IN THE COURT OF APPEALS
STATE OF GEORGIA

WILLIAM JOSEPH HANIG and COAKLEY HANIG, Appellants, v. CHRISTINA LOFT, Appellee.	COA No. A24A1551

BRIEF OF APPELLEE

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INTRODUCTION

Appellee, Christina Loft, filed this action for defamation against Appellants, William Joseph Hanig and Coakley Hanig, in March 2020. Following a jury trial in October 2023, the jury found the Appellants jointly and severally liable for defamation in two instances: a Facebook post and an email. The relevant documents are in the appellate record at A22A0517-V2-31-32 and A22A0517-V2-17-30. A trial transcript is unavailable for this Court's consideration.

The Court now faces two questions of law: whether Georgia's defamation statutes are field preempted by the Uniform Code of Military Justice (UCMJ) and whether Appellants are entitled to intra-military immunity. The Appellee asserts that the UCMJ does not provide exclusive jurisdiction for torts committed by or against military members and that Congress did not intend for intra-military immunity to shield retired military members and their spouses from liability for intentional torts committed outside of and unrelated to military service. Congress' purpose for drafting the UCMJ does not extend to providing exclusive jurisdiction for torts committed by or against military members, and Congress does not intend for intra-military immunity to provide immunity for retired military members and/or their spouses for intentional torts committed outside of and unrelated to military service. The matter underlying the action for defamation involved a retired military

officer and his wife who committed retaliatory libel against an active-duty officer living in the civilian community about an off-base, off-duty cat rescue unrelated to the military or its missions. Even without the benefit of hearing the evidence presented at trial including the testimony of the Commanders, this Court can decide the matter is not incident to military service.[1]

Without the trial transcript, however, the merits of this case, which necessarily includes the sufficiency of the verdict form, cannot be reviewed without significant supposition.

RESPONSE TO APPELLANTS' STATEMENT OF THE CASE AND THE FACTS

The Appellants' recitation of facts, taken from the Trial Court's Order Denying Appellants' Motion for Summary Judgement, [2] predates the trial and does not account for the testimony presented. This Motion and the resulting Order were pretrial matters. Citations to pretrial factual representations in the appellate record are not citations equivalent to evidence.[3] Here, as testified, include that Appellee found a distressed cat in her off-base neighborhood, took extensive measures to find its owner, and ultimately re-homed the cat after 21 days. The Appellants contacted her a month after she found the cat, and upon her refusal to disclose the new owner's

[1] A24A1551-V2-209, 2nd para
[2] A24A1551-Appellants' Brief, at 7 of 34
[3] *Mommies Props., LLC v. Semanson*, 8880 S.E.2 376, 366 Ga.App.154 (2022)

identity, they made defamatory statements to her superiors and on social media.

Appellee's rank and occupation at the time of the incident was rank of Major, Battle Manager in the United States Air Force. [4] Appellee found a cat on June 11th while off duty and taking a walk in the community, a civilian off-base neighborhood where she lived[5]. The cat didn't have a chip, was declawed, had a nick in its ear and was missing a fang.[6] She took extensive measures to locate the cat's owners, including contacting Houston County Animal Control multiple times, posting on various lost pet websites, and putting up flyers at the vet's office.[7] After trying to locate the cat's owner for 21 days, Appellee re-homed the cat by giving it to a friend in Florida.[8] Thirty days after Appellee found the cat, on July 11th, Appellants contacted Appellee to tell her the cat she'd found had been theirs.[9] They wanted the cat returned to them. Appellee politely advised Appellants that she had been advised by animal control that after harboring and feeding a stray for seven days, the cat was hers. She couldn't keep the cat, so she had given it to a good home. Appellee told Appellants she was willing to reach out to the person who now owned the cat. [10] Appellee reached out to her friend in Florida to see if the cat could be returned. The

[4] A22A0517-V2-134, Deposition of Appellee, lines 4-5
[5] A22A0517-V2-141, Deposition of Appellee, line 11
[6] A22A0517-V2-141, Deposition of Appellee, line 17-23
[7] A22A0517-V2-142, Deposition of Appellee, line 1-14
[8] A22A0517-V2-143, Deposition of Appellee, lines 1-12
[9] A22A0517-V2-143, Deposition of Appellee, line 20
[10] A22A0517-V2-144, Deposition of Appellee, lines 8-12

friend did not want to relinquish the cat and wanted to remain anonymous.[11] On July 12, 2019, after Appellee refused to give Appellants her friend's name, Appellants made a report to the Houston County Sheriff's Office. On July 15, 2019, Appellants published a libelous email to Appellee's superiors and on July 18, 2019, Appellants published a libelous Facebook post.[12] The Houston County Sheriff's Office investigated and found no criminal element in Appellee's actions. The Investigator concluded that Appellee's timeline of events was accurate and Appellants' timeline was inaccurate, and that Appellee had become the legal owner of the cat after taking reasonable measures to find the owners.[13] Later Appellee contacted the same Sheriff's Office. The report indicates Appellants' social media actions caused Appellee to become an object of hatred in the community and caused her to become concerned for her safety and her own pets' safety. The report cites that Appellee was also concerned about the professional repercussions to her career.[14] And in her deposition, Appellee testifies she was humiliated when commanders on base, her superiors, and the superiors of her peers, meowed at her.[15]

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[11] A24A1551-V2-33-34, Law Enforcement Report
[12] A24A1551-V2-33-34, Law Enforcement Report ;A22A0517-V2-31-32, email; A22A0517-V2-17-30, Facebook post
[13] A24A1551-V2-33-34, Law Enforcement Report
[14] A24A1551-V2-36, Law Enforcement Report
[15] A220517-V2-139, lines 13-16; A20517-V2-140, lines 1-5, Appellee's Deposition

Appellants argue in their statement of the case and facts that "Appellee herself in her pleadings shows the Houston County Sheriff's Office investigated" and that this showing negates the Trial Court's finding in its Order Denying Appellants' Motion for Summary Judgement that an issue of material fact existed as to whether the Facebook post imputed a crime.[16] Appellee responds to this argument later in her Argument and Citation to Authority.

