jones*, 66 M.J. at 706, *rev. denied*, 2008 CAAF LEXIS 1402 (C.A.A.F. 2008). Under the principle of vertical stare decisis, courts

must strictly follow the decisions issued by higher courts. *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (citation omitted). Yet, as the Government conceded at oral argument before the Air Force Court, *Robbins* is still good law. JA 12.

The Government's reliance on *Forbes* is similarly inapplicable. Gov. Br. at 24. In *Forbes*, the D.C. Circuit Court said that "preemption arguments . . . are merits defenses because they challenge sufficiency of the conduct described in the specification to establish the elements of the crime." 153 F.4th at 86. This is incorrect. Preemption is not a special or affirmative defense that attacks the sufficiency of the evidence, such as the defenses described in R.C.M. 916. Preemption is an express limit on the application of Article 134, UCMJ, to offenses "not specifically mentioned in this chapter." *Grijalva*, 84 M.J. 441. The preemption analysis does not depend on the sufficiency of the evidence; rather, it depends on whether conduct is already covered by Articles 80 through 132, UCMJ. *Avery*, 79 M.J. at 366.

If this Court were to adopt the D.C. Circuit Court's interpretation that preemption claims are simply merits defenses, it would be a sea change in how the entire Department of War treats the preemption doctrine, and run counter to decades of this Court's precedent. *United States v. McCormick*, 30 C.M.R. 26, 28 (1960) ("The statute expressly excepts from its coverage conduct 'not specifically

mentioned in this chapter’ and each of the general articles which preceded it, ranging backward through history to those extant in the British Army, were similarly intended only ‘to provide a general remedy for wrongs not elsewhere provided for.’”) This Court should decline to adopt the D.C. Circuit Court’s interpretation of preemption.

The limitation on the scope of Article 134, UCMJ, is explicit. If an offense is already covered in Articles 80 through 132, UCMJ, a court-martial cannot take cognizance of it as an offense under Article 134, UCMJ. 10 U.S.C. § 934. If the court-martial cannot take cognizance of an offense, it lacks jurisdiction over the offense. A preemption challenge directly addresses whether an Article 134, UCMJ, offense is already covered in Articles 80 through 132, UCMJ. Accordingly, a preemption challenge directly affects whether the court-martial had jurisdiction over the Article 134, UCMJ, offense. Such a jurisdictional challenge is not waived by pleading guilty. R.C.M. 907(b)(1), 910(j).

C. This Court has historically reviewed preemption issues in cases that involved a guilty plea.

Beyond the textual review of Article 134, UCMJ, this Court’s historical treatment of preemption demonstrates that it is not waived by pleading guilty.

The earliest example of this Court’s predecessor recognizing the preemption doctrine involved a guilty plea. *United States v. Norris*, 8 C.M.R. 36, 37 (C.M.A. 1953). In *Norris*, the accused pleaded guilty to taking without authority in violation

of Article 134, UCMJ. *Id.* at 37–38. At the conclusion of the trial, the law officer advised that the court-martial could not find the accused guilty of an offense other than larceny or wrongful appropriation under Article 121, UCMJ, because it would violate the preemption doctrine. *Id.* at 38. This court held that the law officer’s advice that the appellant could not be convicted under Article 134, UCMJ, for wrongful taking without the specific intent element was correct. *Id.* at 39–40.

Twenty years later the same Court decided a similar preemption claim in *United States v. Toutges*, 32 C.M.R. 425, 426–27 (C.M.A. 1963). In *Toutges*, the appellant pleaded guilty to assaulting a commissioned officer in violation of Article 134, UCMJ. On appeal, the defense contended that the conviction was preempted by Article 90, UCMJ, because Congress “already acted in the area of assault conduct toward commissioned officers.” *Id.* The Court reviewed the merits of the preemption claim, even though the appellant pleaded guilty to the offense being challenged. *Id.* (finding that Congress had not already covered the field of the conduct).

