

No. 18-5188

In the Supreme Court of the United States

HANK SCHRADER, PETITIONER

v.

STATE OF NEW TEJAS

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT*

BRIEF FOR THE PETITIONER

TEAM NO. 22
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the district court holds the authority to decide disputed issues of fact, viewed in the light most favorable to the State, when deciding a Rule 12(b) motion to dismiss based on immunity under the Supremacy Clause, where questions of fact do not assist in determining a valid immunity defense.

2. Whether the test governing Supremacy Clause immunity from state criminal prosecution for a federal agent is a bifurcated test applied under an objective standard, where entitlement to immunity depends on clearly established federal law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is not published in the Federal Reporter. The order of the district court (Pet. App. 27a-41a) is not published in the Federal Supplement.

JURISDICTION

The judgement of the court of appeals was entered on October 2, 2018. The petition for a writ of certiorari was granted on March 18, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI of the Constitution of the United States of America provides in pertinent part:

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.

STATEMENT

Special Agent Hank Schrader detained Mr. White for possession of marijuana pursuant to 18 U.S.C. § 3052. Pet. App. 28a. The Madrigal, New Tejas police did not arrest Mr. White due to a recent ballot initiative legalizing possession of marijuana. Pet. App. 2a. Later, the State of New Tejas indicted Agent Schrader for assault and aggravated assault under Penal Code of New Tejas §§ 22.01, 22.02, respectively, due to the detainment. Pet. App. 33a. Agent Schrader removed the case to the United States District Court for the District of Madrigal under 28 U.S.C. § 1442. Pet App. 34a. The State did not challenge the removal. *Id.*

Agent Schrader filed a motion to dismiss the indictment under Federal Rule of Criminal Procedure 12(b), based on a Supremacy Clause immunity defense. Pet. App. 34a. The district court granted the motion pursuant to Article VI of the United States Constitution. D.C. No. 17-cr-5142 (Sept. 14, 2017). Pet. App. 27a. In response, the State of New Tejas appealed the dismissal to the United States

Court of Appeals for the Thirteenth Circuit. No. 18-5719 (Oct. 2, 2018). Pet. App. 1a. The court of appeals reversed the dismissal and remanded for further proceedings. Pet. App. 13a. Agent Schrader petitioned for writ of certiorari, which this Court granted.

The arrest of Mr. White

Agent Schrader dedicated nearly 20 years of his life protecting the American people as a special agent with the Federal Bureau of Investigation. Pet. App. 27a. From the outset of his career, Agent Schrader swore an oath to enforce federal laws across all the United States. Pet. App. 32a. A recipient of many FBI commendations, Agent Schrader is recognized for outstanding proficiency. Pet. App. 28a. He has experience investigating a transnational criminal organization, various white-collar crimes and kidnappings. *Id.*

Early November 2016, Agent Schrader left Wisconsin with his wife and two stepchildren to visit Madrigal, New Tejas. Pet. App. 28a. The family was walking in downtown Madrigal when Agent Schrader saw Mr. White exit a building about fifteen feet ahead. Pet. App. 31a. Agent Schrader noticed Mr. White carrying a bag of marijuana and shouted, “Stop! You’re under arrest!” *Id.* Mr. White turned to run from Agent Schrader. *Id.* Making a split-second decision, Agent Schrader lunged toward Mr. White to prevent him from fleeing, and the two men fell on the ground. *Id.* Agent Schrader handcuffed Mr. White, detaining him until local police arrived on the scene. *Id.*

Agent Schrader identified himself to the police as a special agent with the FBI, explaining that he arrested Mr. White for possession of marijuana under 21 U.S.C. § 844. *Id.* The police informed Agent Schrader that the State of New Tejas recently legalized possession and consumption of marijuana under New Tejas Admin. Code § 51.014. Pet.

App. 31a. Unbeknownst to Agent Schrader, Mr. White had bought marijuana legally from a local dispensary. *Id.* The dispensary was difficult to identify because the Code restricted signage to “a single plain-text, black-and-white sign, with letters no larger than six inches tall, in Times New Roman or similar font.” *Id.* n.3. The Madrigal police did not issue an arrest. Pet. App. 32a. Mr. White went to the hospital, where he was treated for injuries, and Agent Schrader returned to his family. *Id.*

A brief altercation

Agent Schrader’s attempted arrest was not the first time the two men met. Pet. App. 29a. Earlier that morning, they nearly collided on the road while driving down Salamanca Avenue. *Id.* Agent Schrader and his family were heading to see the New Tejas History Museum in downtown Madrigal, when Mr. White changed lanes and pulled in front of Agent Schrader. *Id.* Agent Schrader slammed on his breaks to avoid crashing into Mr. White’s truck. *Id.*

Moments later, both men stopped at a red light and exited their vehicles. *Id.* Agent Schrader shouted at Mr. White for endangering his family. *Id.* Then, Mr. White shoved Agent Schrader in the chest, threatening that he would not back down from a fight. Pet. App. 29a. The light turned green, and other drivers began honking at the men for obstructing the road. Pet. App. 30a. Agent Schrader returned to his vehicle, relaxing once inside the car. *Id.* The Schrader family continued with their plans for the day. *Id.* The incident was never mentioned again. *Id.*

The indictment and removal to district court

The next day, the public gathered downtown in protest of the injuries caused to Mr. White. Pet. App. 32a. The local news station covered the event, videotaping Madrigal County District Attorney Wexler as she spoke to the crowd.

Id. In her speech, Attorney Wexler defended Mr. White and the regular consumption of marijuana. *Id.* She spoke against the federal government for “interfering with the sovereign will of the people of New Tejas . . .” *Id.* After praising Mr. White for his contribution to the marijuana community, Attorney Wexler warned against federal officers enforcing marijuana laws in the State of New Tejas. Pet. App. 33a. The crowd cheered in agreement as Attorney Wexler vowed to prosecute Agent Schrader for the events which had occurred. *Id.*

The State of New Tejas indicted Agent Schrader for assault and aggravated assault. *Id.* Agent Schrader removed the case to the district court under 28 U.S.C. § 1442, which permits removal of state prosecution against a federal agent, “in an official or individual capacity,” for any act committed under congressional authority in apprehending a criminal. *Id.* The State of New Tejas did not challenge removal of the case. Pet. App. 34a. Once in district court, Agent Schrader filed a motion to dismiss, invoking immunity to the indictment based on the Supremacy Clause. *Id.* The district court proceeded with an evidentiary hearing where both parties presented extensive arguments in brief and in oral testimony. Pet. App. 34a, 37a.

The federal courts conflict on Supremacy Clause immunity

The United States District Court for the District of Madrigal granted Agent Schrader’s motion to dismiss. Pet. App. 41a. The court held that Supremacy Clause immunity provides broad protection for federal agents “to carry out discretionary duties without the fear of personal criminal liability.” *Id.* The court reasoned that principles of Supremacy Clause immunity empower the district court to resolve any disputed issues of fact. Pet. App. 37a. The court determined that Agent Schrader, under 18 U.S.C. §

3052, holds authority to arrest Mr. White for violating federal drug laws. Pet. App. 39a. The court reasoned that Agent Schrader properly detained Mr. White in a manner both “necessary and proper” under his federal duties. *Id.*, Pet. App. 41a. Most notably, the district court granted Agent Schrader immunity under the Supremacy Clause because he reasonably discharged his duty and his conduct did not violate clearly established federal law. Pet. App. 40a.

The State of New Tejas appealed the district court’s ruling and the United States Court of Appeals for the Thirteenth Circuit reversed the motion to dismiss. Pet. App. 13a. Reviewing the facts *de novo*, the appellate court held that the district court improperly decided genuine issues of fact. Pet. App. 8a. The court determined that evidence supports the inference Agent Schrader acted with criminal intent, even though the parties agree he did not violate clearly established federal law. Pet. App. 10a, 11a. The court held in viewing the evidence in the light most favorable to the State, it “is convinced that Agent Schrader tackled Mr. White . . . to satisfy a personal problem.” Pet. App. 11a. The appellate court decided that Agent Schrader has no right to Supremacy Clause immunity because the facts suggest he could not honestly believe his conduct was reasonable. *Id.*

Judge Hamlin in his dissenting opinion concluded that “Agent Schrader is entitled to immunity based on the ‘necessary and proper’ test.” Pet. App. 15a. Citing the Ninth Circuit, he recognized that Supremacy Clause immunity serves as a “substantial safeguard against frivolous or vindictive criminal charges by states against federal officers.” Pet. App. 18a. Judge Hamlin reasoned that the majority applied the Supremacy Clause immunity test with a legal error because “[t]he ‘subjective’ prong

should not be included in the test for immunity under the Supremacy Clause. Pet. App. 21a. He accordingly would have affirmed the district court's decision to grant Agent Schrader's motion to dismiss. Pet. App. 26a.