The email begins with a strong accusatory tone. Appellants' summary of the email sent to Appellee's superiors[17] omits the following:

"I am writing to inform you about a disturbing incident involving Maj. Loft. She took possession of a cat that belongs to my family and has refused to return it despite repeated requests. This act, in my view, demonstrates a severe lapse in judgment and integrity."

"Maj. Loft's actions have caused significant distress to my family. The cat was a beloved pet, and her refusal to return it, even after knowing its importance to us, raises serious ethical concerns."

[16] A24A1551, Appellants' Brief, at 9 of 34 pages
[17] A24A1551, Appellants' Brief, at 9 of 34 pages

"Such behavior is unbecoming of an officer of her rank. It not only reflects poorly on her personal ethics but also raises questions about her professional conduct and suitability for her position."

"Her actions could potentially undermine the trust and cohesion within the unit. Officers are expected to uphold the highest standards of conduct, and her failure to do so could have broader implications for morale and discipline."

"I urge the command to take this matter seriously and to consider the implications of having an officer who demonstrates such poor judgment and lack of respect for her peers and their property."[18]

Appellants' brief selectively omitted portions of the email that are crucial in understanding its full defamatory impact[19]. The complete email goes beyond merely informing the chain of command; it accuses Appellee of significant ethical and professional failings, suggesting that her actions are detrimental to her role and the military community[20].

There is no indicia of Defamation Per Quod in the Record. Although Appellants' Counsel nor this Honorable Court have the benefit of the closing

[18] RII-V2-28-29, Email
[19] A24A1551, Appellants' Brief at 9 of 34 pages
[20] A24A1551-V2-28-29, Email

remarks made at trial or of the bifurcated hearing on damages, the proposed jury instructions are available in the Record. The proposed jury instructions focus on defamation per se, detailing how such statements are inherently harmful and do not require proof of specific damages[21]. There is no indication of jury instructions proposed for defamation per quod, which would necessitate proving special damages. The verdict form nor the proposed jury instructions included defamation per quod. [22] The Trial Court noted that there were no objections to the verdict form[23] and the record reflects no objections to the jury instructions.

RESPONSE TO PRESERVATION OF ENUMERATED ERRORS

Appellants contend they raised defenses of both federal preemption and of intra-military immunity in their Third Defense in their Answer to the Complaint.[24] Appellants use their Third Defense to preserve Errors 1 and 2, their claim for federal preemption of both the Facebook Post and the email as well as Error 3, their claim for intra-military immunity. Their Third Defense states federal "protocol" makes Appellee's claim fall "exclusively" under the jurisdiction of the federal government. This defense does not use the word "preempt" and does not point to any preempting

[21] A24A1551-V2-122-129, Proposed Jury Instructions for Libel
[22] A24A1551-V2-148-149, Verdict Form and A24A1551-V2-99-147, all Proposed Jury Instructions
[23] A220517-V3-755, Court Transcript
[24] A22A0517-V2-44

federal statute or law which is a minimum requirement for a federal preemption defense. Assuming arguendo that the verbiage preserves the alleged federal preemption errors, the verbiage does not include an intra-military immunity defense. The verbiage does not use "intra-military" or "immunity" or "the *Feres* doctrine" or the "Federal Tort Claims Act (FTCA)". The first and only time intra-military immunity was raised was in their Motion for Reconsideration of the Judgment rendered.

Like the intra-military immunity defense, the only time Appellants raised the issue set out in their fourth and fifth enumerated errors was in their Motion to Set Aside Judgement. Appellants contend that the verdict form must be wrong because the libelous email and the libelous Facebook post cannot constitute defamation per se. Their issue with the verdict form was not preserved at the trial court level. Failure to preserve this matter for this Court's consideration waives the issue on appeal.[25]

STANDARD FOR DEFAMATION

A libel is a false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule.[26] Appellants published the Facebook

[25] *Choi v. Sierra Construction Company, Inc.,* 366 Ga. App. 107 (2022); *Baggs v. State*, 265 Ga. App. 282. 285 (2004)
[26] O.C.G.A.§ 51-5-1

post and the email, and these publications tend to injure Appellee's reputation and expose Appellee to public hatred, contempt or ridicule. Appellants contend the statements they published are not libelous because the statements are true, or, in the alternative, the statements are opinion which cannot be proven true or false[27].

