

No. 18-5719

In The
Supreme Court of the United States

November 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

TEAM NUMBER 60
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. When a state provides an evidentiary showing that establishes a material dispute of fact regarding the defendant's pre-trial claim of immunity from prosecution under the Supremacy Clause, should resolution of the immunity defense be reserved for a jury trial determination?

II. Under Neagle, the Supremacy Clause of the United States Constitution grants immunity to federal agents acting within the scope of their authority whose acts are necessary and proper. FBI Special Agent Schrader attempted to arrest an individual carrying two ounces of marijuana which is legal in New Tejas but federally illegal. Can New Tejas prosecute Special Agent Schrader for assault when enforcing federal criminal law?

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PARTIES TO THE PROCEEDING

Petitioner Hank Schrader is a special agent with the Federal Bureau of Investigation.

Respondent is the State of New Tejas.

DECISIONS BELOW

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

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered October 2, 2018. The petition was timely filed and granted on November 18, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner brought this action under Article VI of the Constitution of the United States, claiming immunity under the Supremacy Clause from Respondent's criminal prosecution when enforcing federal criminal law. The relevant federal and state statutes are set forth at R. 43a and reprinted in the Appendix.

Article VI of the Constitution provides:

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

INTRODUCTION

The Supremacy Clause of the United States Constitution provides that federal law is the “supreme Law of the Land; and Judges in every State shall be bound thereby.” U.S. Const. Art. VI, Cl. 2. The Supremacy Clause protects the right of the United States and its officers to enforce federal law without state interference. *In re Neagle*, 135 U.S. 1, 62 (1890). Federal officers acting under federal authority cannot be subject to criminal prosecution when their acts are “necessary and proper” to carry out that duty. *Id.* at 58. Immunity under the

Supremacy Clause affords broad protections to federal officers from state criminal prosecution, including protection from trial. Agent Schrader’s federal law enforcement duties include arresting violators of federal criminal law. *See* 18 U.S.C. § 3052. His method of arrest was “necessary and proper” and therefore immune from state criminal prosecution. This Court should reverse the Thirteenth Circuit’s ruling and uphold the district court’s 12(b) dismissal of the state’s criminal charges based on Supremacy Clause immunity.

STATEMENT OF THE CASE

I. FACTUAL HISTORY

The Involved Parties

Petitioner Hank Schrader has served for nearly 20 years as a special agent with the Federal Bureau of Investigation. R. 27a. Agent Schrader has received several commendations for the investigations he has done for the FBI – most notably for his investigation involving a major transnational criminal organization. R. 28a. Though he has received past complaints of excessive force, none of these complaints have ever been sustained. *Id.* Agent Schrader has only been reprimanded on a singular occasion for the reckless discharge of a firearm. *Id.* During his 20 years of service, he has been stationed in several locations including New Mexico, Michigan, and (at present) Wisconsin. *Id.* At the time of the incident, Agent Schrader was present in Madrigal, New Tejas on vacation with his family.

Mr. White is a New Tejas citizen and a habitual recreational marijuana user. R. 31a. While the federal government continues to classify marijuana as a Schedule

I drug that is illegal to possess, the citizens of New Tejas voted to legalize its possession and consumption under state law earlier that year. R. 30a. Mr. White is one of the leaders of the Madrigal marijuana community and was an advocate for its legalization. R. 32a.

First Interaction – A Traffic Incident

On the morning of November 8th, Agent Schrader and his family drove to downtown Madrigal to visit the New Tejas History Museum. R. 28a. As the family was driving, a red truck driven by Mr. White pulled in front of them. R. 29a. Though Mr. White denies speeding and denies braking after changing lanes, Agent Schrader asserts that Mr. Whites reckless driving forced him to “slam on [his] brakes” to avoid a collision, which caused him to risk a serious collision with the car driving behind him. *Id.* Following this incident, the two cars stopped at a stoplight and both men exited their vehicles. *Id.* Neither man remembers precisely what was said, but during the course of the heated conversation Mr. White admits to shoving Agent Schrader in the chest. *Id.* It was at this point that the light turned green and the confrontation was cut off by the honking of cars behind them. R. 30a. Both men returned to their vehicles and Agent Schrader and his family proceeded to the New Tejas Natural History Museum. After spending a number of hours enjoying the museum’s extensive artifact collection, the family took a walked along a shady boulevard, and had lunch in downtown Madrigal. *Id.* Agent Schrader said nothing more about the interaction with Mr. White. R. 30a.

