Docket No. 18-5188

In the

Supreme Court of the United States

October 2019 Term

Hank Shrader,
Petitioner

v.

State of New Tejas,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR RESPONDENT

Team 14
Attorneys for Respondent
November 18, 2019

QUESTIONS PRESENTED

1. When deciding a motion to dismiss a state criminal prosecution based on immunity under the Supremacy Clause, are disputed issues of fact relevant to the defendant's innocence or guilt decided by the district court or are they viewed in the light most favorable to the State?

2. What test governs whether the Supremacy Clause provides a federal officer with immunity from a state criminal prosecution when the officer's actions were subjectively and objectively unreasonable?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases **Page(s)**

TABLE OF CITED AUTHORITIES (cont'd)

Cases **Page(s)**

TABLE OF CITED AUTHORITIES (cont'd)

Cases **Page(s)**

TABLE OF CITED AUTHORITIES (cont'd)

Cases **Page(s)**

TABLE OF CITED AUTHORITIES (cont'd)

Cases **Page(s)**

TABLE OF CITED AUTHORITIES (cont'd)

Constitutional Provisions **Page(s)**

Statutory Provisions **Page(s)**

TABLE OF CITED AUTHORITIES (cont'd)

Other Authorities **Page(s)**

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BRIEF FOR RESPONDENT,

TO THE SUPREME COURT OF THE UNITED STATES:

Respondent, State of New Tejas, petitioner in Docket No. 18-5719 before the United States Court of Appeals for the Thirteenth Circuit, respectfully submits this brief on the merits, and ask this Court to affirm the United States Court of Appeals for the Thirteenth Circuit.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on October 2, 2018. (R. at 2.) The petition for writ of certiorari was granted on March 18, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Article VI the United States Constitution is relevant to this case and reads in pertinent part as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, clause 2.

The Tenth Amendment to the United States Constitution is relevant to this case and reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution is relevant to this case and reads in part as follows: "[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Factual History

Agent Schrader. Petitioner Hank Schrader has served as a special agent with the Federal Bureau of Investigation (FBI) for nearly 20 years. (R. at 27a.) Agent Schrader has been stationed in New Mexico and Michigan and is presently stationed in Wisconsin. (R. at 27a.) Agent Schrader has spent his career investigating crimes of kidnapping, racketeering, wire fraud, and money laundering, and participated in the investigation of a major transnational criminal organization. (R. at 28a.) He has never participated in any drug trafficking investigations. (R. at 28a.)

Agent Schrader has received several commendations for his work but has also faced some criticism. (R. at 28a.) On four separate occasions, complaints of excessive force were made against Agent Shrader, although none were sustained by his supervisors. (R. at 28a.) On another occasion, Agent Schrader was reprimanded for reckless discharge of a firearm. (R. at 28a.)

The Honeymoon. In November 2016, Agent Schrader traveled with his new bride to Madrigal, New Tejas for their honeymoon vacation. (R. at 28a.) The newlyweds were accompanied by Mrs. Shrader's nine-year-old daughter and eleven-year-old son from a previous marriage. (R. at 28a.)

The First Encounter. After four days exploring various Madrigal offerings, the Schraders decided to travel downtown to visit the New Tejas History Museum. (R. at 28a). As they were en route to the museum in their rented green convertible, a red truck pulled in front of them. (R. at 29a.)

The details of what occurred next are disputed. (R. at 29a.) Agent Schrader testified that the red truck sped dangerously past his vehicle before changing lanes and recklessly braking in front of Agent Schrader's vehicle. (R. at 29a.) Agent Schrader claims that as a result, he was forced to "slam on [his] brakes" to avert a collision. (R. at 29a.) Mr. White, the driver of the red truck, disputes this rendition of the facts and denies that he was driving unlawfully. (R. at 29a.)

It is undisputed, however, that shortly after the lane change, the vehicles stopped at a stoplight. (R. at 29a.) At this point, Agent Shrader left his car and approached Mr. White's vehicle. (R. at 29a.) By his wife's own testimony, Agent Schrader was "furious" and his face was "red." (R. at 29a.) Mrs. Schrader stated that she was worried that violence would break out. (R. at 29a.) Agent Schrader admitted that he was angry and that he lost his temper. (R. at 29a.)

Observing Agent Schrader approach, Mr. White also left his vehicle and turned to face the agent. (R. at 29a.) Mr. White and Agent Schrader presented different accounts of precisely what was said during this exchange. (R. at 29a.) The parties both agree, though, that at some point Agent Schrader began

yelling and that Mr. White shoved him in the chest. (R. at 29a.) Mrs. Schrader testified that she believed she saw Agent Schrader draw back his arm, as if to punch Mr. White. (R. at 30a.) Before anything else could happen, however, the light turned green and other cars began to honk. (R. at 30a.) Both men returned to their vehicles, ending the confrontation. (R. at 30a.)

The Second Encounter. Following the encounter with Mr. White, the Schraders continued with their plans and headed downtown. (R. at 30a.) They spent the next several hours exploring the New Tejas Natural History Museum before leaving the museum to find a spot to eat lunch. (R. at 30a.) As the family was walking around downtown looking for a restaurant, Agent Schrader spotted Mr. White leaving a marijuana dispensary. (R. at 30a.) Mr. White had just stepped out of a building advertised as "Pinkman's Emporium," where he purchased two ounces of marijuana packaged in a transparent bag. (R. at 30a–31a.)

Possession of marijuana is not illegal under New Tejas state law. (R. at 30–31a.) In 2016—in a well-publicized ballot initiative—the citizens of New Tejas voted to legalize the sale, possession, and consumption of the drug. (R. at 30–31a.) Of course, while Mr. White's purchase and possession of the marijuana fully complied with New Tejas law, marijuana remains a Schedule I drug that is illegal to possess under federal law. (R. at 30–31a.)

After Agent Schrader observed Mr. White carrying the marijuana, he shouted "Stop! You're under arrest." (R. at 31a.) Mr. White, recognizing Agent Schrader from their recent encounter, began to run away. (R. at 31a.) Before he got far, however, Agent Schrader tackled him from behind, landing atop Mr. White and leaving him sandwiched between the concrete sidewalk and Agent Schrader's body. (R. at 31a.) Mr. White cried out in pain and made no effort to struggle. (R. at 31a.)

After witnessing Agent Schrader's actions, the owner of Pinkman's Emporium called 9-1-1. (R. at 31a.) When local police arrived at the scene shortly thereafter, they found Mr. White in handcuffs and Agent Schrader informing him that he was under arrest for possessing marijuana in violation of § 844 of Title 21 of the United States Code. (R. at 31a.) Agent Schrader identified himself to the police officers as an FBI agent enforcing federal law. (R. at 31a.) Agent Schrader was not arrested at the scene. (R. at 31a.)

Procedural History.

District Court. Following the altercation between Mr. White and Agent Schrader outside the marijuana dispensary, the State of New Tejas indicted Agent Schrader for assault and aggravated assault. (R. at 33a.)

Agent Schrader removed the state prosecution to the United States District Court for the District of Madrigal under § 1442 of Title 28 of the

United States Code, which permits removal of a "criminal prosecution that is commenced in a State court and that is against . . . any officer . . . of the United States or of any agency thereof . . . for or relation to any act under color of such office or on account of any . . . authority claimed under an Act of Congress for the apprehension or punishment of criminals." (R. at 33a–34a.); *see also* 28 U.S.C. § 1442; *Mesa v. California*, 489 U.S. 121, 129 (1989) (holding that an officer removing under 28 U.S.C. § 1442 must plead a federal defense to the prosecution). The State did not challenge removal or the district court's jurisdiction. (R. at 34a.)

Agent Schrader testified before the district court that at the time of the altercation between himself and Mr. White, he was unaware that New Tejas legalized marijuana. (R. at 31a.) He stated, however, that even if he had been aware, it would have made no difference in his decision to arrest Mr. White because his actions were made pursuant to his oath to enforce federal laws. (R. at 31a–32a.)

Agent Schrader pleaded that because he was a federal officer enforcing federal law, he was immune to state criminal prosecution under the Supremacy Clause. (R. at 34a.) Accordingly, Agent Schrader moved to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b). (R. at 34a.)

In determining whether Agent Schrader was entitled to immunity, the district court decided all disputed issues of fact. (R. at 34a.) The district court held that under the test for Supremacy Clause immunity laid out by this Court in *Cunningham v. Neagle*, 135 U.S. 1 (1890), Agent Schrader entitled to immunity. (R. at 34a.) Accordingly, the district court granted Agent Shrader's motion to dismiss the indictment. (R. at 34a.) The State timely appealed. (R. at 34a.)