1. Opinion Statements may be Defamatory.

Statements couched in opinion are defamatory when the statement implies facts that are incorrect, incomplete, in error, or unrevealed. *Michael Milkovich, Sr., v Lorain Journal Co*., *et al*, 491 U.S. 1, 110 S. Ct. 2695 (1990). In the *Milkovich* case, a newspaper implied that a high school coach lied under oath. The U.S. Supreme Court rejected the artificial dichotomy between opinion and fact and provided an example which has been quoted numerous times in case law to settle once and for all how courts should handle statements of opinion in defamation cases. That example on page 42 of *Milkovich* illustrates, and the Court asserted, that a statement of opinion may often imply an assertion of objective fact. If a speaker says, "In my opinion John Jones is a liar," the speaker implies a knowledge of facts which lead to that conclusion. If the speaker states or implies facts and those facts are incorrect or incomplete, or in error, the statement may imply a false assertion of fact which can be disproved. Another example, an attorney's statement that a judge "wasn't worried about political ramifications," was not a protected

[27] Appellants' Brief, at 25-29

opinion because the statement implied the attorney was privy to some underlying facts, but the facts weren't revealed. *McQueen v. Fayette Cnty. Sch. Corp*., 711 N.E.2d 62 (Ind. Ct. App. 1999). Appellants contend that whether Appellee's actions constituted a lack of moral compass and a lack of good judgment and decision-making skills may be a matter of opinion, that opinion implies facts which the jury found were disproved.

2. Interpret in Context.

The Supreme Court of Georgia agrees opinion statements can be defamatory and requires that an alleged defamatory statement be construed in the context of the entire publication as a whole to determine whether it was potentially defamatory. *Gast v Brittain* 277 Ga. 340, 589 S.E.2d 63 (2003). In *Gast*, the issue was whether Gast's opinions implied defamatory facts about Brittain that were capable of being proven false. Gast's publication was about a person who had abused Boy Scouts while Brittain was a troop leader. In the end, the Georgia Supreme Court found that the letter Gast wrote was unambiguous regarding to whom he referred as the abuser and could not reasonably be interpreted to imply that Brittain had engaged in or condoned criminal behavior. Gast's letter clearly assigned responsibility for the child abuse which had occurred in the Boy Scouts to another individual. Thus, according to both *Milkovich* and *Gast*, and in this case before this Court, Appellants' contention must fail if Appellants' opinions can reasonably be

interpreted, according to the context of the entire writing in which the opinions appear, to state defamatory facts about Appellee that the jury believed were proven false.

3. Interpret as the "Average Reader"

Precedential case law explains that a court should look to what construction would be placed upon a writing by the average reader. The whole item should be read and construed together, and its meaning and signification determined. The analysis must center upon the substance of the statement and the impression created by the words as they relate to the defamed person. Substance over form. *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990); see page 16 of *Mar-Jac Poultry, Inc., v Rita Katz, et al* (D.D.C. 2011) for a federal district court's application of Georgia defamation law relying on *Mead v. True Citizen*, Inc. 417 S.E.2d 16 (Ga. Ct. App. 1992); *Wolfe v. Ramsey*, 253 F. Supp. 2d 1323 (N.D. Ga/ 2003); see also *Washington Post v. Chaloner*, 250 U.S. 290, (1919); *Macon Telegraph Publishing Co v. Elliott*, 302 S.E.2d 692 (Ga. Ct. App. 1983).

ARGUMENT AND CITATION OF AUTHORITY

A. **Article 139 of the UCMJ does not preempt Georgia's defamation statute to divest the trial court of subject matter jurisdiction over the libelous email.**

A. Congress' Purpose is the "Ultimate Touchtone."[28]

For federal law to preempt a state statute, the party seeking preemption must point to a federal law. Field preemption occurs when a comprehensive regulatory structure precludes supplementary state regulation which makes the full federal occupation of a particular field obvious, such that all state law in an entire field of law is overridden.[29] In other words, Congress has manifested an intention that the federal government occupy an entire field of regulation. The nature of any preemption claim, whether express or implied, depends on congressional intent in enacting the particular federal statute. "Courts must consider whether the federal statute's 'structure and purpose," or nonspecific statutory language, nonetheless reveal a clear, but implicit pre-emptive intent." [30] The issue before this Court, then, is whether Congress intended for the UCMJ to preempt Georgia's defamation statute when the matter arises from the activity of a military member who rescued a distressed cat in a civilian neighborhood [31]and who refused to tell the cat's prior owners to whom she had given the cat when the prior owners of the cat happen to be a retired military officer and his wife, who then, in an effort to pressure that military member to get the cat back, defame her in an email to her superiors.

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[28] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)
[29] *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)
[30] *Arizona v. United States*, 567 U.S. 387, 399 (2012) quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)
[31] RI-V2-219-220, Appellee's Deposition excerpt, p219, line 11-15 p220 lines 19-22

While the issue is fact sensitive, perhaps this Honorable Court will find that enough undisputed facts appear in the evidentiary record to decide that reputational damage to a military member caused by false claims of misconduct outside the scope of a military member's military duties is not a matter Congress intended for the UCMJ to preempt. The Congressional history of Article 139 of the UCMJ provides insight into Congress' intent regarding Article 139.