In *United States v. McGuiness*, this Court’s predecessor again reviewed a preemption claim on appeal even though the appellant pleaded guilty to the Article 134, UCMJ, offense that was being challenged. 35 M.J. 149, 150–51 (C.M.A. 1992). There, the appellant pleaded guilty to an offense in violation of 18 U.S.C. § 793(e), incorporated through Clause 3 of Article 134, UCMJ. *Id.* at 151. On appeal

the appellant challenge that the conduct he pleaded guilty to was already covered by Article 92, UCMJ. *Id.* The Court reviewed the merits of the claim and held that the prosecution was not preempted. *Id.* at 152.

As discussed above, in *Robbins*, this Court reviewed a preemption claim on appeal even though the appellant pleaded guilty to the Article 134, UCMJ, offense at trial. 52 M.J. at 160. There, the Government expressly argued that the issue was waived by the appellant's guilty plea. *Id.* This Court rejected the Government's argument and "h[e]ld that the preemption issue was not waived." *Id.*

Again, in *United States v. Erickson*, this Court reviewed a preemption claim even though the appellant pleaded guilty to the Article 134, UCMJ, offense at trial. 61 M.J. 230, 233 (C.A.A.F. 2005). There, the appellant pleaded guilty to wrongfully using nitrous oxide under Article 134, UCMJ. *Id.* at 231. On appeal, the appellant challenged that the conviction was preempted by Article 112a, UCMJ. *Id.* This Court reviewed the merits of the preemption challenge and concluded the conviction was not preempted. *Id.* at 233. Notably, *Erickson* was decided three years after the Supreme Court's decision in *Cotton*. This further demonstrates the inapplicability of *Cotton* to military preemption claims and this Court's continued adherence to *Robbins* even after the Supreme Court decided *Cotton*.

This Court has reviewed the merits of preemption issues for over seventy years and expressly held that preemption claims are not waived by pleading guilty in *Robbins*, 52 M.J. at 160. If this Court finds it necessary to decide certified Issue I, it should hold that preemption claims are not waived by pleading guilty.

III. Appellee’s conviction for being naked in view of the public was preempted by Article 120c, UCMJ.

A. Standard of review.

In certified Issue III, both the phrasing of the certified issue itself and the Government’s description of the standard of review suggest that this Court should review Appellee’s preemption claim under a plain error or abuse of discretion analysis. Gov. Br. 43-44. This is incorrect.

Whether Articles 80 through 132, UCMJ, preempt a specification alleging a violation of Article 134, UCMJ, is a question of law that this Court reviews de novo. *Grijalva*, 84 M.J. at 435 (citing *Avery*, 79 M.J. at 366).

B. The preemption doctrine prohibits using Article 134, UCMJ, when an enumerated offense covers the field of the underlying conduct.

The President has enumerated various offenses that might be charged under Article 134, UCMJ. *See MCM* pt. IV, ¶ 92–108. However, the scope of Article 134, UCMJ, is not unlimited. *Grijalva*, 84 M.J. at 435. “The preemption doctrine prohibits application of Article 134, UCMJ, to conduct covered by Articles 80 through 132.” *MCM* pt. IV, ¶ 91.c.(5)(a).

The primary question when determining whether an enumerated offense has “covered the entire field,” is “whether congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code.” *Robbins*, 52 M.J. at 161 (quoting *McGuinness*, 35 M.J. at 151–52); *United States v. Wright*, 5 M.J. 106, 110–11 (C.M.A. 1978). The intent of Congress may be discerned “through direct legislative language” *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010) (citing *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979); *United States v. Taylor*, 38 C.M.R. 393, 395 (C.M.A. 1968); *United States v. Taylor*, 30 C.M.R. 44, 45–47 (1960)). Where the elements of the offenses are essentially the same, there is “no need to delve into legislative history to ascertain anything further about the intent of Congress.” *Grijalva*, 84 M.J. at 439. “The secondary question is whether the offense charged is composed of a residuum of elements of a specific offense.” *Robbins*, 52 M.J. at 161 (quoting *McGuinness*, 35 M.J. at 151–52); *Wright*, 5 M.J. at 110–11.