The Thirteenth Circuit. The Thirteenth Circuit reviewed the district court's legal conclusions *de novo* and the district court's relevant findings of fact for clear error (R. at 3a.) The Thirteenth Circuit held that the district court erred in deciding disputed issues of fact, rather than viewing such facts in the light most favorable to the State. (R. at 5a.)

The Thirteenth Circuit also held that while the district court correctly recited the *Neagle* standard for Supremacy Clause immunity, it erred in its application of that standard. (R. at 8a.) The Thirteenth Circuit then concluded that under *Neagle*, the State carried its burden to disprove Agent Schrader's defense of immunity on three separate grounds. (R. at 9a–13a.) Accordingly, the Thirteenth Circuit held that the district court erred in dismissing the state's indictment and reversed. (R. at 1a.)

Agent Schrader petitioned this Court for a writ of certiorari, which was granted on March 18, 2019. This Court has limited the argument to the issues

of (1) whether, when deciding a motion to dismiss a state criminal prosecution based on immunity under the Supremacy Clause, disputed issues of fact are decided by the district court or viewed in the light most favorable to the state, and (2) what the appropriate test is in deciding whether the Supremacy Clause provides a federal officer with immunity from a state criminal prosecution.

SUMMARY OF THE ARGUMENT

Standard of Review

Federal Rule of Civil Procedure 12 allows a federal agent to raise the defense of Supremacy Clause immunity to avoid a state's criminal prosecution against him. In determining whether a defendant is entitled to immunity, the majority of court's hold that a judge may not decide disputed issues of material fact and that such issues must be viewed in the light most favorable to the state. This approach is supported by the plain language of the statute, which provides that courts may grant immunity defenses raised by Rule 12 motions only as a matter of law. Additionally, this approach is in line with the Fifth and Sixth Amendments, which together require that criminal convictions rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.

Test for Supremacy Clause Immunity

This Court, in *Cunningham v. Neagle*, established the test for Supremacy Clause immunity. Under that test, a federal officer is entitled to

immunity if: (1) the officer was performing an act that federal law authorized him to perform; and (2) the officer's actions were necessary and proper to fulfilling his federal duties.

An officer's actions are authorized by federal law under *Neagle*'s first prong when the officer is acting pursuant to a direct order or within the scope of his official duties. *Neagle*'s second prong requires consideration of two separate elements: (1) whether the agent *subjectively* believed that his actions were necessary and proper to carry out his federal duties; and (2) whether this belief was *objectively* reasonable. A finding that a defendant acted with malice or criminal intent precludes a finding that the defendant's actions were necessary and proper to fulfilling his federal duties.

ARGUMENT

I. When deciding a motion to dismiss a state criminal prosecution based on immunity under the Supremacy Clause, disputed issues of fact are decided in the light most favorable to the State.

Federal Rule of Criminal Procedure 12(b) (Rule 12(b)) permits pretrial motions raising "any defense, objection, or request that the court can determine *without a trial on the merits*." FED. R. CRIM. P. 12(b)(1) (emphasis added). In interpreting an earlier, substantively identical version of Rule 12(b), this Court explained that such motions are permitted only where "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v.*

Covington, 395 U.S. 57, 60 (1969). In other words, pretrial motions to dismiss allow criminal defendants to avoid trial only when the prosecution's legal theory is flawed. *See generally*, James Fallows Tierney, *Summary Dismissals*, 77 U. CHI. L. REV. 1841 (2010).

The Advisory Committee notes to Rule 12(b) indicate that "immunity" is among the defenses that can be raised by pretrial motion. *See* Advisory Committee Note to FED. R. CRIM. P. 12(b). Still, the Supremacy Clause requires a delicate balance between federal and state law enforcement powers. *See Kentucky v. Long*, 837 F.2d 727, 742–49 (6th Cir. 1988) (discussing the history of Supremacy Clause jurisprudence).

In comprehending the import of the Supremacy Clause, courts are guided by the principle announced long ago by this Court in *McCulloch v. Maryland*: while the national government shall not be subjected to undue interference by the states in enforcing federal law, neither too should any state be made "to tolerate unwarranted interference with its duty to protect the health and welfare of its citizens." *Id*. at 749 (citing *McCulloch v. Maryland*, 17 U.S. 316 (1819)).

A. Under the plain language of Rule 12, a court can resolve an immunity defense by pretrial motion only if it can be determined without a trial on the merits.

There is no dispute that immunity is a recognized defense under Rule 12(b). *See* Advisory Committee Note to FED. R. CRIM. P. 12(b). Unlike other

permitted defenses, however, the defense of Supremacy Clause immunity may overlap significantly with the elements of the offense for which a federal agent is being charged. *See generally*, James Wallace, *Supremacy Clause Immunity: Deriving a Willfulness Standard from Sovereign Immunity*, 41 AM. CRIM. L. REV. 1499 (2004). When this happens, the facts that are necessary for determining the defense of Supremacy Clause immunity may be inseparable from facts relevant to the elements of the offense, rendering a Rule 12(b) motion inappropriate. *See id*. While the district court characterizes this as unfair to the agent seeking protection under the Supremacy Clause, it does not change the plain language of the statute, which expressly prohibits a court from conducting *a trial on the merits*, or from granting a 12(b) motion except as a matter of law. FED. R. CRIM. P. 12(b).

In this case, for example, Hank Schrader is being charged with assault and aggravated assault under sections 22.01 and 22.02 of the New Tejas Penal Code. (R. at 2a.) In response, Agent Schrader asserted the defense of "justification" based on "arrest and search." (R. at 6a.) If a jury finds that Agent Schrader "reasonably believe[d] the arrest [wa]s lawful" and that he used force no more than "immediately necessary to make or assist in making an arrest," then he must be acquitted. NEW TEJAS PENAL CODE § 50.02; *see id*. § 50.01.

Agent Schrader, of course, asserts that, as a matter of law, he is immune from suit under the Supremacy Clause. (R. at 3a.) He recognizes that to raise this defense, he must show that he did "no more than what was necessary and proper" in fulfilling his federal duties. (R. at 8a.) The findings of law made by the district court thus overlap with the issues of fact that a jury would traditionally decide on this matter—facts relevant to the elements of the crimes and to Agent Schrader's defense of justification. *See* (R. at 37a–41a.)

The district court, for example, made the "finding of fact" that Agent Schrader "believed that his duties as an agent of the Federal Bureau of Investigation included arresting individuals who committed federal crimes in his presence, regardless of state law." (R. at 37a). Separately, as a "conclusion of law," the district court found that "Agent Schrader acted in subjective good faith—without criminal intent and without malice." (R. at 40a.)

To make this latter "conclusion of law" the district court necessarily decided disputed issues of fact traditionally reserved for a jury. (R. at 37a–40a.) Rather than sending such issues to the jury, however, the district court submitted its own overlapping legal and factual findings and held that Agent Schrader was entitled to immunity. (R. at 37a–41a.) Under the plain language of Rule 12, a court is expressly prohibited from conducting such a trial on the merits. FED. R. CRIM. P. 12(b); *see also Kentucky v. Long*, 837 F.2d 727, 750 (6th Cir. 1988) (holding that a district court may make preliminary findings of

fact necessary to decide questions of law only if "the court's findings . . . do not invade the province of the ultimate finder of fact.").

1. The standard of review used by the Thirteenth Circuit is in line with the analogous civil motion by which a defendant raises an immunity defense.

Rule 12(b) reflects the well-established principle that where disputed questions of fact preclude a holding that a defendant is entitled, *as a matter of law*, to a dismissal, pretrial judgments are not the appropriate vehicle for determining the outcome of the case. *See* Charles Alan Wright & Andrew D. Leipold, 1A Federal Practice and Procedure § 191 at 390–93 (West 4th ed. 2008). In such circumstances, it is unfounded for courts to hold that a judge may decide *as a matter of fact* a defendant's innocence or guilt. *See id.*

While the district court correctly noted that courts rarely address the issue of standard of review in deciding 12(b) motions, it failed to recognize why that may be the case. (R. at 36a.) In most instances, the proper standard of review is simply not a controversial issue. *See, e.g.*, *Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006) ("[The] court must review the evidence in the light most favorable to the non-moving party and assume the truth of the allegations in the indictment . . . . [t]he parties do not dispute these standards . . .").

This standard of review is also in line with Rule 12(b)'s civil procedural counterpart. *See generally*, James Fallows Tierney, *Summary Dismissals*, 77

U. CHI. L. REV. 1841 (2010). Under Rule 56 of the Federal Rules of Civil Procedure, a court may not permit summary judgment disposing of the case until the movant "shows that there is no genuine dispute as to any *material fact* and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a) (emphasis added). The language of Rule 56, therefore, is substantively identical to the language in Rule 12 that a defendant may raise "any defense, objection, or request that the court can determine *without a trial on the merits*" FED. R. CRIM. P. 12(b)(1) (emphasis added).