SUMMARY OF ARGUMENT

The court of appeals erred in denying Agent Schrader Supremacy Clause immunity under a Rule 12(b) motion to dismiss where undisputed evidence proved he acted under clearly established federal law. Pet. App. 13a. The Supremacy Clause protects federal agents, ensuring judicial efficiency under Rule 12(b) and immunity under a bifurcated test established by this Court in 1890. *See* Fed. R. Crim. P. 12(b); *In re Neagle*, 135 U.S. 1 (1890). For thirteen decades, federal courts have dismissed Supremacy Clause immunity cases under an objective standard to uphold the legal underpinnings of federal supremacy. *Texas v. Kleinert*, 855 F.3d 305, 314-15 (5th Cir. 2017) But the appellate court diverged from this precedent, frustrating principles of federal immunity by refuting the district court's findings of fact and incorporating a subjective element to the leading test established by this Court in *Neagle*. Pet. App. 13a.

As Judge Hamlin recognized in his dissent, "The district court should be affirmed, either because it acted properly by resolving disputed issues of fact or, alternatively, because Agent Schrader is entitled to immunity even viewing the facts in the light most favorable to the State." Pet. App. 26a. Rule 12(b) provides Agent Schrader a procedural tool to invoke immunity from state prosecution under the Supremacy Clause. Congress enacted this rule to promote judicial efficiency, prevent state prosecutorial malice, and secure constitutional

principles of federal authority. The appellate court raises the issue that an immunity defense often presents questions of fact resolved by a jury. Pet. App. 6a. But even if there are disputed fact findings, this Court's precedent clarifies that the district court is competent to determine questions of fact. *Neagle*, 135 U.S. at 75; *New York v. Tanella*, 281 F. Supp. 2d 606, 611 (NY Dist. Ct. 2003) (quoting *United States v. Covington*, 295 US. 57, 60, 89 S. Ct. 1559, 23 L. Ed. 2d 94 (1969)). The parties concede the following: 1) Agent Schrader is an FBI agent under federal law, 2) Mr. White possessed marijuana in the presence of Agent Schrader in violation of federal law, 3) Agent Schrader tackled Mr. White when he resisted arrest for violating federal drug laws. Pet. App. 27a, n1. In viewing this evidence, the district court correctly granted Agent Schrader's motion to dismiss based on undisputed findings of fact and clearly established federal law.

This Court granted Supremacy Clause immunity where a federal agent 1) acted under federal authority and 2) the act was necessary and proper under the circumstances. *Neagle* 135 U.S. at 75, 76. Lower federal courts continually apply this test as leading precedent on Supremacy Clause immunity, but also include an ancillary test under the second prong. *See Kentucky v. Long*, 837 F.2d 727, 745-46 (6th Cir. 1988) (granting immunity to a federal agent after admitted facts proved the agent believed his conduct was necessary and proper under both subjective and objective factors). When the appellate court applied this test, it denied Agent Schrader's motion to dismiss because it "is convinced," based on evidentiary inferences, that he detained Mr. White for personal reasons. Pet. App. 10a-11a. But this Court repeatedly showed that the correct test does not require the agent to reach a subjective threshold. *Arizona v. Files*,

36 F. Supp. 3d 873, 878 (D. Ariz. 2014) (citing *Clifton*, 549 F.2d at 728. And Judge Hamlin correctly stated in his dissent “[t]he ‘subjective’ prong should not be included in the test for immunity under the Supremacy Clause.” Pet. App. 21a.

The parties agree that Agent Schrader did not violate clearly established federal law. Pet. App. 11a, 41 n.8. Under Supremacy Clause principles, this factor alone vindicates the district court’s opinion. *See generally Ohio v. Thomas*, 173 U.S. 276 (1899), *superseded by statute*, 28 U.S.C. § 2254(b) (on other grounds). Even if Agent Schrader recognized Mr. White from the previous incident, this Court has determined that a subjective element contradicts Supremacy Clause principles, specifically where admitted facts prove he did not violate federal law. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-16 (1982). And unless disputed evidence leads to opposing results in a Supremacy Clause immunity defense, constitutional principles compel the court to grant Agent Schrader’s motion to dismiss. *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 26 S. Ct. 229, 50 L. Ed. 343 (1906). Because an objective standard best protects constitutional principles and Agent Schrader did not violate clearly established federal law, the order granting Agent Schrader's motion to dismiss should be affirmed.

ARGUMENT

Federal Rule of Criminal Procedure 12(b) permits a party to “raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.” Fed. R. Crim. P. 12(b)(2). A motion to dismiss is the proper procedural tool in an immunity defense based on the Supremacy Clause. U.S. Const. art. VI, cl. 2; 63C

AM. JUR. 2D *Public Officers and Employees* § 364. Under this standard, the district court will deny a defendant's motion "if the state raises any genuine issues of material fact." *Kleinert*, 855 F3d at 314 n.6 (citing *New York v. Tanella*, 374 F.3d 141, 148 (2nd Cir. 2004)). Likewise, the court may grant the motion to dismiss where disputed issues of fact will not help determine a valid immunity defense. *Tanella*, 281 F. Supp. 2d at 611 (quoting *Covington*, 295 US. at 60; *City of Jackson v. Jackson*, 235 F. Supp. 2d 532, 535 (S.D. Miss. 2002)).

Supremacy Clause immunity dismissals present a mixed question of law and fact. *Tanella*, 374 F.3d at 146. Therefore, the district court's decision is reviewed *de novo*, with factual determinations reviewed for clear error. *Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006); *Long*, 837 F.2d at 750; *Kleinert*, 855 F.3d at 314. A finding of fact is clearly erroneous only if the appellate court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). "[T]wo permissible views of the evidence . . . cannot be clearly erroneous." *Kleinert*, 855 F.3d at 314 (quoting *Anderson*, 470 U.S. at 528). More specifically, where the factual findings are plausible, the reviewing court may not reverse the district court's choice, even where the appellate court "would have weighed the evidence differently." *Anderson*, 470 U.S. at 573-74; *Kleinert*, 855 F3d at 314.¹

¹ The State of New Tejas does not challenge the facts as found by the district court as clearly erroneous. Pet. App. 20a (Hamlin, J., dissenting).

I. The District Court must resolve any conflicting issues of fact that help determine a valid immunity defense.

The Supremacy Clause establishes that federal law “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, cl. 2. States may not impede federal officials in the exercise of their duties to carry out federal laws. *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819). The clause governs how often states may impose civil or criminal liability on federal officials for alleged violations of state law committed during their federal duties. *See In re Neagle*, 135 U.S. 1, 75 (1890) (granting habeas relief to a federal officer charged with murder); *Clifton*, 549 F.2d at 726-27 (holding that a Bureau of Narcotics and Dangerous Drugs agent was immune for a killing in the line of duty and noting that “acts done in connection with a mandatory duty apply with equal force to discretionary acts”).

Disputes over federal and state authority offer no easy answers. State criminal law provides an important check against abuse of power by federal officials. Yet the supremacy of federal law precludes the use of state prosecutorial power to frustrate the legitimate and reasonable exercise of federal authority. *Livingston*, 443 F.3d at 1213. “The sovereignty of a state...does not extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States.” *Van Brocklin v. Anderson*, 117 U.S. 151, 155 (1886). Federal agents therefore have Supremacy Clause immunity from state law where they are performing their official duties. Both state and federal courts lack jurisdiction to enforce state law under such circumstances.

Courts have generally regarded *Neagle* as establishing a two-prong test for immunity: (1) whether the officer was performing an act that federal law authorized the officer to perform; and (2) whether the officer's actions were necessary and proper to fulfill his or her federal duties. Applying this test is harder than establishing it. The first prong might require that the federal officer can perform the specific act proscribed by statute or it might require only that the officer's actions fall within the general scope of his or her duties. The second prong might be read to mean the officer's action must have actually been necessary and proper to fulfilling their federal duties, or it could mean the prong is satisfied so long as the officer reasonably believed the act was necessary and proper, even if the officer were mistaken. Immunity might only go as far as the letter of the officer's federal authority; alternatively, the federal interest in enabling an officer to perform his or her duties effectively might extend immunity to cover all conduct the officer reasonably, even if ultimately incorrectly, believed to be within their authority. Rebecca E. Hatch, *Construction and Application of United States Supreme Court Decision in Cunningham v. Neagle 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).

Rule 12(b) of the Federal Rules of Civil Procedure is the proper vehicle for pleading an immunity defense and the district court must determine conflicting facts in a Rule 12(b) motion. No court, in considering supremacy clause immunity, has claimed that the trial court lacks the authority to decide issues of fact. The Thirteenth Circuit's majority erred in this conclusion. The majority simply misstates the issue when it claims the trial court's options are to view the facts in the light most favorable to the

prosecution or act as a fact-finder and resolve disputed issues of fact. The Court need not decide whether the trial court may decide issues of fact or whether the trial court must view all disputed facts in the light most favorable to the State because the State must bring forth more than mere allegations to succeed in opposing an immunity defense motion.

