No. 18-5188

IN THE

Supreme Court of the United States

OCTOBER TERM 2019

SCHRADER, HANK,
Petitioner,

v.

THE STATE OF NEW TEJAS
Respondent.

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

BRIEF FOR THE RESPONDENT

TEAM NUMBER 23
COUNSEL FOR RESPONDENT

NOVEMBER 18, 2019

QUESTIONS PRESENTED

I. Under Rule 12 of the Federal Rules of Criminal Procedure which confines dismissal to defenses that can only be determined without a trial on the merits, do courts view the facts in the light most favorable to the non-moving party when a defendant moves to dismiss based on a Supremacy Clause immunity defense?

II. Given the substantial differences in the policies and functions undergirding the two defenses, is it appropriate to wholesale duplicate the test for qualified immunity into the context of Supremacy Clause immunity?

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The Thirteenth Circuit Court of Appeals' decision is available at No. 18-5719 and reprinted at Record 1a. The District Court's decision is available at No. 17-cr-5142 and reprinted at Record 27a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Thirteenth Circuit was entered on October 2, 2018. The petition for writ of certiorari was timely filed and granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

This action implicates the balance between Article VI of the Constitution and the Tenth Amendment. Respondent removed this action under section 1442 of title 28 of the United States Code. As an agent of the Federal Bureau of Investigation, any federal authority granted to Petitioner derives from section 3052 of title 18 of the United States Code. The following are also restated in the Appendix.

The relevant portion of Article VI of the Constitution provides:

> 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.

The Tenth Amendment provides:

> 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.

The applicable portion of 28 U.S.C. § 1442 provides:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of

the United States for the district and division embracing the place wherein it is pending:

> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

18 U.S.C. § 3052 provides:

> The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

STATEMENT OF THE CASE

Federal officers rarely encounter circumstances that require a violation of state law to enforce federal law. More than a century ago, the Supreme Court recognized a defense to state criminal proceedings premised on the Supremacy Clause for a portion of those rare instances. The procedure and substance of that defense lay undisturbed until recently, when the Ninth and Tenth Circuits contemplated breaking ranks. Agent Schrader raised the Supremacy Clause immunity defense to assault and aggravated assault charges brought by the State of New Tejas and founded it on these baseless arguments, seeking to disturb a consistent application of the test this Court presented more than a century ago. This Court should affirm the decision of the Thirteenth Circuit Court of Appeals and hold that: (I) courts must view the facts in the light most favorable to the non-moving party when deciding a Rule 12 motion to dismiss based on the Supremacy Clause, and (II) a federal officer is only entitled to Supremacy Clause immunity to a state criminal prosecution in the limited circumstances that the Thirteenth Circuit correctly articulated.

I. Factual Background

A. Mr. White is a leader within the Madrigal community and Hank Schrader is a special agent of the Federal Bureau of Investigation.

Mr. White is a leader in the Madrigal community of New Tejas. Record at 32a. In 2016, New Tejas passed a well-publicized ballot measure making possession and consumption of marijuana legal under New Tejas state law. R. at 30a. Mr. White played an instrumental role in rallying support for the legislation. R. at 32a.

Defendant Hank Schrader is an agent of the Federal Bureau of Investigation, currently posted in Wisconsin. R. at 28a. Agent Schrader has twenty years of experience investigating racketeering, wire fraud, money laundering, and kidnapping. R. at 28a. Agent Schrader has no personal experience with the enforcement of federal drug laws. R. at 28a. Agent Schrader's personnel file includes several commendations, along with multiple unsustained complaints of excessive force and disciplinary action for reckless discharge of a firearm. R. at 28a.

B. Agent Schrader instigated a heated exchange with Mr. White following a traffic dispute.

Agent Schrader recently married and decided to take his new wife and her children on a honeymoon. R. at 28a. The family's trip to Madrigal, New Tejas, was unrelated to any of Agent Schrader's official duties. R. at 28a.

On November 8, 2016, while on that family vacation, Agent Schrader slammed on his brakes to avoid a collision with the truck in front of him. R. at 29a. The truck was driven by Mr. White. R. at 29a. Each party disputes the details of the near accident. R. at 29a. Regardless, both admit to the subsequent events. R. at 29a.

Once both vehicles reached the stoplight, Agent Schrader exited his vehicle and angrily approached Mr. White. R. at 29a. In turn, Mr. White left his vehicle to confront Agent Schrader. R. at 29a. Agent Schrader yelled at Mr. White, who then shoved Agent Schrader in the chest. R. at 29a. Mrs. Schrader stated that Agent Schrader, in retaliation, drew back his arm, likely to punch Mr. White. R. at 29–30a. However, right then, the light turned green and both Mr. White and Agent Schrader returned to their vehicles. R. at 30a.

C. Agent Schrader severely injured Mr. White while arresting him for possession of marijuana in a second encounter just hours later.

Just hours after the traffic confrontation, Agent Schrader encountered Mr. White yet again. R. at 31a. Agent Schrader and his family had just finished touring the local New Tejas Natural History Museum and sought lunch in downtown Madrigal. R. at 30a. While walking along the boulevard, Agent Schrader saw Mr. White step out of a licensed marijuana dispensary fifteen feet ahead, carrying a small bag of marijuana. R. at 31a. While marijuana continues to be a Schedule I drug under federal law,[1] Mr. White's purchase and possession of the marijuana fully complied with the well-publicized New Tejas law. R. at 30a.

Once Agent Schrader saw Mr. White exit the building, he immediately yelled, "Stop! You're under arrest!" R. at 31a. Agent Schrader began running towards Mr. White, and in turn, Mr. White began to run the other way. R. at 31a. With heavy physical force, Agent Schrader tackled Mr. White, landing atop him and forcing him onto the concrete sidewalk. R. at 31a. In doing so, Agent Schrader broke Mr. White's arm and chipped several of his teeth. R. at 32a. Agent Schrader proceeded to handcuff and arrest Mr. White. R. at 31a.

In the meantime, the owner of the dispensary called 9-1-1. R. at 31a. Local New Tejas police arrived but did not impede Agent Schrader once he identified himself as an FBI agent. R. at 31a. Due to his injuries, an ambulance carried Mr.

[1] *See* 21 U.S.C.A. § 802 (West Supp. 2019); 21 U.S.C.A. § 812 (West Supp. 2019); 21 U.S.C. § 844 (2012).

White to the hospital for medical treatment. R. at 32a. Ultimately, Mr. White was not charged with any crime. R. at 32a.

II. Procedural Background

Following the second altercation, the Madrigal community protested the actions of Agent Schrader. R. at 32a. The community was outraged that Agent Schrader injured Mr. White, despite Mr. White's compliance with New Tejas law. R. at 32a. Shortly thereafter, the State of New Tejas indicted Agent Schrader for assault and aggravated assault.[2] R. at 33a. Agent Schrader removed the case to federal court pursuant to 28 U.S.C. § 1442.[3] R. at 33a. Once in federal court, Agent Schrader asserted that the Supremacy Clause afforded him immunity to the state criminal proceeding and moved to dismiss the indictment under Rule 12(b) of the Federal Rules of Criminal Procedure. R. at 34a.

The United States District Court for the District of New Tejas held an evidentiary hearing, issued findings of fact and conclusions of law, and granted Agent Schrader's motion to dismiss the indictment. R. at 37a–41a. The State of New Tejas appealed to the United States Court of Appeals for the Thirteenth Circuit, challenging the dismissal of the indictment. R. at 3a. The Thirteenth Circuit reversed the District court, holding (1) the court must view the facts in the light most favorable to the State, R. at 8a; (2) the arrest of Mr. White was not "necessary" to

[2] The State charged Agent Schrader with violations of Sections 22.01 and 22.02 of the Penal Code of New Tejas. The parties do not dispute that Mr. White's injuries constitute "serious bodily injury" as required by Section 22.02. R. at 33a n.4.

