No. C18-5188

IN THE

Supreme Court of the United States

OCTOBER TERM 2019

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

NOVEMBER 18, 2019

TEAM NUMBER 46
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. When deciding a motion to dismiss based upon immunity under the Supremacy Clause, should disputed issues of fact be determined by the judge to preserve the purpose of the Supremacy Clause?

II. In light of this Court's jurisprudence regarding immunity, what test governs whether the Supremacy Clause provides a federal officer with immunity from state criminal prosecution?

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Petitioner Hank Schrader is a federal law enforcement agent with the Federal Bureau of Investigation of the Department of Justice.

Respondent is the State of New Tejas, the 51st State of the United States of America.

DECISIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is not reported but is available at No. 18-5719 and is reprinted at R. at 1a. The district court's decision is not reported but is available at D.C. No. 17-cr-5142 and is reprinted at R. at 27a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 2, 2018. The petition was timely filed and granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent brought this action in New Tejas State Court under §§ 22.01 and 22.02 of the Penal Code of New Tejas, indicting Petitioner for assault and aggravated assault. The relevant New Tejas statutes are set forth at R. at 45a–46a and are reprinted in the Appendix.

Petitioner removed the state prosecution to federal court under 28 U.S.C. § 1442 and moved to dismiss the action under Federal Rule of Criminal Procedure 12(b), arguing that the Supremacy Clause provided him with immunity from state prosecution. The relevant United States statutes are set forth at R. at 43a–45a and are reprinted in the Appendix.

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

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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

INTRODUCTION

Article VI of the United States Constitution, popularly known as the Supremacy Clause, provides that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The framers designed the Supremacy clause to prevent states from "retard[ing], imped[ing], burden[ing], or in any manner control[ing] the operations of the constitutional laws enacted by congress." *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819). In 1890, this Court held that the Supremacy Clause protects a federal officer from state criminal prosecution where said officer is being held for "an act which he was authorized to do by the law of the United States, which it was his duty to do" and where he did "no more than what was necessary and proper for him to do." *In re Neagle*, 135 U.S. 1, 75 (1890). Here, the State of New Tejas seeks to prosecute Agent Schrader for exercising his duties as a federal law enforcement agent and enforcing the unpopular, federal marijuana laws. For this reason, this Court should reverse the decision of the Thirteenth Circuit Court of Appeals. This Court should hold that the district court must decide issues of fact in determining a motion to dismiss based upon Supremacy Clause immunity. Additionally, this Court should hold that in light of its jurisprudence regarding immunity, the test for determining whether an agent is entitled to Supremacy Clause immunity depends on whether the agent acted within the scope of his duties and whether, under a wholly objective analysis, his actions were necessary and proper.

STATEMENT OF THE CASE

A. Agent Schrader's Background

For nearly twenty years, Petitioner, Agent Hank Schrader, has served as a special agent with the Federal Bureau of Investigation (FBI) and has been stationed in three different states, namely: New Mexico, Michigan, and, presently, Wisconsin. R. at 27a–28a. Agent Schrader has received several commendations for his work over the years. R. at 28a. Notably, one of his commendations was received in recognition of his investigation of a major, transnational criminal organization. R. at 28a.

B. New Tejas' Legalization of Marijuana

In 2016, New Tejas legalized the possession and consumption of marijuana. R. at 30a. The legislation allows the licensure of small, independent stores to grow and sell marijuana to the public. R. at 30a. The law also limits the signage for marijuana dispensaries to a "single plain-text, black-and-white sign, with letters no larger than six inches tall, in Times New Roman or similar font." R. at 31a, n. 3; New Tejas Admin. Code § 51.014. No signage may contain the word "marijuana." *Id.*

Marijuana remains illegal under federal law and is a Schedule I controlled substance. 21 U.S.C. § 812.

C. Agent Schrader's Family Vacation and the Traffic Incident

In November 2016, Agent Schrader traveled with his new bride and her two children on a family vacation to Madrigal, New Tejas. R. at 28a. Over the course of four days, the family went swimming in Lake Madrigal and visited a local amusement parks and various historical sights. R. at 28a. On November 8, the fifth day of their

vacation, the family planned to visit the New Tejas History Museum in downtown Madrigal. R. at 28a.

At approximately 8 a.m. on November 8, the family was driving down Salamanca Avenue when a red truck pulled in front of them. R. at 28a–29a. The parties dispute the details of the lane change. R. at 29a. Agent Schrader testified that the red truck was speeding and cut him off suddenly, causing him to "slam on his brakes" to avoid collision. R. at 29a. His wife did not observe the lane change but corroborated his testimony that he "slam[med] on his brakes" by testifying that she felt him brake sharply. R. at 29a. The driver of the red truck, Mr. White, claims that he was not speeding and did not brake after changing lanes. R. at 29a.

After the lane change, the two vehicles were stopped by a red light. R. at 29a. At the light, Agent Schrader exited his vehicle and walked towards Mr. White's truck. R. at 29a. Mr. White then exited his truck and turned to Agent Schrader. R. at 29a. Agent Schrader testified that he did lose his temper in that moment because Mr. White had almost caused his family to wreck their vehicle. R. at 29a. He further testified that his anger was due to a concern for his family and a desire to keep his children safe. R. at 29a. When Agent Schrader and Mr. White met in the street, Agent Schrader began to yell at Mr. White, but neither remembers what was said. R. at 29a. Mr. White claimed to have told Agent Schrader to "back off" but then admits to shoving Agent Schrader in the chest. R. at 29a. After Mr. White shoved Agent Schrader, the light turned green and both men returned to their vehicles without further issue. R. at 29a–30a.

When Agent Schrader returned to his vehicle, he appeared "visibly relaxed" and apologized to his family for the incident. R. at 30a. The family then continued their vacation, spending the next several hours at the New Tejas Natural History Museum. R. at 30a. Agent Schrader said nothing more about the encounter and enjoyed those hours spent with his family at the museum. R. at 30a.

D. Mr. White's Arrest

After leaving the museum, the Schrader family decided to walk to downtown Madrigal to have lunch. R. at 30a. While walking down the street, Agent Schrader spotted a man carrying a bag of marijuana, shouted, "Stop! You're under arrest!" and began to chase after the man. R. at 31a. The man, who turned out to be Mr. White, saw Agent Schrader and began to run away. R. at 31a. Agent Schrader then tackled Mr. White from behind, landing on top of him. R. at 31a. The incident was witnessed by the owner of Pinkman's Emporium, a local marijuana dispensary, who called 9-1-1 to report what he saw. R. at 31a.

The local police arrived on scene to find Mr. White in handcuffs. R. at 31a. Agent Schrader identified himself as an FBI agent and informed the local police that Mr. White was under arrest for possession of marijuana, a violation of federal law. R. at 31a. The local police did not arrest Agent Schrader at this time. R. at 31a.

E. The Protest and the District Attorney's Speech

Unfortunately, it was later discovered that Mr. White sustained a broken arm and several chipped teeth during the arrest. R. at 32a. The Madrigal community was outraged that Mr. White had been injured while purchasing marijuana. R. at 32a.

Notably, Mr. White is a leader in the Madrigal community and his support was "instrumental" to the legalization of marijuana in New Tejas. R. at 32a.