The standard of review for summary judgment motions under Rule 56 is well-established: "[o]n summary judgment, the inferences to be drawn from the underlying facts . . . must be viewed *in the light most favorable to the party opposing the motion*." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis added); *see United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962).

As is permitted in the context of Rule 12(b) motions, defendants may use civil motions for summary judgment to assert an immunity defense. *Tolan v. Cotton*, 572 U.S. 650, 651 (2014). Specifically, this Court has held that federal officials may raise the defense of qualified immunity in civil causes of actions against them for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. *Bivens v. Six*

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); *see* 42 U.S.C. § 1983.

In such actions, certain state and federal officials will be immune from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Summary judgment has been the most common vehicle for defendants asserting qualified immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Where a defendant asserted the defense of qualified immunity at the summary judgment level, this Court held that "court[s] must view the evidence 'in the light most favorable to the opposing party'" and must "draw [] inferences in favor of the nonmovant." *Tolan v. Cotton*, 572 U.S. 650, 657–58 (2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)) (reaffirmed in *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Because of the underlying purposes of qualified immunity, however, courts review summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions. *See, e.g.*, *Cartier v. Lussier*, 955 F.2d 841, 844 (2d Cir. 1992); *see also Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1204 (10th Cir. 2008) ("[b]ecause of the underlying purposes of qualified immunity, we review summary judgment orders deciding

qualified immunity questions differently from other summary judgment decisions").

Viewing the facts in the light most favorable to the nonmovant, in the existence of a genuine factual dispute, the plaintiff bears the ultimate burden to establish that the facts show a violation of the Constitution, while the defendant must establish facts that support the affirmative defense of qualified immunity. *See Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001).

Nevertheless, when qualified immunity turns on issues of fact, the case must proceed to trial. *See Ting v. United States*, 927 F.2d 1504, 1511 (9th Cir. 1991) ("The issue of whether [a defendant] is entitled to qualified immunity . . . cannot be resolved as a matter of law [when there is a] factual conflict surrounding the circumstances of [a] shooting."). "This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014).

The modified standard of review adopted by courts deciding the defense of qualified immunity at the summary judgment level is the same standard appropriate for analyzing Supremacy Clause immunity in the context of 12(b) motions. *See, e.g.*, *Hurlman v. Rice*, 927 F.2d 74, 78–79 (2d Cir. 1991); *Santiago v. Fenton*, 891 F.2d 373, 386–87 (1st Cir. 1989). Indeed, the Ninth

Circuit's decision in *Horiuchi*—the lone case cited by the district court in discussing standard of review—appears to be the only example of where a court has endorsed the idea that judges should decide disputed issues of fact. *See Idaho v. Horiuchi*, 253 F.3d 359, 378 (9th Cir. 2001) (Fletcher, J., dissenting).

The Second Circuit, for example, addressed a similar situation to the one at hand, in which the basis for invoking Supremacy Clause immunity turned on facts material to the elements of the crime at issue. *See New York v. Tanella*, 374 F.3d 141, 144 (2d Cir. 2004). The court viewed the evidence "in the light most favorable to the State and assume[d] the truth of the allegations in the indictment." *Id.* at 148. The court noted, however, that:

> [O]nce a threshold defense of immunity is raised, the State bears the burden of com[ing] forward with an evidentiary showing sufficient at least to raise a *genuine* factual issue whether the federal officer was . . . doing no more than what was necessary and proper for him to do in the performance of his duties."

Id. (quoting *Kentucky v.* Long, 837 F.2d 727, 752 (6th Cir. 1988)). Likewise, in *City of Jackson v. Jackson*, the court stated that when a "Supremacy Clause immunity defense [is raised] by way of motion to dismiss, the district court should grant the motion in the absence of an affirmative showing by the state that the facts supporting the immunity claim are in dispute." 235 F. Supp. 2d 532, 534 (S.D. Miss. 2002).

Although the standards differ for determining whether qualified immunity and supremacy clause immunity apply,[1] the civil and criminal procedural statutes for invoking each respective defense are substantively identical and mandate the same standard or review. *See* FED. R. CRIM. P. 12(b); FED. R. CIV. P. 56. Any argument the Respondent may make for why the district court should be able to decide disputed issues of fact is simply unsupported by the plain language of the statute under which he seeks immunity. FED. R. CRIM. P. 12(b).

2. Frivolous or vindictive criminal charges by states against federal officers will not survive 12(b) motions because the State must prove by way of more than mere allegations that material facts are in dispute.

Viewing the facts in the light most favorable to the state—while still requiring the state to come forward with affirmative evidence showing material issues of fact are in dispute—strikes the proper balance between competing state and federal interests in Supremacy Clause immunity cases. *See Tanella*, 374 F.3d at 148.

Under this approach, criminal charges brought by overzealous prosecutors attempting to undermine federal law will not survive 12(b) motions, as the district court suggested. (R. 36a–37a.) This is because once a

[1] *See infra* Part II (discussing the differing standards for qualified immunity and Supremacy Clause immunity).

federal officer raises a threshold defense of immunity, the state has the burden of producing evidence "sufficient at least to raise a *genuine* factual issue whether the federal officer was . . . doing no more than what was necessary and proper from him to do in the performance of his duties." *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988) (emphasis in original). Mere allegations that material factual disputes exist will not be sufficient to defeat a defendant's 12(b) motion based on immunity. *See Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006) ("[O]nce a defendant raises the defense of Supremacy Clause immunity the burden shifts to the state to supply sufficient evidence to raise a '*genuine* factual issue' that is supported by more than mere allegations.") (emphasis added).

The case of *New York v. Tanella* illustrates this standard. 374 F.3d 141 (2d Cir. 2004). In that case, the Second Circuit reviewed a federal officer's claim that he was entitled to immunity from the State of New York's suit against him for manslaughter. *Id*. at 146. The defendant, Tanella, was a special agent with the U.S. Drug Enforcement Administration, who participated in a joint operation with the New York City Police Department. *Id*. at 142–43. The joint surveillance led to the pursuit of Egbert Dewgard, after he was seen receiving a bag containing narcotics. *Id*. at 143. Trying to escape the authorities during this pursuit, Dewgard got into his car and struck a pursuing vehicle. *Id*.

At some point in the chase, Agent Tanella was the only car to keep up with Dewgard's. *Id*. When Dewgard's car became wedged between a pole and a fence, he got out and began running. *Id*. Agent Tanella shouted at Dewgard to stop before jumping on top of him. *Id*.

During the ensuing struggle, Tanella testified that Dewgard "'look[ed] directly at [Tanella's] gun and [went] for [the] weapon,' reaching for it in a twisting motion.'" *Id*. at 144. Tanella stated that he reasonably believed that Dewgard posed an imminent threat of death or serious bodily injury and that he fired his gun at Dewgard to stop the threat. *Id*. at 143.

Neither the State nor Tanella disputed the underlying facts of the operation, the pursuit, the foot chase, or Dewgard's struggle to avoid arrest. *Id*. at 144. Nor was there any disagreement that Tanella shot and killed Dewgard. *Id*. Instead, "the dispute center[ed] on the relative positions of Dewgard and Tanella at the time of the shooting." *Id*. The State claimed that divergent eyewitness accounts as to the two men's positions gave rise to a genuine issue of fact about Tanella's motive. *Id*. at 150.

The court, however, rejected the State's contention. *Id*. at 144. In viewing the facts in the light most favorable to the state, the court held that the State's "paraphrasing of witness testimony" did not raise a triable issue of fact on Tanella's entitlement to Supremacy Clause immunity. *Id*. at 151–52. It noted that assuming "the credibility of the State's witnesses," the state

established that "Dewgard 'tried to run,' 'turned to run,' or 'looked like he wanted to . . . run' at the instant Tanella shot him," but that the men remained in close proximity at all times. *Id.* at 150–51.

