No. 18-5188

In the

Supreme Court of the United States

Hank Schrader,

Petitioner,

v.

State of New Tejas,

Respondent.

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

Brief for the Petitioner

Team No. 43
Counsel for the Petitioner

Questions Presented

I. Federal officers often assert their Supremacy Clause immunity on a pretrial motion to dismiss. If the state does not dispute material facts, district courts resolve Supremacy Clause immunity pretrial. When the state does dispute material facts, should district courts determine the facts and still resolve Supremacy Clause immunity claims on a pretrial motion to dismiss?

II. The qualified immunity test provides state officers immunity from civil claims for discretionary actions, regardless of the officer's subjective intent. It further protects state officers when they do not violate clearly established law. Does the Supremacy Clause immunity test entitle federal officers facing state criminal prosecution to at least the same level of protection?

Parties to the Proceeding

Petitioner Hank Schrader is a special agent with the Federal Bureau of Investigation and currently resides in Wisconsin. Respondent is the State of New Tejas.

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The Order of the United States District Court for the District of Madrigal is unreported but is available at No. 17-cr-5142 and reprinted in the record. R. at 27a–42a. The Opinion of the United States Court of Appeals for the Thirteenth Circuit is unreported but is available at No. 18-5719 and reprinted in the record. R. at 1a–26a.

Statement of Jurisdiction

The Thirteenth Circuit's judgment was entered on October 2, 2018. The Petitioner timely filed an appeal, and this Court granted Petitioner's writ of certiorari on March 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

Constitutional and Statutory Provisions

Petitioner brought this action under the Supremacy Clause claiming that, as a federal officer, his constitutional protections were violated by the State of New Tejas' attempt to prosecute him under state criminal law. The relevant federal constitutional provisions are provided in Appendix A. The pertinent federal statutory provisions are set forth in R. at 43a–45a and reprinted in Appendix B. The relevant sections of the Penal Code of New Tejas (N.T. Penal Code) are set forth in R. at 45a–46a and reprinted in Appendix C.

U.S. Const. art. VI, cl. 2 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.

Statement of the Case

1. Statement of Facts

FBI Special Agent Hank Schrader has served the United States for nearly twenty years and is currently stationed in Wisconsin. R. at 28a. In November 2016, he and his family vacationed in Madrigal, New Tejas. *Id.*

Traffic altercation. While driving one morning in Madrigal, Agent Schrader was involved in a traffic altercation with Mr. White. R. at 29a–30a. Agent Schrader claims Mr. White was speeding dangerously, pulled in front of his vehicle, and slammed on breaks. R. at 29a. This forced Agent Schrader to slam on his breaks to avoid a serious collision that could have endangered his family. *Id.* Shortly after this incident, at a red light, both men exited their vehicles and angrily exchanged words—though neither recall precisely what was said. *Id.* The altercation ended with Mr. White shoving Agent Schrader. *Id.* Before Agent Schrader could respond, the traffic light turned green and both men returned to their vehicles. R. at 30a. The Schrader family then proceeded to tour a local museum. *Id.*

Arrest. Later that day, Agent Schrader saw Mr. White leaving a marijuana dispensary carrying a transparent plastic bag of marijuana. R. at 31a. Marijuana is a Schedule I drug that is illegal to possess under federal law. *See* R. at 30a; 21 U.S.C. § 812 (2012). Agent Schrader shouted "Stop! You're under arrest!" and began running towards Mr. White. R. at 31a. Mr. White turned and ran away from Agent Schrader. *Id.* In response, Agent Schrader tackled Mr. White onto the sidewalk,

which injured him. *Id.* Agent Schrader identified himself as an FBI agent, placed Mr. White in handcuffs, and informed him he was under arrest for possession of marijuana in violation of federal law. *Id.* Although marijuana possession is illegal under federal law, New Tejas legalized the possession and consumption of marijuana in 2016. R. at 30a. Agent Schrader testified that he was unaware that New Tejas legalized marijuana possession, but he said it would not have changed his decision to arrest Mr. White since he "swore an oath to enforce federal laws." R. at 32a. Initially, local police did not arrest or otherwise reprimand Agent Schrader after this incident. R. at 31a.

State prosecutor's pro-marijuana speech. The next day, however, the Madrigal Country District Attorney, Mrs. Wexler, got involved. R. at 32a. Mrs. Wexler, who was elected on a pro-marijuana platform, spoke at a rally of hundreds of pro-marijuana protestors gathered to complain of what happened to Mr. White. *Id.* Mrs. Wexler said, among other things, that "the federal government has no business interfering with the sovereign will of the people of New Tejas," and she would "use every power of [her] office to prevent federal marijuana laws from being enforced in this great state." *Id.*

She further explained that she was going to charge Agent Schrader with aggravated assault and intended he serve "a lengthy prison sentence." R. at 33a. She hoped Agent Schrader's prosecution would "serve as a warning to any other federal officers" seeking to enforce federal drug laws that they "are not welcome

here." *Id.* She left federal officers with a final warning: "You attempt to enforce these laws at your own risk." *Id.*

2. Nature of Proceedings

State criminal charges. At Mrs. Wexler's discretion, Agent Schrader was indicted for assault and aggravated assault for his arrest of Mr. White. *Id.;* N.T. Penal Code §§ 22.01–22.02. Agent Schrader removed the state prosecution to the United States District Court for the District of Madrigal under the federal officer removal statute. R. at 34a; 28 U.S.C. § 1442 (2012). Agent Schrader moved to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b) ("Rule 12") claiming he was immune from the prosecution because he had Supremacy Clause immunity. *Id.;* Fed. R. Crim. P. 12(b)(1).

District court. The district court received extensive briefing and held a hearing on the immunity claim. *Id.* It found that district courts should resolve material factual disputes when deciding motions to dismiss based on Supremacy Clause immunity, and it resolved the disputed issues underlying Agent Schrader's claim. R. at 36a–39a. Next, it found that Agent Schrader was protected by Supremacy Clause immunity because his actions were necessary and proper. R. at 37a. On these grounds, the district court dismissed the case. R. at 41a. New Tejas appealed. R. at 2a.

Thirteenth Circuit. A split panel of the Thirteenth Circuit reversed. R. at 1a. The Thirteenth Circuit held the facts must be viewed in the light most favorable to the state on a Rule 12 motion to dismiss and then disregarded the district court's

factual findings. R. at 8a. The Thirteenth Circuit then held that Agent Schrader was not entitled to Supremacy Clause immunity. R. at 13a. It reasoned that Agent Schrader's arrest of Mr. White was not: necessary to accomplish his duties, subjectively proper, or objectively proper. R. at 8a–13a.

Agent Schrader appealed, and this Court granted certiorari. This Court should review the decision of the Thirteenth Circuit *de novo*. *Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006) ("Supremacy Clause immunity dismissals . . . are reviewed de novo.").

Summary of the Argument

Agent Schrader's arrest of Mr. White was necessary and proper. And—as the district court properly held in resolving the material factual disputes—he is protected by Supremacy Clause immunity. That decision was wrongly reversed by the Thirteenth Circuit for the following reasons.

1. District courts should resolve material factual disputes.

The Thirteenth Circuit held that the district court improperly resolved disputed facts underlying Agent Schrader's Supremacy Clause immunity claim. It reasoned that district courts should view the facts in the light most favorable to the state when determining a motion to dismiss based on Supremacy Clause immunity. The Thirteenth Circuit was wrong for four reasons.