On November 9, the day following Agent Schrader and Mr. White's encounter, several hundred people gathered in downtown Madrigal to protest Agent Schrader's actions. R. at 32a. Present at the protest was the recently-elected Madrigal County district attorney, Mrs. Wexler. R. at 32a. Mrs. Wexler, who ran for district attorney on a pro-marijuana platform, addressed the protestors and assured them that she would pursue aggravated assault charges against Agent Schrader. R. at 32a. During her address, Mrs. Wexler directed her attention to the enforcement of federal marijuana laws saying, "Let this serve as a warning to any other federal officers who seek to enforce marijuana laws in the State of New Tejas. You are not welcome here, and you attempt to enforce these laws at your own risk." R. at 33a. Agent Schrader was later indicted for assault and aggravated assault at the direction of Mrs. Wexler. R. at 33a.

SUMMARY OF ARGUMENT

The Supremacy Clause of the United States Constitution provides that the "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. It is this clause that prevents the states from utilizing their criminal laws to impede the enforcement of unpopular federal laws. While this Court has provided little guidance on the procedure that courts should follow in determining whether a federal officer is entitled to Supremacy Clause immunity, its jurisprudence regarding other types of

immunity is instructive, particularly its jurisprudence regarding qualified immunity. Both this Court's qualified immunity jurisprudence and the purpose of the Supremacy Clause require that federal judges decide disputed issues of fact when faced with a motion to dismiss based upon a claim of Supremacy Clause immunity.

In the area of qualified immunity, this Court has held that "immunity ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)). It has also expressed that routinely placing the question of immunity in the hands of the jury is categorically "wrong." *Id.* These principles apply with equal force in the context of Supremacy Clause immunity, where the federal officer faces criminal sanctions rather than civil liability. Thus, because this Court has held that the question of immunity should not routinely rest in the hands of the jury, and material facts are "almost invariably" disputed "in cases involving criminal charges," the judge must be able to determine factual disputes that arise in determining the applicability of Supremacy Clause immunity. *Morgan v. California*, 743 F.2d 728, 733 (9th Cir. 1984).

Additionally, the very purpose of Supremacy Clause immunity demands that the judge act as gatekeeper to prevent states from vindictively prosecuting federal agents in order to impede the enforcement of unpopular federal laws. Supremacy Clause immunity is intended to immunize the federal officer from trial, not simply liability. *See Idaho v. Horiuchi*, 253 F.3d 359, 376 (9th Cir. 2001), vacated as moot, 266 F.3d 979 (9th Cir. 2001). However, this purpose will be "severely limited" if the availability of relief "were to turn entirely on the nonexistence of a material dispute

over the facts." *Morgan*, 743 F.2d at 733. Indeed, if a jury were to decide the applicability of the immunity, the Court would be subjecting federal officers to trial in order to determine whether they should be immune from standing trial. Such a nonsensical conclusion cannot stand. Federal officers will be deterred from enforcing unpopular laws by the fear of possibly being subjected to such a process. *See Pierson v. Ray*, 386 U.S. 547, 554 (1967). Thus, the purpose of Supremacy Clause immunity demands that judges determine factual disputes that arise in determining the applicability of Supremacy Clause immunity.

However, even if this Court were to determine that the facts must be viewed in the light most favorable to the nonmoving party, Agent Schrader is still entitled to the protections afforded him by Supremacy Clause immunity because his actions conformed with the requirements established by this Court in the seminal case, *In re Neagle*. 135 U.S. 1 (1890).

In *Neagle*, this Court established a two-prong test for determining whether a federal officer is entitled to Supremacy Clause immunity. *Id.* at 75. The first prong asks whether the officer was performing an act that federal law authorizes him to perform. *Id.* Here, Agent Schrader's actions were authorized under 18 U.S.C. § 3052 which provides that "agents of the Federal Bureau of Investigation of the Department of Justice may . . . make arrests without warrant for any offense committed in their presence." 18 U.S.C. § 3052. Additionally, they may make arrests without warrant "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." *Id.* Agent Schrader did have reason to believe that Mr. White was committing a felony, specifically possession of a controlled substance, and thus was authorized under 18 U.S.C. § 3052 to arrest Mr. White. R. at 31a. For these reasons, Agent Schrader's conduct satisfied the first prong of the *Neagle* test.

The second prong of *Neagle* asks whether the officer's actions were necessary and proper to fulfil his federal duties. *Neagle*, 135 U.S. at 75. While the majority of the circuit courts apply both a subjective and objective inquiry into this prong, the application of a subjective analysis is inappropriate in light of this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (rejecting the subjective inquiry in qualified immunity cases) and other cases regarding immunity. While *Harlow* involved qualified immunity and not Supremacy Clause immunity, the two doctrines share a "functional similarity" because "both reduce the inhibiting effect that a civil suit or prosecution can have on the effective exercise of official duties by enabling government officials to dispose of cases [against] them at an early stage." Rebecca E. Hatch, Annotation, *Construction and Application of United States Supreme Court Decision in* Cunningham v. Neagle*, 135 U.S. 1, 10 S. Ct. 658, 34 L. Ed. 55 (1890), Establishing Standard for Supremacy Clause Immunity as to Actions of Federal Officers or Agents Alleged to Be in Violation of State Law*, 53 A.L.R. Fed. 2d 269, 9 (2011). Thus, in light of this Court's decision in *Harlow* and its other immunity jurisprudence, this Court should reject the subjective inquiry in Supremacy Clause immunity cases as well. Therefore, the proper test to apply in Supremacy Clause

immunity cases involves a solely objective inquiry into whether the officer's actions were necessary and proper to fulfill his federal duties.

Agent Schrader's actions were objectively reasonable under the existing circumstances. He was attempting to arrest someone who committed a felony in his presence, he announced his intent to arrest, and when the suspect began to flee, he tackled him in order to apprehend what he reasonably believed to be a fleeing felon. R. at 31a. Thus, Agent Schrader is entitled to Supremacy Clause immunity and the Thirteenth Circuit Court of Appeals decision should be reversed.

ARGUMENT

I. FACTUAL DISPUTES SHOULD BE DECIDED BY THE JUDGE WHEN DETERMINING A MOTION TO DISMISS BASED ON IMMUNITY UNDER THE SUPREMACY CLAUSE

When ruling on a motion to dismiss based on a claim of Supremacy Clause immunity, the judge should decide disputed issues of fact rather than viewing the facts in a light most favorable to the State. Resolving cases of immunity "inherently requires a balance between the evils inevitable in any available alternative." *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982). Although there is very little precedent on the issue of Supremacy Clause immunity, this Court and other circuits have established strong policy reasons that require a judge to determine facts for cases involving a claim of Supremacy Clause immunity. Because the Supremacy Clause was created for the purpose of unifying the nation under one supreme governing body, it would be illogical to allow states to vindictively prosecute the federal government by prosecuting federal officers. Therefore, in the interest of enforcing the purpose of the

Supremacy Clause and encouraging federal officers to perform their duties without undue fear or hesitation, the judge should determine the facts on a motion to dismiss based on Supremacy Clause immunity.