Second Interaction – Marijuana Possession and Arrest

Mr. White walked out of a nondescript building marked as a dispensary only by a black-and-white plain-text sign with letters no larger than six inches tall. R. 30a-31a. Mr. White had purchased two ounces of marijuana for recreational use that was clearly visible in a transparent plastic bag. R. 31a. Agent Schrader happened to be 15 feet away from Mr. White and observed his possession of the marijuana. As an Agent of the FBI, Agent Schrader had sworn an oath to enforce federal laws. R. 32a. Because this possession of marijuana was in violation of Section 844 of Title 21 of the United States Code, Agent Schrader shouted, “Stop! You’re under arrest!”, and began running towards him R. 31a. Mr. White turned and began to flee. *Id.* Agent Schrader then tackled Mr. White from behind, landed on top of him, and placed him in handcuffs. From this interaction, Mr. White received a broken arm and several chipped teeth. R. 32a.

The Politicized Aftermath

Madrigal District Attorney Wexler was elected in 2016 on a pro-marijuana platform. R. 32a. At Mrs. Wexler’s direction, Agent Schrader was indicted for assault and aggravated assault following the arrest of Mr. White. At a rally of several hundred people, Mrs. Wexler spoke about her regular consumption of marijuana, and made a promise to “use every power of this office to prevent federal marijuana laws from being enforced” within the New Texas. R. 32a. In a message directed to other federal agents, Mrs. Wexler said the charging of Agent Schrader should “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. 33a.

II. PROCEDURAL HISTORY

Agent Schrader removed the state prosecution to the United States District Court for the District of New Tejas based on Section 1442 of Title 28 of the United States Code. R. 33a. Agent Schrader pleaded that because he was a federal officer enforcing federal law, the Supremacy Clause provided him with immunity to state criminal prosecution. R. 34a. The State did not challenge removal or federal jurisdiction, and Agent Schrader moved to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b), arguing that he is immune to state prosecution. *Id.* Following an evidentiary hearing, the district court issued findings of fact and conclusions of law and granted Agent Schrader’s motion to dismiss the indictment. R. 3a. The 13th Circuit Court of Appeals held that any disputed facts must be viewed in the light most favorable to the State. R. 8a. It then determined that when using this standard, it concludes that the State has carried its burden to disprove the immunity defense. R. 9a. Agent Schrader appealed, and this Court granted certiorari.

SUMMARY OF THE ARGUMENT

Given governmental agents’ overriding obligation to enforce all manners of federal law without hindrance created by state authorities, this Court should recognize a broad construction of Supremacy Clause immunity to prevent the “inversion of the fundamental principles” of our government. THE FEDERALIST

No. 44 (James Madison). This Court should reverse the holding of the 13th Circuit Court of Appeals and find it erred in two independent findings.

First, the district court did not make an improper resolution of disputed factual issues in deciding a motion to dismiss the state's criminal prosecution. The Court may find that resolution of the motion to dismiss was proper because there was not a material dispute of fact relevant to the claim of immunity. In a circumstance where there is not a material dispute of fact, the court may rule without taking evidence or holding a testimonial hearing. *Idaho v. Horiuchi*, 253 F.3d 359, 374 (9th Cir.) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001). Contrary to the appellate court's holding, should the district court choose to take evidence or hold a testimonial hearing, a district court may hear evidence and make factual findings to resolve disputed issues when deciding motions to dismiss based on immunity under Rule 12(b) of the Federal Rules of Criminal Procedure. The district court's ability to resolve disputed issues of fact when deciding a motion to dismiss a state criminal prosecution protects the heart of the Supremacy Clause. Subjecting federal agents to the course of trial inherently destroys the benefits of immunity. *New York v. Tanella*, 374 F.3d 141, 147 (2nd Cir. 2004). If judges are not afforded the ability to evaluate factual disputes during pretrial proceedings, federal agents will inevitably be subjected to otherwise frivolous trials conducted as part of a larger political statement which will ensure obstruction of effective governmental functions.