[3] It is notable that Agent Schrader is represented by private counsel as the federal government has taken no position as to whether Supremacy Clause immunity affords him a shield from liability. R. at 34a n.5.

accomplish Agent Schrader's duties, R. at 9a; (3) Mr. White's arrest was not subjectively "proper," R. at 10a; (4) Mr. White's arrest was not objectively "proper," R. at 11a; and thus, (5) Agent Schrader was not entitled to immunity, R. at 8a–9a. Agent Hank Schrader petitioned this Court for review, and this Court subsequently granted certiorari. Because the issues presented are questions of law, the standard of review is *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF ARGUMENT

A century of jurisprudence, first established by this Court, recognizes the need for federal officers to enforce federal laws, subject, however, to various limitations. The restrictions to *carte blanche* immunity for federal officers represent an attempt to balance the need for federal enforcement of federal laws with the established principles of federalism. Viewing the facts in the light most favorable to the state and properly applying the *Neagle* test effectively and delicately balance these competing interests.

An immunity defense may be raised pretrial under Rule 12(b) of the Federal Rules of Criminal Procedure. A court may grant a motion to dismiss based on immunity early in the proceedings, but only when the determination does not evolve into a trial on the merits. When the parties dispute the facts, and the facts are material to the federal officer's defense of Supremacy Clause immunity, the court must view the facts in the light most favorable to the non-moving party (the State). Such disputed facts should be reserved for a jury determination and the court must not decide their merits pretrial. Any pretrial decision of the disputed material facts

frustrates the plain language of Rule 12(b), violates precedent, and would abridge the Sixth Amendment.

Supremacy Clause immunity is not equivalent to absolute immunity or qualified immunity. Because it encroaches on the states' interests to enforce their own laws and is implicated in a criminal action, the proper test requires a narrower application than those defenses relevant in civil actions. This Court laid the foundation for the proper test well over one hundred years ago in *Cunningham v. Neagle*. Courts consistently and seamlessly applied the test until this Court altered the elements of qualified immunity. A few courts then erroneously equated Supremacy Clause immunity with qualified immunity, and confusion ensued. Despite these few courts' error, the test remains the same. Supremacy Clause immunity is only proper when: (1) a federal officer, (2) required by federal law to perform an act, (3) does no more than what the officer subjectively believed was necessary and proper to perform his duties, and (4) that belief was objectively reasonable under the circumstances. At worst for Agent Schrader, he is not entitled to immunity as a matter of law, and at best a jury must decide the issue.

ARGUMENT

The Thirteenth Circuit Court of Appeals correctly held that disputed facts must be viewed in the light most favorable to the State. Upon indictment by a state court and pending criminal prosecution, federal officers occasion to remove their cases to federal court and seek immunity under the Supremacy Clause defense. Procedurally, courts will grant or deny the motion to dismiss depending on the

relevance of the disputed facts. When the facts underlying the defense are genuinely disputed by the parties, the court must assume the facts alleged by the state are true. Petitioner erroneously argues that a court may adjudicate the facts at this pretrial juncture, contrary to the purpose and practical application of Rule 12. This Court should apply the plain meaning of Rule 12 and affirm the Thirteenth Circuit Court of Appeals' ruling that the facts must be viewed in the light most favorable to the State.

The Thirteenth Circuit Court of Appeals also correctly held that Supremacy Clause immunity intends to protect federal officers acting according to their federal duties, both reasonably and subjectively. It requires a narrow application because it intrudes on the rights of the states to exercise their powers to enforce state law and protect their citizens. Petitioner seeks to revolutionize the test and expand it to near *carte blanche* immunity. This Court should reinforce the narrower application of Supremacy Clause immunity and end the manufactured confusion within the courts by distinguishing it from qualified immunity.

I. The Court of Appeals correctly determined that courts must view the facts in the light most favorable to the non-moving party when deciding a Rule 12 motion to dismiss under the Supremacy Clause.

Rule 12(b) of the Federal Rules of Criminal Procedure allows 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). Four circuits have addressed the discrete question of correct procedure under Rule 12(b) when dealing with a motion to dismiss involving the Supremacy Clause. Three courts of appeals affirmed this Court's precedent that, in the context of a motion to dismiss, courts must view

the facts in the light most favorable to the non-moving party and evade a pretrial determination. *See Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n.16 (1952).

The only outliner is the Ninth Circuit Court of Appeals. In a null plurality opinion, four out of eleven judges held that it was appropriate for courts to have a trial on the merits and determine the facts when reviewing the motion to dismiss. *Idaho v. Horiuchi*, 253 F.3d 359, 374 (9th Cir.) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001). In doing so, the Ninth Circuit controverted the plain meaning of Rule 12(b), which limits defenses to those where direct factual determinations are unnecessary. While immunity under the Supremacy Clause is meant to protect from prosecution, the conditions attached to Supremacy Clause immunity demonstrate the protection is not absolute. *Id.* at 376. Instead, whether an individual is entitled to those protections is conditional, and constitutes a mixed question of fact and law. When those facts are in dispute, as they are here, the only appropriate action for courts is to deny the motion to dismiss—something the Ninth Circuit acknowledges in the very opinion that runs counter to Rule 12. *Id.* at 367.[4] Any holding to the contrary violates the plain language of Rule 12, abridges the Sixth Amendment, and cuts against a century of procedural precedent.

[4] The court frames the inquiry correctly, stating the district court may only grant the motion to dismiss if the facts supporting the immunity defense are not in dispute. *Idaho v. Horiuchi*, 253 F.3d 359, 367 (9th Cir.) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001). The court further clarified that when facts are in dispute, the non-moving party must be given the benefit of all doubts. *Id.* Curiously, the court later enables the district court to determine the evidence and decide the agent's entitlement to immunity. *Id.* at 378. While the court properly laid out the framework for the inquiry, it failed in its application.

A. The Court of Appeals correctly applied the plain language of Rule 12, which requires facts be viewed in the light most favorable to the non-moving party regardless of defensive theory.

Rule 12 provides an opportunity for defendants to raise determinable defenses pretrial. Fed. R. Crim. P. 12(b). Since Rule 12(b)'s inception, immunity has been one of the contemplated defenses that falls under the rule. *Kentucky v. Long*, 837 F.2d 727, 750 (6th Cir. 1988). The plain language of Rule 12 provides that "a party may 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). This Court narrowly defines a defense that is dependent on facts as "capable of determination" when facts relevant to the offense do not assist in deciding the validity of the defense. *United States v. Covington*, 395 U.S. 57, 60 (1969). The definition was not a revolutionary statement, as it aligned with established precedent. Less than twenty years earlier, this Court affirmed a Third Circuit ruling to reinstate indictments despite arguments by the criminal defendant that it could not practicably avoid the offense. *Boyce Motor Lines*, 342 U.S. at 343. This Court explained that the argument by the criminal defendant was a matter for proof at trial and up to the jury to decide. *Id.* Furthermore, this Court answered the question clearly: "It should not be necessary to mention the familiar rule that, at this stage of the case, the allegations of the indictment must be taken as true." *Id.* at n.16.

i. The courts of appeals uniformly accept the facts alleged by the non-moving party as true.