A. Leaving the Question of Immunity for the Jury Destroys the Purpose of Immunity under the Supremacy Clause

As a matter of practicality, subjecting a federal agent to a trial to determine whether that agent should be immune from trial "virtually erases the immunity that agent seeks to invoke." *Idaho v. Horiuchi*, 253 F.3d 359, 375 (9th Cir. 2001), vacated as moot, 266 F.3d 979 (9th Cir. 2001). Courts have historically allowed judges to determine the facts in cases regarding immunity and complex matters of law. *See Harlow*, 457 U.S. at 818. Because a motion to dismiss based on Supremacy Clause immunity involves both immunity and complex questions of law, judges must determine the facts.

1. Other cases of immunity are determined by the judge rather than a jury

For the past several decades, this Court and other circuits have held that a judge should determine the facts in cases involving immunity of federal officers. *See Hunter v. Bryant*, 502 U.S. 224, 228 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *Harlow*, 457 U.S. at 818; *Horiuchi*, 253 F.3d at 376. Unfortunately, there is "practically no law, and very little guidance" regarding the issue of fact-finding for immunity arising from the Supremacy Clause. *Horiuchi*, 253 F.3d at 374. However, this Court has been consistent in its approach to immunity in other contexts, specifically in cases involving qualified immunity. In the civil context, federal officers are granted qualified immunity to prevent insubstantial claims from proceeding to

trial and provide federal officers with peace of mind so they may fulfill their duties without fear of repercussions. *Harlow*, 457 U.S. at 818. Therefore, because this Court and other lower courts agree that immunity is an issue for the judge and should be determined before trial commences, the same consideration should be applied to the Court's Supremacy Clause immunity analysis.

a. Issues involving questions of immunity are distinct from typical questions of law and fact.

While this Court has emphasized the importance of the jury's role in mixed questions of law and fact, questions of immunity are distinct from such cases. In *United States v. Gaudin*, the defendant was charged with making false statements on Department of Housing and Urban Development loan documents. 515 U.S. 506, 506 (1995). The government argued that, when the court is faced with a mixed question of law and fact, only the jury should determine the facts of the case while the judge should use those determinations to make a decision on the legal questions. *Id.* at 511. This Court rejected the argument for two reasons: first, these mixed questions are generally resolved by juries. *Id.* at 512. Second, the government's position lacked historical support. *Id.* Thus, there was no reason to adopt the government's position on this issue. *Id.* However, this Court has never applied this general rule to cases involving immunity; instead, a different approach is taken.

This Court held in *Hunter v. Bryant* that "immunity ordinarily should be decided by the court long before trial." 502 U.S. 224, 228 (1991) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)). Routinely placing the question of immunity in the hands of the jury is categorically "wrong." *Id.* As the Ninth Circuit noted, a trial

determining whether immunity even applies destroys the very immunity that this Court granted to federal officers over one hundred years ago. *Horiuchi*, 253 F.3d at 376. If a jury were to determine whether an officer is entitled to immunity under the Supremacy Clause, then the immunity ceases to be effective as the officer will then be subjected to a trial to determine whether the officer should be immune from a trial. This nonsensical scenario is precisely why it is necessary for a judge to determine the facts on a motion to dismiss for Supremacy Clause immunity. Furthermore, in recognition of the importance of immunity, this Court held that the improper denial of immunity cannot be remedied post trial. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). This is because immunity from trial cannot be remedied after the trial has already commenced. *Id.* Because of this, when approaching the question of immunity, this Court should give particular consideration to preserving the purpose of the immunity in question.

b. Judges may determine the facts in cases of qualified immunity so that federal officers are not deterred from performing their duties

In cases of qualified immunity, this Court has consistently held that federal officials are entitled summary judgment unless the official violated clearly established law. *Harlow*, 457 U.S. at 818 . This determination, however, is not made by a jury, nor are the facts viewed in a light most favorable to the non-moving party. *See id.* Instead, this Court held that the judge must use an objective analysis to determine whether the laws were clearly established. *Id.* "On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Id.* Thus,

this Court has already demonstrated a policy of granting deference to the judge in determining whether federal officers are entitled to immunity. *See id.*

Furthermore, in cases of qualified immunity, this Court held that a claim of subjective malice should not be viewed in a light most favorable to the non-moving party and should instead be determined by the judge. *Id.* at 817–18. In *Harlow*, the plaintiff alleged that the defendant government actors acted with malice and thus did not qualify for an affirmative defense of good faith. *Id.* at 815. Therefore, since all reasonable inferences are usually drawn in favor of the non-moving party, the petitioner argued that the judge should have denied the respondent's motion for summary judgment. *Id.* at 815–16. However, this Court disagreed and held that the judge should make a determination based on objective factors. *Id.* at 818.

Additionally, this Court held that the determination of subjective good faith was incompatible with its jurisprudence on immunity. *Id.* at 817–18. Relying on its precedent set in *Butz v. Economou*, 438 U.S. 478, 507–08 (1978), this Court balanced the competing values of litigating the subjective intent of government officials in qualified immunity cases. *Harlow*, 457 U.S. at 816. This Court concluded that the subjective component of a qualified immunity analysis was not compatible with the *purpose* of the immunity. *Id.* at 818–19. This is due to the fact that it is extremely easy for "ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved." *Id.* at 817 n.29 (quoting *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, D.J., concurring)). Because

these fact determinations were "particularly disruptive of effective government," this Court held that the question of immunity rests solely with a judge's objective analysis of the relevant facts. *Id.* at 818–19.

c. Judicial determination of facts in cases of Supremacy Clause immunity would also ensure that federal officers are not deterred from fulfilling their duties

While it is true that the above examples are not an exact match to Supremacy Clause immunity, the policy considerations underlying immunity with respect to criminal charges present an even more compelling reason to adopt the same rule for criminal charges arising from Supremacy Clause immunity. Generally, with cases involving civil liability of federal agents, the federal agencies indemnify the agents from personal liability. *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 49–50 (1998). This is because, as a matter of practicality, the federal government may only act through its agents. Thus, lawsuits against individual agents are mere conduits by which a State may prosecute the federal government. *See Horiuchi*, 253 F.3d at 376. While it is common for the federal government to indemnify its agents for civil suits arising from agents performing their duties, it is impossible for the federal government to indemnify a federal agent from criminal liability since the government cannot serve a prison sentence on behalf of the agent. *Id.* Because of this, the threat of potential criminal liability would weigh heavily on all federal agents while they attempt to fulfill their duties. *Id.* This burden would inevitably cause agents to hesitate in enforcing federal law. *Id.* This Court has consistently held that this outcome is extremely contrary to public policy as such hesitation in enforcement places the public as a whole at risk. *See Harlow*, 457 U.S.

at 819. Instead, society is better served when government agents are able to "exercise their functions with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

In addition to criminal consequences, the trial process itself can also be a major deterrent to federal officers from fulfilling their duties. *Horiuchi*, 253 F.3d at 376. In fact, the Ninth Circuit pointed out that "[h]aving to live through the anxiety of a criminal trial destroys most of the benefits of immunity, and so courts often dispose of factual questions underlying immunity defenses prior to allowing the jury to deliberate on criminal liability." *Id.* at 375. Importantly, all these concerns weigh heavily on the individual officer rather than the federal government. Fear of such a process and potential punishment, with no hope of indemnification, has the significant likelihood of discouraging federal agents from adequately fulfilling their duties. *Id.* at 376. Therefore, in the interest of encouraging federal officers to exercise their functions without fear of consequences, the judge, rather than a jury, should be permitted to determine disputed issues of fact on a motion to dismiss for immunity under the Supremacy Clause.