First, the Thirteenth Circuit's decision undermines the effectiveness of Supremacy Clause immunity. Under the Thirteenth Circuit's approach, if a state disputes a material fact underlying a federal officer's immunity claim, the immunity

determination is taken out of the judge's hands, the criminal case proceeds to a jury trial, and the jury resolves the disputed factual issues underlying the immunity. This approach is dangerous because it allows state prosecutors—often with a personal vendetta against a certain federal law—to rob federal officers of the benefits of immunity: avoiding trial in the first place. This Court can prevent this by providing two procedural protections to federal officers facing criminal prosecution: (1) a federal judge and (2) a pretrial resolution of the immunity claim. This approach is consistent with other protections this Court and Congress provide to government officers facing liability. Moreover, keeping the immunity decision in the judge's hands for pretrial resolution maintains the full benefits of immunity when federal officers are entitled to it.

Second, Rule 12 encourages districts courts to resolve immunity issues on a pretrial motion to dismiss. The Advisory Committee listed "immunities" as one of the objections to be decided by pretrial motion without a trial on the merits. And Rule 12 specifies that district courts may resolve factual issues in resolving such pretrial motions. The district court followed Rule 12 procedures in resolving Agent Schrader's motion to dismiss, and the Thirteenth Circuit was wrong to reverse.

Third, district courts are the superior arbiter of disputed material facts underlying criminal immunities. District courts routinely resolve disputed material facts underlying immunity deals, double jeopardy claims, and selective prosecution claims. Supremacy Clause immunity, like each of these immunities, concerns a constitutional defect in the prosecution rather than the guilt or innocence of the

accused. Accordingly, judges are best suited to resolve the separate, federal question of Supremacy Clause immunity before the guilt or innocence phase of the prosecution.

Finally, the Thirteenth Circuit improperly held that the Sixth Amendment requires a jury determination of disputed material facts underlying Supremacy Clause immunity. By its plain text, the Sixth Amendment is only triggered if there is a criminal prosecution. When a federal officer has Supremacy Clause immunity, the state has no criminal offense to prosecute because it is stripped of its jurisdiction. The Thirteenth Circuit's understanding of Supremacy Clause immunity as a defense to liability rather than an immunity from suit altogether is incorrect. Additionally, the Thirteenth Circuit disregards this Court's precedent that says a jury is not required to determine Supremacy Clause immunity.

2. The Supremacy Clause immunity test should provide more protection than qualified immunity—not less.

The Thirteenth Circuit held that Agent Schrader was not entitled to Supremacy Clause immunity. It reasoned that his actions were not necessary because he was not mandated to arrest Mr. White. Further, it found that Agent Schrader's actions were both subjectively and objectively improper. The Thirteenth Circuit's application of the Supremacy Clause test was wrong for three reasons.

First, the Thirteenth Circuit erred in limiting the scope of Agent Schrader's duties to mandatory actions. That ruling is too narrow because it discounted Agent Schrader's need for discretionary decision-making. Agent Schrader was empowered by federal law to make the arrest. More importantly, elimination of federal officers'

discretionary decision-making abilities exposes them to significant criminal liability. This exposure not only nullifies immunity—it chills federal law enforcement.

Second, Agent Schrader's subjective intent is irrelevant. This Court removed subjective intent from the qualified immunity test because it proved unworkable and inconsistent with the policy aims of immunity doctrines. And when analyzing excessive force in arrest cases, this Court consistently applies the Fourth Amendment "objective reasonableness" test—which also does not include subjective intent. Similarly, adding subjective intent to the Supremacy Clause immunity test negates a chief purpose of the immunity—avoiding trial altogether—and is inconsistent with Fourth Amendment precedent.

Lastly, when determining that Agent Schrader's action were objectively improper, the Thirteenth Circuit failed to ask whether he violated clearly established federal law. Thus, the objectivity analysis ended prematurely. Supremacy Clause immunity must include the same "double standard of reasonableness" offered under qualified immunity. The Thirteenth Circuit's analysis failed to satisfy the Due Process Clause's requirement that federal officers receive "fair warning" about the illegality of their actions. More importantly, failure to ask this question empowers states to impede federal law and violates the federalism principles that bind our country together. Since the Thirteenth Circuit applied the incorrect Supremacy Clause immunity test, this Court should reverse the Thirteenth Circuit's ruling.

Argument

This Court should reverse the Thirteenth Circuit's decision for two reasons. First, the Thirteenth Circuit improperly held that district courts cannot resolve material factual disputes necessary to determine Supremacy Clause immunity on a federal officer's pretrial motion to dismiss. Second, the Thirteenth Circuit misapplied the test for determining whether a federal officer is entitled to Supremacy Clause immunity.

I. District courts should resolve material factual disputes necessary to determine Supremacy Clause immunity on a pretrial motion to dismiss.

The Supremacy Clause of the United States Constitution provides that "[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. To prevent states, like New Tejas, from frustrating the legitimate execution of supreme federal laws, "federal officers have long been held immune from state prosecutions for actions reasonable and necessary in the discharge of their federal responsibilities." *Wyoming v. Livingston*, 443 F.3d 1211, 1217 (10th Cir. 2006) (citing *In re Neagle,* 135 U.S. 1, 75 (1890); *Ohio v. Thomas,* 173 U.S. 276, 284 (1899)).

Originally, federal officers asserted Supremacy Clause immunity through a writ of habeas corpus. Today, however, federal officers generally assert their immunity using a motion to dismiss under Rule 12(b). *See, e.g.*, *Kentucky v. Long*, 837 F.2d 727, 730 (6th Cir. 1988). Courts analyze the merits of the immunity claim identically under either vehicle. *See New York v. Tanella*, 374 F.3d 141, 149 n.1 (2d

Cir. 2004) ("We note that the Supremacy Clause immunity principles enunciated in the habeas context apply equally to a Rule 12(b) motion to dismiss.").

When a federal officer raises Supremacy Clause immunity on a Rule 12(b) motion to dismiss and the state *does not dispute* any material facts, the judge determines whether the officer is entitled to immunity (and if so, dismisses the criminal case). The question before this court, however, is when the state *does dispute* underlying material facts, should the judge make factual findings or view the facts in the light most favorable to the state (and accordingly deny the motion to dismiss and let the criminal case go to a jury trial)? In other words, who is the proper arbiter of conflicting material facts underlying Supremacy Clause immunity—the judge before trial or the jury during trial? Agent Schrader, the Ninth Circuit, and the Fourth Circuit suggest the proper arbiter is the district court judge *before* a trial on the merits. The Thirteenth Circuit decided, however, the proper arbiter is the jury *during* the trial on the merits.

In *Idaho v. Horiuchi*, the Ninth Circuit directly analyzed this question and determined that the "factual issues must be resolved by a district court prior to trial." 253 F.3d 359, 376 (9th Cir.) (en banc), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001).[1] The Ninth Circuit relied on "the only case to speak directly to this issue"—a century old Fourth Circuit habeas case. *Id.* at 374 (citing *West Virginia v. Laing*, 133 F. 887, 891 (4th Cir. 1904)). In *Laing*, the state argued that a writ of habeas corpus should not have been granted to the federal officer in part because "a jury

[1] The *Horiuchi* decision became moot because Idaho later dropped the charges against the federal agent.

and not the court below should have passed upon the evidence" underlying Supremacy Clause immunity. *See* 133 F. at 891. The Fourth Circuit concluded that "Congress certainly intended, in cases of this character, that the judges of the United States should hear the evidence, and without a jury proceed in a summary way to pass upon the federal question involved." *Id.*

Here, the district court found the Ninth Circuit approach persuasive and resolved the disputed material facts underlying Agent Schrader's Supremacy Clause immunity on his Rule 12(b) motion to dismiss. The Thirteenth Circuit reversed in part because it relied on cases from the Tenth, Second, and Sixth Circuits to support its view that the district court should view conflicting material facts in the light most favorable to the state. *See* R. at 6a (citing *Livingston*, 443 F.3d at 1266; *Tanella*, 374 F.3d at 148; *Long*, 837 F.2d at 752). The Thirteenth Circuit's reliance on these cases is misplaced.