The trial court, by determining fact issues in a Rule 12(b) motion achieves the goal of such pretrial motions, promoting judicial economy by dismissing invalid claims before trial. In the context of Supremacy clause immunity, empowering the district court to decide disputed issues of fact also prevents state prosecutorial malice and protects federal authority by preventing state intervention on regulation of federal authorities. The district court must resolve any disputed issues of material fact in deciding pretrial motions and views evidence in the indictment in the light most favorable to the state so long as they present facts beyond mere allegations.

A. The Trial Court's duty to act as factfinder promotes judicial efficiency by reducing long trials and court proceedings.

Federal officer immunity from state prosecution under the Supremacy Clause is an affirmative right not to be tried, not merely a defense. *Neagle*, 135 U.S. at 75. If states could force a federal officer to stand trial on criminal charges before a ruling is made on a motion to dismiss, the right to not be tried would be lost. The Thirteenth Circuit claims, "Agent Schrader identified no rule or statute that would permit him to evade a jury trial." Pet. App. 8a. However, Supremacy Clause immunity is the exact kind of defense that allows a federal agent to evade a jury trial, if properly pleaded. Even if a federal officer were eventually deemed immune by the court after trial, by having to stand

trial on state criminal charges, the agent would have already been forced to endure the exact harm that immunity was intended to protect against. *See United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 269 (1982) (per curiam) (the “right not to be tried...can be enjoyed only if vindicated prior to trial”) *Long*, 837 F.2d at 752 (The “goal” of the *Neagle* line of cases “is not only to avoid the possibility of conviction of a federal agent, but also to avoid the necessity of undergoing the entire process of the state criminal procedure.”).

For that reason, the state has the burden of presenting evidence showing that disputed issues of fact exist to rebut the claim of immunity. When a federal officer raises the Supremacy Clause as a defense for a state crime, the court has a duty to make a prompt ruling on that issue. *Hatch*, *supra* at 269. The Thirteenth Circuit disregards the Ninth Circuit’s reasoning in *Idaho v Horiuchi*. 253 F.3d 359, 374 (9th Cir.) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001). In *Horiuchi*, the Ninth Circuit held that courts should decide factual questions related to immunity defenses. The Thirteenth Circuit instead adopts the approach of the Second, Tenth, and Sixth Circuits, as described by the State of New Tejas, which requires viewing any disputed facts in the light most favorable to the state. *See Tanella*, 374 F.3d at 148; *Livingston*, 443 F.3d at 1226; *Long*, 837 F.2d at 752.

The State is correct that the district court must view the allegations in the indictment in the light most favorable to the state. But this does not mean that the court must accept, without further consideration, bare allegations from the state. Once a defendant raises the defense of Supremacy Clause immunity, the burden shifts to the state to supply enough evidence to raise a *genuine* factual issue that is supported by more than mere allegations.

Livingston, 443 F.3d at 1226. If the state produces no evidence showing that disputed issues of fact exist to rebut the claim of the federal officer, the district court should sustain the defense. *Hatch*, *supra* at 269. In fact, in each of the cases cited by the majority and the State, the trial court makes determinations of fact in ruling on the Rule 12(b) motion.

It has long been accepted that the trial court judge sits as the trier of facts on a motion to suppress. The judge hearing a pretrial motion to suppress cannot reserve an issue for the jury at trial on the assumption that it is the responsibility of the jury to make credibility determinations. *United States v. Lang*, 8 F.3d 268 (5th Cir. 1993) (judge erred in allowing jury to question truthfulness of officer's somewhat implausible claim to have seen cocaine in the defendant's pocket as "the preliminary question of whether officer . . . saw the cocaine in plain view was within the sole province of the district court"). Even if the motion to suppress is properly made during the trial, it must be heard and ruled on by the judge outside the presence of the jury. *Davis v. State*, 368 So.2d 880 (Ala. Crim. App. 1979); *Sisk v. State*, 290 So.2d 608 (Miss. 1974). An appellate court must defer to a trial court's determination of a witness' credibility on a motion to suppress; the appellate court reviews *de novo* the trial court's application of the law to undisputed facts, it must accept the trial court's ruling on disputed facts unless clearly erroneous. *State v. Lee*, 825 S.E.2d 575 (Ga. Ct. App. 2019).

The Sixth Circuit held that Rule 12(b) was written to encourage the making of motions prior to trial and that

Rule 12(e)² and (g)³ “clearly envision” that the district court may make preliminary findings of fact necessary to decide the questions of law presented by the pretrial motion. *United States v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976). The Second Circuit said of the *Neagle* test:

There often exist disputes over the fact inherent in the determination of federal authorization of the acts in question and whether the agent did no more than was “necessary and proper.” Such factual disputes must be confronted while the court walks the fine line created between the goal of protecting federal officials acting in the scope of their duties and the obligation to avoid granting a license to federal officials to flout state laws with impunity.

Whitehead v. Senkowski, 943 F.2d 230, 234 (2nd Cir. 1991).

While the majority is correct that Supremacy Clause immunity can overlap with elements of the offense, Agent Schrader’s “justification” defense under New Tejas State law is irrelevant to his defense of immunity under the Supremacy Clause. Whether or not Agent Schrader has a valid state law defense is secondary to his immunity claim.

² Rule 12(e) provides: “A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where *factual issues are involved in determining a motion, the court shall state its essential findings on the record.*” (emphasis added).

³ Rule 12(g) provides: “A verbatim record shall be made of all proceedings at the hearing, including such *findings of fact* and conclusions of law as are made orally.” (emphasis added).

It is only if this claim fails that Agent Schrader would rely on a state law defense.

In *Tanella*, the Second Circuit upheld the district court's dismissal of criminal charges against a Federal Drug Enforcement Agency (DEA) agent who shot a drug dealer during a foot pursuit. *Tanella*, 374 F.3d at 148. The court held that the Supremacy Clause protects federal officers from state prosecution where the officer is charged in state court for acts that the officer could do under the laws the United States and that it was the officer's duty to do as a federal officer. *Id.* Agent Schrader removed the state prosecution to federal court based on Section 1442 of Title 28 of the United States Code, arguing that he was a federal officer enforcing federal law. Pet. App. 33a-34a. The State did not dispute the legitimacy of the removal nor the jurisdiction of the appellate court. *Id.* This Court has said that this removal statute is not "narrow" or "limited" but is broad enough to cover all cases in which federal officers can raise a colorable defense arising out of their duty to enforce federal law. *Colorado v. Symes*, 286 U.S. 510, 517 (1932). The Court said, "[O]ne of the most important reasons for removal is to have the validity of the defense of official immunity tried in federal court." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969); *See also Peterson v. Blue Cross/Blue Shield of Texas*, 508 F.2d 55, 58 (5th Cir. 1975), *cert. denied*, 422 U.S. 1043 (1975) (holding that the purpose of this section is to prevent federal officers from being tried in state courts for acts done within the scope of their federal employment).

This Court has even recognized that a single federal judge can dispose of the state prosecution of a federal official:

It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an

indictment in a state court and subject to its laws may, by the decision of *a single judge* of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented.

Baker v. Grice, 169 U.S. 284, 290 (1898) (emphasis added). The district court thus properly used its authority to determine whether Agent Schrader acted out of personal malice when arresting Mr. White and not merely within the scope of his federal authority. As the district court of Madrigal noted, “[R]esolution of the factual issues pertaining to immunity by the judge seems more consistent with the protective purposes of Supremacy Clause immunity.” Pet. App. 37a (quoting *Horiuchi*, 253 F.3d at 390 n.12 (Hawkins J., dissenting)).

B. Resolving disputed factual issues at the district court level prevents state prosecutorial malice against federal law enforcement agents when state and federal interests conflict.

One purpose of Supremacy Clause immunity is to protect federal officers from imprisonment under state authority based on conduct related to federal authority. As noted by Judge Hamlin in his dissent, the federal government empowers Agent Schrader to make warrantless arrests of individuals committing federal crimes in his presence. 18 U.S.C. § 3052; Pet. App. 21a. Thus, Agent Schrader was acting within his scope of authority when he arrested Mr. White and yet the State of New Tejas still chose to prosecute him.

As Judge Hamlin noted, “The State of New Tejas has admitted precisely why it is prosecuting Agent Schrader.”

Pet. App. 15a. The local news station videotaped the Madrigal County District Attorney say about Agent Schrader's prosecution, "Let this serve as a warning to any other federal officers who seek to enforce marijuana laws in the State of New Tejas. You are not welcome here, and you attempt to enforce these laws at your own risk." Pet. App. 33a. Following this speech, Agent Schrader was indicted for assault and aggravated assault resulting from his lawful arrest of Mr. White. *Id.* This is precisely the type of conduct that Supremacy Clause immunity was intended to prevent.