2. The underlying policy of Supremacy Clause immunity applies equally in cases arising under Rule 12(b) and those arising under a writ for *habeas corpus*

The underlying policy of Supremacy Clause immunity has inspired courts in habeas corpus cases to allow judges to decide factual disputes when determining whether the immunity will apply. Because Rule 12(b) is an alternative avenue by which federal officers can obtain the same relief under the Supremacy Clause, that same rationale applies in Supremacy Clause immunity cases arising under Rule

12(b). Thus, the underlying policy of Supremacy Clause immunity requires that the district court decide factual disputes in Supremacy Clause immunity cases arising under Rule 12(b) when determining whether that immunity will apply.

There are two principle avenues by which a federal officer can invoke Supremacy Clause immunity: (1) a Rule 12(b) motion to dismiss in a case that was removed to federal court under 28 U.S.C. § 1442 and (2) a writ of habeas corpus. *See Whitehead v. Senkowski*, 943 F.2d 230, 233 (2d Cir. 1991); *Kentucky v. Long*, 837 F.2d 727, 751 (6th Cir. 1988). In both contexts, the policy underlying Supremacy Clause immunity is served by supplying the federal officer with immunity from state criminal prosecution. *See Whitehead*, 943 F.2d at 233. Because these two options are undergirded by the same policy and provide the same, underlying relief to federal officers, cases arising under either can be used as a guide for courts attempting to determine the applicability of Supremacy Clause immunity. Specifically, cases arising under writs of habeas corpus have supplied rationale regarding factual disputes that is equally compelling in Supremacy Clause cases arising under a Rule 12(b) motion to dismiss. *See e.g.*, *Morgan v. California*, 743 F.2d 728, 733 (9th Cir. 1984).

In *Morgan v. California*, the Ninth Circuit explained that a federal court may grant habeas relief even where a material factual dispute exists concerning the state charges. *Id*. The Ninth Circuit further explained that such cases "must be read in light of the purpose that habeas relief for federal officers was intended to serve." *Id.* The court explained that:

> The usefulness of the statute would be severely limited if the availability of federal habeas relief were to turn entirely on the nonexistence of a material dispute over the facts. First, there are almost invariably matters of factual dispute in cases involving criminal charges. Second, when the objective is obstruction or harassment it is far too easy to allege the existence of a factual dispute, even when none exists. All that a local prosecutor would have to do to secure a state court jury trial would be to fabricate a factual allegation that, if true, would negate the officer's reliance on a federal privilege. While we are confident that such attempts would be infrequent, we do not read the relevant cases as preventing the federal courts from responding effectively should one occur.
>
> . . . If, after holding an evidentiary hearing, it is apparent to the district judge that the state criminal prosecution was [intended to frustrate enforcement of federal law], the writ should be granted even if the judge has to resolve factual disputes to arrive at that conclusion.

Id. In essence, the court in Morgan held that judges are permitted to solve factual disputes following an evidentiary hearing if it is "apparent to the district judge that the state criminal prosecution was" intended to frustrate the enforcement of federal law. *Id.* Although this reasoning was applied in the context of a writ of habeas corpus, the principles enunciated herein apply with equal force in the context of a Rule 12(b) motion to dismiss in a case removed under 28 U.S.C. § 1442. *See New York v. Tanella*, 374 F.3d 141, 149 n.1 (2d Cir. 2004).

Courts routinely refer to the removal statutes and habeas relief as "alternative avenues" for relief available to "persons in state custody who were acting under the authority of the United States." *Long*, 837 F.2d at 751; *see also Whitehead*, 943 F.2d at 233. "The habeas corpus provisions were grounded in the Supremacy Clause and were enacted, in part, to avoid state frustration of federal law enforcement efforts." *Whitehead*, 943 F.2d at 233. In fact, the Second Circuit in *Long* analyzed the history of both the habeas corpus and removal provisions and determined that the purpose

of those provisions "was to ensure federal protection for federal officers performing federal duties, in the anticipation that depending on the sentiments of the time, the federal law being enforced would be unpopular and even hated in various local areas of the country." *Long*, 837 F.2d at 752. It is this purpose that makes the instant case uniquely appropriate for the application of Supremacy Clause immunity.

Here, the district attorney publicly announced her intention in pursuing the prosecution of Agent Schrader. R. at 33a. Specifically, Mrs. Wexler stated that she intends Agent Schrader's prosecution to "serve as a warning to any other federal officers who seek to enforce marijuana laws in the State of New Tejas." *Id.* With this "warning" Mrs. Wexler expressed the intent to utilize New Tejas's criminal law in order to deter federal officers from enforcing federal marijuana laws within the state. This kind of vindictive prosecution is precisely what Supremacy Clause immunity is intended to prevent.

Therefore, applying the rationale enunciated in habeas relief cases, the district court did not err when it decided the facts in its determination of Petitioner's Rule 12(b) motion to dismiss. Because the district court found that the state criminal prosecution was intended to frustrate the enforcement of federal law and because the purpose of Supremacy Clause relief is to ensure federal protection for federal officers performing their duties to enforce unpopular federal laws, the district court's grant of Petitioner's motion to dismiss should not have been overturned simply because the district court was required to resolve factual disputes–even material factual disputes–in reaching that conclusion.

B. The District Court Must Determine Facts to Protect the Federal Government from Vindictive Prosecution By The States

Judges must act as a gatekeeper to prevent states from vindictively prosecuting the federal government. The purpose of the Supremacy Clause is to unify the individual states under one supreme law. *See* U.S. Const. art. VI, § 1, cl. 2. If states are given the unchecked ability to charge a federal officer under state criminal law, it would allow states to vindictively prosecute federal officers as a means to prevent the federal government from enforcing its laws within the state. *Tennessee v. Davis*, 100 U.S. 257, 262–63 (1879); *Horiuchi*, 253 F.3d at 376. Thus, in order to protect the very purpose of the Supremacy Clause, judges must determine the facts of a motion to dismiss based on Supremacy Clause immunity.

1. The framers intended the Supremacy Clause to unite the Nation under one sovereign government

From the inception of the United States Constitution, the framers intended that the Supremacy Clause provide a solution where conflicts arise between state and federal law. It does so by declaring that "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.

On this issue, the intent behind the Constitution must be derived from our nation's historical backdrop. Specifically, this Court must examine how the Articles of Confederation shaped the United States Constitution, especially drafting the Supremacy Clause. This Court has considered the Articles numerous times in its interpretation of the Constitution; in fact, this Court has referenced the Articles in more than 150 cases. Gregory E. Maggs, *A Concise Guide to the Articles of*

Confederation as a Source for Determining the Original Meaning of the Constitution, 85 Geo. Wash. L. Rev. 397, 398 (2017). This historical background is key to understanding the importance of the immunity afforded to federal officers under the Supremacy Clause.

Following the American Revolutionary War, the framers recognized a need to formally unite the states. *See id.* at 412. Unfortunately, the Articles of Confederation were seriously flawed. For example, in matters of foreign policy, the states often engaged in their own negotiations and refused to adhere to the terms of treaties. *Id.* at 415. Alexander Hamilton spoke on this issue when he recognized that "[n]o nation . . . would be unwise enough to enter into stipulations with the United States, conceding on their part privileges of importance, while they were apprised that the engagements on the part of the Union might at any moment be violated by its members . . . ." The Federalist No. 22 (Alexander Hamilton).