At best, the Thirteenth Circuit relied on dicta because none of the district courts actually resolved disputed material facts underlying the immunities because they each found that no material facts were disputed. *See Livingston*, 443 F.3d at 1229 ("We believe the undisputed evidence in the record establishes that the [requirements of Supremacy Clause immunity are met]."); *Tanella*, 374 F.3d at 147 ("[The district court concluded that] the facts that are disputed do not bear on the issue of immunity."); *Long*, 837 F.2d at 741 ("[T]he district court concluded that there was no genuine factual dispute [related to Supremacy Clause immunity]."). Further, these cases provide no analysis on—and the parties did not argue—who

the proper arbiter of the underlying facts should be. *See, e.g.*, *Livingston*, 443 F.3d at 1226 ("The parties do not dispute these standards."). In all of these cases, the circuit courts affirmed the district courts' motions to dismiss and found that the federal agents were entitled to Supremacy Clause immunity. *See id.* at 1231; *Tanella*, 347 F.3d at 148; *Long*, 837 F.2d at 752.

This Court should determine that federal judges must resolve material factual disputes underlying Supremacy Clause immunity before trial. This approach ensures that Supremacy Clause immunity retains its bite. Moreover, it is consistent with the purposes of Rule 12(b), the practice of judges determining facts underlying other criminal immunities, and the Sixth Amendment.

A. Supremacy Clause immunity will only remain effective if district courts resolve material factual disputes pretrial.

The procedures used to adjudicate immunities are often as important as the underlying substantive law in protecting the goals and purposes of the immunity. *See* R. at 8a (Hamlin, J., dissenting) ("How a right is asserted (and that assertion adjudicated) is often as important as the substantive standard."). Here, the Court is faced with a procedural question that could undermine the effectiveness of Supremacy Clause immunity and accordingly the supremacy of federal law guaranteed in our Constitution. To ensure its vitality, this Court should determine that judges should resolve the material factual disputes underlying Supremacy Clause immunity at the motion to dismiss phase.

Allowing judges to determine material factual disputes pretrial is important for two reasons. First, it prevents state prosecutors from simply alleging a disputed

fact to rob federal officers of the benefits of immunity—avoiding trial in the first place. Second, it protects the effectiveness of Supremacy Clause immunity, like this Court and Congress have done in other contexts, by imposing a federal judge and ensuring a pretrial resolution of the immunity.

1. The effectiveness of Supremacy Clause immunity is undermined if state prosecutors can obstruct enforcement of unpopular federal laws simply by alleging a disputed fact.

One of the concerns this Court had over a century ago was that without the protection of Supremacy Clause immunity, "the operations of the general government may at any time be arrested at the will of one of its members." *Neagle*, 125 U.S. at 62 (citing *Tennessee v. Davis*, 100 U.S. 257, 262 (1879)). The Thirteenth Circuit ignored this concern. Here, the prosecutor, Mrs. Wexler, admitted she is attempting to "arrest" the operations of the general government. As she announced at a rally before Agent Schrader was arrested: "I will use every power of this office to prevent federal marijuana laws from being enforced in this great state." R. at 32a. This case illustrates that allowing state prosecutors to overcome the protections of Supremacy Clause immunity by alleging a conflicting material fact would be contrary to the robust protections of the immunity. To prevent this, this Court should allow federal judges to resolve material factual disputes before trial to "provide a significant restraint on overzealous state prosecutors and ensure such prosecutions remain an avenue of last resort in our federal system." *Horiuchi*, 253 F.3d at 376.

If facts must be viewed in the light most favorable to the state on a motion to dismiss, federal judges will often lose the ability to protect federal officers from prosecutors, like Mrs. Wexler. This is because "there are almost invariably matters of factual dispute in cases involving criminal charges." *Morgan v. California*, 743 F.2d 728, 733 (9th Cir. 1984). And "when the objective [of the state prosecution] is obstruction or harassment [of federal law,] it is far too easy to allege the existence of a factual dispute, even when none exists." *Id.* Taking the immunity decision out of the judge's hands on a motion to dismiss would "permit local prosecutors to fabricate allegations that, if true, would negate immunity." R. at 17a (Hamlin, J., dissenting). But allowing the district court to sit as the fact finder over disputed issues relevant to Supremacy Clause immunity will "act as a substantial safeguard against frivolous or vindictive criminal charges by states against federal officers." *Horiuchi*, 253 F.3d at 376.

2. This Court and Congress repeatedly alter norms to ensure the effectiveness of governmental immunities by inserting a federal judge and ensuring pretrial resolution of immunities.

The civil and criminal immunities provided to government officials are undermined if officials are forced to stand trial. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("[The] entitlement is an *immunity from suit* rather than a mere defense to liability [which] is effectively lost if a case is erroneously permitted to go to trial."); *Tanella*, 374 F.3d at 147 ("[T]he federal immunity defense ought to be decided early in the proceedings so as to avoid requiring a federal officer to run the gauntlet of standing trial and having to wait until later to have the immunity issue

decided."). That is why this Court and Congress have developed special measures to fortify the immunities provided to government officials in civil suits and criminal prosecutions.

These special measures repeatedly alter norms to impose two vital protections: an intervening federal judge and a quick resolution of the governmental immunity before a full trial. These norm-altering devices include the: (1) federal officer removal statute, (2) adaptation of the civil qualified immunity test to facilitate early resolution of the immunity as a pure question of law, and (3) availability of immediate interlocutory appeals from a denial of civil absolute and qualified immunity. To preserve the effectiveness of Supremacy Clause immunity, this Court should likewise alter the factual determination norm on a motion to dismiss to ensure the two vital protections of the immunity—a federal judge and a pretrial resolution—remain intact.

First, Congress altered the removal norm to impose the vital protection of an intervening federal judge when a federal officer is sued or charged with a crime and asserts a federal defense. Normally, a defendant may remove her case from state court to federal court only if the plaintiff could have brought the case in federal court originally—either because the federal court has subject matter jurisdiction based on diversity of citizenship or the presence of a federal question. *See* 28 U.S.C. § 1441(b) (2012). Normally, removal is not permitted based on an "anticipated federal defense." *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). Congress altered this norm by passing the federal officer removal statute

which provides for removal of "[a] civil action or criminal prosecution commenced in a State court against . . . any officer [of] the United States sued in an official or individual capacity for any act under color of such [office]." 28 U.S.C. § 1442 (2012). This norm altering device allows a federal officer to remove her case based on a federal defense—like Supremacy Clause immunity. In passing this statute, "Congress has decided that federal officers . . . require the protection of a federal forum." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). This Court has interpreted this procedural protection broadly by holding a "[federal] officer need not win his case before he can have it removed." *Id.*

Second, this Court altered the qualified immunity doctrine—by eliminating the subjective prong—to encourage resolution of the immunity as a question of law on a pretrial summary judgment motion. Under the old qualified immunity test, courts considered the government officer's subjective intent. *See Wood v. Strickland*, 420 U.S. 308, 321 (1975), *abrogated by Harlow v. Fitzgerald*, 457 U.S. 800, 815–16. Subjective intent is inherently a factual question which made qualified immunity difficult to resolve without a full trial. *See Harlow*, 457 U.S. at 816 ("[A]n official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury."). In *Harlow*, however, this Court eliminated the subjective component of the *Wood* test. *See id.* at 818. This transformed the inherently fact based question into a question of law which can normally be resolved on a pretrial motion. *See id.* ("Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly

established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."). This Court has emphasized that a judge should determine the validity of the qualified immunity defense early in the litigation process. *See id.* ("Until this threshold immunity question be resolved, discovery should not be allowed."); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.").