The United States Court of Appeals for the Second Circuit applied this very precedent when the State of New York indicted a federal agent of the Drug

Enforcement Agency after he killed a cocaine dealer and firearms trafficker. *New York v. Tanella*, 374 F.3d 141, 142–43 (2d Cir. 2004). In the course of an arrest and during a physical struggle, the agent shot and killed the criminal dealer. *Id.* Similar to the case at hand, the state indicted the federal agent, who removed the case to federal court and asserted an immunity defense. *Id.* The court appropriately viewed the presented "evidence in the light most favorable to the State and [assumed] the truth of the allegations in the indictment." *Id.* at 148.[5]

The Sixth Circuit and Tenth Circuit have also followed suit. *See Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006) (holding Supremacy Clause immunity dismissals are a mixed question of law and fact and 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"); *see also Long*, 837 F.2d at 752 (holding genuine factual issues in dispute prevent prompt sustaining of an immunity defense under the Supremacy Clause).

In the vacated *Horiuchi* decision, the Ninth Circuit found material questions of fact were genuinely disputed and reversed the district court's dismissal of the case. *Horiuchi*, 253 F.3d at 374. The court, unnecessarily and in dictum, proceeded to ask whether the judge or jury should resolve the factual issues. *Id.* The court inaccurately stated that little guidance existed regarding the question. *Id.* Nonetheless, the first case the court referred to stated that if facts were in dispute,

[5] The court concluded that the disputed facts did not impact the issue of immunity and dismissed the indictment. *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004). Nonetheless, the court applied the appropriate test and found that no genuine issue of material fact existed. *Id.* at 148.

"the court would let the . . . jury decide them." *Id.* at 374–75 (quoting *United States v. Lipsett*, 156 F. 65, 71 (W.D. Mich. 1907)). Despite the direct answer, the court elected to deviate and claim that a jury would be easily confused while a judge was well equipped to make the necessary factual findings. *Horiuchi*, 253 F.3d at 375–76. The rationale of the Ninth Circuit was not only improper, but grossly undermined precedent and the Sixth Amendment. Regardless of the error, the Ninth Circuit vacated the opinion as moot.

ii. *A court should grant a motion to dismiss based on Supremacy Clause immunity only if the parties do not dispute the facts relevant to the defense.*

Neither party disputes the notion that a court may grant a motion to dismiss an indictment when no facts are disputed. However, such a statement is drastically different from Petitioner's argument that a judge may determine the facts pretrial. Record at 4a. The United States District Court for the Western District of Texas correctly synthesized both rules. *See Texas v. Kleinert*, 143 F. Supp. 3d 551, 557 (W.D. Tex. 2015), *aff'd*, 855 F.3d 305 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 642 (2018). In *Kleinert*, an FBI agent killed a suspected bank robber and was later indicted by the State of Texas for murder. *Id.* at 555. The agent removed to federal court and similarly raised a defense of Supremacy Clause immunity. *Id.* In laying out the procedural framework of the case, the court stated that the evidence in a motion to dismiss an indictment should be viewed in the light most favorable to the state, and the motion to dismiss should be granted only if the facts relevant to the defense are

not in dispute. *Id.* at 557. The two rules do not counteract each other. *Id.* Instead, as demonstrated by the court's analysis, they work together.[6]

Agent Schrader disputes facts that are indeed relevant and underly the defense of Supremacy Clause immunity. Namely, the parties disagree over the reasonableness of Agent Schrader's conduct in addition to his subjective intentions. R. at 37a–41a. The Ninth Circuit itself said, in an opinion that purports to allow judges to determine facts under a Rule 12(b) motion, "the district court may grant the motion [to dismiss] only if the facts supporting the immunity claim are not in dispute." *Horiuchi*, 253 F.3d at 367. Because the parties dispute genuine facts that are material to Agent Schrader's immunity defense, the allegations of the indictment must be taken as true.

iii. Mere allegations do not suffice, but genuinely disputed factual allegations preclude pretrial disposition of the case for the purposes of immunity.

Furthermore, the concern that mere allegations would bar immunity if facts were viewed in the light most favorable to the state is simply unfounded. The United States Court of Appeals for the Tenth Circuit addressed the concern that mere allegations would prevent application of an immunity defense. In *Wyoming v. Livingston*, the Tenth Circuit held that once a defendant raises a Supremacy Clause immunity defense, the burden shifts to the state to point to a *genuine* factual issue,

[6] The court, after viewing the facts in the light most favorable to the state, found that the facts provided "no assistance in determining the validity of the [immunity] defense," were not in material dispute, and thus could be determined pretrial. *Texas v. Kleinert*, 143 F. Supp. 3d 551, 557 (W.D. Tex. 2015), aff'd, 855 F.3d 305 (5th Cir. 2017), cert. denied, 138 S. Ct. 642 (2018). The court later elected to hold an evidentiary hearing and both parties signed and filed a "limited Waiver of Jury Trial," waiving any right to have certain factual issues decided by a jury. *Id.* at 558.

supported by more than a mere allegation. 443 F.3d at 1226. As a result, mere allegations are never sufficient to defeat immunity. *Id.* Instead, the state must point to facts with an evidentiary basis. The plain language approach simply requires that a court avoid determination of a defense if the facts underlying the defense are disputed. Fed. R. Crim. P. 12(b). A mere allegation is not based on fact and would not prevent courts from granting motions to dismiss under the Supremacy Clause. But if facts supporting an allegation exist, and are disputed, the court should view such alleged facts in the light most favorable to the non-moving party, which is consistent with the plain language interpretation of the Rule.

iv. Similar underlying rationale does not justify replacing Rule 12 procedure with habeas procedure.

Citing *Morgan v. California*, both Petitioner and Judge Hamlin argue that it is appropriate for a judge to determine disputed facts despite the ultimate holding of *Morgan* that the district court abused its discretion by determining disputed facts. 743 F.2d 728, 733–34 (9th Cir. 1984); R. at 17a. In *Morgan*, two federal officers petitioned for a writ of habeas corpus to enjoin a pending state court criminal proceeding. *Morgan*, 743 F.2d at 730. The Ninth Circuit held that the district court abused its discretion by determining disputed facts. *Id.* at 734. In dicta, the Ninth Circuit commented that if the district court believed, after an evidentiary showing, that the sole purpose of the state criminal proceeding was to frustrate the enforcement of federal law, the district court could resolve disputed facts to rule on the petition for habeas. *Id.* at 733.

Petitioner conflates the true statement that principles of Supremacy Clause immunity apply to habeas and Rule 12(b) motions, with the inaccurate statement that habeas procedural standards should apply to rule 12(b) motions when the rationale underlying the arguments is the same. Most glaringly, there is no jury in a habeas proceeding. *See* 28 U.S.C. § 2243 (2012) ("The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.") The only facts for the Court to determine in a habeas proceeding are whether imprisonment of an individual is valid, not whether an individual is guilty of a crime, which is effectively what Petitioner asks this court to let judges decide. 28 U.S.C. § 2241 (2012); *see also Horiuchi*, 253 F.3d at 379 ("Neither is collateral to a defendant's guilt. Rather, both go directly to the question whether the defendant's conduct is, or can be, criminal under the law of the prosecuting authority.").

In what is a supreme display of irony, Judge Hamlin cites *New York v. Tanella* as supporting the proposition that habeas principles under *Morgan*—which allow courts to determine disputed facts in very narrow circumstances—extend to Rule 12(b) when in fact *New York v. Tanella* cites *Morgan* as standing for the proposition that federal agents are not entitled to immunity when facts are disputed. R. at 17a; *Tanella*, 374 F.3d at 149. *New York v. Tanella* does state that immunity principles apply equally in habeas and Rule 12(b) settings while expressly holding that disputed facts must be viewed in the light most favorable to the non-moving party when reviewing a motion to dismiss based upon immunity. *Id.* at 148, 149 n.1. It is clear that the *Tanella* court did not believe there was some immunity principle which

allowed courts to determine disputed facts, and therefore it does not support Petitioner's argument that habeas procedural standards should control a Rule 12(b) motion to dismiss.

v. Viewing the facts in the light most favorable to the non-moving party provides a proper balance between both state and federal interests.