The UCMJ was enacted in 1950 and derived from the Articles of War (A.W.). The Articles of War were established in 1920 and used through World War II until the UCMJ was enacted. [32] The statute has remained unchanged since UCMJ enactment when the 81st Congress, Subcommittee on Armed Services, House of Representatives introduced H.R. 2498, a Bill to unify, consolidate, and codify the Articles of War, the Articles for the Government of the Navy and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice, March and April 1949.[33] Below are the only two comments regarding Article 139 from that subcommittee hearing:

> Art.109. Property other than military property of the United States – Waste, spoil, or destruction. Any person subject to this Code who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than the military property of the United States shall be punished as a court-martial may direct." *References*. – A.W.89. *Commentary*—This article is derived from A.W. 89. The provision relating to

[32] Library of Congress: Articles of War, approved June 4, 1920, Washington Government Printing Office, War Department, Washington, September, 1920
[33] Act of May 5, 1950, Pub. L. No. 81-506, ch.169, 64 Stat. 108

behavior, reparation and riot have been deleted. The reparation aspect is now handled by article 139 and the riots by Article 116.[34]

Mr. Smart: I would say, if I may, Mr. Chairman, point out that the remaining articles from 135 to 140, inclusive as a restatement of existing law, substantially speaking, except in the case of article 139, which is redress of injuries to property. This article has been cut down from the present article of war in view of the definition of larceny and forgery now contained in the code.[35]

Hereinafter are (A.W.) 89 and 105. The UCMJ Subcommittee referenced

A.W. 89 which references A.W. 105 from which Article 139 is derived:

Art. 89 GOOD ORDER TO BE MAINTAINED AND WRONGS REDRESSED.—All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of the commanding officer), or commits any kind of depreciation or riot, shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, as provided in Article 105, shall be dismissed from the service, or otherwise punished, as a court-martial may direct.[36]

Art. 105. INJURIES TO PROPERTY—REDRESS OF.—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damaged sustained against the responsible parties. The

[34] *UCMJ Hearings on H.R. 2498* Before a Subcomm. on Armed Services House of Representatives, 81st Congress, 1230 (1949)
[35] *Id*
[36] *Articles of War*, approved June 4, 1920, at 23

> assessment of damages made by such board shall be subject to approval of the commanding offer, and in the amount approved by him shall be stopped against the pay of the offenders…[37]

Congress' intent is discerned from the language of the preemption statute and the statutory framework surrounding it. Also relevant is the structure and purpose of the statute as a whole. Revealed not only in text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect the business, consumers and the law.[38]

Contemporary practice Article 139 is a claims payment provision. Although payments under Article 139 may result from conduct that is separately prosecuted under the UCMJ, a determination of liability under this statute is not dependent upon referral or disposition of UCMJ charges. Article 139 is implemented through service regulation.[39] If the claim is payable, and assessed against a military member, the claim is paid from that service-member's pay. Military appellate courts have had to consider Article 139 only occasionally.[40] Relationship to Federal Civilian Practice Article 139 has no direct federal counterpart. However, federal law permits persons to file administrative claims under the Federal Torts Claims Act or the Military Claims Act for damages caused by federal employees acting within the scope of their

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[37] *Id*, at 27
[38] *Medtronic, Inc. v. Lohr*, 518 U.S. 486 (1996)
[39] *AFI 51-502* (Nov 10, 2008); AR 27-20 (Feb. 8. 2008); *JAGINST 5800.7F* (June 26, 2012); *CGCI M5890.9* (Mar 3, 1993)
[40] *U.S. v. Henderson*, 23 M.J. 860, 862 (A.C.M.R. 1987)

employment.[41] Just as with Article 139, the federal counterpart looks toward the actions of the actor in determining whether the federal law applies.

Other than the cases establishing the supremacy of federal law and the doctrine of preemption, Appellants cited one case in which federal law preempted a state's defamation statute, *Jackson v. U.S. Steel Corp.,* 763 Fed Appx 805, 806-7 (11th Cir. 2019). Jackson alleged U.S. Steel defamed him by publishing statements that he was using his union position for his own benefit and engaging in criminal conduct. The Federal Labor Management Relations Act (FLMRA) expressly granted federal court jurisdiction to adjudicate employment disputes involving bargaining agreements. Determining falsity required a determination of whether Jackson improperly asserted he and other grievance committee members were entitled to the superseniority provision in the FLMRA. The defamation claim was inextricably intertwined with the terms of the labor contract because the state court could not adjudicate this claim without determining Jackson's rights under the FLMRA.[42] The resolution of the defamation claim depended on the meaning and interpretation of the FLMRA. This case is an example of express preemption, not implied field preemption. Even so, the actions of the actor were actions within the scope of his employment with U.S. Steel and his actions were so intertwined with the meaning of

[41] 28 U.S.C.§ 2680; 10 U.S.C.§ 2733
[42] *Jackson v. U.S. Steel Corp.,* 763 Fed Appx 807 (11th Cir. 2019)

the terms in the FLMRA, the FLMRA preempted the state law for this fact situation. Such is not the case at hand. Appellee was walking around her community neighborhood, talking to her neighbor, found a cat in distress, rescued the cat and after looking for its owner and waiting 21 days for word from the owner, and unable to keep the cat, re-homed it with a friend. She would not tell Appellants to whom she gave the cat and Appellants retaliated. She was not on a federal installation. She was not performing military duties. No action on her part triggers Article 139. Appellants contends that their action of complaining to the Commander triggered Article 139 proceedings turning the incident into a military matter, that their complaint to Appellee's superiors caused the entire situation to be preempted by federal law giving the UCMJ exclusive jurisdiction to adjudicate Appellee's claim for defamation against them. Appellants have provided no cases to support their argument that Article 139 is the exclusive remedy available to Appellee.