The court reiterated that the issue was not whether Dewgard was *actually* about to run, but whether Tanella reasonably believed that Dewgard was about to grab his gun. *Id.* at 151. It held that in conjunction with the undisputed evidence, no version of the testimonial evidence compelled the conclusion that Tanella's belief was unreasonable. *Id.* at 144. Specifically, the court highlighted the undisputed facts that (1) Tanella knew Dewgard was a seasoned drug dealer, (2) Tanella had watched Dewgard violently avoid arrest and nearly hit a pedestrian and her child in the process, (3) and Dewgard engaged Tanella in a fist-fight rather than submit to arrest. *Id.* at 151–52. The court held that Tanella's perception that Dewgard was reaching for his gun was objectively reasonable as a matter of law. *Id.*

Tanella can be distinguished from the Ninth Circuit's opinion in *Morgan v. California*, in which the state produced affirmative evidence establishing that material issues of fact were in dispute. *Morgan v. California*, 743 F.2d 728, 733–34 (9th Cir. 1984). In *Morgan*, two agents with the Federal Drug Enforcement Administration were on their way to a restaurant to meet with an informant when they hit a parked car. *Id.* at 729–30. A dispute ensued between the agents and the driver of the car, which resulted in each agent

being charged with seven misdemeanor counts, including assault with a deadly weapon and displaying a gun in a threatening manner. *Id.*

Among several other material issues, the court noted that it was "hotly disputed" whether the agents were intoxicated, whether they were on duty, and whether the occupant of the parked car ever displayed a weapon. *Id.* at 733–34. A state's witness, for example, testified that the agents told him they were en route for drinks at the police academy, despite the fact that the agents claimed they were driving to meet an informant. *Id.* at 733. The occupants of the parked car also testified that the agents used force upon them after the collision but prior to the time that one of the occupants allegedly displayed a weapon of his own. *Id.*

The court held that viewing the evidence in the light most favorable to the state, the agents were not entitled to immunity because the resolution of factual disputes was central to determining both whether the agents were acting within the scope of their duties and whether their actions were no more than necessary and proper for the performance of those duties. *Id.*

The court stressed that the defendants had not demonstrated how it would be necessary and proper for an agent to drive while under the influence in order to carry out the federal duty of meeting with an informant. *Id.* Additionally, the court stated that it "fail[ed] to see how any use of force or violence stemming from a minor traffic incident and prior to any display of a

weapon by [the victim] could be within the scope of the agents' federal authority." *Id*.

B. In addition to the plain language of Rule 12, the Sixth Amendment guarantees a jury trial where material facts are in dispute.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST., amend. VI. The Fifth Amendment guarantees that no person will be deprived of liberty without "due process of law." U.S. CONST., amend. V. Together, these provisions require that criminal convictions rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506, 509–10 (1995).

The role of the jury has long been cemented as "fact-finder," as the "prized shield against oppression," the "conscience of the community," and the "defense against arbitrary enforcement." *See* Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1385–93 (1994).

This fundamental right to a trial by jury was designed to guard against tyranny and oppression—on the part of state prosecutors and judges alike. *Gaudin*, 515 U.S. at 510–11. It is a right that courts have long recognized may

not be waived inadvertently or easily. *See* Poulin, 62 U. CIN. L. REV. at 1385–93 (1994).

At the same time, our justice system has recognized limited situations in which the jury will not be of use. *See generally*, James Fallows Tierney, *Summary Dismissals*, 77 U. CHI. L. REV. 1841 (2010). For example, upon certain pretrial motions, a judge may adjudicate a case because there are no disputed facts and a jury could only reach but one conclusion, or because some procedural defect renders the plaintiff's claim inadequate. *See Will v. Hallock*, 546 U.S. 345, 351 (2006) (recognizing pretrial judgments for "claims that the district court lacks personal jurisdiction, that the statute of limitations has run, . . . that an action is barred on claim preclusion principles, that no material fact is in dispute and the moving party is entitled to judgment as a matter of law, or merely that the complaint fails to state a claim").

Most commonly, such motions ask the court to determine whether the government can prove its case as a matter of law. *See generally*, Fallows 77 U. CHI. L. REV. 1841. They do not, however, ask the court to waive a criminal defendant's right to a jury trial for him. *Id*.

Without discussing the Sixth Amendment, the Ninth Circuit in *Idaho v. Horiuchi* pointed to limited circumstances in which a jury is not required to resolve disputed questions of fact on issues arising during the course of a criminal prosecution. *Idaho v. Horiuchi*, 253 F.3d 359, 375–76 (2001). The

court listed double jeopardy, immunized testimony and the scope of an immunity deal with the prosecution, attorney-client privilege, executive privilege, probable cause, and other evidentiary issues. *Id*.

In all of those circumstances, however, the judge must decide only issues that are collateral to the defendant's innocence or guilt. *See id*. at 378 (Fletcher, J., dissenting). Indeed, the *Horiuchi* court itself recognized that "none of these [examples] provides a perfect analogy because a claim of Supremacy Clause immunity is much more central to the subject matter of the criminal case." *Id*. at 375.

The *Horiuchi* court barely contemplated the competing state interests in supremacy clause cases and relied instead on "significant policy reasons" for permitting immunity defenses in support of its decision. *Id*. In doing so, however, it failed to recognize that the Sixth Amendment—in conjunction with the Supremacy Clause and the Tenth Amendment—already contemplates competing policy considerations and gives courts the parameters to which federal agents may raise the defense of immunity. *See id*. at 378 (Fletcher, J., dissenting). A defendant may not invoke immunity under the Supremacy Clause insofar as that invocation violates another constitutional provision—or in this case, the Sixth Amendment. *Id*.

II. A federal officer will not be immune from suit under the Supremacy Clause when the officer's conduct was not authorized by federal law and was subjectively and objectively unreasonable for the performance of the officer's duties.

This Court, in *Cunningham v. Neagle*, established the test for Supremacy Clause immunity, or federal officer immunity as to conduct alleged to be in violation of state law. *Cunningham v. Neagle*, 135 U.S. 1, 3 (1890). The *Neagle* court made clear that the test for Supremacy Clause immunity is fact-dependent and requires a careful case-by-case analysis. *Id*.

In *Neagle*, the State of California prosecuted a United States deputy marshal who had been assigned to protect former Supreme Court Justice Stephen Field during his annual circuit assignment in California. *Id*. at 40. Prior to Neagle's assignment, Justice Field presided over a contentious case in California federal court concerning the validity of a marriage license. *Id*. When Justice Field read his opinion to the parties, the husband, David Terry, attacked the court marshals with a bowie knife while his wife tried to pull a pistol out of her purse. *Id*. at 42–46.

The Terrys made continual threats against Justice Field thereafter and eventually it became common knowledge that once Mr. Terry was free from prison, he would try to kill the Justice. *Id*. at 46. In response, the United States Attorney General assigned Neagle to protect Justice Field while in California. *Id*. at 51–52.

This decision proved wise. *Id.* at 52. While Justice Field and Neagle were traveling from Los Angeles to San Francisco, the Terrys boarded their train. *Id.* Shortly after boarding, Mr. Terry confronted and began assaulting Justice Field. *Id.* at 52–53. Observing this altercation, Neagle shouted "Stop! Stop! I am an officer!" *Id.* at 53. Mr. Terry then turned his attention to Neagle and, according to Neagle's testimony, seemed to recognize him, and immediately made a motion as if reaching for a knife. *Id.* In response, Neagle shot Mr. Terry twice, killing him. *Id.*

In holding that Neagle was immune from state prosecution under the Supremacy Clause, this Court stated:

> [I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state of California.

Id. at 75. This Court reaffirmed the *Neagle* decision in *Ohio v. Thomas*, 173 U.S. 276 (1899). In *Thomas*, a federal administrator of a veteran's home refused to label oleomargarine, a butter substitute, as was required by Ohio state law. *Id.* at 277. The *Thomas* Court held that the federal officer was entitled to immunity, stating:

> In making provision for so feeding the inmates, the governor, under the direction of the board of managers and with the assent and approval of congress, is engaged in the internal administration of a federal institution, and we think a state

> legislature has no constitutional power to interfere with such management as is provided by congress.

Id. at 282. In both *Neagle* and *Thomas*, it was apparent that the federal officers had acted reasonably in discharging their duties. *See Cunningham v. Neagle*, 135 U.S. 1, 3 (1890); *Thomas*, 173 U.S. at 276. In *United States ex rel. Drury v. Lewis*, however, this Court was confronted for the first time with the issue of whether Supremacy Clause immunity applies when it is unclear whether the officer acted reasonably. *United States ex rel. Drury v. Lewis,* 200 U.S. 1, 2 (1906).

In *Drury*, state prosecutors charged two United States soldiers with murdering a civilian. *Id.* Lieutenant Ralph W. Drury had been directed by his commanding officer to "use his best endeavors" to stop a suspected robbery from happening at a property in Ft. Niagara where the men were stationed. *Id.* On the morning in question, Drury received word that certain persons were stealing copper from the property and took John Down, the guard on duty, and another solider to investigate. *Id.* at 2–3. It was during this encounter that the suspect, William H. Crowley, was shot and killed. *Id.* at 1, 3. While the soldiers claimed that the shooting was lawful because Crowley was in flight, witnesses for the state testified that the soldiers had shot Crowley after he had surrendered. *Id.*

A federal circuit court denied the soldiers' writ of habeas corpus at an early stage in the litigation. *Id*. at 6. This Court affirmed, noting that only "exceptional" cases warrant exercise of the "exceedingly delicate" jurisdiction of federal courts to usurp state prosecutions. *Id*. at 7–8. The *Drury* court held that the circuit court properly exercised its discretion not to issue the writs, given the conflicting evidence about whether the whether the killing took place before or after the victim surrendered. *Id*.