By viewing the facts in the light most favorable to the state, a federal officer is not precluded from satisfying the elements of the immunity defense. *See Livingston*, 443 F.3d at 1230; *Tanella*, 374 F.3d at 152; Texas v. Kleinert, 143 F. Supp. 3d at 569; *Colorado v. Nord*, 377 F. Supp. 2d 945, 951 (D. Colo. 2005). If the facts underlying the immunity defense are not disputed by the parties, then a court may grant a motion to dismiss. Texas v. Kleinert, 143 F. Supp. 3d at 557. In other words, an officer can receive immunity from trial if the uncontroverted facts provide the officer with a right to immunity. *State v. Kleinert*, 855 F.3d 305, 320 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 642 (2018). However, by avoiding a determination of the facts pretrial, the court can similarly serve the state's interest. When the facts are in dispute, it is necessary for the court to defer adjudication of those facts for the jury.

The federal officer removal statute also accounts for the federal government's interests. *See* 28 U.S.C. § 1442 (2012). When a federal officer is prosecuted in state court, the officer may remove the case to a federal forum. *Id.* The option for removal neutralizes claims that the state will take hostile action against the officer, as the federal court levels the playing field. *Mays v. City of Flint*, 871 F.3d 437, 448 (6th Cir. 2017).

Viewing the facts in the light most favorable to the state also balances the federalism concerns implicated by the Supremacy Clause. Because the Supremacy Clause limits a state's ability to protect its citizens, and removal statutes effectively dictate that states must prosecute allegedly criminal federal actors in federal forums, decisions regarding immunity under the Supremacy Clause implicate federalism concerns. No one seriously disputes that federal law trumps state law when the two are in direct conflict. *See* U.S. Const. art. VI, cl. 2. But the Supremacy Clause does not grant immunity to a federal officer when he does not act in pursuance of federal law. *U.S. ex rel. Drury v. Lewis*, 200 U.S. 1, 8 (1906). By viewing the facts in the light most favorable to the state, courts strike the correct balance between a state's interest in protecting its citizens and the federal government's interest in protecting its agents charged with carrying out federal law.

B. The Sixth Amendment's guarantee to a trial by jury extends to factual disputes that are material to an immunity defense.

Juries are a staple of the American judicial process and play a vital role in deciding the facts of a case. *United States v. Bailey*, 444 U.S. 394, 414 (1980). Likewise, judges have always been entrusted with ensuring juries hear the right information for a full disposition of the case. *Id.* at 416. Judges decide threshold issues to alleviate the trial court and jury from the burden of wasting valuable trial resources. *Id.* at 416–17. But in the context of Supremacy Clause immunity judges may only absolve a jury of its responsibility to determine facts when "no rational jury

could fail to conclude" that immunity is proper. *LaBounty v. Coughlin*, 137 F.3d 68, 74 (2d Cir. 1998).[7]

i. Juries often resolve mixed questions of law and fact and maintain the right and responsibility to adjudicate the factual issues.

Juries are no stranger to deciding issues that mix a question of law and fact. This Court recognized the vital and expansive role of a jury in *United States v. Gaudin*, explaining that "the application-of-legal-standard-to-fact sort of question . . . commonly called a 'mixed question of law and fact,' has typically been resolved by juries." 515 U.S. 506, 512 (1995). The same analysis applies here. While the issue of immunity may be a question of law, the facts are so wrapped into the dispute that they must be determined by a jury, and not the court. *Horiuchi*, 253 F. 3d at 379 (Fletcher, J., concurring).

Petitioner again points to the Ninth Circuit's vacated opinion that outlined policy concerns with the application of the plain language of Rule 12. *Horiuchi*, 358 F.3d at 374. The court expressed concern in a jury's ability to apply two potentially conflicting legal standards to a set of facts. *Id.* at 375. The court, however, maintained confidence in a federal judge's ability to determine the facts accordingly. *Id.* at 376. The court justified its rationale, stating: "These rulings can then be reviewed on appeal much more easily than a jury verdict which, after all, is almost entirely opaque." *Id.* The court further justified its break from precedent, stating

[7] The qualified immunity defense is broader than Supremacy Clause immunity. *See infra* Section II. But even in a Section 1983 action, the defendants were deprived of a qualified immunity defense because the court determined a reasonable person would have understood that the actions could violate the Eighth Amendment. *LaBounty v. Coughlin*, 137 F.3d 68, 74 (2d Cir. 1998).

that allowing a district court to hear the evidence acts as a safeguard against frivolous or vindictive criminal charges. *Id.* While there is no doubt that federal judges are well acquainted with the different legal doctrines, it is not an excuse to allow a judge instead of a jury to resolve factual disputes. Even as the court admits, in the civil context, "disputed factual issues underlying the immunity defense must be put to the jury." *Id.* Frivolous complaints are far more likely brought by lay plaintiffs in the civil context than by state prosecutors pursuing criminal charges. If judicial usurpation of the right to a jury is unnecessary in the civil context, as recognized by the Ninth Circuit, then it is especially unnecessary in the more stringent criminal context. *Id.* Thus, even if such judicial intervention were necessary, it would be limited to the civil setting.

The "threshold" issue is whether the state has proffered sufficient evidence to meet the elements of the case. *Bailey*, 444 U.S. at 415. More specifically, the test in this case is whether the State of New Tejas provided sufficient evidence to survive a Supremacy Clause immunity defense. It did. If allegations exist, the facts support the allegations, and the parties dispute the facts – as they do in this case – it is the jury's right and responsibility to decide such facts. *See id.*

ii. *Petitioner provides no rule or statute that justifies the violation of the plain meaning of Rule 12.*

In the face of two constitutional rights, namely a right to a trial by jury and Supremacy Clause immunity, Petitioner must demonstrate why one right is subordinate to another. Here, no conflict exists as Petitioner maintains a right to immunity, subject to a jury's determination. Congress further answers the question

as procedural issues that impact constitutional provisions are governed by rule and statute. *See e.g.*, Fed. R. Crim. P. 12(b); Fed. R. Crim. P. 23(a); 28 U.S.C. § 1442 (2012).

Rule 23(a) of the Federal Rules of Criminal Procedure resolves any potential conflict with direct statutory instruction. Specifically, a criminal trial must be resolved by a jury unless (1) the defendant waives it in writing, (2) the government consents, and (3) the court approves. Fed. R. Crim. P. 23(a). The State did not waive the right to a jury trial. Thus, Petitioner does not meet the elements of Rule 23(a) and the disputed facts must be decided by a jury. *Id.* Unlike the Respondent, Petitioner cannot point to a single rule or statute that justifies judge rather than jury determination. In light of Rule 23(a) and precedent, this Court should apply the plain meaning approach of Rule 12.

The *Horiuchi* court's primary concern centered on a policy of ensuring that the Supremacy Clause affords adequate protection to federal officers and compared that protection to qualified immunity to expand its breadth. *Id.* at 375. That unease is unfounded and cuts against the public policy behind the nearly universal procedural standard that facts are to be viewed in the light most favorable to the non-moving party.[8] Supremacy Clause immunity already provides other layers of protection. For example, orders on motions to dismiss under the Supremacy Clause are immediately appealable whether the order is final or not. *Mitchell v. Forsyth*, 472 U.S. 511, 525

[8] Certainly, a common procedural purpose exists between Supremacy Clause immunity and qualified immunity—to avoid dragging a federal agent through the entire procedure of the trial. *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988). But the common purpose between the two defenses should be restricted to the procedural similarities, as the substantive purposes between the two are distinct.