B. Presumption Against Preemption

The presumption against federal law preempting state law is rooted in principles of federalism that underpin the United States Constitution. This presumption plays a critical role in maintaining the balance of power between federal and state governments. The Tenth Amendment to the U.S. Constitution explicitly states that powers not delegated to the federal government are reserved to the states

or to the people. Thus, while Article VI, Clause 2 of the U.S. Constitution, the Supremacy Clause, establishes federal law as the supreme Law of the Land, and thus can preempt state law, courts have interpreted this clause to include a presumption against preemption in areas traditionally regulated by states. As far back as 1947, the Supreme Court held that there is a presumption against preemption in areas of traditional state regulation, unless Congress made its intent to preempt "clear and manifest."[43] In evaluating congressional purpose, the Supreme Court employs this presumption against preemption, a canon of construction that provides federal law should not be interpreted to preempt historically state powers out of respect for state sovereignty[44] unless it's an express preemption case.[45] The case before you is not claimed to be an express preemption case. Appellants contend it is a field preemption issue. Field preemption is an implied preemption as opposed to an express preemption. Even so, the presumption against preemption applies even when the issue is a field preemption question. For example, the federal government has long regulated drug labeling.[46] In *Wyeth*, a drug label case, the question before the Supreme Court was whether the FDA approval of a drug provided the manufacturer of that drug with a field federal preemption defense to the plaintiff's tort claims for failure to adequately warn about the risks to arteries when the drug is

[43] *Rice v. Santa Fe Elevator Corp*. 331 U. S. 218, 230 (1947)
[44] *Tarrant Reg'l Water Dist v. Herrmann*, 569 U.S. 614 (2013)
[45] *Puerto Rico v. Franklin Cal. Tax-Free Tr*., 579 U.S. 115, 125 (2016)
[46] *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)

administered with an IV push. The jury found the warnings were inadequate under state law. In considering the manufacturer's federal preemption defense argument, the Court stated: "First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996); see *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963). Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated … in a field which the States have traditionally occupied,' … we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Lohr*, 518 U. S., at 485 (quoting *Rice* v. *Santa Fe Elevator Corp*., 331 U. S. 218, 230 (1947)). Appellants are unable to point to any clear and manifest purpose of Congress for **exclusive** jurisdiction to rest with Article 139 of the UCMJ. If Congress thought state lawsuits for defamation posed an obstacle to the UCMJ, it surely would have enacted an express preemption provision at some point during the history of the Articles of War or the UCMJ. A person need not even be associated with the military to lodge an Article 139 complaint against a military member. Anyone can complain to a military member's commander. Likewise, when someone makes a libelous complaint, the military member against whom the complaint is lodged is not limited solely and exclusively to the UCMJ. Georgia's defamation laws offer an additional and important layer of protection to the members of our armed forces against those

who would use this avenue of complaining to one's commander to bully or intimidate the military member for fear of displeasing one's commander.

2. **10 U.S.C. § 1552 does not preempt Georgia's defamation statute to divest the trial court of subject matter jurisdiction over the libelous email.**

Appellants contend the absence of a civil remedy has no bearing on the issue of federal preemption.[47] However, the Supreme Court answered this question for us differently in the area of safety regulation of nuclear energy, a field generally preempted by the federal Atomic Energy Act. In *Silkwood v. Kerr-McGee Corp*.,[48] the Supreme Court upheld a punitive damages award against a lab for injuries an employee suffered from plutonium contamination. The Court rejected the lab's argument that the damages award related to the preempted field of nuclear safety by observing that Congress had not provided an alternate remedy for persons injured in nuclear accidents and that Congress would not have removed all judicial recourse from plaintiffs injured in nuclear accidents without an explicit statement to that

[47] Appellants' Brief, at 21 of 34
[48] *Silkwood v. Kerr-McGee Corp*, 464 U.S. 238, 241-42 (1984)

effect.[49] In the case before you, Appellee would be left with no remedy when a defamation was committed against her.

Appellants contend that this federal statute authorizing correction of military records is the sole or exclusive remedy for Appellants' defamation of Appellee and they cite *Chappell v. Wallace* in support of their contention. In *Chappell*, five enlisted seamen on board a combat vessel brought action against their commanding officers seeking damages, declaratory judgment and injunctive relief for actions, including low performance ratings, they alleged were taken against them in violation of their constitutional rights to not be discriminated against because of their race, color or previous servitude. The Court denied the five the relief they sought in deference to the Legislative Branch's plenary authority over rights, duties and responsibilities in the framework of the Military Establishment and the military's need for unhesitating and decisive action by military officers and disciplined responses by enlisted personnel. The Court noted the actions were incident to the complainants' military service and that four of the five had not availed themselves of the administrative remedies to have their military records corrected under 10 U.S.C. §1552. Taken together, the disciplinary requirements of the military and Congress'

[49] *Id*

activity in the field would make it inappropriate to provide enlisted personnel with a remedy against their superior officers.[50]

In the case before you, there is no evidence of Appellee's military record needing correction. Appellee suffered injury to her reputation, not to her military records. Her actions which gave rise to the incident were not related to military service. Appellants are not in her chain of command nor are they her superiors. Subsequently, this proposed exclusive remedy is not a remedy at all as it provides no relief for the defamation and has no relevance to this case. Appellants are desperately searching for any regulation they can find to create a remedy and the military record correction regulation fails in that regard.