C. Appellee’s underlying conduct is indecent exposure.

Appellee was found guilty under Article 134, UCMJ, for standing at or near the door of his residence naked in view of the public. JA 67–68. The Government argues that this conduct is different from indecent exposure because Appellee’s conduct was “being naked,” while indecent exposure under Article 120c, UCMJ, applies to “exposing a single prohibited body part.” Gov. Br. at 47. The

Government’s argument is a distinction without a difference, unsupported by any law, and plainly contradicts this Court’s precedent.

In *United States v. Shaffer*, this Court affirmed the appellant’s conviction for indecent exposure. 46 M.J. 94, 97–98 (C.A.A.F. 1997). There, the evidence supporting the conviction was that three witnesses saw appellant standing “completely naked” in the back of his garage. *Id.* at 96. “Each time, he just stood there, naked.” *Id.* at 97. The facts of this case are directly analogous to Appellee’s conduct—standing naked near his residence when he knew passersby could see him. JA 142, 146, 151.

Similarly, in *United States v. Graham*, this Court affirmed a conviction under indecent exposure. 56 M.J. 266, 266–67 (C.A.A.F. 2002). As this Court said, “[the appellant] made certain that an unsuspecting and uninterested member of the general population had no choice but to see him naked. That is indecent exposure” *Id.* at 268. This is exactly how the Government characterized Appellee’s conduct at the outset of its sentencing argument, saying “Your Honor, the sentence is about the punishment that [Appellee] has earned. It is about a 32 year-old man who exposed his penis to an *unsuspecting* 16 year-old-girl walking to a train station.” JA 194 (emphasis added). “It’s about a 32 year-old man, that on another date, exposed his penis to an *unsuspecting* young woman walking home from the

train station.” *Id.* (emphasis added). As the Government concluded its argument, it again characterized Appellee’s conduct as “exposing his penis.” JA 203.

The military judge also highlighted that the conduct Appellee pleaded guilty to was covered by indecent exposure. During the presentencing hearing, the military judge sustained a defense objection to prosecution exhibits 7, 8, and 9. JA 190. When explaining his ruling, the military judge said that he had already found Appellee guilty of indecent exposure. JA 192 (“does not fundamentally change whether or not indecent exposure, which I have already found him guilty”). The military judge’s statement shows that the conduct that Appellee pleaded guilty to and described during the providence inquiry constituted indecent exposure. The Government’s distinction between Appellee’s conduct and indecent exposure fails.

D. Congress intended to cover indecent exposure in Article 120c, UCMJ.

The elements of indecent exposure under Article 120c, UCMJ, and the offense Appellee were convicted are essentially the same:

Article 120c, UCMJ	Appellee’s Article 134, UCMJ Offense
That the accused exposed his or her genitalia, buttocks, or female areola or nipple;	That Appellee engaged in certain conduct, to wit: standing at or near the door of his residence naked in view of the public;
That the exposure was in an indecent manner;	That the conduct was indecent;
That the exposure was intentional.	That, under the circumstances, his conduct was of a nature to bring discredit upon the Armed Forces.

MCM, pt. IV, ¶¶ 63.b.(6), 104; JA 139. The first element of both offenses address public nudity. The second element of both offenses requires that the conduct be indecent. When describing the second element of the offense Appellee pleaded guilty to, the military judge used the definition provided in the text of Article 120c, UCMJ. *Compare* JA 139 *with* 10 U.S.C. § 920c(d)(6) (“that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.”)