Finally, this Court altered the final judgment rule norm to impose the protection of a speedy, pretrial resolution of the absolute and qualified immunity defenses. Normally, in federal courts, a party may appeal only a "final judgment." *See* 28 U.S.C. § 1291 (2012). This Court in *Mitchell*, however, altered the final judgment rule norm by allowing government officials to immediately appeal the denial of a qualified immunity claim through an interlocutory appeal. *See* 472 U.S. at 526–27 (making clear the immediate appeal mechanism is also available in the absolute immunity context). This Court reasoned that qualified immunity is "effectively unreviewable on appeal from a final judgment" since it is a right "not to stand trial." *Id.*

It is true that in the civil qualified immunity context, if a trial court bases its rejection of qualified immunity on the presence of genuine issues of fact concerning a principal element of the plaintiff's case, the defendant may not pursue an interlocutory appeal on immunity. *Johnson v. Jones*, 515 U.S. 304, 313 (1995) (holding the district court's denial of summary judgment on qualified immunity was

"not appealable" because it "raised a genuine issue of fact concerning petitioners' involvement in the alleged beating of respondent"). Similarly, lower courts frequently find that disputed factual issues underlying qualified immunity claims can not be resolved on summary judgment and must be put to the jury. *See, e.g.*, *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir.1993).

Even so, immunity from a criminal prosecution should be broader and more protective than immunity from a civil suit. Judges should still resolve factual disputes underlying Supremacy Clause immunity at the motion to dismiss phase. The Ninth Circuit, in *Horiuchi*, explained that Supremacy Clause immunity calls for a "more cautious approach" than qualified immunity because "criminal liability threatens the officer personally in a way that civil liability does not." 253 F.3d at 376. If an officer is not immune from a civil suit, the government agency will often indemnify the agent's civil damages. *See id.* In contrast, if a federal officer is not immune from a criminal prosecution, the government agency cannot "serve prison time for the officer, . . . restore voting or other civil rights, or make up for the shame that results from a criminal conviction." *Id.* Since the federal office will bear the entire criminal sanction in Supremacy Clause immunity cases, "the procedures we follow in the civil context will not sufficiently protect officers from the risk of state criminal prosecution." *Id.*

Further, if we treat Supremacy Clause immunity identically to qualified immunity, and allow a disputed issue of fact to take the determination out of the judge's hands, state prosecutions of federal officers could become "common" like civil

suits against government officers. *Id.* This is troubling because state prosecutions "whether successful or not" impose a "heavy burden on the [federal] agent charged and the agency that employs him." *Id.*

B. Rule 12 encourages district courts to resolve immunity issues on a pretrial motion to dismiss.

Rule 12(b)(1) 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." *See* Fed. R. Crim. P. 12(b)(1). The Advisory Committee explains that this "group of objections and defenses" includes determining whether the defendant has "immunity" from the criminal prosecution. *See* Fed. R. Crim. P. 12(b), Advisory Committee Notes. Rule 12 "creates a presumption that motions filed prior to trial will be resolved prior to trial." *See* 1A Charles Alan Wright et al., *Federal Practice and Procedure Criminal* § 194 (4th ed. 2018). Rule 12(d) even *requires* the court to "decide every pretrial motion before trial unless it finds good cause to defer a ruling." Fed. R. Crim. P. 12(d). Rule 12(d) clarifies that the district court must resolve factual issues in ruling on such pretrial motions. *See id.* ("When factual issues are involved in deciding a motion, the court must state its essential findings on the record."). Here, the district court resolved factual disputes underlying Supremacy Clause immunity and stated his essential findings on the record in compliance with Rule 12.

The Thirteenth Circuit disagreed with this approach. It claimed that Supremacy Clause immunity can only be determined "without a trial on the merits" if the state does not dispute any material facts. R. at 7a. Not so. A trial on the

merits is not required because the determination of Supremacy Clause immunity is a distinct, preliminary federal question to be determined *before* a state can pursue the case on the merits. *See Clifton v. Cox*, 549 F.2d 722, 730 (9th Cir. 1977) (noting that when Supremacy Clause immunity is established "the prosecution has no factual basis upon which to prosecute [the federal officer] and the entire proceeding is a nullity"); *Horiuchi*, 253 F.3d at 375. ("[T]he question of Supremacy Clause immunity, while very similar to the issues presented in the criminal case, is nevertheless quite distinct.").

While it is true that the facts underlying the Supremacy Clause immunity determination are similar to the facts that a jury would have to determine if the criminal case goes to trial,[2] the district court still has discretion to determine the separate, and preliminary federal question of Supremacy Clause immunity on a Rule 12(b) motion. *See id.* ("While the jury must decide the case under state law, Supremacy Clause immunity is a matter of federal law."). Rule 12 provides support that Congress intended, in ratifying the rules, that district courts should resolve immunity defenses on a pretrial motion. But "[e]ven if Rule 12 were removed from the federal rules, the Constitution[] would still require—and empower—district judges to rule on and decide any disputed issues of fact related to the assertion of immunity." R. at 19a (Hamlin, J., dissenting).

[2] The facts underlying the elements of the assault and aggravated assault charges are not in dispute. However, Agent Schrader's potential defense to criminal liability—if he is denied immunity—is justification based on arrest and search. *See* N.T. Penal Code § 50.01. The jury would have to determine if Agent Schrader "reasonably believe[ed] the arrest [was] lawful." N.T. Penal Code § 50.02.

C. District courts are the superior arbiter of disputed material facts underlying criminal immunities.

Courts routinely resolve factual disputes in other criminal immunity contexts before a criminal trial. *See, e.g., United States v. Mendoza,* 78 F.3d 460, 464–65 (9th Cir. 1996) (immunity deals); *United States v. Gutierrez–Zamarano,* 23 F.3d 235, 237 (9th Cir. 1994) (double jeopardy); *United States v. Berrigan*, 482 F.2d 171, 175 (3d Cir. 1973) (selective prosecution). The Ninth Circuit, in *Horiuchi*, found this practice persuasive in holding that district courts should determine factual disputes underlying Supremacy Clause immunity. *See* 254 F.3d at 375. Courts, rather than a jury, decide these questions because they address whether there is a "constitutional defect" in the institution of the prosecution not the "guilt or innocence" of the accused. *Berrigan*, 482 at 175. Judges should determine the existence of a "constitutional defect" since it is separate and independent from the question of criminal liability. *Id.* (citing *Ford v. United States*, 273 U.S. 593, 606 (1927) ("The Supreme Court has distinguished between the necessity for a jury determination when the question is the defendant's guilt or innocence, and those preliminary matters concerning the right of the court to conduct the trial.")).

In other words, even if a state could prove every element of an underlying criminal offense beyond a reasonable doubt, the defendants are still immune from prosecution in these cases. *See, e.g.*, *United States v. MacDougall*, 790 F.2d 1135, 1142 (4th Cir. 1986) ("Guilt or innocence is immaterial to the disposition of double jeopardy claims."). This is true regardless of whether some of the factual determinations may be relevant to both the immunity and the underlying merits of

the criminal claim. To be sure, none of these situations "provide[] a perfect analogy" to the question here since the facts underlying Supremacy Clause immunity are more similar to the facts underlying the criminal case. *Horiuchi*, 254 F.3d at 375. But there are "significant policy reasons" for still treating Supremacy Clause immunity like these other "constitutional defect" questions. *See id.*

Judges, in fact, are routinely tasked with resolving factual disputes when a policy reason compels them to do so. For example, judges often determine "factual disputes underlying attorney-client privilege, executive privilege, probable cause and other evidentiary matters." *Id*. There are multiple policy reasons for a judicial resolution of Supremacy Clause immunity. First, as discussed above, a judicial factual resolution will maintain the effectiveness of immunity. Second, practically speaking, a federal judge is the superior arbiter. Federal judges are better equipped in the "subtleties of federal immunity law," can issue more transparent rulings than a jury for easy appellate review, and can avoid confusing the jury with applying two "similar-yet distinct-legal standards" to the same underlying facts. *Id.* at 375–76.