3. **Intra-military immunity does not bar Appellee's state defamation claims against Appellants because even with the limited facts available in the appellate evidentiary record, this matter did not arise out of activities incident to military service.**

Historical Background. Under the doctrine of sovereign immunity, the federal government cannot be sued without its consent[51]. Congress passed the Federal Torts Claims Act (FTCA) to give claimants the ability to sue the federal government in court pursuant to the FTCA's limitations. Claims that fall outside of

[50] *Chappell v. Wallace*, 462 U.S. 296 (1986)
[51] *United States v. Navajo Nation*, 556 U.S. 287, 289 (2009)

the FTCA remain barred by sovereign immunity. The FTCA's principal waiver provision waives sovereign immunity for claims that are (1) against the United States (2) for money damages (3) for injury or loss of personal property , or personal injury or death (4) caused by the negligent or wrongful act or omission of any employee of the government(5) while acting within the scope of his office or employment (6) under circumstances where the United State if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[52] For almost 75 years, the Courts have interpreted the Federal Torts Claims Act (FTCA) as stating that the Government cannot be held liable for injuries to servicemen when the injuries arise out of activities incident to service.[53]

The UCMJ is not useful in determining whether the *Feres* doctrine applies to any given set of circumstances as military active-duty members are subject to military discipline at all times. Additionally, the UCMJ subjects more than just active-duty servicemembers to its jurisdiction. As counsel for Appellants point out, it subjects retired military member offenders, and, in certain field or military-accompaniment circumstances, civilian offenders, to its jurisdiction for purposes of punitive accountability.[54] Simply because the UCMJ can subject one of the

[52] *FDIC v. Meyer*, 510 U.S. 471, 477 (1994)
[53] *Feres v. United States*, 340 U.S. 135, 146 (1950)
[54] UCMJ arts. 2(a)(8)-(12) codified at 10 § U.S.C. 802(a)(8)-(12)

Appellants to its jurisdiction does not mean the UCMJ is the standard for determining intra-military immunity. The standard for determining intra-military immunity is whether the matter in question arose out of activities incident to military service.[55] In addition to the fact that this matter did not arise out of activities incident to military service, another insurmountable obstacle to claiming intra-military immunity exists for Appellants to overcome. Appellants can point to no statute or case which shows Congress intended for sovereign immunity to apply to the complaints of a retired military member and his wife. Simply because retired military members may be subject to the UCMJ, used to enable prosecution of crimes committed while on active duty, it does not necessarily mean their complaints to an active-duty member's chain of command rise to the level of being "incident to military service".

Assume for purposes of argument that we had a different set of facts, a set of facts that clearly arose from activities incident to military service, which is a stretch because Appellants are not active duty servicemembers, but assume they were, and turn to the first Supreme Court case to interpret the FTCA's applicability to injured servicemembers, *United States v. Brooks*. In *Brooks*, two active-duty Army brothers were on leave driving their private car when an Army truck negligently hit them. The Supreme Court held the FTCA did not categorically exclude claims by

[55] *Feres v. United States*, 340 U.S. 135 (1950)

servicemembers stressing the fact that the accident had nothing to do with the Brooks' service in the military.[56] Then came *Feres* which was a consolidation of three cases: two medical malpractice cases and a fire in an Army barracks. Unlike *Brooks*, all the injuries sustained were while the service members were on active duty and were in the course of activity incident to service.[57] And then came *Chappel v. Wallace* which established the principle of intra-military immunity for constitutional tort claims against superior officers. The court was careful not to extend this immunity to non-military related civil claims brought in civil courts. The Court explained the "need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel," the need to avoid "undermining military discipline," and the unique relationship between enlisted military personnel and their superior officers. [58] The Court's analysis implies that outside this context, such protections are not necessary and that civilian matters do not carry the same concerns. Note that none of these factors apply to the case before you.

Moving from the first to the last or most recent Supreme Court case to interpret intra-military immunity, the Court emphasized the *Feres* doctrine exists to

[56] *Brooks v. U.S.*, 337 U.S. 49,51 (1949)
[57] *Feres v. U.S.*, 340 U.S. 135, 141 (1950)
[58] *Chappel v. Wallace*, 462 U.S. 296, 304 and 305 (1986)

prevent judicial second guessing of sensitive military decisions and discipline.[59] The retaliatory defamation which arose out of a cat rescue had nothing to do with any sensitive military decisions or discipline. In the 35 years since *Johnson*, the Courts have borne the burden of applying the *Feres* doctrine and filling in the gaps. In between *Brooks* and *Johnson*, the Supreme Court provided the following guidance:

In *Johnson,* the *Feres* doctrine barred a FTCA action on behalf of a Coastguard servicemember killed during an activity incident to service even though the alleged negligence was committed by a civilian employee of the federal government. The active duty servicemember was a helicopter pilot on duty during a rescue mission and the alleged negligent employee was a radar control operator. The Court cited the distinctly federal character of the relationship between the Government and Armed Forces personnel, the uniform veteran benefits the widow of the pilot received, and the potential to undermine the duty and loyalty servicemembers owe to their service. [60] In *Shearer*, a claim was filed against the Army for negligently and carelessly failing to exert sufficient control over a soldier the Army knew had been convicted of manslaughter who then murdered another soldier. Finding the suit required civilian authorities to second guess military decisions about management of the military, the complaint could not escape the "*Feres* net." The