Second, federal agents acting within the scope of their authority employing objectively necessary and proper means to carry out those duties are immune from state criminal prosecution. *Wyoming v. Livingston*, 443 F.3d 1211, 1225 (10th Cir. 2006) (finding this two-prong test provides the best protection of the United States’ ability to carry out federal laws). Agent Schrader’s federal law enforcement authority included arresting individuals violating federal criminal law in his presence. *See* 18 U.S.C. § 3052. Federal law authorized Agent Schrader to arrest Mr. White when he witnessed him carrying two ounces of marijuana in a clear plastic bag, a violation of federal drug law. *Id.*; 18 U.S.C. § 844(a). “Necessary” acts include those acts an officer could reasonably believe required to carry out federal duties. *Kentucky v. Long*, 837 F.2d 727, 744 (6th Cir. 1988). Given the circumstances, an officer under similar circumstances could reasonably believe arresting Mr. White was necessary to carry out law enforcement function. “Proper” means includes a broad reading of methods which could be considered reasonable and is not meant to scrutinize officers making split-second decisions. *See Tanella*, 374 F.3d at 151-52 (2004). While a flying tackle may not have been the best method to arrest Mr. White, it was not so unreasonable as to be considered legally improper.

ARGUMENT

I. THE SUPREMACY CLAUSE HAS BEEN BROADLY INTERPRETED TO PROVIDE PROTECTIVE IMMUNITY TO FEDERAL AGENTS ACTING ON BEHALF OF THE FEDERAL GOVERNMENT.

A. The Supremacy Clause establishes that one state may not burden or impede the actions of the federal government.

Longstanding precedent recognizes the fundamental principle that a federal agent is entitled to immunity under the Supremacy Clause from prosecution of actions reasonably believed necessary and proper to the accomplishment of federal duties. The Supremacy Clause, as interpreted by this Court, ensures states are bound by federal law and prohibited from impeding federal officials in the exercise of operational duties. U.S. Const., art. VI, cl. 2; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). (“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 subordinate governments, as to exempt its own operations from their own influence.”). This premise of federalism ensures an individual state government does not compromise the interests of the citizens of the country that live outside the governmental powers of that state. *See* Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 701-02 (1976). While the basic premise is straightforward, the intersecting zones of competing federal and state authority are continually rebalanced to protect our system of federalism.

B. Under the Supremacy Clause, federal agents acting with authorization of the law and in a manner necessary and proper, are immune to criminal charges relating to that action.

In the seminal case *In re Neagle*, 135 U.S. 1 (1890), the Court was faced with a deputy marshal charged with murder after mistakenly shooting and killing an innocent citizen in the course of the defendant's protective duties. Directly referencing the concern for conflicts of power between dual sovereigns, the Court

held that the Supremacy Clause provides federal agents protection from state criminal charges when the agents act within the scope of their federal duties. *In re Neagle*, 135 U.S. 1 (1890). In applying this protective holding, lower courts have required that “(1) the federal agent was performing an act which he was authorized to do by the laws of the United States and in (2) performing that authorized act, the federal agent did no more than was necessary and proper for him to do.” *Long*, 837 F.2d 727 (6th Cir. 1988). This two-part test defines a critical line necessary to federal legitimacy. In the context of removal based on supremacy clause immunity, this court has recognized that because the federal government “can act only through its officers and agents, and they must act within the States,” it “must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.” *Tennessee v. Davis*, 100 U.S. 257, 262-63 (1879).

C. The rule has been broadly construed to protect errors for judgment, mistake, and overzealousness

The Court’s emphasis on broad protections from state control has been mirrored by lower courts’ recognition of an equally broad application of immunity. When applying the *Neagle* holding to determine whether an agent has authorization to act, the law “does not require [an agent] to show that his action was in fact necessary or in retrospect justifiable, only that he reasonably thought it to be.” *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977). Courts have consistently recognized that the immunity protections of the Supremacy Clause cover unauthorized and even unlawful conduct. Each circuit court of appeals that has answered this issue has held that it must be objectively reasonable for the officer to