(1985). Furthermore, there is a much higher burden of proof in criminal cases, like the case here, as opposed to civil cases that implicate qualified immunity. *See Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 43 (2d Cir. 1986).

Consistent with Rule 12(b), evidence must be viewed in the light most favorable to the non-moving party, regardless of the Rule 12 defense. *See Tanella*, 374 F.3d at 148 ("In reviewing this matter, we view the evidence in the light most favorable to the State and assume the truth of the allegations in the indictment."); *see also United States v. Besmajian*, 910 F.2d 1153, 1154 (3d Cir. 1990) ("In considering defense motion to dismiss an indictment, the district court [must] accept as true the factual allegations set forth in the indictment.").

In the case at hand, Agent Schrader moved for dismissal and relies on an immunity defense that turns on disputed facts relevant to the alleged offense. R. at 4a. According to Agent Schrader, the presented factual issues impact the necessity and reasonableness of the force used. R. at 4a. Because determination of these facts assists in deciding the validity of his immunity, as the record plainly states (R. at 39a), Agent Schrader's defense is not capable of determination at this stage. *Covington*, 395 U.S. at 60. As the defense is not capable of determination pretrial, Rule 12 prohibits the trial court from deciding the facts. This Court should apply the plain language of Rule 12 and abstain from influential factual determinations. Fed. R. Crim. P. 12(b); *see also United States v. Bergrin*, 650 F.3d 257, 265 (3d Cir. 2011).

II. The Court of Appeals correctly articulated and applied the proper test for whether the Supremacy Clause provides a federal officer with immunity from a state criminal prosecution.

This Court created the immunity defense for a federal officer and grounded it in the Supremacy Clause. *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890). Since that decision, courts have interpreted the application of Supremacy Clause immunity as a two-prong test. Immunity only applies when: (1) the officer was performing an act that federal law authorized such officer to perform; and (2) the officer had an honest and reasonable belief that he did no more than what was necessary and proper to fulfill his federal duties. *See* State v. Kleinert, 855 F.3d at 314; *see also Whitehead v. Senkowski*, 943 F.2d 230, 234 (2d Cir. 1991); *Long*, 837 F.2d at 744. Courts have further delineated the "necessary and proper test," the second prong, to a subjective and objective component. State v. Kleinert, 855 F.3d at 314 ("For conduct to be 'necessary and proper,' an officer must subjectively believe that his actions were appropriate to carry out his federal duties, and that belief must be objectively reasonable."); *see also Tanella*, 374 F.3d at 147 ("To meet [the second prong], two conditions must be satisfied: (1) the actor must subjectively believe that his action is justified; and (2) that belief must be objectively reasonable.").

Agent Schrader has the burden to prove each of these elements to be afforded Supremacy Clause immunity. State v. Kleinert, 855 F.3d at 314–15. Broken down, Agent Schrader must show: (1) he is a federal officer;[9] (2) authorized by federal law to perform an act; (3) who, in performing the authorized act, did no more than what

[9] The parties do not dispute that Agent Schrader is a federal officer.

he subjectively believed was necessary and proper, and (4) that belief was objectively reasonable under the circumstances. *Id.* Agent Schrader did not show all of these elements; therefore, this Court must affirm the Court of Appeals' application of the test and denial of Agent Schrader's motion to dismiss.

A. An officer is authorized by federal law and eligible for immunity only if his federal duties require the criminal actions.

The court of appeals correctly articulated and applied the "authorized by federal law" prong of the test. This Court restricted the scope and application of a federal officer's duties since establishing the test in *Neagle*. *Drury*, 200 U.S. at 8 (immunity applies when the federal officer's actions were in "performance of a duty *imposed* by the federal law") (emphasis added).

Immunity does not attach automatically when criminal acts occur during the scope of a federal officer's employment. *New York v. De Vecchio*, 468 F. Supp. 2d 448, 460 (E.D.N.Y. 2007). "Rather, the [criminal] acts themselves must of necessity be required in the discharge of the officer's duties." *Id.*; *see also State v. Ivory*, 906 F.2d 999, 1003 (4th Cir. 1990) (criticizing the dissent for "relapsing into the same 'scope of employment' test for removal of state prosecutions which was explicitly rejected by the Supreme Court").

The Supreme Court of Hawaii encountered a case with facts substantially similar to the case at hand when a federal agent Deedy shot and killed a patron at a fast food restaurant. *State v. Deedy*, 141 Hawai'i 208, 213 (2017).[10] Agent Deedy

[10] The federal agent subsequently filed a habeas petition seeking to prevent the State of Hawaii from retrying him on the criminal charges under the theory of double jeopardy. The United States Court of

alleged Supremacy Clause immunity and argued that he was authorized to arrest the deceased because the deceased assaulted him while he was engaged in his official duties. *Id.* at 233. The court, however, could not reconcile Agent Deedy's "night of socializing and drinking alcoholic beverages in Waikiki with friends" as part of his official duties as a State department agent. *Id.* The court required a showing of federal authority for the proposition that his official duties included the activities of the evening. *Id.* Agent Deedy was not investigating passport or visa issuance on the night of the altercation pursuant to the legislative grant of authority for the Diplomatic Security Service. *Id.* Instead, he socialized with friends and consumed alcoholic beverages. *Id.* Therefore, Agent Deedy's federal duties did not require his alleged criminal actions and he lacked the federal authorization necessary for Supremacy Claus immunity. *Id.*

A commonly shared statutory grant of authority to officers of the FBI does not require federal action for every violation of the law, nor provides equal authority among all agents. Agents of the Federal Bureau of Investigation are empowered to "make arrests without warrant for any offense against the United States committed in their presence." 18 U.S.C. § 3052 (2012). However, the grant of authority does not require them to make arrests every time an offense is committed. The statute grants officers the ability ("may") but does not require ("shall") an officer to make an

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Appeals for the Ninth Circuit held that because the second trial ended with a hung jury on the assault charges, the State may retry the federal officer again on the same charges. The case was remanded to the district court for further proceedings. *See Deedy v. Suzuki*, No. 18-16632, 2019 U.S. App. LEXIS 33345 (9th Cir. Nov. 7, 2019).

arrest. *Id.* Within the afforded discretion of the grant, FBI officers may possess different levels of authority and maintain different federal duties.

Petitioner relies on this Court's holding in *Barr v. Mateo* but fails to recognize its restrictive rationale. In *Barr v. Mateo*, former employees of the Office of Rent Stabilization brought a civil suit against the then acting director. 360 U.S. 564, 565 (1959). The acting director pled a defense of absolute privilege which was granted. *Id.* at 574. However, even though the case arose in the civil posture and invoked absolute privilege, this Court limited its holding to match the responsibilities of the director. *Id.* at 573–75. This Court reasoned:

> "To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails."

Id. at 573. The dissent addressed the balance achieved by limiting the application of the immunity: "Giving officials below cabinet or equivalent rank qualified privilege for statements to the public would in no way hamper the internal operation of the executive department of government, nor would it unduly subordinate the interest of the individual in obtaining redress for the public defamation uttered against him." *Id.* at 584 (Warren, J., dissenting). Thus, even when two federal officers operate under the same office of government power, each may be authorized to do some acts that the other is not authorized to perform. *Id.* at 573. Accordingly, federal officers must show an authorization by federal law to execute the criminal actions—

specifically an obligation or requirement; otherwise, Supremacy Clause immunity will not apply.