Most recently, in *Johnson v. Maryland*, this Court held that an employee of the United States Post Office Department was not subject to state prosecution for driving without a state driver's license while operating a government truck to deliver postal mail in the performance of his official duties. *Johnson v. Maryland*, 254 U.S. 51, 57 (1920). The *Johnson* court concluded that:

> Such a requirement [to obtain the license to pay the fee] does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient.

Id. The Court noted, though, that:

> It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might *affect incidentally* the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets.

Id. at 56 (emphasis added). The shape of Supremacy Clause immunity has remained largely the same since these four decisions. *See* Stephen A. Cobb, *Jettisoning "Jurisdictional": Asserting the Substantive Nature of Supremacy Clause Immunity*, 103 VA. L. REV. 107, 120 (2017); *see also Wyoming v. Livingston*, 443 F.3d 1211, 1220 (10th Cir. 2006) ("The Supreme Court has decided no Supremacy Clause immunity case since 1920.") *(*citing *Johnson* 254 U.S. at 51); *Conn. v. Marra*, 528 F. Supp. 381, 385 (D. Conn. 1981) ("The law as enunciated in Neagle . . . has remained undisturbed.").

Since the holding in *Johnson*, lower courts—albeit with varying application—have generally regarded *Neagle* as establishing a two-prong test for federal immunity: (1) whether the officer was performing an act that federal law authorized him to perform; and (2) whether the officer's actions were necessary and proper to fulfilling his federal duties. *See* James Wallace, *Supremacy Clause Immunity: Deriving a Willfulness Standard from Sovereign Immunity*, 41 AM. CRIM. L. REV. 1499, 1502 (2004); *see also Whitehead v. Senkowski*, 943 F.2d 230, 234 (2d Cir. 1991) (stating the elements of the offense); *Kentucky v. Long*, 837 F2d 727, 744 6th Cir. 1988) (same); *Clifton v. Cox*, 549 F.2d 722, 730 (9th Cir. 1977) (same).

A. A federal officer will not be immune from suit for his conduct that is in violation of state law where that officer was performing an act not authorized by federal law.

Neagle stands for the proposition that if a state law prohibits conduct that an officer's federal duties require or authorize, the law is preempted as to that conflict. *Cunningham v. Neagle*, 135 U.S. 1, 95 (1890); *see also* Seth P. Waxman, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2233 (2003).

Most cases involving assertions of Supremacy Clause immunity, however, arise in the absence of specific legislative guidance authorizing the actions there at issue. *See* Waxman 112 YALE L.J. at 2233. While courts generally recognize that Supremacy Clause immunity does not require that federal law explicitly authorize a violation of state law, the question remains whether the agent was acting under some color of federal authority or whether he was acting under the guise of his federal position to violate state law. *See*, e.g., *State of Maryland v. DeShields*, 829 F.2d 1121 (4th Cir. 1987).

The first prong of the *Neagle* standard—requiring that the agent acted under federal authority—has been susceptible to three differing interpretations: (1) the "mandatory duty" interpretation, (2) the "actual

authority" interpretation, and (3) the "scope of duties" interpretation.[2] *See* Smith 16 COLUM. J. ENVTL. L. 1 at 38–39.

Under the mandatory duty interpretation, immunity is limited to circumstances in which the officer is under a federal duty to act. *See id*. This first interpretation stems from the literal language of *Neagle*, which framed the issue in terms of whether Neagle was *obligated* under the laws of the United States to protect Justice Field from attack. *See Cunningham v. Neagle*, 135 U.S. 1, 54 (1890) (stating that immunity from suit would be available "if it was the *duty* of Neagle, under the circumstances—a duty which could only arise under the laws of the United States—to defend Mr. Justice FIELD from murderous attack upon him") (emphasis added).

The actual authority interpretation immunizes a federal officer's conduct as long as he had actual authority under federal law to commit the act for which he is being prosecuted. *See Massachusetts v. Hills*, 437 F. Supp. 351, 353 (D. Mass. 1977). This interpretation stems from the idea that while the *Neagle* Court spoke in terms of duty, the court's primary concern was whether Neagle possessed actual authority under federal law to protect Justice Field

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[2] For a comprehensive analysis of Supremacy Clause jurisprudence, *see* Rebecca E. Hatch, *Construction and Application of United States Supreme Court Decision in Cunningham v. Neagle, 135 U.S. 1, 10 S. Ct. 658, 34 L. Ed. 55 (1890), Establishing Standard for Supremacy Clause Immunity as to Actions of Federal Officers or Agents Alleged to Be in Violation of State Law*, 53 A.L.R. Fed. 2d 269 (2011).

from harm and to use force to do so. *See* Smith 16 COLUM. J. ENVTL. L. at 38–39.

Lastly, under the scope of duties interpretation, Supremacy Clause immunity extends to any act taken within the scope of a federal officer's duties, provided the "necessary and proper" prong (discussed below) is also satisfied. *Id*. This third interpretation stems from *Neagle's* reliance on this Court's decision in *Tennessee v. Davis*, 100 U.S. 257 (1879). *See* 100 U.S. at 262. The *Neagle* Court stated that the federal government:

> [C]an act only through its officers and agents, and they must act within the states. If, when thus acting, *and within the scope of their authority*, those officers can be arrested and brought to trial in a state court for an alleged offense against the law of the state, yet *warranted by the federal authority they possess* . . . the operations of the general government may at any time be arrested at the will of one of its members.

Neagle, 135 U.S. at 54, 62 (emphasis added) (quoting *Davis*, 100 U.S. at 263).

1. Supremacy Clause immunity applies only to conduct that occurs when the officer is acting within the scope of his official duties.

While different courts have adopted each of the three competing interpretations discussed above, only the third interpretation—the scope of duties interpretation—is supported by the purpose of the Supremacy Clause and by *Neagle* and its predecessors. *See Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977).

Indeed, in each *Neagle*, *Thomas*, *Drury*, and *Johnson*, this Court stressed the fact that the federal officer asserting immunity was acting either pursuant to a direct order authorized by federal law or acting during the course of his federal employment. *See Neagle v. Cunningham*, 135 U.S. at 54; *Ohio v. Thomas*, 173 U.S. 276, 277, 282 (1899); *United States ex rel. Drury v. Lewis,* 200 U.S. 1, 6 (1906); *Johnson v. Maryland*, 254 U.S. 51, 57 (1920).

In *Neagle*, the alleged state violation occurred while Neagle was accompanying Justice Field in his travels, pursuant to the Attorney General's order to protect Justice Field from the hostile litigants. *Neagle*, 135 U.S. at 54. In *Thomas*, the defendant was serving food pursuant to his job duties as a federal administrator when the state crime occurred. *Thomas*, 173 U.S. at 277, 282. In *Drury*, the enlisted soldiers were on duty when they were given specific instructions from their superior to prevent the possible robbery from taking place. *Drury*, 200 U.S. at 6. And in *Johnson*, the defendant was en route to deliver mail pursuant to his job duties as a federal post officer when he was pulled over for driving without a state driver's license. *Johnson* 254 U.S. at 57.

This understanding of *Neagle's* first prong permits clearly proscribed acts, as well as discretionary acts, so long as the acts were taken during the course of the federal officer's employment. *See Clifton v. Cox*, 549 F.2d 722, 726 (9th Cir. 1977) (holding that conduct may be within the scope of a federal officer's authority even if it is of "questionable legality" or taken without

specific direction of a superior). At the same time, the scope of duties interpretation prevents discretionary acts from sweeping too broadly or from masking acts taken for reasons other than to uphold federal law because the official must still operate within the confines of his general federal employment duties to assert immunity. *See, e.g.*, *Morgan v. Cal*ifornia, 743 F.2d 728, 731 (9th Cir. 1984) ("[A] federal officer cannot be held on a state criminal charge when the alleged crime arose during the performance of the officer's federal duties.") (citing *Neagle*, 135 U.S. at 10).

In *Baucom v. Martin*, for example, the Eleventh Circuit affirmed a declaratory judgment that FBI agent Robert Baucom—who had been indicted by the State of Georgia for attempted bribery—had acted within his authority as an FBI agent. 677 F.2d 1346, 1350 (11th Cir. 1982).