believe his conduct was necessary and proper. *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004); *Texas v. Kleinert*, 855 F.3d 305, 314 & n.7 (5th Cir. 2017); *Long*, 837 F.2d at 745; *Clifton*, 549 F.2d at 728; *14 *Wyoming v. Livingston*, 443 F.3d 1211, 1222 (10th Cir. 2006). For instance, if “the officer makes an error in judgment in what the officer conceives to be his legal duty, that alone will not serve to create criminal responsibility in a federal officer.” *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982). Rather, “where an officer, from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority,” the immunity protections of the Supremacy Clause are still applicable. *See Clifton*, 549 F.2d at 727 n.10; *Long*, 837 F.2d at 745. Underlying these holdings is the understanding that an agent’s actions “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving.” *Graham v. Connor*, 490 U.S. 386 (1989). Officers’ unique position requires a broad protection that recognizes neither mistake nor judgmental error should strip an agent acting in a reasonable manner of the immunity defense.

II. THE DISTRICT COURT DID NOT MAKE AN IMPROPER RESOLUTION OF MATERIALLY DISPUTED ISSUES OF FACT IN DECIDING A MOTION TO DISMISS THE STATE’S CRIMINAL PROSECUTION.

A. 12(b) Supremacy Clause Immunity defense may be asserted pre-trial

Petitioner properly asserted a pretrial immunity defense based on his role as a federal agent. Written to encourage the use of pre-trial motions¹, Rule 12(b) 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.” The Advisory Committee specifically identifies immunity as a defense “capable of determination without a trial of the general issue” pursuant to Rule 12(b)(2). Notes of the Advisory Committee to Fed. R. Crim. P. 12. Under Rule 12(d) a district court “must decide every pretrial motion before trial unless it finds good cause to defer a ruling. . . [w]hen factual issues are involved in deciding a motion, the court must state its essential findings on the record.” The advisory committee also emphasized that Rule 12 necessarily “vests in the court authority to determine issues of fact in such manner as the court deems appropriate.” Notes of the Advisory Committee to Fed. R. Crim. P. 12. Therefore, as the lower courts have held, “Rule 12(b) motion is a proper vehicle by which to assert the defense of immunity under the Supremacy Clause of the United States Constitution.” *Long*, 837 F.2d at 750.

B. The District Court’s opinion did not require the resolution of materially disputed facts relevant to the question of immunity; therefore, it validly dismissed the state’s criminal prosecution.

When the state has not shown a material dispute of fact relevant to the determination of immunity, then the court should resolve the motion for dismissal. First, the state has the burden of producing an evidentiary showing sufficient to

¹ See Notes of the Advisory Committee to the 1975 Amendments to [Fed. R. Crim. P. 12](#), reprinted in 8 [J. MOORE](#), FEDERAL PRACTICE P12.01[3] at 12-7, 8 (2d ed. 1976)

demonstrate a showing of materially disputed issues of fact relevant to the immunity claim of the federal officer. *Long*, 837 F.2d at 750, 749-50, 752; *Tanella*, 281 F. Supp. 2d at 611. This burden placement is grounded in analysis of congressional provisions for removal and habeas corpus coupled with the policy reasoning of legally analogous situations. *Id.* If the facts provided by the state are not materially disputed or provide "no assistance in determining the validity of the [immunity] defense," a court should determine the issue of the immunity during the pretrial period. *New York v. Tanella*, 281 F.Supp. 2d 606, 611 (E.D.N.Y 2003) (quoting *United States v. Covington*, 395 U.S. 57, 60, (1969)), *aff'd*, 374 F.3d 141 (2d Cir. 2004); See Fed. R. Crim. P. 12(b)(2). In a circumstance where there is not a material dispute of fact, the court may rule without taking evidence or holding a testimonial hearing. *Idaho v. Horiuchi*, 253 F.3d 359, 374 (9th Cir.) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001).