Just because a court resolves material factual disputes does not mean that immunity is bulletproof and will always protect a federal officer from trial. It simply gives the officer the ability to take full advantage of his immunity—if he in fact has it—by avoiding the stress of a criminal trial. *See Tanella*, 374 F.3d at 147. Thus, judges should resolve Supremacy Clause immunity factual disputes pretrial like they do in related criminal immunity contexts.

D. The Sixth Amendment does not require a jury determination of disputed material facts underlying Supremacy Clause immunity.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by an impartial jury." U.S. Const. amend. VI. The Thirteenth Circuit determined that this requires Agent Schrader to "face trial before a jury of his peers" when facts are disputed underlying his immunity defense. R. at 6a. But the jury requirement is only triggered *if there is a criminal prosecution*, which is not the case when a federal officer has Supremacy Clause immunity. The Thirteenth Circuit's approach is wrong for two reasons. First, it misconstrues Supremacy Clause immunity as being a defense to liability rather than a question of the state's jurisdiction to prosecute the criminal offense. Second, it disregards this Court's Supremacy Clause immunity precedent that says a jury is not required.

If an agent has Supremacy Clause immunity, the state has no criminal offense to prosecute because it is "stripped of its jurisdiction." *See Thomas*, 173 U.S. at 283 ("[F]ederal officers discharging their duties in a state . . . are not subject to the jurisdiction of the state in regard to those very matters of administration which are thus approved by federal authority."); *United States ex rel. Drury v. Lewis*, 22 U.S. 1, 8 (1906) ("The Circuit Court was not called on to determine the guilt or innocence of the accused. That was for the state court *if it had jurisdiction*." (emphasis added)). Supremacy Clause immunity does not simply provide "a mere shield against liability" like most defenses but rather "immunity from suit" all together. *See Tanella*, 374 F.3d at 147; *Clifton*, 549 F.2d at 730. Unlike defenses to

liability,[3] once Supremacy Clause immunity is established, no court has to "acquit" the federal officer of the criminal charges. *See Neagle*, 135 U.S. at 75 (If the requirements of Supremacy Clause immunity are shown, "[t]here is no occasion for any further trial in the state court, or in any court."); *Arizona v. Files*, 36 F. Supp. 3d 873, 877 (D. Ariz. 2014) ("[I]t is not left to a federal or state jury to acquit the defendant of state-law criminal charges, or to a federal or state judge to direct a verdict in the defendant's favor; the federal or state court is instead *stripped of any jurisdiction* over the defendant." (citing *Thomas*, 173 U.S. at 283)). In *Neagle*, the Court compared the determination of Supremacy Clause immunity to a "preliminary examination by a committing magistrate" to determine "whether there is an offense to be submitted to a jury." 135 U.S. at 75. Accordingly, the Sixth Amendment protection does not require a jury determination of Supremacy Clause immunity.

Moreover, when this Court first established Supremacy Clause immunity, it held that a jury is *not* required to determine the facts underlying the immunity. *Id*. In *Neagle*, a U.S. Marshall assigned to protect Justice Field was charged with murder in California after he shot a man believed to be pulling out a knife to harm Justice Field. *Id.* at 53. This Court, after determining that Neagle was properly appointed and carrying out federal law when he made the shot, held that Neagle

[3] This approach is consistent with the treatment of the criminal immunity determinations discussed above which also do not "implicate the issue of appellants' guilt or innocence" but "the right of the government to bring the action itself." *See, e.g.*, *MacDougall*, 790 F.2d at 1142 (holding double jeopardy claims are for the court—not a jury—to resolve).

was completely shielded from prosecution in state court. *Id.* at 69. In response to the state's argument that it should get to try Neagle for the "whole offense," the court responded that "[t]he circuit court of the United States was as competent to ascertain these facts [to determine Supremacy Clause immunity] as any other tribunal, and it was *not at all necessary that a jury should be impaneled* to render a verdict on them." *Id.* at 75 (emphasis added).

To be sure, if Supremacy Clause immunity is denied, Agent Shrader's Sixth Amendment right to a jury trial would be implicated for the criminal assault trial. The Sixth Amendment does not require, however, that a jury determine the facts underlying the Supremacy Clause immunity defense on a preliminary motion to dismiss. Thus, this Court should reverse the Thirteenth Circuit's decision since the district court judge properly resolved the disputed material facts underlying Agent Schrader's Supremacy Clause immunity on his Rule 12(b) motion to dismiss.

II. The Supremacy Clause immunity test should be at least as protective as the qualified immunity test.

As Chief Justice John Marshall stated, "The states have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *McCulloch v. Maryland*, 17 U.S. 316, 317 (1819). The Thirteenth Circuit's decision, however, allows states to do everything this Court prohibited in *McCulloch*.

This Court recognized over a century ago that federal officers are immune to state prosecution when they: (1) act under valid federal authority and (2) do "no

more than what [is] necessary and proper" to carry out their authority. *See Neagle*, 135 U.S. at 75; *see also Thomas*, 173 U.S. at 456. It also granted state officers qualified immunity—recognizing that government officers face asymmetrical incentives because they endure substantial risks without receiving any of the rewards available to private citizens. *See Richardson v. McKnight*, 521 U.S. 399, 410–11 (1997).

While the two doctrines of immunity have different sources, they are functionally identical. *Livingston*, 443 F.3d at 1221. Both seek to balance asymmetrical incentives and "reduce the inhibiting effects that a civil suit or prosecutions can have on the effective exercise of official duties by enabling government officials to dispose of cases against them at an early stage of litigation." *Id.*; *see also Anderson v. Creighton*, 483 U.S. 635, 638 (1987) ("[D]amages suits against government officials can entail social substantial social costs, including the risk that fear of personal liability and harassing litigation will unduly inhibit officials in the discharge of their duties."); *Butz v. Economou*, 438 U.S. 478, 504–06 (1978) (noting "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging vigorous exercise of official authority"). And "in general our cases have followed a 'functional' approach to immunity law." *Harlow*, 457 U.S. at 810. Thus, it follows that federal officers should enjoy—at least—the same protection from criminal prosecution that state officers receive under qualified immunity from civil damages. *See Long*, 837 F.2d at 752 (analogizing Supremacy Clause immunity to qualified immunity).

The Thirteenth Circuit applied the *Neagle* test and held that Agent Schrader was not entitled to Supremacy Clause immunity because: (1) it was not mandatory to arrest Mr. White, (2) the arrest was not subjectively proper, and (3) the arrest was not objectively proper. But the Thirteenth Circuit's opinion misapplies the *Neagle* test and misinterprets the functional approach of Supremacy Clause immunity for three reasons.

First, Supremacy Clause immunity should protect *both* mandatory and discretionary actions. Second, subjective intent should be irrelevant. Third, like the qualified immunity test, the Supremacy Clause immunity test should include a "double standard of reasonableness." *Anderson*, 483 U.S. at 659 (Stevens, J., dissenting). This means even if Agent Schrader's methods were objectively unreasonable, this Court still should ask whether he violated clearly established federal law. Thus, this Court should reverse the Thirteenth Circuit's opinion for these three reasons.

A. Supremacy Clause immunity should include discretionary actions.

Federal officer immunity from state criminal prosecution is derived from the supremacy of federal law established by the United States Constitution. U.S. Const. art. VI, cl. 2. And the federal government "can act only through its officers and agents, and they must act within the states." *Tennessee v. Davis*, 100 U.S. 257, 263 (1879). Therefore, states may not interfere with the operation of the federal government through enforcement of state criminal laws.