Since 1879, this Court has acknowledged that federal officers need to be protected from state prosecution for actions committed in the scope of their federal duties.

"If, when thus acting, and within the scope of their authority, [federal] officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,...the operations of the general government may at any time be arrested at the will of one of its members."

Tennessee v. Davis, 100 U.S. 257, 263 (1879). In *Cunningham v. Neagle*, the leading case on Supremacy Clause immunity, this Court provided immunity from suit to a U.S. Marshal charged with murder. 135 U.S. 1. In that case, the U.S. Marshal killed a man who he thought would stab a Supreme Court Justice. *Id.* The Court recognized that providing immunity from suit to a federal officer does more than provide a mere shield against liability; a federal immunity defense protects the federal officers carrying out their duties from the chilling effect of state prosecution. *Id.*

The Tenth Circuit held that, “Supremacy Clause immunity cases require courts to evaluate the circumstances as they appear to a federal officer at the time of the act in question, rather than the more subtle and detailed facts later presented to a court. *Livingston*, 443 F.3d at 1229. In *Livingston* there was a factual dispute as to whether U.S. Fish and Wildlife Service employees knowingly entered private property without authorization and littered. The District Court weighed the conflicting evidence and ultimately dismissed the charges. On appeal, the Tenth Circuit said, “In our view, to reverse and remand to the district court for an evidentiary hearing (on nothing), as the State requests, would be a colossal waste of time and resources.” *Id.* at 1225. Similar to Agent Schrader’s prosecution, the Tenth Circuit recognized that the evidence in the record supported the suspicion that the prosecution of the Fish and Wildlife Service employees was not a bona fide effort to punish a violation of Wyoming trespass law “but rather an attempt to hinder a locally unpopular federal program.”

Despite the Thirteenth Circuit’s characterization, *Idaho v. Horiuchi* is not an anomaly; it lays out the procedure for how courts should deal with high-profile, disputed issues of supremacy clause immunity. A majority of the en banc Ninth Circuit concluded and “persuasively explained” that a district court should decide any disputed issues of material fact in resolving motions to dismiss under Supremacy Clause immunity. Pet. App. 36a. The case was vacated as moot only because the state of Idaho dismissed the charges against the federal officer. Before the state dismissed the indictment, the Ninth Circuit took the extraordinary step and invited briefing on whether the case should be reheard a third time before the court’s entire complement of more than twenty active judges. Seth P.

Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L. J. 2195, 2205 (2003).

The facts in *Horiuchi* were hotly disputed and involved the shooting of a mother who died with her young child in her arms. *Horiuchi*, 215 F.3d at 986. For over a year United States marshals attempted, without success, to arrest Randall Weaver for his refusal to answer gun-trafficking charges. *Id.* Weaver, a separatist, refused to surrender and stayed with his wife and their children on their remote property near Ruby Ridge. *Id.* Weaver was heavily armed and vowed to use force to repel anyone who approached. *Id.* Several marshals were scouting the area near the Weaver property and were confronted by Weaver, his son, and a family friend. *Id.* A firefight erupted that left a deputy marshal and Weaver's son dead. *Id.*

In response, FBI Special Agent Lon Horiuchi and members of the FBI Hostage Rescue Team were deployed to Ruby Ridge. *Id.* The team was advised that Weaver was extremely dangerous and was a suspect in the shooting of the deputy marshal. Horiuchi, a trained sniper, was deployed about 200 yards from the Weaver cabin. *Id.* An FBI helicopter conducting surveillance approached and Weaver and two others ran from the cabin armed with rifles. *Id.* Weaver pointed his rifle at the sky, appearing to aim at the helicopter, and Horiuchi responded by firing a shot, hitting Weaver in the shoulder. *Id.* The group retreated to the cabin. *Id.* But before the last armed male disappeared inside, Horiuchi aimed at him and shot. *Id.* The bullet went through the cabin door and struck Weaver's wife, Vicki Weaver, in the skull while she held her infant child. Mrs. Weaver died instantly. *Id.*

The death of Vicki Weaver spawned many federal investigations highly critical of the FBI's conduct. *Id.* The

Attorney General concluded that federal criminal charges were unwarranted against Agent Horiuchi and concluded that the facts did not support a finding that Horiuchi had willfully used unreasonable force when firing the shot that killed Vicki Weaver. *Id.* Five days after the Justice Department announced it would not prosecute, a local Idaho prosecutor charged Horiuchi with involuntary manslaughter. *Id.* Horiuchi removed the case to federal court and then moved to dismiss because he acted properly in the discharge of his duties as a federal officer and was thus entitled to Supremacy Clause immunity. *Id.* The district court granted the motion and a divided appeals panel affirmed. *Id.* The case was reheard in an en banc panel of 11 judges and by a vote of 6-5 reversed the district court's dismissal. *Id.* The Ninth Circuit invited briefing on whether the case should be reheard yet again, but Idaho dropped the charges altogether. Waxman, *supra* at 2205. This anticlimactic ending notwithstanding, the facts and proceedings in Horiuchi showcase how the courts can resolve complicated, difficult, and emotionally charged proceedings against federal officers.

The key inquiry in Horiuchi's case concerned the reasonableness of his belief that the shooting was necessary and proper in the circumstances. The majority in the first appellate review held that Horiuchi satisfied that standard. *Horiuchi*, 215 F.3d at 986. Judge Kozinski wrote in the first appellate review that the facts were "largely not in dispute" yet during the en banc rehearing he concluded that too many facts were in dispute. *Id.* at 887-98 (Kozinski, J., dissenting); *Horiuchi*, 253 F.3d at 374. The Ninth Circuit wrote, "Courts must avoid the temptation to dissect the events which flashed before a police officer in a matter of seconds and to over scrutinize the officer's response to those events." *Id.* at 994. There cannot be in

the same record both too many facts in dispute and facts that are largely not in dispute.

Just as in *Horiuchi*, the State has produced no evidence against Agent Schrader materially inconsistent with his testimony. The State asserts, without evidence, that Agent Schrader acted with malice or vindictively toward Mr. White during his arrest. Even if Agent Schrader's subjective intent is relevant, the District Court, having received "extensive briefing and evidence submitted by the parties and having received live testimony at a hearing" concluded that Agent Schrader was either acting within the scope of his federal employment or reasonably believed himself to be acting within that scope. Pet. App. 27a. To conclude otherwise would require the trial court to disregard all of Agent Schrader's testimony that he believed it was his duty as a federal agent to arrest Mr. White and he was solely motivated by his federal duties. Never has this Court held that the trial court must only give weight to the testimony of the state in a Rule 12(b) motion and to decide that today would destroy the doctrine of Supremacy Clause immunity. This would leave all federal officers vulnerable to malicious state prosecution for federal laws with which a state expresses hostility.

C. Resolving disputed factual issues in a pretrial motion upholds federal authority to regulate federal employees without state interference.

Two federal tools for constraining the conduct of individual law enforcement officers, whether state or federal, are particularly important. The first tool is Section 1983 which created a private right of action against officers who violate rights protected by federal law. 42 U.S.C. § 1983. Although the section only applies to state and local officers, this Court held in *Bivens* that a parallel damages action exists against federal officers. 403 U.S. 388 (1971).

The second tool is Section 242 which makes it a criminal offense for officers acting under color of federal, state, or local law willfully to deprive individuals of their rights under federal law. 18 U.S.C. § 242.

In the Section 1983 context, this Court created the rule of qualified immunity under which “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow*, 457 U.S. at 818. But unlike Supremacy Clause immunity, qualified immunity does not appear to be constitutionally required. The Court’s cases in this area hinge on the theory that qualified immunity existed at common law and that Congress did not abolish it in passing Section 1983. Waxman, *supra* at 2209. So the State, in analogizing Supremacy Clause immunity to qualified immunity, erred by comparing a common law immunity to a constitutionally required immunity. The analysis of supremacy clause immunity and qualified immunity accomplish different ends.

If protecting against state judicial or prosecutorial bias were the only federal interests at play there would be no need for a substantive immunity doctrine. Removal to federal court would suffice. But as *McCulloch* reveals, even good-faith state attempts to regulate the federal government or its agents can interfere with federal laws or policies. 17 U.S. at 316. In the context of state criminal prosecutions, the interference can occur in two ways. First, subjecting federal officers like Agent Schrader to state criminal law would require officers to memorize up to fifty potentially different sets of laws for enforcing their federal duties. Second, even if the laws of all States are uniform on a particular point, the prosecution of federal officers

may compromise federal laws and policies just as Maryland's tax threatened to impede operating the National Bank.