Even on-duty officers may not be afforded immunity when their federal duties do not require the actions taken. For example, courts have restricted the accessibility of immunity in on-duty vehicular traffic accidents. The narrower test requires that the accident result from an exigency or emergency related to the officer's federal duties. *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) (immunity warranted because defendant was speeding pursuant to an order "to proceed as fast as possible"); *Lilly v. State of W. Virginia*, 29 F.2d 61, 64 (4th Cir. 1928) (immunity warranted when "speed and the right of way are a necessity").

Indeed, Agent Schrader's duties do not include drug trafficking investigations. R. at 28a. Furthermore, Agent Schrader was on vacation with his family unrelated to any of his official duties. R. at 28a. Agent Schrader cannot demonstrate a nexus between his investigative duties and the aggravated assault, nor was he ever authorized by his superiors to even make such an arrest. Therefore, Agent Schrader's lack of authorization under federal law to make the arrest defeats his immunity defense.

B. The court of appeals correctly applied the "subjective-belief" test.

To be entitled to Supremacy Clause immunity, a federal officer must do no more than what that officer believes is necessary and proper. *Long*, 837 F.2d at 745.

The courts of appeals consistently subject the officer's subjective intent to scrutiny when Supremacy Clause immunity is invoked, and the few courts that have erroneously questioned the propriety of such an analysis did so only in speculation, not holdings. Such scrutiny of subjective intent is also consistent with the purpose of Supremacy Clause immunity—to ensure that federal law is supreme to state law, not to allow federal officers to pursue personally motivated grudges with impunity. Therefore, the Thirteenth Circuit was correct when it included Agent Schrader's subjective intent in its analysis of Supremacy Clause immunity.

i. The courts of appeals consistently include a "subjective-belief" analysis when determining a defendant's entitlement to Supremacy Clause immunity.

Courts of appeals apply the subjective arm of the "necessary and proper" test. State v. Kleinert, 855 F.3d at 317 ("This subjective element depends on an officer's honest belief that his actions are reasonable and necessary to the exercise of his authority. Any evidence of personal interest, malice, or actual criminal intent will negate subjective reasonableness.") (cleaned up); *Tanella*, 374 F.3d at 149 (analyzing eyewitness testimony to determine the agent's subjective belief); *Whitehead*, 943 F.2d at 234 ("[T]he agent must have a subjective belief that his conduct was justified, and that belief must be objectively reasonable."); *Torres Chaparro*, 738 F. Supp. at 622 ("What is necessary and proper is a subjective measurement guided by whether a defendant reasonably thinks his conduct is necessary and justifiable … a federal officer loses his *Neagle* protection when he acts out of personal interest, malice, or with criminal intent."); *Long*, 837 F.2d at 745 ("The [necessary and proper] concept contains both a subjective and an objective element. On the subjective side, the agent

must have an honest belief that his action was justified."); *Maryland v. DeShields*, No. 86–5180, 1987 WL 38619, *6 (4th Cir. 1987) ("The test on what is 'necessary and proper' is a subjective one and goes to whether the defendant reasonably thought his conduct was necessary and justifiable.") (quoting *Long*, 637 F. Supp. 1550)); *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977) ("Determination of whether [the officer's act] 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.").

The small minority of courts that have questioned the propriety of the subjective-intent analysis did so erroneously and in dicta. In response to this Court's elimination of such a test in the context of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Ninth and Tenth Circuits contemplated, though did not hold, that elimination of the subjective analysis for a Supremacy Clause immunity defense may be proper. *See Horiuchi*, 253 F.3d at 366 n.11 (noting in dictum that Supremacy Clause immunity cases engage in an objective and subjective test, and speculating that it might be proper to eliminate the subjective prong to align with the qualified immunity defense); *Livingston*, 443 F.3d at 1221–22 ("Just as the Supreme Court jettisoned the subjective element of the qualified immunity test . . . it may also be appropriate to reject a subjective element of the Supremacy Clause immunity test."). However, such concern was misguided, as the Ninth and Tenth Circuits failed

to recognize the substantial *substantive* differences between qualified immunity and Supremacy Clause immunity that justify the disparate tests.

In *Horiuchi*¸ the Ninth Circuit's decision was vacated as moot and left *Clifton* as the controlling law of the land. *See Arizona v. Files*, 36 F. Supp. 3d 873 (D. Ariz. 2014) (citing *Clifton* and applying both the subjective and objective test). *Clifton* appropriately applied the subjective prong of the *Neagle* test. 549 F.2d at 728 (determination of whether the officer's conduct was necessary and proper must not only rely on the officer's subjective belief, but also on the objective finding that his conduct was reasonable under the existing circumstances). And in *Livingston*, the Tenth Circuit reserved the question of whether analysis of subjective belief is proper. *Livingston*, 443 F.3d at 1222 ("[W]e need not now decide whether a federal officer's subjective intent factors into the determination of whether an action was reasonable and necessary.").

Because, as it turns out, every circuit applies the subjective element of the Supremacy Clause immunity defense, any deviation would disturb century old constitutional principles. This Court must affirm the court of appeals' correct application of the settled subjective component of the test.

ii. *Supremacy Clause immunity and qualified immunity originate from different sources and serve different functions, and therefore require separate tests.*

And the courts of appeals have good reason to consistently include a subjective-intent analysis. This Court introduced Supremacy Clause immunity in *Neagle* when a United States Marshal, under the attorney general's direction, killed a man attempting to murderously assault the Honorable Judge Field, a justice of the

Supreme Court of the United States. *Neagle*, 135 U.S. at 5. The decision provided necessary protection for federal officers *criminally* prosecuted by the states. *Id.* at 75–76. Nearly one hundred years later, this Court adjusted the test in the civil context to make it easier for defendants in both *Bivens* and Section 1983 actions to escape a full-blown trial by removing the subjective component within the qualified immunity analysis. *Harlow*, 457 U.S. at 818. Note the difference in the underlying purposes: the *Neagle* test applies to state criminal prosecutions against federal officers, whereas the *Harlow* test carved-out the subjective component only in civil cases brought by private individuals against state and federal officers. Supremacy Clause immunity and qualified immunity are substantively different, and each require an independent test.

The Sixth Circuit correctly recognized the similar procedural purpose and dissimilar substantive purposes between Supremacy Clause immunity and qualified immunity. *Long*, 837 F.2d at 752. In *Long*, the court procedurally analogized Supremacy Clause immunity to qualified immunity, stating "there comes a point early in the proceedings where the federal immunity defense should be decided in order to avoid requiring a federal officer to run the gauntlet of standing trial and having to wait until later to have the issue decided." *Id.* However, procedural similarities do not dictate substantive applications and comparisons. Furthermore, complete application of the *Neagle* test does not preclude federal officers from early grants of immunity when warranted. Any notion of a *Neagle*-based qualified immunity test is a conflation of distinct holdings in *Neagle* and *Harlow*. Hence, the

Sixth Circuit correctly characterized the *Neagle* test as including a subjective component. *Id.* at 740.

iii. *The notion of federalism requires different tests for Supremacy Clause immunity and qualified immunity.*

Supremacy Clause immunity and qualified immunity operate in completely different spheres, and the implication of federalism concerns in the context of Supremacy Clause immunity provides a clear direction on how this Court should proceed. Justice Kennedy provided clarity to federalism when he said, "The Framers split the atom of sovereignty . . . The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). The Constitution provides the split in the Supremacy Clause and the Tenth Amendment. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .." U.S. Const. art. VI, cl. 2. "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.