Alexander Hamilton emphasized the need for a supreme law over the individual states as a means of unifying the nation. *See* The Federalist Nos. 28, 33 (Alexander Hamilton) . Hamilton expressed the concern that a government with no unifying head is no government at all. The Federalist No. 33 (Alexander Hamilton). Hamilton, acknowledging that future conflict between the two governments may arise, went so far as to say "[p]ower being almost always the rival of power, the general government will at times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government . . . ." The Federalist No. 28 (Alexander Hamilton).

James Madison echoed Hamilton's concern of a government composed of the several states with no unifying head. The Federalist No. 44 (James Madison). Like Hamilton, Madison recognized that, without a sovereign government, the rights and privileges of the public would be inconsistently applied across the nation. *Id.* In fact, without the Supremacy Clause, the federal government could, and would, be usurped by any State constitution that contradicted it, thus bringing into question every power under the Constitution. *Id.* Madison went so far as to call the lack of a supreme unifying body "an inversion of the fundamental principles of all government." *Id.* Had the United States adopted such a system, Madison warned that the world would have seen a government "subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members." *Id.*

Thus, with the recognition of the need for a unifying body of law under which the states could operate, the Supremacy Clause was born. Importantly, this clause "prevents states from enforcing their laws in a way that interferes with federal law and policy." Seth P. Waxman, *Federalism, Law Enforcement, and the Supremacy Clause: The Strange Case of Ruby Ridge*, 51 U. Kan. L. Rev. 141, 145 (2002). Indeed, as this Court explained in *Tennessee v. Davis*:

> "[T]he general government" . . . can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brough to trial in a State court, for an alleged offence [sic] against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection . . . the operations of the general government may at any time be arrested at the will of one of its members.

100 U.S. 257, 262–63 (1879).

This point was well summarized by the Ninth Circuit in *Horiuchi*, 253 F.3d at 375. In *Horiuchi*, the court recognized that one of the primary purposes of the Supremacy Clause was to prevent the states from vindictively prosecuting the federal government for enforcing its laws in the states. *Id.* at 376. This concern ties directly to the conflict predicted by Hamilton and Madison.

Therefore, because the Framers intended the Supremacy Clause to unite the states under one sovereign government, a federal judge, rather than a jury, must determine the facts on a motion to dismiss a criminal charge based on immunity arising under the Supremacy Clause to serve as a substantial safeguard for criminal liability resulting from vindictive prosecution of the states.

2. The State of New Tejas is using this action to vindictively prosecute the federal government

In the present case, Respondent is using the criminal prosecution of Agent Schrader to usurp the enforcement of federal law. Such prosecution conflicts with the very purpose of the Supremacy Clause. The Record reflects that the Madrigal County district attorney, Mrs. Wexler, undertook the present case specifically for the purpose of sending a message to the federal government regarding its marijuana laws. *See* R. at 32a–33a. Mrs. Wexler went so far as to say that the federal government "has no business interfering with the sovereign will of the people of New Tejas," and that she would "use every power of [her] office to prevent federal marijuana laws from being enforced in this great State." R. at 32a. In a particularly revealing statement, Mrs. Wexler directly addressed the federal government and stated that the prosecution of Agent Schrader should serve as a "warning" that federal agents are not welcome in

New Tejas and that agents should "enforce [federal] laws at [their] own risk." R. at 33a. In light of these statements, there is no doubt that the Respondent undertook this prosecution as a means of preventing the federal government from enforcing its laws in the State of New Tejas. This attempt at usurpation through vindictive prosecution is precisely the type of harm that the Supremacy Clause was designed to curtail.

If a jury were allowed to determine the facts in this case, there is a significant risk that Agent Schrader will be subjected to a vindictive prosecution by the State of New Tejas with no chance of indemnity. Even if Agent Schrader is not found guilty of the criminal charges, the long and exhausting process of trial would serve as a significant deterrent to effectively fulfilling his and other federal agents' obligations. *See Horiuchi*, 253 F.3d at 375. The long-term impact of that prosecution would be a chilling effect on any future agents that attempt to enforce federal marijuana laws in New Tejas. *See Davis*, 100 U.S. at 262–63. This would allow the State of New Tejas to effectively circumvent the supreme law of the federal government. Because this result is directly contrary to the purpose of the Supremacy Clause, the judge must serve as a gatekeeper to prevent the states from vindictively prosecuting federal officers. Thus, the judge must be allowed to determine the facts on a motion to dismiss based on immunity arising from the Supremacy Clause.

II. THE PROPER TEST PROVIDING A FEDERAL OFFICER WITH SUPREMACY CLAUSE IMMUNITY FROM STATE CRIMINAL PROSECUTION REQUIRES AN ANALYSIS OF THE OFFICER'S GENERAL DUTIES AND AN OBJECTIVE INQUIRY INTO THE OFFICER'S ACTIONS

Since this Court decided *In re Neagle* in 1890, it has not specifically expounded upon the doctrine of Supremacy Clause immunity as it pertains to the standard of inquiry into a federal officer's actions—that is, until now. Despite however limited the relevant caselaw addressing this issue is, "it *does* establish that an officer's entitlement to immunity is determined by examining the reasonableness of his actions in light of his federal powers and duties alone, irrespective of the requirements of state criminal law." Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2202 (2003) (emphasis added). This Court "has for over a century recognized some form of Supremacy Clause immunity. Th[is] Court has not, however, clearly defined the scope of that immunity." *Id.* The question that has been unanswered by this Court, up until this point, is what kind of inquiry is used to evaluate the reasonableness of the officer's actions. While this Court has not yet spoken as to the kind of inquiry to be used in examining an officer's conduct as it relates to Supremacy Clause immunity, this Court has already determined which standard to use in assessing an officer's conduct in other areas of law enforcement. The standard to be used is an *objective* one. *See, e.g.*, *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) (probable cause); *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (probable cause); *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (probable cause); *Horton v. California*, 496 U.S. 128, 138 (1990) (probable cause); *Mitchell v. Forsyth*, 472 U.S.

511, 519 (1985) (qualified immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (qualified immunity).

However, many circuit courts have, without explanation, incorporated an officer's subjective intent into their analysis of Supremacy Clause immunity. *Wyoming v. Livingston*, 443 F.3d 1211, 1221 (10th Cir. 2006). But that approach is inconsistent with the general approach this Court has taken in its evaluation of law enforcement conduct. Furthermore, the subjective inquiry approach incorporated by the circuit courts is inconsistent with the guidance that this Court has already provided in cases regarding immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The Supremacy Clause is implicated in the context of immunity when an officer acts pursuant to a federal law that is contrary to a state law, and his actions result in a violation of a law imposed by that state. "Supremacy Clause immunity . . . governs the extent to which states may impose civil or criminal liability on federal officials for alleged violations of state law committed in the course of their federal duties." Rebecca E. Hatch, Annotation, *Construction and Application of United States Supreme Court Decision in* Cunningham v. Neagle*, 135 U.S. 1, 10 S. Ct. 658, 34 L. Ed. 55 (1890), Establishing Standard for Supremacy Clause Immunity as to Actions of Federal Officers or Agents Alleged to Be in Violation of State Law*, 53 A.L.R. Fed. 2d 269 (2011).