[59] *United States v. Johnson* 481 U.S. 681, 686 (1987)
[60] *Id* at 689, 690

Court held that the *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in the light of the statute as it has been construed.[61] In *Stanley*, a serviceman was barred from filing an FTCA claim against the Army for the ill effects of LSD because the Army administered the LSD as part of its chemical warfare program and the injuries were, therefore, incident to service. The Court held the standard for liability depends on whether the serviceman's injury arises out of activity incident to service and not on the extent to which a particular suit would call into question military discipline and decision making as such would be an impermissible intrusion upon military matters.[62] The federal district courts resolve the tension between these cases by turning to a multi-factor test to determine whether a claim rises from activity incident to service where each case's facts are compared, a balancing test: (1) the place where the act occurred, (2) the duty status of the plaintiff where the negligent act occurred, (3) the benefits accruing to the plaintiff because of plaintiff's status as a servicemember, (4) and the nature of the plaintiff's activities at the time the negligent act occurred.[63]

The case before you meets none of the factors, whether you analyze it from

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[61] *United States v. Shearer* 473 U.S. 52, 57 (1985)
[62] *United States v. Stanley* 483 U.S. 672 (1987)
[63] *Norris v. Sec'y, U.S. Dep't of the Army*, No. 12-11928, D.C. Docket No. 2:11-cv-00018-WKW-SRW (11th Cir. Apr 26, 2013); *Norris v. McHugh*, 857 F.Supp.2d 1229, 1235 114 Fair Empl.Prac.Cas. (BNA) 1075 (M.D. Ala. 2012)

the Appellee's perspective of the activities giving rise to the incident or the Appellants' perspectives of the activities giving rise to the incident. (1) The cat rescue occurred in the civilian community, a neighborhood; the defamation was published in an email to Appellee's superiors and a Facebook post (2) Appellee was off duty walking and talking with a neighbor when she found the cat; neither Appellants were on active duty at the time of their complaints (3) there are no government or military benefits which accrue to Plaintiff/Appellee as a result of Appellants' defamation, and (4) Appellee was rescuing a cat in distress; Appellants were trying to get their cat returned to them. Appellee learned later that the prior owners of the cat happened to be a retired military officer and his spouse who then libeled Appellee in an email to her superiors and on social media calling out to the public to help law enforcement and let members of Appellee's military unit know of her taking of the cat and of her low moral character.

A *Feres* analysis is not required every time an active-duty service member brings suit against someone even if that someone happens to have served in the military at some point in the past. With regard to all of the cases Appellants cite relative to this enumerated error, all of them have several factors which cause the court to determine the injury arose out of activities incident to military service. In *Dudney*, a General was fired from his military official duties for reporting unethical

conduct of his supervisor after he claimed federal "whistleblower" protection[64]; in *Deckinger* an active duty member wrote a clinical summary of unfit for duty regarding a reservist who had been examined while on active duty[65]; and in *Cross*[66], enlisted members told alleged misinformation to their chain of command about one of their superiors in their chain of command. These cases cited by Appellants all involve actions directly related to military service and duties, unlike the present case in which the defamation arose from actions taken in a civilian context.

4. **Evidence existed from which the jury could find the libelous email constituted defamation per se.**

Appellants contend that the standard of review for their 4th enumerated error is de novo. However, Appellants' contention is not about application of law to undisputed facts. The essence of Appellants' 4th alleged enumerated error is that a jury could not have found the libelous email constituted defamation per se because it was either truth or opinion. Whether the email was false or true and whether the email stated opinion based on untrue facts was a jury question to which the any-evidence standard applies. The beginning point for a standard of review analysis is to ask what the trial court did. If the trial court decided an issue without taking live testimony by applying the law to the undisputed facts, the standard will normally be

[64] *Dudney v. State of Ga. DOD*, 322 Ga. App. 464, 466 (2013)
[65] *Deckinger v. Catro-Reyes*, 689 F.Supp 531 (D. Md 1988)
[66] *Cross v. Fiscus*, 830 F.2d 755 (7th Cir. 1987)

de novo review. If the trial court made findings of fact, the standard will normally be the any-evidence test, the substantial-evidence or the clearly-erroneous standard, which are all equivalent.[67] In the case before you the trial court made findings of fact when it denied Appellants' Motion to Set Aside Judgement.[68] The Court stated "Indeed, Plaintiff's superior officers who appeared at trial testified that the parties dispute was not a military matter (namely, Col. Shawn Cullen and Col. Richard Holt)"; ""It is clear from the email in question in this case that its purpose was an attempt to gain the return of the cat"; "It appears clear to this Court that the intent of the email was not merely to express concerns about military affairs or personnel decisions (especially when one such member was unknown), but to exert pressure to force a return of the cat"; "The meaning of "outer perimeters of duty" can certainly be argued, but this Court finds that in no way could it include the Facebook post and email communication of a retired military officer and his wife about losing their cat." Appellants' repeated questioning of Appellee's judgment and decision-making skills went beyond mere opinion. These statements could be seen as assertions of fact, which are actionable in defamation law and directly impugn Appellee's professional character, fitting the definition of defamation per se. Under Georgia law, defamation per se includes statements that harm an individual's professional reputation[69].