Baucom was participating in a joint state and federal investigation into suspected public corruption when the alleged state crime occurred. *Id*. The court held that the first prong of *Neagle* requires "that the federal officer *be in the performance of an act which he is authorized by federal law* to do as part of his duty." *Id*. (emphasis added). The court held that Baucom—who was unquestionably engaged in a deliberate investigation—acted with the necessary authority to pursue the suspect. *Id*.

Of course, the inquiry does not end there; under the second prong of *Neagle*, the federal officer's actions must also be necessary and proper. *See*

Conn. v. Marra, 528 F. Supp. 381, 384 (D. Conn. 1981) ("[A] federal officer cannot be held on a state criminal charge where the alleged crime arose during the performance of his federal duties *and* was necessary and proper to the performance of those duties.") (emphasis added); *see also Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977) ("[W]e do not mean to imply that the exercise of authority in and of itself places a federal officer beyond the reach of a state's criminal process. The significant question of whether the conduct was necessary and proper under the circumstances must still be answered.").

The present case, however, presents a situation in which no authority to act existed in the first place. Agent Schrader conceded that at the time of the incident, he was on vacation and looking for a place to eat lunch. (R. at 9a.) By chance, he spotted Mr. White—a person with whom he'd very recently had a negative personal encounter. (R. at 2a.) He was acting pursuant to neither a direct order nor an implicit duty to act while in the scope of his employment. (R. at 9a.) Rather than acting with the intent to uphold federal law, the facts strongly indicate that Agent Schrader, under the guise of federal authority, satisfied a personal vendetta against Mr. White by tackling, injuring, and publicly arresting him outside the dispensary. (R. at 4a.)

This is precisely the behavior the *Neagle* test was designed to prevent. As the *Neagle* court stated, "the general government . . . can act only through its officers and agents, and they must act within the States." *Cunningham v.*

Neagle, 135 U.S. 1, 54 (1890). The general government authorizes such officers and agents to act by either direct instruction or through general duties of employment. *Id*.

The limitation to these two sources of authority furthers the ultimate purpose behind the Supremacy Clause, which is to uphold the integrity of federal law over state law, while preventing ill-intentioned federal agents from asserting blanket protection where their actions happen to fall within the confines of federal law. *See Arizona v. Files*, 36 F. Supp. 3d 873, 877–78 (D. Ariz. 2014) (quoting *Barr v. Matteo,* 360 U.S. 564, 572 (1959)) ("What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if [the officer] had been using his power for any of the purposes on whose account it was vested in him.").

The district court thus erroneously found as a conclusion of law that "[i]t is irrelevant to the immunity analysis that Agent Schrader was on vacation and that Agent Schrader was not specifically commanded by a superior to arrest Mr. White." (R. at 39a.) This holding endorses the exact opposite view of the scope of duties interpretation: that a federal officer may assert immunity even when off duty and acting under no specific authorization. It is hard to conceive of a situation under this view in which a federal officer would not be

successful in establishing that he acted with the necessary authority under the first prong of *Neagle*.

2. Even if this court adopts the actual authority interpretation of *Neagle*, Agent Schrader is not entitled to immunity.

Some courts, as stated above, adopt the alternative view that an agent acted with the authority necessary to assert Supremacy Clause immunity when he possessed actual authority under federal law to act as he did. *See* Susan L. Smith, *Shields for the King's Men: Official Immunity and Other Obstacles to Effective Prosecution of Federal Officials for Environmental Crimes*, 16 COLUM. J. ENVTL. L. 1, 38–40 (1991). The actual authority view stems from the idea that although the *Neagle* court spoke in terms of *duty*, what the court's holding really suggested was that Neagle's actions were authorized by a federal statute *empowering* marshals to act, not establishing a duty to act. *See* Smith, 16 COLUM. J. ENVTL. L. 1, 38 n. 126 (1991).

In *Massachusetts v. Hills*, for example, the court held that because federal law vested in the Secretary of Housing and Urban Development the authority to determine *in her discretion* what to do with properties conveyed to her, she was not subject to the restrictive state sanitary code regulation, and therefore was also not subject to criminal prosecution for an alleged violation that code. 437 F. Supp. 351, 352 (D. Mass. 1977). In other words, federal law *empowered* her to act in whatever way she determined appropriate for

handling the properties, and the state law effectively limiting that grant of authority was impermissible. *Id.*

Applying this interpretation to the facts at hand, Agent Schrader did not have the authority to act as he did. Even under the actual authority interpretation that Agent Schrader was authorized to act under federal law insofar as he was *empowered* by federal law to arrest Mr. White, he did not have absolute discretion in how he chose to go about doing so. *See* Smith, 16 COLUM. J. ENVTL. L. at 38–40.

Particularly, federal law does not empower a federal agent to use whatever force he deems necessary in making an arrest. *Id*. Agent Schrader was thus not authorized to employ the force that he used in making an arrest for a minor offense. *Id*.

At best—as the Thirteenth Circuit correctly noted (R. at 9a–10a.)—federal law may have empowered Agent Schrader to act as he did if his actions resulted from exigent circumstances or an emergency. *See North Carolina v. Cisneros*, 947 F.2d 1135, 1139 (4th Cir. 1991); *see also Puerto Rico v. Torres Chaparro*, 738 F. Supp 620, 621 (D.P.R. 1990), *aff'd* 922 F.2d 59 (1st Cir. 1991). No such circumstances, however, existed at the time Agent Schrader made his arrest. (R. at 9a–10a.) Both parties agree (and the district court recognized) that the force employed by Agent Schrader was unreasonable. (R. at 11a; 37a–38a.)

B. A federal officer will not be immune from state prosecution if his actions were not necessary and proper to fulfilling his federal duties.

After establishing that Neagle's conduct was properly authorized under federal law—by the Attorney General's directive to protect Justice Field—the *Neagle* Court explained that the remaining inquiry was whether Neagle did "no more than what was necessary and proper" to carry out his duty. *Neagle v. Cunningham*, 135 U.S. 1, 75 (1890).

In interpreting *Neagle*'s "necessary and proper" prong, the majority of courts consider two separate elements: (1) whether the agent *subjectively* believed that his actions were necessary and proper to carry out his federal duties; and (2) whether this belief was *objectively* reasonable. *See, e.g.*, *Kentucky v. Long*, 837 F.2d 727, 744 (6th Cir. 1988) (emphasis added) ("The [necessary and proper] concept contains both a subjective and an objective element."); *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977) ("Determination of whether [the defendant's actions were] necessary and proper, we find, must rest not only on the subjective belief of the officer but also on the objective finding that his conduct may be said to be reasonable under the existing circumstances.").

In determining whether the federal agent's actions were necessary and proper, the court must assess the agent's actions under the circumstances as they existed at the time. *Id.* The focus of the inquiry is the *reasonableness* of

the officer's action; "[t]hat a different course of action might have been more appropriate is beyond the scope of [the] inquiry." *New York v. Tanella*, 281 F. Supp. 2d 606, 615 (E.D.N.Y 2003), *aff'd*, 374 F.3d 141 (2d Cir. 2004).

To reiterate, however, to determine as a *matter of law* that a federal officer is entitled to immunity, the court must rely only on undisputed material facts or disputed facts that are not material to the general issue (*e.g.*, the offense or an officer's affirmative defense). FED. R. CRIM. P. 12(b). And where the state alleges that the federal agent did more than was necessary and proper in fulfilling his federal duties under *Neagle*'s second prong, disputed issues of fact must be viewed in the light most favorable to the state. *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586 (5th Cir. 1999).

1. For a federal agent's conduct to be necessary and proper it must be subjectively reasonable.

The Thirteenth Circuit and the district court recognized that the subjective motivations of the federal officer must be considered in determining whether his actions were "necessary and proper" under *Neagle*. (R. at 10a; 35a.) In support of this proposition, both courts cited the Ninth Circuit's decision in *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977). (R. at 10a, 35a.)

The *Clifton* court held that the subjective component of *Neagle* requires an inquiry into "whether the official employs means which he cannot honestly

consider reasonable in discharging his duties or otherwise acts out of malice or with some criminal intent." *Id*.

While it is not necessary for the state to prove that the federal agent acted with malice or criminal intent to rebut the subjective element under *Neagle*, a finding that a federal official acted with malice precludes a finding that he honestly believed his actions were reasonable in the discharge of his duties. *See Arizona v. Files*, 36 F. Supp. 3d 873, 878 (D. Ariz. 2014) (citing *Idaho v. Horiuchi,* 253 F.3d 359, 366 n. 10) ("While a state opposing a Supremacy Clause immunity defense need not necessarily show the federal officer acted with malice . . . if the evidence shows a federal officer acted 'out of malice or with some criminal intent' the officer's conduct certainly will fall outside the scope of the defense."); *see also New York v. Tanella*, 281 F. Supp. 2d 606, 620 (E.D.N.Y. 2003), *aff'd*, 374 F.3d 141 (2d Cir. 2004) (quoting *Petition of McShane*, 235 F. Supp. 262, 273 (N.D. Miss. 1964)) ("[T]he Supremacy Clause will not shield an officer who acted "out of malice or with some criminal intent.").