With the concept of federalism in mind, Supremacy Clause immunity directly intrudes upon the State's core police power and this Court should not tolerate it any more than absolute necessary. *See generally Mesa v. California*, 489 U.S. 121, 138 (1989) ("Because the regulation of crime is pre-eminently a matter for the States, we

have identified a strong judicial policy against federal interference with state criminal proceedings.") (quoting *Arizona v. Manypenny*, 451 U.S. 232, 243 (1981)). Qualified immunity, however, presents no such conflict between a state's rights and federal law. Thus, the test for Supremacy Clause immunity must be more stringent than that of qualified immunity. The subjective component of the test, as recognized by this Court in *Neagle*, must apply when a federal officer raises the Supremacy Clause immunity defense. The incorporation of the subjective analysis upholds the notions of federalism and sustains the rights of the states to enforce their police power.

iv. *Subjective analysis comports with the policy that states may hold federal agents accountable for actions based on malice or criminal intent.*

Even in the face of federally authorized acts, federal agents should not escape criminal liability when they act with malice or criminal intent. *Clifton*, 549 F.2d at 728 (immunity depends on "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"). Successful opposition to Supremacy Clause immunity does not require a showing of malice. *Files*, 36 F. Supp. 3d at 878. But if the evidence shows a federal officer acted with malice or some criminal intent, the officer will not be privy to the immunity defense. *Id.* As a matter of policy, the Supremacy Clause should not afford a federal agent immunity when the agent acts out of self-interest in lieu of the interest of the government. State v. Kleinert, 855 F.3d at 317 ("Any evidence of personal interest, malice, or actual criminal intent will negate subjective reasonableness."); *Torres Chaparro*, 738 F. Supp. at 622 ("a federal officer loses his

Neagle protection when he acts out of personal interest, malice, or with criminal intent").

Scrutiny of an agent's subjective belief safeguards against protection for federal officers that seek to use the tools or authority of their job to satisfy a personal problem. *See Files*, 36 F. Supp. 3d at 884. Pertinent facts exist in this case and show Agent Schrader used his federal authority to pursue a personal vendetta against Mr. White for the prior traffic incident. R. at 2a. The District Court misconstrued the test, finding Agent Schrader's belief that his duties included arresting Mr. White was reasonable. R. at 39a. (citing *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982)) ("Even if the officer makes an error in judgment in what the officer conceives to be his legal duty, that alone will not serve to create criminal responsibility in a federal officer."). But such a finding is inconsistent with the subjective issue at hand. Agent Schrader not only made an error in judgment, but also an error in subjective motivation to execute the arrest. Failure to account for Agent Schrader's subjective belief is a disservice to the policy this Court enacted in *Neagle*. *See generally Neagle*, 135 U.S. at 75.

Elimination of the subjective analysis would promote an opportunity for federal officers to receive *carte blanche* immunity, well beyond the means intended by this Court. *Id.* This Court should bless the long accepted subjective component of the necessary and proper test, and in so doing, will respect federalism, revere settled Constitutional law, and encourage proper behavior by federal officers—all without upsetting the purpose or intended bounds of Supremacy Clause immunity.

C. The Court of Appeals correctly applied the "objectively-reasonable-under-the-circumstances" test.

To be entitled to Supremacy Clause immunity, a defendant must finally show that "his conduct may be said to be reasonable under the existing circumstances." *Clifton*, 549 F.2d at 728. This element is an objective one, and its proper application "does not require [the party claiming immunity] to show that his action was in fact necessary or in retrospect justifiable, only that he reasonably thought it to be." *Id.* Inclusion of such an element is necessary to ensure that federal officers are not wholly insulated from criminal liability when they "employ means which they cannot honestly consider reasonable in discharging their duties." *Petition of McShane*, 235 F. Supp. 262, 273 (N.D. Miss. 1964). Further, the inquiry here does not turn on whether the officer violated clearly established law, as entitlement to qualified immunity does. *See Harlow*, 457 U.S. at 818 ("[G]overnment officials performing discretionary functions generally are shielded from *liability for civil damages* insofar as their conduct does not violate clearly established [law].") (emphasis added). Therefore, Agent Schrader could only meet his burden on this element by showing that his actions in arresting Mr. White were objectively reasonable under the circumstances, and *not* by demonstrating only that his actions did not violate clearly established federal law.

i. Entitlement to Supremacy Clause immunity turns on the objective reasonableness of the officer's actions, not whether the actions violated clearly established law.

Even the few courts that have doubted whether a subjectivity analysis is appropriate in the context of Supremacy Clause immunity roundly hold that, to be

entitled to such immunity, the federal officer's actions must be objectively reasonable. *See, e.g.*, *Livingston*, 443 F.3d at 1222 ("[W]e hold that a federal officer is not entitled to Supremacy Clause immunity unless . . . the agent had an objectively reasonable and well-founded basis to believe that his actions were necessary to fulfill his duties."); *Horiuchi*, 253 F.3d at 366 ("Federal agents will be immune from state prosecution if they acted in an objectively reasonable manner in carrying out their duties."). Judge Hamlin's contention that courts should be barred from inquiring into the reasonableness of a federal officer's actions would not only wholly insulate even the most unreasonable actions by federal officers from criminal proceedings, but would also be inconsistent with this Court's precedent.

That a federal officer's actions must be objectively reasonable to be entitled to immunity from state prosecution strikes a delicate balance. On the one hand, the federal government has an interest in protecting officers who simply make "a mistake in judgment" or participate in a "botched operation," so that officers are not discouraged from performing their legitimate duties. *Long*, 837 F.2d at 745. On the other hand, however, there is no federal interest in immunizing from liability an officer who "employed means which he could not honestly consider reasonable in the discharge of his duties," performed an "act done wantonly," or acted "with criminal intent." *Id.* Therefore, the inclusion of an objective element is necessary to ensure that the Supremacy Clause immunizes federal officers from state prosecution only insofar as their actions are objectively reasonable in carrying out their federal

duties—any further would impermissibly curtail the State's ability to enforce its criminal laws.

Further, excluding this element from the analysis entirely, as Judge Hamlin advocated, would directly contradict this Court's plain language on the issue in *Neagle*. This Court held that a federal officer is entitled to immunity when, in performing his federal duties, "he did no more than what was necessary and proper for him to do." *Neagle*, 135 U.S. at 75. The Court emphasized that Neagle was entitled to immunity because "Neagle was *correct* in the belief that, without prompt action on his part, the assault of Terry upon the judge would have ended in the death of the latter; [and] that, such being his *well-founded belief*, he was *justified* in taking the life of Terry." *Id.* at 76 (emphasis added). Put another way, the *Neagle* Court granted immunity for federal officers "who reasonably believed that their acts were necessary to perform their duties." *Livingston*, 443 F.3d at 1221. To disregard the objectivity element would directly contradict this Court's explicit guidance on this issue.

Moreover, this inquiry does not turn on whether the federal officer violated clearly established law—an isolated showing that the officer did not violate clearly established law is insufficient to entitle the officer to immunity. Such a standard is used in the context of qualified immunity, not Supremacy Clause immunity. *See Harlow*, 457 U.S. at 818. And such a rule in the context of Supremacy Clause immunity would make little sense.

A state actor is not entitled to qualified immunity in a Section 1983 cause of action when his actions violated clearly established *federal* law. *See, e.g.*, *White v.*

Pauly, 137 S. Ct. 548, 552 (2017); *Carroll v. Carman*, 574 U.S. 13, 17 (2014). This makes sense because qualified immunity is not supposed to protect those state actors who violate "clearly established statutory or constitutional rights [of others] of which a reasonable person would have known." *Pauly*, 137 S. Ct. at 551 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); *see also Harlow*, 457 U.S. at 818–19 ("If the [federal] law was clearly established, the [qualified] immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.").