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[67] *Georgia Appellate Practice*, 2023-2024 Ed, at 698
[68] A24A1551-V2-209-210
[69] O.C.G.A. §§ 51-5-1 and 51-5-4(a)(3)

Because the statements constitute defamation per se, harm to Appellee's reputation is presumed, and she does not need to prove special damages[70]. Appellants cannot shield themselves by claiming their statements were merely opinions. Statements that imply factual assertions, particularly those questioning someone's professional competence, are not protected as pure opinions[71].

5. **Evidence existed from which the jury could find the libelous Facebook post constituted defamation per se.**

The same standard of review holds true for the Facebook post. "We will uphold a trial court's decision granting or denying a motion for reconsideration absent an abuse of discretion. *Cochran v. Emory Univ*., 251 Ga.App. 737, 739(2), 555 S.E.2d 96 (2001)."[72] "Subject to the general rule that any point of law is reviewed de novo, the appellate court reviews a trial court's refusal to set aside a judgement (including default judgements) for an abuse of discretion. A trial court's ruling on a motion to set aside a judgment will be affirmed 'if there is any evidence to support it.'"[73] Appellants contended in their Motion for Summary judgement that a factfinder could not find the publications libelous because they were either true or opinion, but the trial court responded to their

[70] O.C.G.A. §§ 51-5-1 and 51-5-4(b)
[71] *Gast v. Brittain*, 277 Ga. 340, 341 (2003)
[72] *Stephens v. Alan V. Mock Const. Co., Inc*., 690 S.E.2d 225, 302 Ga. App. 280 (2010)
[73] *Georgia Appellate Practice*, Ed 2023-24, at 723

Motion for Summary Judgment on this issue by pointing out material facts which a jury should hear and rule upon. And then after hearing the evidence in the case from law enforcement, the commanders, the parties, the witnesses to the cat rescue, the jury considered the truth or falsity of the publications, and the jury ruled on those points. In their Motion to Set Aside the Judgment, Appellants repeat the same contention that they made in their Motion for Summary Judgment, and in response, after hearing the evidence that was presented and the jury verdict, the trial court refused to set aside the judgment and listed certain findings of fact to explain to Appellants why he refused to set the judgement aside.[74]

And finally, Appellee addresses herein the argument contained in Appellants' statement of the case and facts that "Appellee herself in her pleadings shows the Houston County Sheriff's Office investigated" and this showing negates the Trial Court's finding in its Order Denying Appellants' Motion for Summary Judgement that an issue of material fact existed as to whether the Facebook post imputed a crime.[75] In response to Appellants' Motion for Summary Judgment which was primarily based on the assertions that the publications were either true or opinion, the trial court identified an issue of material fact regarding whether the Facebook post imputed a crime to Appellee, specifically theft. The post mentioned investigations by the Houston County Sheriff's Office and Animal Control, leading

[74] A24A1551-V2-209-210
[75] Appellant's Brief, at 9 of 34

to an inference that Appellee committed a crime. The court noted that this inference was reasonable and supported by the comments of numerous readers, who appeared to reach the same conclusion.[76] The Facebook post solicited public help and highlighted law enforcement's involvement[77], which can amplify the defamatory impact by suggesting serious wrongdoing on Appellee's part. Under Georgia law, defamation per se includes statements that impute a crime to the plaintiff. The trial court identified that the Facebook post met this criterion, as it led readers to believe that Appellee was involved in criminal activity. In cases of defamation per se, harm to the plaintiff's reputation is presumed, eliminating the need for Appellee to prove special damages. [78]The trial court's reasoning aligns with this principle, as the post's content and the resulting public comments supported the finding of inherent harm to Appellee's reputation. The fact that numerous readers concluded Appellee committed a crime based on the post [79] reinforces the post's defamatory nature and supports the jury's award of damages.

CONCLUSION

Appellants' alleged enumeration of errors 1 through 4 focus on the email, not the Facebook post, in the hope that the retired military status of one of the Appellants

[76] A241551-V2-14, Facebook Post
[77] A241551-V2-14, Facebook Post
[78] O.C.G.A. §§ 51-5-1 and 51-5-4(a)(1)
[79] A241551-V2-14, Facebook Post

will entitle Appellants to defame Appellee. Appellee asks the Court to find that though one of the Appellants could be subjected to the jurisdiction of the UCMJ and could still be prosecuted under the UCMJ if he had committed a crime while in active service, that subjection does not mean Appellee's exclusive remedy to address Appellants' defamation is limited to the UCMJ or the records correction regulation; that Appellants were not engaging in activity incident to military service but were trying to get a cat returned to them when they defamed Appellee; that Appellee was not engaged in activity incident to military service when she rescued the cat; and finally, that the jury was able and did, in fact, find Appellants committed defamation per se under Georgia law for both the libelous email aimed at Appellee's professional reputation and the libelous Facebook post which the average reader could interpret as if Appellee had committed a crime in taking the cat and not returning it to Appellants.

CERTIFICATION OF WORD COUNT. This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted, this 2nd day of July, 2024.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing counsel, Brian P. Brupbacher, RUSSELL WALKER LAW FIRM, 920 Carroll Street, Perry, GA 31069, with a true and correct copy of the foregoing Brief of Appellee by placing the copy in the United States Mail, properly addressed and with sufficient postage, this 2nd day of July, 2024.

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