In, *Arizona v. Files*, for example, the court held that former Federal Wildlife Services employee Russel Files was not entitled to immunity from the State of Arizona's prosecution against him for animal cruelty. *Files*, 36 F. Supp. 3d at 875.

Files worked for the Federal Wildlife Services ("WS") as an "urban specialist," with duties similar to an animal control officer. *Id*. at 879. A typical day for Files included "shooting pigeons, capturing ducks, trapping coyotes" and engaging in other similar conduct aimed at "preventing 'human/animal' conflict." *Id*.

Files and his former wife were involved in a personal feud with their neighbors, Britan and Linsday Hartt. *Id*. at 879–80. Although the two families initially developed a friendship when the Hartts moved onto the same cul de sac as the Files in 2010, sometime around October 2011 they had a bitter falling out and developed "sour feelings" toward one another. *Id*. Files's counsel described the situation as a "cold war." *Id*. at 879.

In November 2012, a dispute arose over the Hartts' dog, "Zoey." *Id*. at 879–80. Files testified that Zoey acted with "aggression" toward a member of his family on at least three separate occasions. *Id*. at 879. After hearing this and other testimony, the court—in viewing that facts in the light most favorable to the state—found that "Zoey displayed what could be described as aggressive, possibly playful conduct, toward non-family members on infrequent occasions, and often romanced the neighborhood unattended over the years." *Id*. at 877, 880.

In December 2012, Files received permission from his WS supervisor to trap "feral free-roaming dogs in [his] neighborhood." *Id*. at 880. On December

15, Files set two traps in his own front yard, and two days later, Zoey was caught in one of the traps. *Id*. at 881–82. A veterinarian report later showed that Zoey—after attempting to break free by gnawing through the leg holds of the traps—sustained injuries including severe tooth damage that required removal of seventeen of her teeth, significant loss of blood, and damage to her jaw. *Id*.

The district court—applying the scope of authority interpretation discussed above—first found that the nature of Files's employment involved, albeit rarely, trapping domesticated animals. *Id*. at 883. ("[F]or the purposes of the 'scope of authority' inquiry, the evidence shows an urban specialist is generally authorized to trap domesticated animals in certain circumstances.") The court therefore turned to *Neagle*'s second prong: whether Files's conduct was "necessary and proper" in exercising that authority. *Id*. at 883–84.

The court found that though trapping a free-roaming dog is a task that might fall within the scope of Files's ordinary course of employment, the record showed that Files did not have "an honest and reasonable belief that what he did was necessary in performance of his duty" to satisfy the subjective element under *Neagle*. *Id*. at 884 (citing *Morgan v. California*, 743 F.2d 728, 731 (9th Cir. 1984)).

In support of its finding, the court stressed that the undisputed facts showed that Files misrepresented to his supervisors how he planned to execute

the trapping and did not disclose the context of the personal dispute with the Hartts. *Files*, 36 F. Supp. 3d at 873. The facts also showed that Files had never before used his position to catch a neighborhood dog, that no neighbor requested his or animal control's services regarding Zoey or any other animal, and that Files exaggerated the relatively minor November 2012 incidents. *Id.*

Ultimately, the court found that the "admitted dislike between the Fileses and Hartts underlie[d] the entire unfortunate incident," that Files did not approach his supervisors in good faith, and held his actions were not subjectively reasonably. *Id.* at 884. The court explained that:

> Without an honest disclosure to his supervisors, [Files] cannot cloak himself with immunity under the Supremacy Clause, which is appropriately applied to prevent states from prosecuting a federal officer who, in good faith and in a reasonable manner, carries out his or her federal duties. The defense does not protect a federal officer who misuses his or her position to further wholly personal interests.

Id. The court's analysis in *Files* is informative for understanding the application of *Neagle's* subjective prong to the case at hand. Similar to Files's inexperience in trapping neighborhood dogs, it is undisputed that Agent Schrader had no experience in drug enforcement up until his incident with Mr. White. (R. at 28a.) And like in *Files*, Agent Schrader's actions followed a negative, personal dispute with Mr. White. (R. at 28a–31a.) Coupled with evidence pertaining to Agent Schrader's past violent history, the severity of the injuries sustained by Mr. White, and the fact that Mr. White did not resist

arrest, a material dispute exists as to whether Agent Schrader acted "out of malice or with some criminal intent" to preclude a finding that he acted subjectively reasonable. *Files*, 36 F. Supp. At 878.

The undisputed facts alone show that Agent Schrader did not act with the requisite good faith or subjective reasonableness for the court to grant immunity as a matter of law. (R. at 28a–31a.) But regardless, the disputed facts—insofar as they are relevant to the defense of immunity—must be sent to the jury and they prohibit a judge from disposing of the case by a 12(b) motion. *Files*, 36 F. Supp. At 878.

The district court, however, erroneously decided disputed facts relevant to this subjective element. (R. at 37a.) The court determined as a "finding of fact" that Agent Schrader, in attempting to arrest Mr. White, "was motivated solely to fulfill his federal duties and enforce federal law," and that Agent Schrader "believed that his duties as a federal agent of the Federal Bureau of Investigation included arresting individuals who committed federal crimes in his presence, regardless of state law." (R. at 37a–38a.) This was for the jury, and not the district court, to decide. *Files*, 36 F. Supp. At 878.

2. For a federal agent's conduct to be necessary and proper it must be objectively reasonable.

Supremacy Clause immunity is not absolute. *See* Seth P. Waxman, *What kind of Immunity? Federal Officers, State Criminal Law, and the*

Supremacy Clause, 112 YALE L.J. 2195, 2233 (2003). Accordingly, every court interpreting *Neagle's* "necessary and proper" prong has held that a federal officer will not be immune from suit if his actions were not objectively reasonable in fulfilling his federal duties. *See id.*; *see also Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977) ("Determination of whether petitioner's shooting of [the victim] was necessary and proper, we find, must rest not only on the subjective belief of the officer but also on the objective finding that his conduct may be said to be reasonable under the existing circumstances.").

To determine whether the defendant acted objectively reasonable, courts generally adhere to the same analysis used by civil courts in § 1983 actions involving allegations of Fourth Amendment violations. *See* Waxman, 112 YALE L.J. at 2233. That inquiry turns on whether "the circumstances, viewed objectively, justify [the challenged] action." *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (citing *Scott v. United States,* 436 U.S. 128, 138 (1978)). Where, however, in light of the facts and circumstances then known to him, a federal agent's actions were objectively unreasonable, he will not be immune from suit under the Supremacy Clause. *See* Waxman, 112 YALE L.J. at 2233.

Although an agent is not required to show that his action was in fact necessary, or in retrospect justifiable, the standard for reasonableness is not so low that a federal agent has carte blanche simply because he is acting in an official capacity. *See Kentucky v. Long*, 837 F.2d 727, 746 (6th Cir. 1988)

("[W]hile it is necessary for federal officials to be able to enforce federal laws without undue interference from the states, on the other hand the Supremacy Clause was not intended to be a shield for 'anything goes' conduct by federal law enforcement officers.")

The objective element depends in part on facts pertaining to the defendant's state of mind because a court must decide whether the defendant's actions—based on his interpretation and perception of the situation—were reasonable. *Clifton v. Cox*, 549 F.2d 722, 729 (9th Cir. 1977).

In the case *of United States ex rel. Drury v. Lewis* discussed above, for example, the soldiers conceded that had they heard the suspect surrender before their shooting, the shooting would have been unlawful and therefore objectively unreasonable. *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 8 (1906). Although the Court did not decide the disputed facts, it held that because there was conflicting testimony as to what the soldiers would have seen and heard in the encounter, the soldiers were not entitled to immunity. *See id*. at 8. ("[E]ven though it was petitioners' duty to pursue and arrest [the suspect], if the question of [the suspect] being a fleeing felon was open to dispute on the evidence; that is, if that were the gist of the case, it was for the state court to pass upon it, and its doing so could not be collaterally attacked. The assertion that [the suspect] was resisting arrest and in flight when shot was matter of defense. . . .").

C. Supremacy Clause Immunity is narrower than Qualified Immunity and does not depend on whether the law was clearly established.

Justice Hamlin, dissenting for the Thirteenth Circuit below, endorsed the minority view that *Neagle's* "necessary and proper" test does not involve a subjective standard. (R. at 21a.) In support of this assertion, Justice Hamlin likened Supremacy Clause immunity with qualified immunity, the latter of which should be determined solely based on the "objective reasonableness of an official's conduct." (R. at 23a.)