Federal officers fulfilling authorized duties under the laws of the United States "doing no more than what [is] necessary and proper . . . cannot be guilty of a crime under the law of the state." *Neagle*, 135 U.S. at 75. The Thirteenth Circuit reasoned that only mandatory actions, or on-duty emergencies, can be considered necessary or proper. Not so. "To employ means necessary to an end is generally understood as employing *any means* calculated to produce the end, and not as being confined to those single mean . . . ." *McCulloch*, 17 U.S. at 413–14 (emphasis added). Therefore, "the concept of duty [must] encompass[] the sound exercise of discretionary authority." *Barr v. Matteo*, 360 U.S. 564, 575 (1959). This concept has been consistently upheld—even under Supremacy Clause immunity. *See Livingston*, 443 F.3d at 1227; *Clifton*, 549 F.2d at 728; *see also In re McShane*, 235 F. Supp. 262, 275 (N.D. Miss. 1964) (holding that a federal marshal was immune from state prosecution when he exercised discretion to use tear gas to control a crowd).

In *Clifton*, for example, a federal agent was part of a task force executing a search warrant at a suspected drug manufacturing house. 549 F.2d at 724. After exiting the helicopter that brought them to the house, one of the agents tripped and fell. *Id.* This caused the agent to mistakenly believe his fellow agent had been shot. *Id.* When the suspect fled the house, the agent chased after, shot, and killed him. The court held that "even though his acts may have exceeded his *express* authority, this did not necessarily strip [him] of his lawful power to act under the scope of his authority." *Id.* at 728 (emphasis added).

The Tenth Circuit adopted a similar analysis in determining whether discretionary acts can be necessary and proper. In *Livingston*, a federal contractor tasked with attaching tracking devices to gray wolves spotted a wolf pack while flying above a parcel of land. 443 F.3d at 1214. At the time, the contractor was unsure whether the land was private or federal property. *Id.* Federal procedure required contractors to secure permission from land owners if they needed to enter private property—something the contractor failed to do. *Id.* After the contractor secured the wolves, the property owner discovered the contractor depositing them on his private property. *Id.* at 1215. The state filed suit for trespass. *Id.* at 1216. The court held that the contractor was entitled to Supremacy Clause immunity despite the absence of explicit authority to trespass. It explained that "the question is not whether federal law expressly authorizes violation of state law, but whether the federal official's conduct was reasonably necessary for the performance of his duties." *Id.* at 1227–28. Thus, even conduct outside explicit authorization was found to be necessary and proper.

Like the defendants in *Clifton*, *Livingston,* and *McShane*, Agent Schrader was acting "within the outer perimeter of his line of duty." *Barr*, 260 U.S. at 575. He was authorized under federal law to make warrantless arrests for individuals committing federal crimes in his presence. *See* 18 U.S.C. § 3052 (2012). Whether it was mandatory for Agent Schrader to make the arrest is immaterial because he had discretionary "authority . . . derived from the general scope of [his] duties." *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982).

Moreover, the Thirteenth Circuit's distinction that Agent Schrader was off-duty and therefore not obligated to arrest Mr. White misses the point.[4] Agent Schrader, as an FBI Agent, had the authority to make the arrest regardless of his duty status. Besides, all federal employees are required to take an oath of office to uphold the Constitution—as an executive branch employee that includes the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. That duty never rests. Without protecting discretionary actions to insulate against state criminal prosecution, federal law enforcement will not just be chilled—it will be frozen solid. The Thirteenth Circuit's version of Supremacy Clause immunity based solely on mandatory duties gives federal officers a scarf in the face of a blizzard. Thus, this Court should reverse the Thirteenth Circuit's decision.

B. Supremacy Clause immunity should not include subjective intent.

The Thirteenth Circuit ruled that Agent Schrader's actions were not subjectively proper. That ruling is irrelevant. Not only is this holding contrary to this Court's functional approach towards immunity tests, it is inconsistent with the Fourth Amendment's "objective reasonableness" standard.

[4] Further, lower courts have applied qualified immunity under § 1983 to off-duty state officers who "slip[] into [their] police roles." *Lusby v. T.G. & Y. Stores*, 749 F.2d 1423, 1432 (10th Cir. 1984) (citations omitted) (finding an off-duty officer was not entitled to qualified immunity because he acted objectively unreasonable), *vacated sub nom. City of Lawton v. Lusby*, 474 U.S. 805 (1985); *see also Traver v. Meshriy*, 627 F.2d 934, 940 (9th Cir. 1980) (assuming that qualified immunity would apply to an off-duty police officer working as a security officer at a bank).

1. Including subjective intent erodes the functional protection of Supremacy Clause immunity.

This Court eliminated the subjective intent inquiry in civil suits because it was unworkable with the aims of qualified immunity. *See Harlow*, 457 U.S. at 817–18 ("The subjective element of the good-faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial."). And qualified immunity standards have already been applied to federal officers, at least in the civil context. *See id.* at 807 ("For executive officials in general, however, our cases make plain that qualified immunity represents the norm.").[5] Requiring a subjective intent analysis in Supremacy Clause immunity cases is not only inconsistent with qualified immunity precedent, it creates incongruent protections for federal and state officers—despite the presence of identical social costs.

Indeed, an inquiry into the state-of-mind of federal officers creates "substantial costs." *Id.* at 816. An "official's subjective good faith has been considered a question of fact . . . regarded as inherently requiring resolution by a jury." *Id.*; *see also* Fed. R. Civ. P. 56(a) (noting that disputed questions of fact ordinarily may not be decided on motions for summary judgment). Thus, subjective intent inquiries would "entail broad-ranging discovery and deposing of numerous

[5] Qualified immunity has also been applied to state officers in the criminal context. *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 270 (1997) (applying qualified immunity standards to a claim under 18 U.S.C. § 242). Even when analyzing "willfulness" under 18 U.S.C. § 242, this Court required an objective analysis. *See Screws v. United States*, 325 U.S. 91, 107 (1945) ("And in determining whether the requisite bad purpose was present the jury would be entitled to consider all the attendant circumstance[s] . . . .").

persons, including an official's professional colleagues." *Harlow*, 457 U.S. at 817. These inquiries would be "peculiarly disruptive of effective government" because of the social costs "not only to [federal] officials, but to society as a whole." *Id.* at 814–17. Society would suffer from "the expenses of litigation, diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* at 814.

Further, this Court found these social costs to be too expensive and eliminated the subjective intent analysis in civil suits for damages. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001) ("[I]mmunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" (citing *Mitchell*, 472 U.S. at 526)). But the argument for removing subjective intent in the criminal context stands on even higher ground. "[T]he principle aim of civil suits is not to punish the officers as it is to force law enforcement agencies to internalize social costs imposed by its officers." *Horiuchi*, 253 F.3d at 376. Criminal liability, however, forces federal officers to bear the brunt of social costs. Unlike civil suits for damages, the government cannot indemnify the officer from criminal punishment, restore his voting rights, "or make up for the shame that results from criminal conviction." *Id.* If "the danger that the fear of being sued [for damages] will 'dampen the ardor of . . . public officials, in the unflinching discharge of their duties,'" then surely that danger is exacerbated when faced with the possibility of criminal sanctions. *Harlow*, 457 U.S. at 814 (citations omitted).