Here, the Court may find that resolution of the motion dismiss is proper because there is not a material dispute of fact relevant to the claim of immunity. Though the district court properly conducted an evidentiary hearing and was within its purview to make factual resolutions, this was not necessary to resolving the pre-trial motion for dismissal based on immunity. The district court listed each of the individual factual findings of facts it made. R. 37a-39a. Petitioner argues that the subjective intent of the officer is not relevant to the determination of Supremacy Clause immunity. *See infra*, Section III A. As the Court has already directly addressed in cases of civil immunity, requiring an inquiry into the subjective

motivations of an agent would almost certainly set off “broad-ranging discovery” in which “there often is no clear end to the relevant evidence.” *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). Because this process necessarily strips the defendant of their immunity to trial, the Court has explicitly removed the subjective requirement and echoed this analysis in other areas of involving governmental regulatory action as well. With this in mind, the first five of the district court’s ten findings of fact are only relevant if Agent Schrader must prove his subjective intent was necessary and proper. First, if the scope of his role as a federal agent objectively encompasses “arresting individuals who committed federal crimes in his presence,” then Petitioner does not need to prove his subjective understanding of his position. Second, his personal intent or motivations are not relevant in a consideration of whether the arrest could reasonably be viewed as an attempt to fulfill federal duties and enforce federal law. Neither do the district court’s other factual determinations prevent a resolution of the motion. Petitioner does not dispute the factual occurrence of the tackle, subsequent injuries, or the lack of express identification. Because there is no material dispute of these facts, a resolution of a motion to dismiss evaluates only the questions of law necessary to answer the question of immunity. Even if these are “bad facts,” for Petitioner’s substantive justification defense against the criminal assault charge, the undisputed status of the facts allows a court to make an evaluation of law relevant to dismissal without determining a question of fact. Similarly, District Attorney Wexler’s purpose of this prosecution may be in dispute, but the purpose of the prosecution is not relevant to

a consideration of whether Petitioner is immune to prosecution. Even if Wexler's purpose is wholly legitimate, the test for immunity is based on the position and actions of the Petitioner – not the goals of the state. Therefore, the district court opinion did not make an invalid factual determination and should be upheld by this court as a valid dismissal based on immunity.

C. The district court may resolve disputed issues of fact when deciding a motion to dismiss based on immunity under the Supremacy Clause

The appellate court erred in holding that a district court may not hear evidence and make factual findings to resolve disputed issues when deciding motions to dismiss based on immunity under Rule 12(b) of the Federal Rules of Criminal Procedure. While there is notably little law on this precise question, the Ninth Circuit voted to answer this question before an en banc panel of eleven judges. The en banc court held that when there is “conflicting evidence pertaining to key aspects of [a defendant’s] immunity claim. . . the factual disputes must be resolved by the district court.” *Horiuchi*, 253 F.3d at 374 (*citing West Virginia v. Laing*, 133 F. 887, 891 (4th Cir. 1904) (“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.”)). Following the decision, Idaho announced that it was dropping the charges altogether causing the 9th circuit to vacate the opinion. However, even accepting the legal nullity of the opinion, the analysis of the en banc court provides persuasive analysis regarding the contours of dismissal based on immunity. The district court’s decision to dismiss the case on the pretrial motion was a proper

application of this holding and should be upheld by this court. This Court should recognize the implications of forcing district courts to view all evidence in the light most favorable to the state in cases of dismissal based on Supremacy Clause immunity and overrule the lower court's opinion.

i. Questions of immunity should be determined prior to trial to prevent inevitable burdens associated with standing trial.

Pushing the question of immunity to a jury for deliberation inherently swallows the protections and benefits of immunity from state criminal law. This Court has emphasized in a qualified immunity case that “immunity ordinarily should be decided by the court long before trial.” *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). As a pre-trial motion, the purpose of immunity is necessarily different than a general affirmative defense such as “justification” as offered under New Texas Penal Code §§ 50.01, 50.02. While an officer unquestionably retains the right to acquittal under state law, a regularly asserted defense available to any defendant, such as “justification,” requires trial participation and completion. Contrastingly, lower courts recognize that unlike a typical elemental or state statutory defense, “the immunity provided by the Supremacy Clause is an immunity from prosecution itself” *Horiuchi*, 253 F.3d at 383. Because the prosecution itself is the harm to be avoided, “there comes a point early in the proceedings where the federal immunity defense should be decided in order to avoid requiring a federal officer to run the gauntlet of standing trial and having to wait until later to have the issue decided.” *Long*, 837 F.2d at 752. The purpose of a pre-trial dismissal is to avoid the emotional, financial, and physical tolls associated with

criminal litigation. Therefore, “Having to live through anxiety of a criminal trial destroys most of the benefits of immunity.” *Tanella*, 374 F.3d at 147 (2nd Cir. 2004). This loss suffered by a defendant is wholly irretrievable. The harm caused by forcing a defendant through trial cannot be corrected through subsequent judicial action or review because the very continuation of the proceedings duplicates the defendant’s loss.