As this Court previously explained in *Tennessee v. Davis*, the federal government can only act through its officers and agents, who must in turn act within the States. 100 U.S. 257, 263 (1880). If, when acting within the scope of their

authority and within the States, "those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State" despite their actions being "warranted by the Federal authority they possess," then the power of the federal government loses its strength. *Id.* "[I]f the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members." *Id.*

> In short, subjecting federal officers to state criminal sanctions for carrying out their federally appointed duties could make it extremely difficult, if not impossible, for the federal government to function. Even the most dedicated federal servant would be reluctant to do his job conscientiously if he knew it could mean prison time in the state penitentiary.

Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2231 (2003). Therefore, to ensure that the federal government can effectively exercise its constitutional authority, this Court should adopt a wholly objective analysis in cases involving Supremacy Clause immunity.

A. Supremacy Clause Immunity Includes an Objective Analysis of the Officer's Duties and Actions

Supremacy Clause immunity is a "seldom-litigated corner" of constitutional law. *E.g.*, *Livingston*, 443 F.3d at 1213. This doctrine was first addressed by this Court in *In re Neagle* in 1890. In *Neagle*, a deputy United States marshal was charged with murdering a man whom he thought was about to stab United States Supreme Court Justice Stephen J. Field. *In re Neagle*, 135 U.S. 1, 52 (1890). While Justice Stephen J. Field was on assignment to California, David Neagle was employed as a

special deputy U.S. Marshal and was given special instructions from the Attorney General to protect Justice Field. *Id.* at 52. While Justice Field traveled by train from Los Angeles to San Francisco, Neagle accompanied him because of prior threats made by some unhappy litigants. *See id.* at 46–48. David Terry, who had previously threatened Justice Field, approached Justice Field, and struck him twice in the face. *Id.* at 53. Neagle ordered Terry to stop and identified himself as an officer. *Id.* During this confrontation, Terry thrust his hand into his coat, and Neagle "felt sure" that Terry was about to stab Justice Field. *Id.* Neagle fired two shots and killed Terry. *Id.* Neagle was thus arrested and charged with murder in the State of California. *Id.* at 5. Neagle asserted that he acted in accordance with his duty as an officer of the United States and could not be found guilty of murder. *Id.* at 6. This Court of the United States agreed with Neagle. *Id.* at 76. This Court held that:

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

Id. at 75. Accordingly, this Court held that Neagle was entitled to Supremacy Clause immunity and could not be prosecuted for his actions. *Id.*

Many courts recognize this Supremacy Clause immunity rule from *Neagle* as establishing a two-prong test. *See, e.g.*, *Long*, 837 F.2d at 744 (stating that the two-prong test from *Neagle* is "well settled"). The first prong considers whether the officer performed an act that the federal law authorized him to perform. *Neagle*, 135 U.S. at 75. The second prong considers whether the officer's actions were necessary and proper to fulfill his federal duties. *Id.*

1. An officer must be acting within the scope of his duties to be entitled Supremacy Clause immunity

In addressing the first prong in *Neagle*, this Court noted that there was "positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty." *Neagle*, 135 U.S. at 68. This Court looked to chapter fourteen of the Revised Statutes of the United States ("which is devoted to the appointment and duties of district attorneys, marshals, and clerks of the courts of the United States"), and noted that section 788 states: "The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof." *Id.* This Court reasoned that if a sheriff in California "was authorized to do in regard to the laws of California as Neagle did, that is, if he was authorized to keep the peace, to protect a judge from assault and murder, then Neagle was authorized to do the same thing in reference to the law of the United States." *Id.*

In its analysis, this Court addressed the argument that the County of San Joaquin (the appellant) proffered regarding state versus federal powers. The County argued, "the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States." *Id.* at 60. The County's argument concluded that, as such, Neagle's duties were not federal duties at all. *Id.* In response, this Court stated:

> We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to

> command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places.

Id. at 60–61. This Court further reasoned that federal law does not exclude the state law "except where both cannot be executed at the same time." *Id.* In such a case where both laws cannot be executed at the same time, "the words of the Constitution itself show which is to yield": "This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land." *Id.* at 61. This Court noted that "[w]ithout the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified." *Id.*

Thus, this Court held that "[i]f we indulge in such impracticable views as these, and keep on refining and [re-refining], we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil." *Id.* If the government is not able to exercise its power, such as conferring certain duties to a U.S. Marshal, it will be brought back "to a condition of greater helplessness than that of the old confederation." *Id.* In essence, "[the government] must execute its powers, or it is no government." *Id.*

2. An officer's actions must be necessary and proper for immunity to attach

The second prong of the *Neagle* analysis considers whether the officer's actions were necessary and proper to fulfill his federal duties. *Neagle*, 135 U.S. at 75. In addressing the second prong, this Court concluded that Neagle was engaged in the discharge of his official duties in protecting the life of Justice Field. *Id.* Thus, acting

within the scope of his duties, Neagle was authorized to resist Terry's attack. *Id.* at 76. In light of Terry's threatening behavior, this Court concluded that Neagle's belief that Justice Field's life was in danger was "well-founded" and that his actions were "justified." *Id.* Neagle did what was necessary and proper to carry out his federal duties. "[W]ithout prompt action on his part[,] the assault of Terry upon the judge would have ended in the death of the latter." *Id.* Acting under the authority of the law of the United States, Neagle was justified in acting in the manner in which he did. *Id.* Thus, this Court held that because he was acting within the scope of his authority, and because he acted in a way that was necessary and proper to carry out his duties, Neagle was granted immunity and was "not liable to answer in the court of California on account of his part in that transaction." *Id.*

3. The Thirteenth Circuit erred in its application of *In re Neagle* to its Analysis of Agent Schrader's Duties and Actions.

The Thirteenth Circuit's application of *In re Neagle* in *New Tejas v. Schrader* virtually nullifies a federal officer's immunity. R. at 9a. The majority argued that when analyzing an officer's actions, the necessity of the conduct is based on the officer's specific duties or "direct orders of a superior." *Id.* The majority concluded that "Agent Schrader's conduct [fell] far outside this rule" because he was not acting on direct orders from a supervising authority. *Id.* The court argued that because Agent Schrader was not obligated to arrest Mr. White, his arrest was not necessary to carry out his duties as a federal officer. *Id.* However, this reasoning is contrary to the powers granted to FBI officers. 18 U.S.C. § 3052. The statute provides:

> [A]gents 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.

Id.

Not only is the court's reasoning contrary to the federal government's grant of power to federal officers, but it nullifies that grant of power. The federal government granted federal officers, such as FBI agents, the ability to act on behalf of the government when *any* offense against the United States is committed in their presence. *Id.* In granting this power, the government gave federal officers the ability to act on their own discretion and initiative. To hold—as the majority did—that a federal officer is not acting within his duties when he acts on his own accord and not under direct orders renders that permission null and void. Rather, society is better served when government agents are able to "exercise their functions with independence and without fear of consequences." *Pierson*, 386 U.S. at 554. *See also Harlow*, 457 U.S. at 819.