2. Including subjective intent is inconsistent with Fourth Amendment precedent.

Moreover, this Court has already held that "excessive force [violations] in the course of making an arrest . . . are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 388 (1989); *see also Tennessee v. Garner*, 471 U.S. 1, 7–22 (1985) (analyzing claim of excessive force under the Fourth Amendment's "objective reasonableness" standard). "In determining the reasonableness of the manner in which a seizure is effected, 'we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Scott v. Harris*, 550 U.S. 372, 383 (2007) (citation omitted). In determining that balance, this Court found that "an arresting officer's state of mind . . . [was] irrelevant." *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). The legal justification for making an arrest is not invalidated because of the officer's state of mind. *Whren v. United States*, 517 U.S. 806, 814 (1996). *Compare Seiner v. Drenon*, 304 F.3d 810, 813 (8th Cir. 2002) (holding it was objectively reasonable for an officer to shoot a suspect even though he had a mistaken understanding that the suspect shot him), *with Deorle v. Rutherford*, 272 F.3d 1272, 1285 (9th Cir. 2001) (holding it was objectively unreasonable to shoot an unarmed man).

Conversely, the Thirteenth Circuit's decision—devoid of any reference to *Harlow* or the Fourth Amendment's "objective reasonableness" standard—fails to consider the balance that immunity provides: "the need to hold public officials

accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). That balance is critical, not only to state officers, but to federal officers. Further, the Thirteenth Circuit's reliance on *Clifton* for the principle of subjective intent is inapposite. *Clifton* was decided five years before *Harlow*. The inclusion of subjective intent was proper under precedent—at the time. *See Pierson v. Ray*, 386 U.S. 547, 557 (1967); *Wood*, 420 U.S. at 322.

To be sure, this Court left open—but did not decide—whether an officer's ill-will or objective good-faith could be relevant to determining an officer's credibility. *Graham*, 490 U.S. at 399 n.12. But the Thirteenth Circuit's reliance on *Files* proves too much. *See* R. at 10a–11a (citing *Files*, 36 F. Supp. 3d 873). First, absent in *Files* is any discussion of *Harlow*. Second, the focus in *Files* was on objective reasonableness: not subjective intent. *See id.* at 878 ("While a state opposing a Supremacy Clause immunity defense *need not* necessarily show the federal officer acted with malice, if the evidence shows a federal officer acted 'out of malice or with some criminal intent' the officer's conduct certainly will fall outside the scope of the defense." (emphasis added) (citations omitted)). At best, proving improper motive is "the plaintiff's burden of proving a constitutional violation." *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998).

But subjective bad faith and objective reasonableness cannot co-exist. *Manuel v. City of Joliet*, 137 S. Ct. 911, 925 (2017) (Alito, J., dissenting); *Livingston*, 443

F.3d at 1221 (expressing "concer[n] with the incorporation of a subjective element into reasonableness of a federal officer's actions"). In fact, lower courts that properly consider *Harlow* have declined to "delve into [a] defendant's intent" even in cases where malice is an element of the violation, like malicious prosecution. *See, e.g.*, *Sykes v. Anderson*, 625 F.3d 294, 309–10 (6th Cir. 2010); *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 n.6 (3d Cir. 1998); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 184 n.5 (4th Cir. 1996).

As former Solicitor General Waxman put it, qualified immunity in *Bivens* and § 1983 actions "best captures the doctrinal foundations and policy aims of Supremacy Clause immunity." Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2230–31 (2003). "We are obviously not free to add a 'malice' requirement where the Supreme Court has not done so, nor would such an addition be warranted." *Horiuchi*, 253 F.3d at 366 n.10. If subjective intent is irrelevant in the qualified immunity test, it is equally irrelevant in the Supremacy Clause immunity test.

Accordingly, Agent Schrader's subjective intent was irrelevant to his arrest of Mr. White, especially under the Fourth Amendment "objective reasonableness" standard. And the Thirteenth Circuit was wrong to consider it. Therefore—even viewing the facts in the light most favorable to the state—this Court must reverse the Thirteenth Circuit.

C. Supremacy Clause immunity should protect federal officers who do not violate clearly established federal law.

The Thirteenth Circuit also held that Agent Schrader's actions were objectively unreasonable. That holding was premature. To be sure, both parties agree that the means Agent Schrader used to arrest Mr. White were objectively unreasonable. But Supremacy Clause immunity should include the same "double standard of reasonableness" available under qualified immunity. *Anderson*, 483 U.S. at 659 (Stevens, J., dissenting). In other words, a federal officer should also get "two bites at the objective reasonableness apple." *See Saucier*, 533 U.S. at 195 (noting that qualified immunity applies where an officer makes a reasonable mistake that the amount of force used in making an arrest was reasonable); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) ("Qualified immunity gives government officials breathing room to make reasonable mistaken judgments about open legal questions. When properly applied it protects all but the plainly incompetent or those who knowingly violate the law." (citations omitted)).

Thus, the Supremacy Clause immunity test—like the qualified immunity test—requires asking whether an officer violated clearly established federal law for two reasons.[6] First, it ensures that federal officers are afforded "fair notice" under the Due Process Clause. Second, it prevents an end run around the Supremacy Clause. Because the Thirteenth Circuit failed to ask this question, it frustrated both of these constitutional provisions and this Court should reverse.

[6] The State of New Tejas concedes that if the test for qualified immunity applies, Agent Schrader's conduct did not violate clearly established federal law. R. at 41a n.8.

1. The Due Process Clause requires courts to ask whether a federal officer violated clearly established federal law to provide fair warning.

Federal officers are entitled to a "fair warning" by the Due Process Clause before being subjected to state criminal law. *See United States v. Lanier*, 520 U.S. 259, 270–71 (1997). Without fair warning "no man shall be held criminally responsible for [his] conduct" because he "could not reasonably understand [it] to be proscribed." *Id.* at 265 (citations omitted). Whether fair warning existed is determined by asking if "the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267; *see also Hope v. Pelzer*, 536 U.S. 730, 741–42 (2002) (holding that under qualified immunity, "clearly established law" includes both statutes and agency regulations or policies).

Further, this Court adapted the fair warning requirement from the criminal context to the civil context in qualified immunity. *See Lanier*, 520 U.S. at 270–71 ("[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability . . . that individuals have traditionally possessed . . . ."). And to ensure fair warning under the qualified immunity test, the Court must ask whether the officer violated clearly established law. *See, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 605–06 (1999) (holding that because the "state of the law was not clearly established" police officers were protected by qualified immunity even though they violated the Fourth Amendment).

Because federal officers acting within the states maintain their due process rights, the same question must be asked under the Supremacy Clause immunity test. This ensures that federal officers are given fair warning about what the law forbids when carrying out their federal duties. The Thirteenth Circuit deprived Agent Schrader of due process when it failed to ask whether he violated clearly established federal law. At bottom, bypassing this question puts all federal officers on dangerously thin ice because under Supremacy Clause immunity they would cease to ever have "fair warning." And without fair warning, federal officers would be blind to cracks in the ice—like being prosecuted under a state assault law—making them one misstep away from plunging into the freezing depths of the state court system below.

2. The Supremacy Clause's purpose is frustrated if courts do not ask whether a federal officer violated clearly established law.

"The purpose of the [S]upremacy [C]lause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls." *United States v. Allegheny Cty.*, 322 U.S. 174, 183 (1944), *abrogated on other grounds by United States v. City of Detroit*, 355 U.S. 466 (1958). But the Thirteenth Circuit's opinion creates an end run around the Supremacy Clause. Avoiding the question of whether a federal officer violated clearly established *federal* law implicitly changes the question to whether the officer violated clearly established *state* law. This frustrates the purpose of the Supremacy Clause because what is objectively reasonable would be defined solely by state statute—not federal law. In other words, states would be improperly empowered to

paralyze the operations of the federal government. This is constitutionally impermissible. *See Davis*, 100 U.S. at 262–63 ("The general government must cease to exist whenever it cannot enforce the exercise of its constitutional powers within the State by the instrumentality of its officers and agents."). Thus, when applying the "clearly established by law question," this Court must solely consider federal law for three reasons.

i. Supremacy Clause immunity stems from federal law not state law.