The Government conceded before the Air Force Court and now concedes before this Court that the first two elements are “similar.” JA 9 (“The Government concedes the first two elements of both offenses are ‘similar.’”); Gov. Br. at 46 (“The Government acknowledges that the specifications of indecent exposure under Article 120c and indecent conduct under Article 134 are similar in this case.”). The only difference between the elements of the offenses the Government points to is that Article 120c, UCMJ, requires specific intent and Article 134, UCMJ, contains its terminal element. JA 9. These elements do not affect the preemption analysis. *Avery*, 79 M.J. at 368 (this Court does not consider the terminal element when conducting a preemption analysis); *MCM*, pt. IV, ¶ 91.c.(5)(a) (preemption prevents the use of Article 134 to create a new kind of offense without the required intent). Thus, the elements of these two offenses are

essentially the same, and there is “no need to delve into legislative history to ascertain anything further about the intent of Congress.” *Grijalva*, 84 M.J. at 439.

Even if this Court chooses to evaluate Congress’s intent, the creation of Article 120c, UCMJ, itself evidences a Congressional intent to occupy the field for public, indecent nudity. Indecent exposure was previously an enumerated offense under Article 134, UCMJ, before it was specifically removed by executive order in 2007. Exec. Order 13447, 72 Fed. Reg. 56179, 56237 (Oct. 2, 2007). Indecent exposure was then subsumed into a new Article 120, UCMJ, for sexual offenses committed between 1 October 2007 and 27 June 2012. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3258, 3263 (effective Oct. 1, 2007); *MCM*, App. 21, at A21-2. Indecent exposure was later moved to Article 120c, UCMJ. National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 112-81, § 541, 125 Stat. 1298, 1406, 1411 (Dec. 31, 2011); *MCM*, App. 22, at A22-19. The explicit removal of indecent exposure from the realm of Article 134, UCMJ, and codification under Article 120c, UCMJ, demonstrates Congress’s intent to cover indecent exposure in a complete way under Article 120c, UCMJ.

E. The offense Appellee was convicted of is a residuum of elements of indecent exposure under Article 120c, UCMJ.

The only distinction between the elements of the two offenses is that Article 120c, UCMJ, required proof that Appellee’s conduct was intentional and the

offense Appellee was convicted of required proof that Appellee's conduct was of a nature to bring discredit upon the armed forces. *See MCM*, pt. IV, para. 63.b.(6), 104; JA 139. For purposes of this Court's preemption analysis, it does not consider the terminal element of Article 134, UCMJ. *Avery*, 79 M.J. at 367. That leaves the intent element necessary to prove Article 120c, UCMJ, as the only material difference between the two offenses.

But this distinction is squarely what the preemption doctrine prohibits: the use of Article 134, UCMJ, to avoid proving a vital element, such as the mens rea of an enumerated offense. *Avery*, 79 M.J. at 367 (quoting *Norris*, 8 C.M.R. at 39). The example provided in the *MCM* itself prohibits the use of Article 134, UCMJ, to create a new offense "without the required intent." *MCM*, pt. IV, ¶ 91.c.(5)(a). Because the offense Appellee was convicted of required proof of the same elements as Article 120c, UCMJ, minus the required intent element, the offense was a residuum of Article 120c, UCMJ.

Both the primary and secondary questions this Court reviews when conducting a preemption analysis show that Appellee's conviction violates the preemption doctrine. *Wright*, 5 M.J. at 110–11. Therefore, this Court should affirm the Air Force Court's conclusion that Appellee's conviction was barred by the preemption doctrine and set aside Charge II and its Specification.

CONCLUSION

Standing naked in view of the public is covered by indecent exposure under Article 120c, UCMJ. Therefore, this conduct was not cognizable as an offense under Article 134, UCMJ, and was barred by the preemption doctrine. This Court should affirm the Air Force Court's decision to set aside Appellee's conviction.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'J. Lopes', is positioned above the typed name.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 24(b) because it contains 6,034 words. This brief complies with the typeface and style requirements of Rule 37.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Clerk of Court on September 3, 2026, and that a copy was electronically served on the Air Force Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on the same date.

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