B. Supremacy Clause Immunity Requires a wholly Objective Inquiry of the Officer's Actions.

In many other areas of law enforcement, this Court has assessed officer's actions considering the objective reasonableness of the officer's conduct. Likewise, this Court should require the same kind of objective inquiry for the purposes of Supremacy Clause immunity.

Acknowledging the difficulties that enforcing the law poses, this Court noted: "Police officers conduct approximately 29,000 arrests every day—a dangerous task

that requires making quick decisions in 'circumstances that are tense, uncertain, and rapidly evolving.'" *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). "To ensure that officers may go about their work without undue apprehension of being sued, we generally review their conduct under objective standards of reasonableness." *See Atwater v. Lago Vista*, 532 U.S. 318, 351, and n. 22 (2001); *Harlow*, 457 U. S. at 814–19. While this Court has not yet expressly held that the necessary and proper test for Supremacy Clause immunity requires an objective inquiry of the reasonableness of the officer's actions, such a holding is consistent with this Court's guidance on other areas of law addressing law enforcement action or a federal officer's conduct. This Court has applied an objective test in its consideration of an officer's conduct as it relates to qualified immunity and probable cause. Moreover, this Court has expressly rejected the subjective inquiry in its analysis of an officer's conduct in these contexts. Therefore, in assessing Supremacy Clause immunity, this Court should likewise require a wholly objective inquiry into the reasonableness of an officer's conduct.

1. Supremacy Clause Immunity is analogous to qualified immunity, and as such, this Court should apply the same objective analysis in considering an officer's actions

In the context of qualified immunity, this Court "jettisoned the subjective element of the qualified immunity test because it was incompatible with the goal of promptly determining whether qualified immunity was appropriate on a motion for summary judgment." *Wyoming v. Livingston*, 443 F.3d 1211, 1222 (6th Cir. 2006). Likewise, it would be "appropriate to reject a subjective element of the Supremacy Clause immunity test." *Id.*

"Qualified immunity is a judge-made doctrine designed to insure that government officials are not unduly chilled in the performance of their duties." Seth P. Waxman, *Federalism, Law Enforcement, and the Supremacy Clause: The Strange Case of Ruby Ridge*, 51 U. Kan. L. Rev. 141, 150 (2002). This Court fashioned the rule for qualified immunity, under which "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Similarly, Supremacy Clause immunity protects against such chill in officers' performance of their duties. If an officer "is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as [an officer] of the United States," and in "doing that act he did no more than what was necessary and proper for him to do," that officer will be protected. *In re Neagle*, 135 U.S. 1, at 75. If he meets these standards, "he cannot be guilty of a crime under the law of the [State]." *Id.* Having this protection of immunity allows government officials to act pursuant to their general duties without the constant fear of prosecution.

"Both qualified immunity and Supremacy Clause immunity reduce the inhibiting effect that a civil suit or prosecution can have on the effective exercise of official duties by enabling government officials to dispose of cases against them at an early stage of litigation." *Livingston*, 443 F.3d at 1221–22 ; *see Anderson v. Creighton*,

483 U.S. 635, 638 (1987) ("Damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."). After all, "[i]f, when . . . acting . . . within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the state, yet warranted by the federal authority they possess," then the powers granted by the federal government are not treated as the supreme law of the land. *See Davis*, 100 U.S. at 263. "[I]f the general government is powerless to interfere at once for [the federal officers'] protection . . . the operations of the general government may at any time be arrested at the will of one of its members." *Id.* "In short, subjecting federal officers to state criminal sanctions for carrying out their federally appointed duties could make it extremely difficult, if not impossible, for the federal government to function." Seth P. Waxman, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2231 (2003).

Likewise, qualified immunity protects officers from unnecessary litigation and allows the government to function smoothly and efficiently. "[D]amages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638 (quoting *Harlow*, 457 U.S. at 814). *See also Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) (acknowledging the

"danger that the threat of . . . liability would deter [an officer's] willingness to execute his office with the decisiveness and the judgment required by the public good").

In both qualified immunity and Supremacy Clause immunity, courts have a duty to make early rulings on issues of immunity in order to avoid excessive interference with government actions. *See Long*, 837 F.2d at 752. Ultimately, "both qualified immunity and Supremacy Clause immunity reduce the inhibiting effect that a civil suit or prosecution can have on the effective exercise of official duties." *Livingston*, 443 F.3d at 1221. Because of the similarities and because both kinds of immunities have the same objective in allowing the government to operate efficiently, the standard in deciding immunity in each context should not contradict the other. Thus, it is "appropriate to reject a subjective element of the Supremacy Clause immunity test" and adopt a solely objective inquiry. *Id.* at 1222.

2. This Court rejected the use of a subjective inquiry in its analysis of an officer's conduct in areas such as qualified immunity and probable cause

In this Court's jurisprudence relating to immunity and an officer's conduct, this Court has rejected the subjective inquiry in its analysis in cases dealing with qualified immunity and probable cause where an officer's conduct was at issue. *See Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *Harlow*, 457 U.S. at 816–17. Once this Court rejected the subjective inquiry, other courts followed this Court's example and have thus "consistently conducted an objective analysis of qualified immunity claims and stressed that an officer's subjective intent or beliefs play no role." *Henry v. Purnell*, 652 F.3d 524, 535 (4th Cir. 2011).

a. Qualified immunity rejects the subjective inquiry

Historically, qualified immunity included an inquiry into the officer's subjective intent. *See Wood v. Strickland*, 420 U.S. 308, 322 (1975). This Court considered whether the officer acted "with malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* However, this Court later rejected the subjective analysis as impracticable. *Harlow*, 457 U.S. at 816–17. This Court noted there are "substantial costs [that] attend the litigation of the subjective good faith of government officials." *Id.* Furthermore, "[n]ot only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"—but "there are special costs to 'subjective' inquiries of this kind." *Id.*

In *Harlow*, this Court outlined several other policy reasons for the rejection of the subjective inquiry. First, when courts consider the subjective inquiry, "the judgements surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment." *Id.* Second, if there is an inquiry into the officer's subjective intent, the variables influencing the discretionary action "frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Id.* This Court recognized that this kind of subjective inquiry can be "particularly disruptive of effective government." *Id.*

Since the rejection of the subjective analysis, courts have "consistently conducted an objective analysis of qualified immunity claims and stressed that an officer's subjective intent or beliefs play no role." *Henry v. Purnell*, 652 F.3d 524, 535 (4th Cir. 2011). The qualified immunity determination "is an objective one, dependent not on the subjective beliefs of the particular officer at the scene, but instead on what a hypothetical, reasonable officer would have thought in those circumstances." *Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004) (citation omitted). *See also Jones v. Buchanan*, 325 F.3d 520, 527 (4th Cir. 2003) ("We do not consider the officer's 'intent or motivation.'") (citing *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996)); *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) ("Subjective factors involving the officer's motives, intent, or propensities are not relevant.")).