First, Supremacy Clause immunity already focuses on federal law. In *Neagle*, for example, this Court asked whether a federal marshal was authorized to shoot a suspect "in pursuance of a law of the United States." 135 U.S. at 58; *see also Johnson v. Maryland*, 254 U.S. 51, 56–57 (1920) ("[E]ven 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."). This Court did not ask whether state law authorized Neagle to act because federal officers derive their authority from federal law—not state law. Thus, it also makes sense to look to federal law when determining whether an officer violated clearly established law. To do otherwise creates an inconsistent standard.

ii. Focusing on state law creates an unworkable standard that burdens federal officers.

Second, looking at state law creates an unworkable standard because it would hinder the swift resolution of immunity claims and place unreasonable

burdens on federal officers, and by extension, the federal government. Supremacy Clause immunity, like qualified immunity, attempts to resolve conflicts swiftly without the need to conduct a trial. *See Pearson*, 555 U.S. at 231 ("[Q]ualified immunity is 'an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.'"); *Harlow*, 457 U.S. at 806–07 (noting that immunity also shields officers "from undue interference with their duties and from potentially disabling threats of liability"). Analyzing clearly established federal law provides courts with an efficient approach compared to the alternative of wading through dredges of unique and underdeveloped state law.

More importantly, allowing state law to determine how federal officers should act places an unreasonable burden on federal officers. If officers had to consult standards from each state before acting, federal operations would be stymied—especially if even a reasonable mistake could land them in jail. *See generally* James B. Jacob, *Criminal Justice in the United States: A Primer*, 49 Am. Studies J. 8 (2007) (noting that "every state . . . has its own substantive criminal law (specifying crimes and defenses) and criminal procedure" (internal marks omitted)). These burdens produce a chilling effect "in such a manner as to paralyze the operations of the [federal] government." *Davis*, 100 U.S. at 263.

iii. Federalism principles prohibit state law from controlling federal officers.

Finally, federalism and the purpose of the Supremacy Clause prohibits state law from controlling federal officers. Under the Articles of Confederation, the national government was dependent and subordinate to the states. But the Framers

altered this relationship when they signed the Constitution and enacted the Supremacy Clause. *See* The Federalist No. 27 (Alexander Hamilton) ("[T]he laws of the [National Government], as to the enumerated and legitimate objects of its jurisdiction, will become the supreme law of the land."). This new relationship required states to give up power to the federal government and not interfere with the federal government's exercise of that power. *See* The Federalist No. 44 (James Madison) (noting that the Supremacy Clause was necessary to prevent the national government's authority from being subordinate to the states).

This Court quickly adopted the same understanding. *See McCulloch*, 17 U.S. at 426 ("The constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them."). Accordingly, the Constitution does not leave the federal government vulnerable to state control of federal officers' enforcement of federal law. To do so would allow the operations of the federal government to be hindered by "one of its members." *Davis*, 100 U.S. at 263.[7]

Therefore, without asking whether federal officers, like Agent Schrader, violated clearly established federal law, the Thirteenth Circuit improperly equipped states with the ability to adjust the balance of power in the opposite direction,

[7] Likewise, states cannot interfere in the way Judge Skyler contemplates in her concurrence. Judge Skyler suggests that whether Agent Schrader is entitled to Supremacy Clause immunity involves balancing a "grievous state offense" with a "trivial federal policy." *See* R. at 14a. (Skyler, J., concurring). This Court has held that the Supremacy Clause does not allow states to interfere with federal law regardless of the state law's importance. *See Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986) ("There can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress.").

giving them the means to control federal officers. *See Thomas,* 173 U.S. at 284 (holding that a federal officer was not "subject to the direction or control of the legislature of Ohio"); *In re Waite*, 81 F. 359, 371 (N.D. Iowa 1897), *aff'd sub nom. Campbell v. Waite*, 88 F. 102 (8th Cir. 1898) ("The *mode or manner* in which the [federal] officer or agent undertakes to perform the duty imposed upon him by the laws or authority of the United States is not a matter of state cognizance."(emphasis added)); *In re McShane*, 235 F. Supp. 262, 274 (N.D. Miss. 1964) (same). This constitutional problem creates a practical governance issue: it allows the states to nullify federal law. Something this Court prohibited. *See Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958) (rejecting the idea that states could nullify federal law or a federal court's rulings).

For instance, suppose a conservative state that disagrees with the federal government's prohibition on machine guns passes a law allowing them. And a liberal state that disagrees with federal immigration law creates "sanctuary cities." If the federal government attempted to confiscate machine guns, arrest machine gun owners, or deport undocumented immigrants in these states, the states could "protect" their citizens by threating to arrest and prosecute any federal agent who tries to enforce federal law—just like the state prosecutor who used Agent Schrader "as a warning to any other officers seek[ing] to enforcing [federal] marijuana laws." R. at 33a.

Although federal courts would declare these state laws unconstitutional, the executive branch would be stripped of any power to enforce the federal court's

ruling. This result would be improper because "[i]f the legislature of the several states may, at will, annul judgements of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality if its own tribunals." *United States v. Peters*, 9 U.S. 115, 136 (1809). And the "[federal] government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." *Martin v. Hunter's Lessee*, 14 U.S. 304, 363 (1816); *McCulloch*, 17 U.S. at 427 ("It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in [state] governments, as to exempt its own operations from their own influence.").

At bottom, unless it is federal law *alone* that controls federal officers, states will be improperly empowered. It would allow states to become their own authority in impermissible ways and divide our country. And as Justice Cardozo put it, "[the Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and in the long run prosperity and salvation are in union and not in division." *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 523 (1935).

To preserve the Constitution's federalism structure and prevent governance problems, this Court must ask whether a federal agent violated clearly established federal law when acting within the states. Because the Thirteenth Circuit failed to ask this question, this Court should reverse.

Conclusion

Agent Schrader had the authority and the duty to "take Care that the Laws be faithfully executed." That duty included arresting Mr. White for violating federal marijuana law. For the forgoing reasons, this Court should reverse the Thirteenth Circuit's decision on both questions in order to preserve the strength of the Supremacy Clause and the federalism values which keep our nation united and strong.

Respectfully submitted,

/s/ *Team 43*
Attorneys for the Petitioner
Team 43

Certificate of Service

The undersigned hereby certify that a true and correct copy of Petitioner's brief on the merits was forwarded to Respondent, the State of New Tejas, through the counsel of record by certified U.S. mail, return receipt requested, on this, the 18th day of November, 2019.

Respectfully submitted,

/s/ Team 43
Team 43
Attorneys for the Petitioner

Certificate of Compliance

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33.1(h), the undersigned hereby certify that this brief complies with the typeface requirements because it was prepared in Century Schoolbook, 12-point font. This brief contains 11,513 words, beginning with the Statement of Jurisdiction through the Conclusion, including all heading and footnotes but excluding the Certificate of Service, the Certificate of Compliance, and the attached Appendices pursuant to Supreme Court Rule 33.1(d).

Respectfully submitted,

/s/ Team 43
Team 43
Attorneys for the Petitioner

Appendix A

1. U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. U.S. Const. amend. XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix B

1. 18 U.S.C. § 3052 provides:

Powers of Federal Bureau of Investigation

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.

2. 21 U.S.C. § 844 provides in pertinent part:

Penalties for simple possession

(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 . . . .

3. 28 U.S.C. § 1442 provides in pertinent part:

Federal officers or agencies prosecuted

(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.

Appendix C

1. N.T. Penal Code § 22.01 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.

2. N.T. Penal Code § 22.02 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.

3. N.T. Penal Code § 50.01 provides:

Justification as a Defense

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

4. N.T. Penal Code § 50.02 provides:

Arrest and Search

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

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

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