As a special agent of the FBI, Agent Schrader's duties included making arrests without warrant for any offense against the United States committed in his presence. 18 U.S.C. § 3052; *See also* Pet. App. 39a. Possession of marijuana remains illegal under federal law and Mr. White violated this section in front of Agent Schrader. 21 U.S.C. § 844. The State does not challenge the findings of the trial court as clearly erroneous. Pet. App. 20a n.10.

It is undisputed in the record that Agent Schrader observed Mr. White carrying a bag of marijuana, visible in a transparent plastic bag. Pet. App. 31a. Agent Schrader orally informed Mr. White that he was under arrest and when Mr. White tried to flee, Agent Schrader used police tactics to secure Mr. White. *Id.* This standard police warning led the Second Circuit to hold that a DEA agent was entitled to supremacy clause immunity for the killing of a suspected drug dealer. *Tanella*, 374 F.3d at 141. "An early grant of immunity reduces the risk that the possibility of state criminal prosecution will deter the performance by federal officers of their federal duties." *Livingston*, 443 F.3d at 1231.

In *Tanella*, the appellate court affirmed the district court's dismissal of a manslaughter indictment against a federal DEA agent, holding that the agent was acting in his capacity as a federal DEA agent, and he did no more than what was necessary and proper in the performance of his duties when he shot and killed a suspected drug dealer following a violent one-on-one struggle. 374 F.3d at 142. The court held that the defendant had used the standard police warning while trying to apprehend the suspect, stating that the suspect was under arrest. *Id.* at 144. Even

though the State presented conflicting eyewitness testimony that the suspect was running away when the agent shot the suspect, the court held that absent additional evidence, the State failed to cast doubt on the defendant's state of mind. *Id.* at 147. The court held that eyewitness testimony that the agent said to the suspect, "I'm gonna shoot you," could not establish criminal intent or improper motive under the circumstances and did not raise a genuine issue of fact. *Id.* at 150. The Second Circuit emphasized that it was viewing the facts in the light most favorable to the state. *Id.* at 148.

If eyewitness testimony that a DEA agent said, "I'm gonna shoot you" before shooting a suspect who was turning to run away did not rise to the level of mere allegations that create a genuine issue of material fact, then Agent Schrader's non-violent, verbal altercation with Mr. White hours before the arrest does not create a genuine issue of material fact. Agent Schrader testified, "I swore an oath to enforce federal laws. That's what I was doing. That's all I was doing." Pet. App. 32a. There is no evidence in the record, aside from the State's inference that Agent Schrader acted with malice, to establish an issue of fact that would preclude dismissal under the Rule 12(b) motion.

Subjecting federal officers to state criminal sanctions for carrying out their federally appointed duties would make it extremely difficult, if not impossible, for the federal government to function. Even the most dedicated federal agents would be reluctant to perform their jobs conscientiously if it meant potential prison time in the state penitentiary. Agent Schrader has served for nearly 20 years as a special agent with the FBI. Pet. App. 28a. He has received several commendations for his work and has investigated crimes such as racketeering, wire fraud, money laundering, and kidnapping. *Id.* This Court should

hold that the district court properly decided disputed issues of fact in holding that Agent Schrader is entitled to Supremacy Clause immunity. The State must provide more evidence than mere allegations of bad faith on behalf of Agent Schrader to subject him to state criminal prosecution. This rule properly defines the constitutional scope of Supremacy Clause immunity by maintaining judicial efficiency, protecting federal officers from malicious prosecution, and preventing inappropriate state interference with federal operations.

II. The test governing Supremacy Clause immunity best upholds constitutional principles of a valid immunity defense when undisputed evidence is viewed objectively under clearly established federal law.

The Constitution establishes federal law as “the supreme Law of the Land.” U.S. Const. art. VI, cl 2. The Supremacy Clause preserves this principle, “that authority which is supreme must control, not yield to that over which it is supreme.” *McCulloch*, 17 U.S. at 405, 426. Commanding uniform administration of national laws, the Supremacy Clause “declares a truth which flows immediately and necessarily from the institution of a Federal Government.” *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015) (quoting THE FEDERALIST NO. 33, at 207 (Alexander Hamilton) (J. Cooke ed., 1961)). This Clause operates as a conflict-of-laws rule that protects federal interests by preventing states from impeding or “in any manner control[ling]” the enforcement of federal laws. *Tanella*, 374 F.3d at 147 (quoting *McCulloch*, 17 U.S. at 436). Without the Supremacy Clause, the federal government would exist only in an advisory role. *In re Neagle*, 135 U.S. at 61.

A federal agent, where he executes his constitutional authority, ensures that the general government will not

erode through the loss of power to protect itself and stop existing. *Id.* at 62 (quoting *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816)). For this reason, federal courts extend immunity when a federal agent discharges his duty outside the District of Columbia. *In re Neagle*, 135 U.S. at 61. Supremacy Clause immunity therefore works preemptively, prohibiting state criminal prosecution of a federal agent who violates state law while enforcing federal law. Waxman, *supra* at 2214-15.

This Court upheld Supremacy Clause immunity in *Neagle* when it created the leading test that governs constitutional protection for a federal agent acting under federal authority. 135 U.S. at 75, 76. A U.S. marshal killed a man to protect a Supreme Court Justice. *Id.* at 56. The assailant had made several death threats toward the Justice, which prompted the Executive Department to discharge the marshal for his protection.⁴ *Id.* at 67. While the men were on a train to the District of California, the assailant attacked. *Id.* at 54. He punched the Justice two or three times and then reached toward his chest, prompting the marshal to shoot the assailant. *Id.* at 54.

This Court granted immunity under the Supremacy Clause, dismissing the state prosecution. *Id.* at 76. In determining the marshal was justified under the circumstances, this Court viewed the facts under an objective standard. *Id.* This Court explained that

⁴ Justice Field delivered a Circuit Court opinion which Mr. and Mrs. Terry found unfavorable. Mrs. Terry protested the decision and accused Justice Field of accepting a bribe. When officers escorted the couple from the courtroom, a brawl erupted, and Mr. Terry drew his bowie-knife. The couple was sentenced for contempt. Following these events, Mr. and Mrs. Terry often threatened to kill Justice Field. *Neagle*, 135 U.S. at 45-46.

unchallenged evidence under clearly established federal law proved the marshal's "well-founded belief" he was protecting the Justice from certain death. *Id.* In finding that the Supremacy Clause provided immunity, this Court applied a bifurcated test which determined whether: 1) the marshal acted within the scope of his duty, and 2) his conduct was "no more than necessary and proper" to perform the duty. *Id.* at 75, 76. The test established in *Neagle* became controlling precedent on Supremacy Clause immunity. Hatch, *supra* at 269.

This Court construed the test governing Supremacy Clause immunity under a fact-intensive legal standard. *Neagle*, 135 U.S. at 54 (commencing analysis stating, "the inquiry whether this proposition is *sustained by law and the facts which we have recited*, we now address ourselves") (emphasis added). The Thirteenth Circuit correctly states that the test created in *Neagle* governs Supremacy Clause immunity. Pet. App. 8a. But the appellate court misapplied the test when it viewed evidence under a subjective standard and denied Agent Schrader's motion to dismiss. Based on this Court's analysis in *Neagle*, Supremacy Clause immunity rests on the legal underpinnings of an objective standard to protect a federal agent acting pursuant to his federal duty, balance state sovereignty with federal law enforcement, and prevent excessive disruption of government function. James Wallace, *Note: Supremacy Clause Immunity: Deriving a Willfulness Standard from Sovereign Immunity*, 41 AM. CRIM. L. REV 1499 (2004). This Court demonstrated these goals when deciding three foundational Supremacy Clause immunity cases following the *Neagle* decision. *See Thomas*, 173 U.S. 276; *Drury*, 200 U.S. 1; *Johnson v. Maryland*, 254 U.S. 51 (1920).

A. Evidence must be viewed under an objective standard to ensure constitutional protection of a federal agent when he discharges a duty pursuant to federal law.

1. An objective standard applies under prong one of the Supremacy Clause immunity test.

A federal agent is entitled to Supremacy Clause immunity where statutory authority permits him to perform certain acts. *Neagle* 135 U.S. at 59 (when the Court held that law, statute, and Constitution obligated the marshal to discharge his duty). This Court affirmed the objective standard applied in *Neagle* when granting immunity to a federal administrator who refused to follow state law. *Thomas*, 173 U.S. at 285. The administrator was arrested by the Ohio Commissioner for serving unlabeled oleomargarine in violation of state public health laws. *Id.* at 282. This Court, however, determined that Congress approved the administrator's conduct when the Secretary of War included oleomargarine as food in the quarterly appropriation for rations. *Id.* at 282. Because the administrator acted pursuant to a congressional provision, the administrator was not found criminally liable by this Court. *Id.* at 283 (applying an objective threshold that officers are not criminally liable where they discharge duties “*under Federal authority pursuant to and by virtue of valid Federal laws.*”) (emphasis added).