This Court should likewise determine that in order to best allow the federal government to function most efficiently, it should reject the subjective inquiry in relation to Supremacy Clause immunity in the same way that is has with qualified immunity.

b. Probable cause rejects the subjective inquiry

This Court has spoken on the necessity of an objective analysis of officers' conduct in other areas of law enforcement, such as in determining probable cause. *See, e.g.*, *Devenpeck*, 543 U.S. at 153. "Probable cause exists when all of the facts known by a police officer 'are sufficient for a reasonable person to conclude that the suspect had committed, or was in the process of committing, an offense.'" *United States v. Castro*, 166 F.3d 728, 733 (5th Cir. 1999) (en banc). Case law "make[s] clear that an arresting officer's state of mind (except for the facts that he knows) is

irrelevant to the existence of probable cause." *Davenpeck*, 543 U.S. 146, at 153. In making an arrest, courts "ask 'whether the circumstances, viewed objectively, justify [the challenged] action,' and if so, conclude 'that action was reasonable whatever the subjective intent motivating the relevant officials.'" *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) (quoting *Ashcroft v. al-Kidd*, 563 U. S. 371, 736 (2011)).

This objective approach serves important policy goals: "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton v. California*, 496 U.S. 128, 138 (1990). If this Court were to adopt a subjective analysis, it would be inconsistent with these other areas of the law.

C. Agent Schrader is Entitled to Supremacy Clause Immunity and is Protected from State Criminal Prosecution

1. As an agent of the FBI, Agender Schrader is an officer of the federal government

In order for Supremacy Clause immunity to apply, the individual seeking immunity must be a federal officer. In *In re Neagle*, David Neagle was specially deputized to be a United States Marshal, and as such, was an officer of the federal government. Similar to David Neagle, Agent Schrader was an officer of the federal government, by virtue of him being a deputized agent of the FBI. *See Texas v. Kleinert*, 143 F. Supp. 3d 551, 562 (W.D. Tex. 2015) (concluding that the deputation of an FBI agent means that the agent is an officer of the federal government).

2. Agent Schrader acted within scope of duties

As discussed previously, in *Neagle*, this Court considered whether Neagle "was authorized to do [what he did] by the law of the United States." *Neagle*, 135 U.S. at

75. Thus, when this Court addressed the scope of a federal officer's conduct pursuant to his federal duties, this Court looked to federal law to determine what power the federal government granted to its officers. *Id.* at 68. This Court found that indeed, there was "positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty." *Id.* at 68.

Similar to David Neagle, Agent Schrader acted within the scope of his duties because he acted pursuant to a grant of power by the federal government. Agent Schrader is an agent of the FBI. R. at 2a. Under title 18 of the United States Code, section 3052 provides FBI agents with the power to do certain acts, such as carry firearms, serve warrants and subpoenas issued under the authority of the United States, and make arrests. 18 U.S.C. § 3052. Specifically, this provision of the code grants an agent of the FBI with power to "may 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." *Id.* Here, Agent Schrader arrested Mr. White for an offense against the United States, which was within his duties as a federal officer.

Under title 21 of the United States Code in section 844, the law sets forth acts and penalties for simple possession of controlled substances. 21 U.S.C. § 844. In pertinent part, the law provides that "[i]t 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." *Id.* The United States Code lists marijuana as a Schedule I controlled substance. 21 U.S.C. § 812. By possessing marijuana, Mr. White was in violation of federal law. Agent Schrader was, therefore, authorized to arrest Mr. White pursuant to 18 U.S.C. § 3052. Thus, arresting Mr. White was within the scope of Agent Schrader's duties as a federal officer.

3. Agent Schrader's actions were objectively reasonable under the circumstances and therefore necessary and proper

In *Neagle*, after this Court ascertained that Neagle was authorized to protect the life of Justice Field, this Court inquired as to whether he did "no more than what was necessary and proper" to carry out that duty. *Neagle*, 135 U.S. at 75. In light of Terry's threatening behavior, this Court concluded that Neagle's belief that Justice Field's life was in danger was "well-founded" and that his actions were "justified." *Id.* at 76. Accordingly, it was necessary and proper for Neagle to act in the manner in which he did. *Id.*

While many circuit courts have erred in their incorporation of the subjective analysis, many of the circuit courts have properly articulated the objective prong, which is consistent with other areas this Court's jurisprudence. For instance, the Ninth Circuit accurately stated in *Clifton v. Cox*, in determining whether the federal officer's conduct was necessary and proper, courts must rely on "the objective finding that [the officer's] conduct may be said to be reasonable under the existing circumstances." 549 F.2d 722, 728 (9th Cir. 1977). *See also New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004); *Whitehead v. Senkowski*, 943 F.2d 230, 234 (2d Cir. 1991)

(also stating that an officer's belief that his acts were justified must be objectively reasonable).

Here, Agent Schrader's conduct was reasonable under the circumstances, and his actions were necessary and proper in carrying out his federal duties. While Agent Schrader was walking in downtown Madrigal, he observed Mr. White carrying a bag of marijuana. R. at 31a. Agent Schrader knew that marijuana is a Schedule I controlled substance, and therefore also knew that Mr. White was in violation of federal law by possessing it. Agent Schrader shouted for Mr. White to stop and told him he was under arrest. R. at 31a. However, instead of stopping, Mr. White turned and began to run. *Id.* Agent Schrader's only option to complete his arrest of Mr. White was to use force. Thus, Agent Schrader tackled Mr. White from behind, in order to apprehend him. R. at 31a. Agent Schrader had little choice as to other alternatives to use to stop a suspect who was very clearly fleeing and resisting arrest. In light of these circumstances, Agent Schrader's act (tackling Mr. White from behind) in order to carry out his federal duties, was objectively reasonable.

While Respondent may argue that Agent Schrader's actions were unnecessarily forceful, this Court stated that, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The standard of reasonableness must also "[allow] for the fact that . . . officers are often forced to make split-second judgments—in circumstances that are tense,

uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 397.

The federal government tasked Agent Schrader with enforcing federal law. Thus, when he saw Mr. White violate the law through possessing a controlled substance, Agent Schrader acted in accordance with his federal duties. When Mr. White resisted arrest, Agent Schrader used means that were reasonable under the circumstances to stop a feeling suspect. His actions were necessary and proper.

CONCLUSION

The district court did not err in deciding the factual disputes in Agent Schrader's motion to dismiss based upon Supremacy Clause immunity. Both this Court's precedented treatment of other types of immunity and the purpose of Supremacy Clause immunity demand that the district court judge decide factual disputes in determining whether Supremacy Clause immunity will apply. Furthermore, Agent Schrader is entitled to Supremacy Clause immunity. This Court should hold that in light of its jurisprudence regarding immunity, the test for determining whether an agent is entitled to Supremacy Clause immunity depends on whether the agent acted within the scope of his duties and whether, under a wholly objective analysis, his actions were necessary and proper. Therefore, this Court should reverse the decision of the Thirteenth Circuit Court of Appeals and affirm the District Court's grant of Petitioner's motion to dismiss.

Respectfully submitted,
/s/ Team #46
Counsel for Petitioner
November 18, 2019

CERTIFICATE OF SERVICE

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

/s/ *Team #46*
Team #46
Counsel for Petitioner
November 18. 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33.1, the undersigned hereby certifies that the Brief of Petitioner, Hank Schrader, contains 12,404 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 #46*
Team #46
Counsel for Petitioner
November 18. 2019

Appendix

Federal Law

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

> 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.

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. . . .

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

New Tejas State Law

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.

Section 50.01 of the Penal Code of New Tejas provides:

Justification as a Defense.

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

Section 50.02 of the Penal Code of New Tejas 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.