But a wholesale duplication of this rationale into the context of Supremacy Clause immunity would be entirely illogical. For starters, when a federal officer invokes Supremacy Clause immunity, there is no allegation that he violated federal law. Instead, Supremacy Clause immunity is only relevant in the context of an alleged *state criminal law* violation. *See, e.g.*, *Neagle*, 135 U.S. at 3 (defendant alleged to have committed murder under California law); State v. Kleinert, 855 F.3d at 310 (defendant alleged to have committed manslaughter under Texas law); *Livingston*, 443 F.3d at 1216 (defendants alleged to have committed criminal trespass under Wyoming law); *Tanella*, 374 F.3d at 145 (defendant alleged to have committed manslaughter under New York law). In this case, for example, the relevant allegation is that Agent Schrader violated New Tejas assault and aggravated assault law. R. at 33a. There is no allegation that Agent Schrader violated federal law, which is typical of cases in which Supremacy Clause immunity would be invoked. To make the Supremacy Clause immunity determination dependent on whether there was a

violation of clearly established federal law, as the District Court did (R. at 41a), would entitle every federal officer to immunity in virtually every state court criminal proceeding. An analysis that creates such broadly sweeping application cannot be correct.

Nor is the correct analysis whether the federal officer violated clearly established *state* law. The basis of Supremacy Clause immunity is exactly that—the Supremacy Clause of the Constitution. As discussed previously, most basically, that clause stands for the proposition that if federal and state law conflict, federal law must triumph. *See Clifton*, 549 F.2d at 730 ("One of the basic tenets in the application of the Supremacy Clause is that the states have no power to determine the extent of federal authority."). To allow the question of whether *state law*—which, by its very nature will vary widely from jurisdiction to jurisdiction—was clearly established at the time of the federal officer's action control his entitlement to immunity would contradict this very principle.

Instead, the final element of Supremacy Clause immunity turns on whether the federal officer reasonably believed his actions to be necessary to pursue his federal duties. *See, e.g.*, *Long*, 837 F.2d at 741 ("[The final element] goes to whether the defendant reasonably thought his conduct was necessary and justifiable."). This articulation strikes a balance on the "delicate question of federal-state relationships." *Clifton*, 549 F.2d at 729. Such a rule does not "allow a state to punish the exercise of federal authority under the guise of questioning the right of federal officials to act," *id.* at 730, as it would if the question turned on how clearly established the state law

is. However, the rule also ensures that federal officers do not have *carte blanche* ability to be free from the consequences of their actions, as the total elimination of the element or allowing the question to turn on the clear establishment of federal law would.

This articulation, which does provide less protection than that of qualified immunity, does not defeat the purpose of qualified immunity, as the District Court contended. R. at 40a. Instead, if Mr. White were to bring a civil *Bivens* claim against Agent Schrader for alleged violations of his constitutional rights, Agent Schrader would still be free to raise the defense of qualified immunity. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). A finding that Agent Schrader's actions were unreasonable in the Supremacy Clause immunity context would have no bearing on whether his actions violated Mr. White's clearly established federal rights. *Cf. Bush v. Lucas*, 462 U.S. 367, 391 (1983) (Marshall and Blackmun, J.J., concurring) (noting that qualified immunity is an available defense to a *Bivens* claim). For the above reasons, when a federal officer "employs means which he cannot honestly consider reasonable in discharging his duties," he is not entitled to Supremacy Clause immunity. *Clifton*, 549 F.2d at 728.

ii. *The Court of Appeals properly determined that Agent Schrader employed means that he could not have honestly considered reasonable in arresting Mr. White.*

Having established that entitlement to Supremacy Clause depends on "the objective finding that [the federal officer's] conduct may be said to be reasonable under the existing circumstances," *id.*, that Agent Schrader failed to meet this element of the defense is obvious. The District Court found: "The flying tackle of Mr.

White onto concrete posed obvious and foreseeable risks." R. at 38a. In addition, the District Court credited the testimony of an expert who testified that "the use of a flying tackle was improper and reckless under these circumstances." R. at 38a n.7. These findings alone end the inquiry. If Agent Schrader's actions were "reckless," then, necessarily, they were not reasonable under the circumstances. *See, e.g.*, *Milwaukee & St. P.R. Co. v. Arms*, 91 U.S. 489, 495 (1875) ('Gross negligence' [or 'recklessness'] is . . . understood as meaning a greater want of care than is implied by the term 'ordinary negligence.'"). Therefore, as the Court of Appeals correctly determined, the District Court's finding that Agent Schrader's actions were reckless necessarily means he failed to satisfy the objective prong of Supremacy Clause immunity.

While the failure to satisfy even just one element of the Supremacy Clause immunity defense would be enough to destroy Agent Schrader's entitlement to it, the above analysis demonstrates that Agent Schrader is unable to satisfy any of the three elements. The Court of Appeals for the Thirteenth Circuit, therefore, correctly determined that Agent Schrader is not entitled to the defense.

CONCLUSION

As plainly stated in Rule 12(b) of the Federal Rules of Criminal Procedure, the genuinely disputed facts underlying Agent Schrader's defense should be viewed in the light most favorable to the State of New Tejas. The disputed facts are material and this Court should reserve the arbitration of the facts for the jury. For entitlement to Supremacy Clause immunity, a federal officer's duties must require the disputed actions, and those actions must be no more than what is necessary and proper both subjectively and objectively. Agent Schrader fails to meet every component necessary for application of the pleaded defense. For the foregoing reasons, this Court should affirm the decision of the Thirteenth Circuit Court of Appeals.

Respectfully submitted,
/s/ Team #23
Team #23
Counsel for Respondent
November 18, 2019

CERTIFICATE OF SERVICE

By our signature, we certify that a true and correct copy of Respondent's brief on the merits was forwarded to Petitioner, Hank Schrader, through the counsel of record by certified U.S. mail, return receipt requested, on this, the 18th day of November, 2019.

/s/ Team #23
Team #23
Counsel for Respondent
November 18, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33, the undersigned hereby certifies that the Brief of Respondent, the State of New Tejas, contains 11,609 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Service, Certificate of Compliance, and the attached Appendix.

/s/ Team #23
Team #23
Counsel for Respondent
November 18, 2019

APPENDIX

The relevant portion of Article VI of the Constitution provides:

> 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.

The Tenth Amendment provides:

> 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.

18 U.S.C. § 3052 provides:

> The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

21 U.S.C. 802 provides in pertinent part:

> **Definitions**
>
> As used in this subchapter:
>
> . . .
>
> (6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.

21 U.S.C. 812 provides in pertinent part:

> **Schedule I**
>
> . . .
>
> (c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:
>
> . . .
>
> (10) Marijuana

21 U.S.C. § 844 provides in pertinent part:

> (a) **Unlawful acts; penalties**
>
> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order. . . .

The applicable portion of 28 U.S.C. § 1254 provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

The applicable portion of 28 U.S.C. § 1442 provides:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 2241 provides:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2243 provides:

> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
>
> The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
>
> The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.
>
> When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.
>
> Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.
>
> The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.
>
> The return and all suggestions made against it may be amended, by leave of court, before or after being filed.
> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Fed. R. Crim. P. 12(b)(1) provides:

> (b) Pretrial Motions.
>
> > (1) In General. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

Fed. R. Crim. P. 23(a) provides:

> (a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless:
>
> > (1) the defendant waives a jury trial in writing;
> >
> > (2) the government consents; and
> >
> > (3) the court approves.

Section 22.01 of the Penal Code of New Tejas provides:

> **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.

Section 22.02 of the Penal Code of New Tejas provides:

> **Aggravated Assault**
>
> (a) A person commits an offense if the person commits assault as defined in 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.