In both *Neagle* and *Thomas*, the first prong in the test governing Supremacy Clause immunity begins with an objective analysis of the agent's federal position. *Id.* at 283-84. This Court viewed the capacity of the individual agent according to his authority under federal law. *See generally Neagle*, 135 U.S. 1; *Thomas* 173 U.S. 276. According to this Court's reasoning, the Thirteenth Circuit erred in deciding that Agent Schrader acted beyond the scope of his duty

when clearly established federal law authorized him to make the arrest. *See* R. Rotunda, J. Nowak, *Treatise on Constitutional Law-Substance and Procedure* ch. 3 § 3.2. *McCulloch v. Maryland* and the Basis of Federal Power (explaining that an immunity claim by a federal employee requires the court to interpret relevant regulations and statutes).

This Court could not have demonstrated the application of prong one more clearly when deciding in *Thomas* that the administrator was justified to receive federal immunity once the federal government deemed him competent to perform his duty. *See* Hatch, *supra* at 269. (explaining that the first step in determining Supremacy Clause immunity requires the courts to first look at the “nature of the conduct involved” in performing the duty). The State is correct that Agent Schrader arrested Mr. White without direct orders of a superior. Pet. App. 9a. But statute does not constrict Agent Schrader to such a boundary. And this Court repeatedly granted constitutional protection under the Supremacy Clause where an agent acted under statutory authority without a direct order from a supervisor.

Federal law specifies that Agent Schrader is not bound to act solely by orders from his supervisor because 18 U.S.C. § 3052 authorizes FBI agents “to make arrests without warrant for any offense against the United States committed in their presence.” The Thirteenth Circuit cited *Osborn v. Bank of U.S.* to prove that Agent Schrader acted beyond the scope of his duty. Pet. App. at 9a. It is not clear why the court of appeals chose this case to support its holding, because *Osborn v. Bank of U.S.* is a case about federal question jurisdiction. *See generally Osborn v. Bank of U.S.*, 22 U.S. at 738 (1824). In that case, the Court had to decide whether the Bank of the United States was

exempt from state levied taxes. *Id.* at 765. That case had nothing to do with Supremacy Clause immunity from state criminal prosecution. As a result, the connection between this case and *Osborn* is nonexistent. The Thirteenth Circuit took an obscure example used to clarify a word in *Osborn* and applied it out of context, without explanation. The majority's decision requires assuming a rule inconsistent with a Supremacy Clause immunity defense.

Supremacy Clause immunity protects a federal agent from criminal liability regardless of exigent or emergency circumstances where clearly established law proves that he acted under federal authority. *See generally Thomas*, 173 U.S. at 285; *see also Johnson*, 254 U.S. 51 (1920) (where this Court granted immunity from state prosecution to federal employees who violated a state public health law and a transportation law, respectively, neither faced pressing circumstances). This Court in these foundational cases suggested that the agent's belief about his circumstances determines whether Supremacy Clause immunity protects him, not the circumstance itself. *Neagle*, 135 US at 76; *Kleinart*, 855 F.3d 319 ("courts must 'evaluate the circumstances as they appear to federal officers at the time . . . rather than the more subtle and detailed facts later presented.'") (quoting *Livingston*, 443 F.3d at 1229).

Based on a juxtaposition of *Neagle* and *Thomas*, exigency is irrelevant. Whereas in *Neagle* this Court discussed that the marshal and those around him faced physical danger, this Court in *Thomas* focused solely on statutory authority without incorporating an analysis of his situation. The Thirteenth Circuit claims that Agent Schrader acted beyond the scope of his duty because circumstances did not merit the arrest, applying *North Carolina v. Cisneros* to support its finding. Pet. App. 9a-

10a. In that case, a marine was driving a military vehicle when he veered to avoid stopped cars and crashed into another motorist, causing that motorist's death. *North Carolina v. Cisneros*, 947 F.2d 1135, 1137. The majority again relied on another unrelated case, failing to address that the court in *Cisneros* decided whether a case may be removed to federal court when an on-duty federal officer caused a car accident. But federal removal is moot because the State did not challenge Agent Schrader's request for removal under federal jurisdiction. Pet. App. 34a. So the decision in *Cisneros* is governed by a different set of rules than the questions here.

Judge Hamlin correctly stated that Agent Schrader acted properly under clearly established federal law. Pet. App. 21a. Based on 18 U.S.C. § 3052 and 21 U.S.C. § 844 Agent Schrader performed an act within the scope of his duty as an FBI agent because these statutes obligate him to enforce the laws of the United States government. Agent Schrader lacks the authority either to judge the laws or to create the laws that he is duty-bound to enforce, nor should he. The Thirteenth Circuit relied on inapposite cases and applied a subjective analysis in determining whether clearly established law authorizes Agent Schrader to act, therefore it misapplied the first prong of the test. For that reason, Judge Hamlin correctly states that the majority began this discussion "with a legal error regarding the scope of a federal officer's duties." Pet. App. 20a.

2. An objective standard applies under prong two of the Supremacy Clause immunity test.

This Court held under the second prong of the test that a federal agent does not commit a crime wherever undisputed facts prove his conduct was no more than necessary and proper in performing his duty. *Neagle* 135 U.S. at 72, *Thomas*, 173 U.S. at 284. In determining

conduct was no more than necessary and proper, this Court in *Thomas* and in *Neagle* applied an objective standard. *See Hatch, supra* at 269. (reasoning that the *Neagle* Court “impliedly recognized . . . the court must apply solely an objective standard”). The Thirteenth Circuit held that Agent Schrader’s conduct was not “necessary” where he arrested Mr. White absent exigent circumstances. Pet. App. 9a-10a. But this view incorporates a subjective analysis, directly contradicting the objective standard applied by this Court. *See Stacy L. Davis, et al., What is action in pursuance of federal law VI. Prisoners in Custody for Acts Done or Omitted in Pursuance of Federal Authority*, 16A FED. PROC., L. ED. § 41:151 (2019) (explaining “[f]or the federal actor's actions to be no more than was “necessary and proper” to carry out his or her duty, the actor must subjectively believe that his or her action is justified and *that belief must be objectively reasonable*”) (emphasis added).

This Court determined an agent’s act was “necessary and proper” where he acted in performance of his duty and where he believed his act was necessary to perform his duty. *Neagle*, 135 U.S. at 76. In both *Thomas* and *Neagle*, conduct was necessary and proper where an agent discharged his duty while believing that the conduct was in performance of that duty. In *Thomas*, the administrator’s conduct was necessary and proper because he served a permissible food item in performance of his duty. *Thomas*, 173 U.S. at 282. The administrator’s conduct was not in response to exigent or emergency circumstances, but rather he served unlabeled oleomargarine under the belief that Congress approved his conduct. *Id.* at 283. Even where exigent circumstances arose in *Neagle*, the marshal’s conduct was necessary and

proper based on his view of the circumstances at the time of the event where it stated:

we are quite sure that if Neagle had been merely a brother or a friend of Judge Field, traveling with him, and aware of all the previous relations of Terry to the judge,—as he was,—of his bitter animosity, his declared purpose to have revenge even to the point of killing him, he would have been justified in what he did in defense of Mr. Justice Field's life, and possibly of his own.

Neagle, 135 U.S. at 53–54.

“Supremacy Clause immunity cases require courts to evaluate the circumstances as they appear to federal officers at the time of the act in question, rather than the more subtle and detailed facts later presented to a court.” *Livingston*, 443 F.3d at 1229 The Thirteenth Circuit claims that Agent Schrader's conduct was objectively unreasonable because he tackled Mr. White when he made the arrest. Pet. App. 11a. But the record shows that Agent Schrader believed his conduct was necessary and proper to detain Mr. White for violating federal drug charges where Mr. White resisted arrest. This analysis directly contradicts this Court in *Thomas*, where insubstantial inferences were discarded and the plain facts controlled whether a Supremacy Clause immunity precluded state prosecution. *Thomas*. 173 U.S. at 282. (refuting evidentiary inferences, this Court reasoned that evidence other than plain facts would create “an inference contrary to the admission”). More specifically, in *Thomas* the administrator received immunity in spite of his blatant disregard of state public health law. *See Livingston*, 443 F.3d at 1219 (explaining that the administrator “impetuously served oleomargarine without advertisement”).

A federal agent's conduct is necessary and proper where an agent believes his action is reasonable under existing circumstances. *Files*, 36 F.Supp 3d at 878. The Thirteenth Circuit is convinced that evidence supports Agent Schrader acted maliciously or with criminal intent, citing *Arizona v. Files*. Pet. App. at 10a-11a. In *Files*, the district court denied immunity to a federal employee who carefully planned and executed a scheme to trap his neighbor's dogs in pursuit of personal motive. *Files*, 36 F. Supp. 3d at 884. But this case is dissimilar to *Files* because Agent Schrader arrested Mr. White under a "split-second" decision. See *Kleinert*, 855 F.3d 305, 320 (finding a federal agent was entitled to Supremacy Clause immunity where he ("necessarily reacted on a 'split-second basis'"); see also *Graham v. Connor*, 490 U.S. 386, 396-97. (finding "[w]ith respect to a claim of excessive force, the same standard of reasonableness at the moment applies: . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation").