In support of his proposition, Justice Harlan cited this Court's decision in *Harlow v. Fitzgerald*, which held that the former test for qualified immunity—which included a subjective element—was inappropriate. 457 U.S. 800, 818 (1982). Whereas previous qualified immunity cases included a subjective inquiry into "good faith" or "malicious intention" as part of the standard for the defense, the *Harlow* Court adopted the objective test that a defendant who acted under color of state law has qualified immunity unless his conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

This Court's subsequent defining cases on qualified immunity explain that the qualified immunity analysis starts with the presumption that the victims claim is true. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 531–32 (Aspen Law & Business 4th ed. 2003) (discussing the two-step process for

determining whether qualified immunity applies). Courts must then ask whether the claim, if true, would represent a violation of a law or right. *Id*. at 32. Finally, courts must determine whether the law or right was *clearly established*, meaning, "the contours of the right [or law] must be sufficiently clear that a *reasonable official* would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (emphasis added). The analysis thus relies solely on an objective reasonableness standard. *Id*.

1. Likening Supremacy Clause Immunity with Qualified Immunity obfuscates the policy considerations supporting and distinguishing the two doctrines.

This Court has never equated qualified immunity with Supremacy Clause immunity. James Wallace, *Supremacy Clause Immunity: Deriving A Willfulness Standard from Sovereign Immunity*, 41 AM. CRIM. L. REV. 1499, 1511 (2004). And while lower courts sometimes compare the two immunities, rarely do they question the suitability of the comparison. *Id*. at 1512.

Courts drawing an inappropriate corollary between Supremacy Clause immunity and qualified immunity rely on the similarities of the *factual* foundations of the two doctrine. *See, e.g.*, *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988) ("[The Supremacy Clause immunity question] confronting us is also analogous to the qualified immunity situation, in that there comes a point early on in the proceedings where . . . immunity . . . should be decided in order to avoid requiring a federal officer to run the gauntlet of standing trial . . . .").

Yet qualified immunity is not analogous to Supremacy Clause immunity for several reasons.

First, the "clearly established" test for qualified immunity discussed above weighs the reasonableness of an officer's actions, whereas Supremacy Clause immunity focuses on the authority granted to the officer under federal law. *See* Wallace, 41 AM. CRIM. L. REV. at 1514; *Cunningham v. Neagle*, 135 U.S. 1 (1890).

Additionally, qualified immunity begins with the assumption that the federal officer violated the defendant's rights, while Supremacy Clause focuses on the breadth of authority granted to the defendant. *See* Wallace, 41 AM. CRIM. L. REV. at 1514; *Long*, 837 F.2d 727 at 752. Under the latter framework, a defendant's case will likely be disposed once he shows that his actions were authorized by federal law. Wallace, 41 AM. CRIM. L. REV. at 1514–15.

Finally, and most importantly, unlike qualified immunity—which centers on the tension between citizen and government—Supremacy Clause immunity encompasses the dichotomy between federal and state government, and fundamental issues of federalism. Wallace, 41 AM. CRIM. L. REV. at 1514–15. Qualified immunity is designed not only to protect individual defendants from damages, but also to protect society as a whole from the costs and disruptions caused by lawsuits against public officers and employees. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (describing qualified immunity

as balancing the need for a remedy to protect the rights of citizens with the competing need to protect officials required to exercise their discretion, and the related public interest in vigorous exercise of such protective authority).

These differences illustrate why a subjective standard is appropriate in the context of Supremacy Clause immunity where it might not be in the context of qualified immunity. Wallace, 41 AM. CRIM. L. REV. at 1512–15. In particular, a subjective element in the first context works to uphold the primary purpose unique to Supremacy Clause immunity, which is to ensure the supremacy of federal law within the states. Supremacy Clause immunity has never been concerned with efficiency of law enforcement or predictability of the defense itself, but instead has primarily centered on the prioritization of federal law over state law.

2. Even if this Court adopts the solely objective view of *Neagle*'s "necessary and proper" prong, Agent Schrader is not entitled to immunity.

The district court appropriately held that whether an officer's conduct was "necessary and proper" requires consideration of both the objective reasonableness of the officer's actions and the officer's subjective motivations. (R. at 35a.) The court, however, misapplied the test and held that Agent Schrader's actions were objectively reasonable. (R. at 35a.) It held, with little explanation, that "[w]ith respect to the 'objective' prong, immunity under the Supremacy Clause necessarily provides protection against criminal liability

that is at least as great as the protection against civil liability provided by qualified immunity." (R. at 40a).

Yet even if this Court accepts that assertion as true—and even assuming that no subjective inquiry is required under *Neagle*—Agent Schrader's actions were not objectively reasonable. While the objective prong, as explained above, requires consideration of whether it was objectively reasonable for a federal officer to believe his actions were authorized by federal law, the inquiry does not end there—federal officers are protected from prosecution only when they employ *objectively reasonable means* in accomplishing their federal duties. *See, e.g.*, *Brown v. Cain*, 56 F. Supp. 56, 58 (E.D. Pa. 1944) ("The bare facts that the [defendant] was . . . authorized to make arrests will not afford him immunity from prosecution under the laws of the State . . . all the surrounding circumstances must be considered, because if they were such that no reasonable man could believe it necessary to shoot to make the arrest, the [defendant's] testimony as to his motives and belief would have to be disregarded.").

The district court held that Agent Schrader's conduct did not violate clearly established federal law and therefore "the means of the arrest satisfies the 'objective' prong of the immunity inquiry." (R. at 41a.) It stressed that agent Schrader reasonably believed that his duties included arresting Mr. White. (R. at 42a.) The court failed to answer, however, whether an objectively

reasonable officer would believe the same force employed by Agent Schrader was necessary to accomplish those means. (R. at 40a–41a.)

Instead, the district court seemed to center its inquiry on whether the state has demonstrated that Agent Schrader violated clearly established law. (R. at 40a–41a.) The court effectively held that Agent Schrader employed means which could be considered reasonable in the discharge of his duty *because* he was authorized to act and *because* the state did not show that such conduct violated clearly established law. (R. at 42.)

Yet the objective test concerns not whether the state has shown that the defendant violated clearly established law, but rather, whether the federal officer's actions were objectively reasonable to accomplish his federal duties. *See Castle v. Lewis*, 254 F. 917, 920 (8th Cir. 1918) (holding that while the defendants were authorized to make an arrest without a warrant, that authority includes the lawful power to use only such force as an ordinarily prudent and intelligent person, with knowledge and in situation of arresting officer, would have deemed necessary). Viewing the facts in the light most favorable to the state, Agent Schrader's actions were not objectively reasonable to accomplish Mr. White's arrest.

CONCLUSION

The Thirteenth Circuit held that in determining whether a defendant is entitled to immunity under the Supremacy Clause, disputed issues of fact

must be viewed in the light most favorable to the State. The court held that under this Court's test for Supremacy Clause immunity in *Cunngingham v. Neagle*, 135 U.S. 1 (1890), Agent Schrader did not act with the necessary federal authority in arresting Mr. White. It also held, in accordance with the majority of circuits, that the test for Supremacy Clause immunity involves both an objective and a subjective inquiry into whether the defendant's actions were reasonable in accomplishing his federal duty.

This Court should affirm the decision of the Thirteenth Circuit Court of Appeals, reverse the District Court's grant of Petitioner's motion to dismiss, and remand for further proceedings.

Respectfully Submitted,

/s/ Team 14
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), we certify that this Brief for Respondent State of New Tejas contains 13,549 words, including footnotes and excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

Respectfully submitted,

/s/ Team 14
Attorneys for Respondent

Appendix A

NTPC § 22.01 - Assault.

Assault.

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another;

(2) intentionally or knowingly threatens another with imminent bodily injury; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

(b) An offense under this section is a Class A misdemeanor.

NTPC § 22.02 – Aggravated Assault.

Aggravated Assault

(a) A person commits an offense if the person commits assault as defined by Sec. 22.01 and the person causes serious bodily injury to another.

(b) An offense under this section is a felony of the second degree.

NTPC § 50.01 – Justification as a defense.

Justification as a defense

It is a defense to prosecution that the conduct in question is justified under this chapter.

NTPC § 50.02 – Arrest and Search.

Arrest and Search

(a) A peace officer is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in the making an arrest or search, or to prevent or assist in preventing escape after arrest, if:

(1) the actor reasonably believes the arrest or search is lawful; and

(2) before using force, the actor manifests his purpose to arrest or search and identifies himself as a peace officer, unless he reasonably believes his purpose and identity are already know by or cannot reasonably be made known to the person to be arrested.