According to this Court's guidance in formative cases, a Supremacy Clause immunity defense requires the court to conduct an extensive fact analysis of the agent's perspective at the moment of the act. If undisputed evidence proves the agent acted in performance of his federal duty, the facts compel immunity under the Supremacy Clause. Judge Hamlin correctly states in his dissent that "[t]he 'subjective' prong should not be included in the test for immunity under the Supremacy Clause." Pet. App. 21a. Because the majority incorporated a subjective analysis when it viewed the facts based on

evidentiary inferences, the Thirteenth Circuit incorrectly applied the second prong of the test.

B. Viewing evidence under an objective standard balances state sovereignty with federal law enforcement.

Supremacy Clause immunity protects a federal law enforcement agent who acts pursuant to his duty, while upholding state sovereignty when disputed evidence leaves a question whether federal immunity applies under the circumstances. *See generally Drury*, 200 U.S. at 8. This Court in *Drury* denied immunity to an enlisted soldier who shot and killed a suspect because conflicting evidence led to opposing conclusions on whether the suspect had surrendered. *Id.* This Court's analysis in *Drury* provided valuable guidance on applying the test because the decision limited where immunity protects a federal agent. *Davis, supra.* (explaining that "the exercise of authority does not of itself place a federal officer beyond the reach of a state's criminal process [,]. . . the actor must subjectively believe that his or her action is justified and *that belief must be objectively reasonable*) (emphasis added).

In *Drury*, admitted facts proved that the soldier chased a suspect who allegedly stole government property then tried to escape. *Id.* at 7-8. However unlike in *Neagle* and in *Thomas*, where several undisputed facts supported an immunity defense, the *Drury* Court heard contradictory testimony about the events surrounding the soldier's conduct. *Id.* at 8. Most notably, the Court held (and both parties conceded) that if the soldier had shot and killed the suspect after he surrendered, "it could not *reasonably* be claimed that the fatal shot was fired in the performance of a duty imposed by the Federal law." *Id.* (emphasis added). By using the term "reasonably," the *Drury* Court clarified a factor that would later become a fundamental touchstone

in federal immunity cases. 91 C.J.S. *United States* § 98 (2019) (explaining that “[f]ederal officials are generally granted Supremacy Clause immunity from state prosecution for actions taken in the course of their official duties; however, such immunity is limited to actions that were *reasonably* necessary for the performance of the officials’ duties”) (emphasis added).

This Court in *Drury* defined the Supremacy Clause immunity test under constitutional principles of balancing state sovereignty with federal law enforcement. *Id.* at 11. (finding that federal courts ought not interfere with state prosecution except under exceptional facts that justify federal supremacy). The *Drury* Court held that disputed facts related to the soldier’s immunity defense must be decided by the state court, regardless of his federal duty to pursue and arrest the suspect. *Id.* The Thirteenth Circuit claims that Agent Schrader is not entitled to immunity because evidence supports inferences that he acted “with some criminal intent.” But this Court demonstrated in *Drury* that a Supremacy Clause immunity defense turns on conflicting evidence of the objective facts, rather than a subjective analysis of the federal agent’s personal motive. 200 U.S. 1. Therefore, Judge Hamlin correctly stated that, “the Supreme Court has repeatedly emphasized the need for objective analysis of officers’ conduct.” Pet. App. 22a.

This Court’s decision in *Drury* affirmed that immunity under the Supremacy Clause does not preclude state prosecution of a federal agent where questions of fact arise from an objective analysis of disputed evidence. 200 U.S. at 8. More importantly, this Court in *Drury* held that “[t]he Circuit Court was not called on to determine the guilt or innocence of the accused,” even if the soldier had to pursue and arrest the suspect. 200 U.S. at 8. In this respect, the Thirteenth Circuit is correct that the Supremacy Clause

does not “wholly forbid[] scrutiny of the officer’s use of force.” Pet. App. 12a, n7. But the majority’s decision requires assuming that Agent Schrader arrested Mr. White to “satisfy a personal problem.” Pet. App. 11a. As a result, the majority’s application of the test governing Supremacy Clause immunity directly conflicts with this Court’s guidance in *Drury*. Furthermore, this Court in *Drury* did not incorporate analysis on the soldier’s subjective intent in shooting the suspect. Instead, this Court acknowledged the soldier’s legal duty under federal law to arrest the suspect then denied immunity based on disputed facts unrelated to his personal motive. The Thirteenth Circuit therefore either misunderstood or misapplied the test governing Supremacy Clause immunity where the majority incorporated subjective analysis of Agent Schrader’s intent when denying him federal immunity.

C. Viewing evidence under an objective standard prevents excessive disruption of government function.

Supremacy Clause immunity prevents excessive disruption of federal government operations where state and federal laws compete. This Court held in *Johnson v. Maryland* that the Supremacy Clause prevents states from disrupting government functions. 254 U.S. 51, 55 (1920). In *Johnson*, a post office employee who drove a mail truck without a state driver’s license was dismissed from state prosecution because the state required that he follow more stringent rules than the federal law directed. *Id.* at 57. The *Johnson* Court determined that the postal worker acted within the scope of his federal duty to deliver mail because he was driving a federal truck on a federal postal route. *Id.* at 56. (citing *Thomas*, 173 U.S. at 283). The *Johnson* Court also found that the state violation occurred while the postal worker performed his federal duty which

the government found him competent to complete. *Id.* at 57.

This Court commenced analysis acknowledging that state and federal laws do not compete where a federal employee's conduct is not in the "course of his employment." *Id.* at 56. By establishing this threshold, the *Johnson* Court upheld state sovereignty and permitted states to prosecute federal officers who violate local laws, generally. *Id.* Yet, even after acknowledging the state's interest, the *Johnson* Court reaffirmed federal supremacy and cited *Neagle* for additional substantiation. *Id.* at 56-57 ("even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States").

Following the Court's decision in *Neagle*, federal courts consistently applied the two-prong test as leading precedent on granting Supremacy Clause immunity. *Hatch, supra* at 269. That said, this Court has not decided a case on Supremacy Clause immunity since *Johnson v. Maryland*, leaving development of the test to the discretion of the lower federal courts for over a century. *Livingston*, 443 F.3d at 1220.

D. Modern federal courts view an agent's subjective belief about his conduct under an objective standard.

Modern federal courts progressively deviated from this Court's solely objective analysis by incorporating an unsubstantiated subjective component. *Livingston*, 443 F.3d at 1221 (rejecting a subjective intent threshold because "most circuit courts have adopted the subjective element without analysis"). For example, in *Brown v. Cain*, the District Court of Eastern Pennsylvania applied a subjective element when granting immunity to a

temporary guard in the Coast Guard who shot and killed a man during a riot. 56 F. Supp. 56, 58-59 (E.D. Pa. 1944) (Brown fired his gun at Mr. Giddings for allegedly throwing a brick that hit Brown in the back of his head). The court cited *Drury v. Lewis*, holding that Brown's conduct was protected under the circumstances because he reasonably believed under the circumstances that Mr. Giddings threw the brick, and he accidentally fired a fatal shot while Mr. Giddings fled. *Id.* at 59.

The court in *Brown* completed a fact-intensive analysis and applied the *Neagle* test almost verbatim, until analyzing whether Brown "honestly believed that the arrest was necessary." *Id.* at 59. The court applied the following test, which fully diverged from the objective standard established by this Court:

The inquiry must, therefore, be as to the honesty of the relator's belief that the arrest was justified and that the shooting was reasonably necessary to accomplish it. As in all cases where intent is involved, 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 relator's testimony as to his motives and belief would have to be disregarded.

Id. at 58.

Eventually, most federal courts applied the two-part test established in *Neagle* with an ancillary subjective analysis of whether the agent reasonably believed his conduct was necessary and proper under the circumstances. *See Long*, 837 F.2d at 745-46, (explaining that the fundamental elements include both a subjective side that "the agent must have an honest belief that his action was justified."), *but see Livingston*, 443 F.3d at 1221 (expressing concern over the incorporation of a subjective

intent factor by modern federal courts because this element was not present in Supreme Court decisions based on Supremacy Clause immunity). Lower federal courts, however, generally included the subjective component with harmless error as the holdings continued to preserve constitutional principles of Supremacy Clause immunity. *See Long*, 837 F.2d at 752 (granting immunity to a federal agent after applying a subjective and objective analysis to the agent's belief that his conduct was necessary and proper).

E. The test governing Supremacy Clause immunity ensures protection for federal agents where their conduct does not violate clearly established federal law.

Supremacy clause immunity protects a federal agent who discharges a federal duty within the confines of federal law, even where his conduct violates state laws. *Neagle*, 135 US at 76. This Court in *Harlow v. Fitzgerald* applied an objective legal reasonableness standard to the qualified immunity doctrine which reflects the rationale demonstrated in *Neagle*. Whereas the *Neagle* test protects a federal agent when his conduct violates state law, the qualified immunity doctrine protects a federal agent when his conduct violates a citizen's constitutional right. Although applied under different circumstances, these immunities reach the same goal: *to protect a federal agent from liability when he acts under federal authority to enforce federal laws*.

This Court abandoned the subjective component from a federal immunity defense in *Harlow v. Fitzgerald*, finding subjective analysis incompatible with constitutional principles. 457 U.S. at 815–16; *Livingston*, 443 F.3d at 1221. (finding that rejecting a subjective element of the Supremacy Clause immunity test may be appropriate,

“[j]ust as the Supreme Court jettisoned the subjective element of the qualified immunity test because it was incompatible with the goal of promptly determining whether qualified immunity was appropriate on a motion for summary judgment, *Harlow*, 457 U.S. at 815–819”). Similarly, the *Neagle* Court applied the same analysis when it justified marshal Neagle’s conduct. (finding that he acted under federal law and his conduct was justified in fulfilling his obligatory federal duty). The *Harlow* Court, in seeking this goal, abandoned the subjective element, finding an objective legal reasonableness standard most compatible with Supremacy Clause principles.

In *Harlow*, two Government officials were indicted for conspiracy when the Air Force dismissed Fitzgerald to improve government efficiency. *Id.* at 804. The parties disputed facts related to the defendants’ subjective intent, requiring a jury trial which prevented the court from granting immunity. *Id.* at 805–06. The *Harlow* Court recognized that lower federal courts were overwhelmed with qualified immunity cases because the subjective element of a good-faith defense inherently led to resolution by jury. *Id.* at 817, n.29. (“It is not difficult for ingenious plaintiff’s counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker’s mental processes are involved.”). Finding this activity abusive, This Court found these proceedings abusive. *Id.* Yet a similar tactic was implemented when the State alleged Agent Schrader improperly discharged his duties as a federal agent because he was on vacation. This factor does not limit Agent Schrader’s authority to enforce federal laws under law, statute, or Constitution. Therefore, the district court properly refutes the State’s argument, concluding this factor was “irrelevant to the immunity analysis” because

work leave does not preclude a federal agent from performing his duty under federal law. Likewise, the test applied by the district court correctly implemented an objective standard that reflected the goals achieved by the *Harlow* Court.

The *Harlow* Court established a verifiable standard that federal agents are immune from liability when 1) they act under federal authority and 2) their conduct does not violate clearly established federal law. Based on these factors, the Thirteenth Circuit incorrectly states that Supremacy Clause immunity and qualified immunity only share in common the word “immunity.” Pet. App. 12a. *See Livingston*, 443 F.3d at 1221. (explaining that “[b]oth qualified immunity and Supremacy Clause immunity reduce the inhibiting effect that a civil suit or prosecution can have on the effective exercise of official duties. . .”). The Court explained that objective legal reasonableness requires federal agents to abide by federal laws which he knows or should have known, providing “no license to lawless conduct” while ensuring constitutional protection from liability. Although Agent Schrader’s claim is not governed under qualified immunity, the district court applied the principle set forth by the *Harlow* Court to provide a predictable measure. In doing so, the district court vindicated the *Harlow* Court’s decision where the subjective component of the qualified immunity doctrine was rendered incompatible with Supremacy Clause principles. *See Harlow*, 457 U.S. at 815.

The *Harlow* Court reasoned that objective legal reasonableness strikes a balance between granting absolute immunity for federal agents and eliminating excessive disruption of government due based on mere allegations. For this reason, the objective legal reasonableness standard promotes collaboration between

state and federal law enforcement, establishing a verifiable standard where federal agents face conflicting laws. Historically, qualified immunity and Supremacy Clause immunity relate to different claims. Whereas Supremacy Clause immunity applies to a federal agent facing state criminal prosecution, qualified immunity applies specifically to cases related to civil liberty. Both tests ensure protection to federal agents under the Supremacy Clause. Most notably, this Court incorporated an objective standard to each, avoiding state interference of federal authority. Therefore, the district court appropriately alluded to the principles of the qualified immunity doctrine when deciding that an objective standard applies to Agent Schrader's motion to dismiss.

The test governing Supremacy Clause immunity aligns with the rationale applied in *Harlow* when the Court abandoned the subjective element which inherently requires a jury trial. More specifically, the *Harlow* Court limited the test so questions related to the agent's conduct are resolved when federal law proves the agent knew or should have known his conduct clearly violated established law. Based on the Court's analysis in *Neagle*, the same objective standard applies in the test governing Supremacy Clause immunity. The Thirteenth Circuit raises the issue that Agent Schrader was objectively unreasonable because he tackled Mr. White on the sidewalk when detaining him. Pet. App. 11a. But this conclusion requires the court to incorporate a subjective element that defeats constitutional principles of federal supremacy. Under this standard, Agent Schrader must obtain permission from the state before enforcing federal law, a proceeding that defeats the purpose of the Supremacy Clause altogether. For this reason, the Supremacy Clause immunity test must be applied under an objective standard that protects

federal agents who act under clearly established federal law.

III. Agent Schrader's motion to dismiss must be granted to uphold the constitutional underpinnings of the Supremacy Clause.

Agent Schrader's motion to dismiss must be granted to uphold the legal underpinnings established by the Supremacy Clause. The purpose of Supremacy Clause immunity is to protect federal officers from the chilling effect of state prosecution in the exercise of their official duties. By resolving disputed factual issues during a pretrial motion, the district court protects federal officers from state prosecutorial malice and reduces unnecessary litigation by dismissing baseless claims. This Court incorporated an objective standard as the touchstone of the test governing Supremacy Clause immunity. The *Neagle* Court and the *Harlow* Court both applied an objective standard that appropriately measures whether a federal agent's conduct is necessary and proper based on a verifiable standard. This objective approach balances federal supremacy principles with an abuse of federal power. In this case, the district court upheld this Court's decision in *Neagle* when it applied the test under an objective standard, referencing the objective legal reasonableness standard attached to the qualified immunity doctrine.

Agent Schrader acted under federal authority as an FBI agent when he arrested Mr. White for violating federal drug laws. The record does not present conflicting evidence that would lead to opposing results in determining whether federal immunity protects Agent Schrader. The State cannot oppose a motion to dismiss based on immunity by presenting bare allegations of malicious conduct and demand the trial court accept these allegations as true.

More importantly, undisputed facts prove that Agent Schrader acted within the scope of his duty and his conduct was necessary and proper in performing that duty. The Thirteenth Circuit raises the issue that Agent Schrader acted under personal motive and his conduct was objectively unreasonable when he tackled Mr. White on the sidewalk. These findings are not supported by undisputed evidence. Even if Agent Schrader erred in arresting Mr. White because he did not violate state law, Supremacy Clause immunity protects Agent Schrader because he acted pursuant to enforcing federal laws. *See Clifton*, 549 F.2d at 727 (emphasizing that errors of judgment will not create criminal responsibility of a federal officer). If the trial court was powerless to decide issues of fact in a pretrial motion, the immunity doctrine would be destroyed by preventing the court from dismissing baseless claims and requiring federal officers to be dragged into state court for fulfilling their legal duties.

The parties agree Agent Schrader did not violate clearly established federal law despite overzealously performing his duty. Because Agent Schrader acted reasonably according to law, statute, and Constitution; and he acted pursuant to his obligatory duty, the Supremacy Clause protects him from criminal prosecution. The Supremacy Clause binds every judicial forum throughout the United States under the authority of this Court. U.S. Const. art. VI, cl. 2.; *Cook v. Moffat & Curtis*, 46 U.S. 295, 308 (1847). Therefore, the Thirteenth Circuit erred when it denied Agent Schrader's motion to dismiss by deciding issues of fact in ruling on the motion and incorrectly applying the test that governs Supremacy Clause immunity. If the majority correctly incorporated a subjective element to the Supremacy Clause immunity test, federal agents across the United States will have to decide the reasonableness of

the laws they must enforce. This standard conflicts with the constitutional principle that federal agencies, under the executive branch, enforce federal laws rather than make the law or judge the law. A subjective element inadvertently obligates a federal agent to determine which laws he should enforce without risk of state prosecution, making it incompatible with a Supremacy Clause immunity defense. Because an objective standard best protects constitutional principles, the Thirteenth Circuit should be overturned and the District Court's order granting Agent Schrader's motion to dismiss should be affirmed.

CONCLUSION

The judgement of the court of appeals should be reversed.

Respectfully submitted.

TEAM NO. 22
Attorneys for Petitioner

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