The importance of efficient pretrial resolution immunity questions is not unique to the Supremacy Clause. In the context of double jeopardy, this court has held “the rights conferred on a ... [defendant] by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence.” *Abney v. United States*, 431 U.S. 651, 660-61 (1977); *see also United States v. Gutierrez-Zamarano*, 23 F.3d 235, 237 (9th Cir. 1994)(evaluating factual disputes pertaining to double jeopardy without sending the case to a jury). The analysis that immunity is intended to protect "not only from the consequences of litigation's results but also from the burdens of defending themselves" was applied in *Helstoski v. Meanor*, 442 U.S. 500 (1979) to a question of congressional immunity. 442 U.S. at 508. Forcing either of these parties to litigate the case prior to a determination of immunity would render a finding of immunity functionally pointless. Because of this, courts have not hesitated to make factual evaluations in the context of immunity. *See e.g. United States v. Medoza*, 78 F.3d 460, 464-65 (9th cir 1996)(involving a factual dispute of whether a defendant furnished information under a grant of immunity). More specifically, in the context

of Supremacy Clause immunity, courts have determined questions of immunity prior to conducting a trial. *See e.g., Texas v. Carley*, 885 F. Supp. 940, 945-46 (W.D. Tex. 1994)(following a review extensive factual submission); *Connecticut v. Marra*, 528 F. Supp. 381, 387 (D. Conn. 1981)(evaluating the credibility of a witness following an evidentiary hearing). Moreover, any ambiguity on this question should be resolved in favor party risking harm by delay. If “the procedural boundaries are so unclear, it seems particularly appropriate to exercise that discretion-if necessary.” *Horiuchi*, 253 F.3d 359, 369 n.15 (9th Cir. 2001). It is acknowledged across the law that resolving the question of immunity is a prerequisite to subjecting an individual to the course of trial. District courts ability to make factual determinations is critical to preserving the benefits and protections of Supremacy Clause immunity.

ii. Federal judges are better positioned than a jury to resolve factual disputes relevant to Supremacy Clause immunity.

Allowing federal judges to make factual determinations in the context of Supremacy Clause immunity would make both practical and logical sense. As a baseline, the court in *Horiuchi* noted that in hearing and examining this evidence, "Federal judges, versed in the subtleties of federal immunity law, are well equipped to make factual findings and legal conclusions." *Idaho v. Horiuchi*, 253 F.3d 359, 376 (9th Cir.) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001). The appellate court majority compares the asserted the defense of “justification” based on “arrest and search” to the question of whether Agent Schrader “reasonably believe[d] the arrest . . . [wa]s lawful” and that Agent Schrader only used force that

was “immediately necessary to make or assist in making an arrest.” R. 6a. The lower court notes that the necessary findings of fact for these two issues overlap significantly. Unfortunately, while federal judge versed in the subtleties may be able to identify and distinguish the similarities and differences between the two separate issues, they remain independent and distinct. First, the question of immunity is determined under federal law while the ultimate question is based on state law. The court in *Horiuchi* noted that “asking the jury to apply two similar-yet distinct-legal standards to the same set of facts can only lead to confusion.”

Horiuchi, 253 F.3d at 375. Here, when determining immunity, even if the tackle would be later determined unjustified under state law, the officer may still demonstrate an objectively valid belief that the action was necessary and appropriate. This discrepancy creates unnecessary confusion that is logically unnecessary. Retaining narrow distinction between “...facts surrounding the commission of the offense, which may be for a jury to decide, and facts concerning the validity of the defense, which are properly the province of the court” prevents that unnecessary confusion. *Tanella*, 281 F.Supp.2d at 611 -612. Second, allowing federal judges to make factual and legal findings would create clear and articulated record of reasoning. “These rulings can then be reviewed on appeal much more easily than a jury verdict which, after all, is almost entirely opaque.” *Id.* In this way, forcing a jury verdict ensures a higher probability for practical issues involving questions of immunity. Third, forcing a jury verdict on all disputes of fact relevant to a finding of immunity duplicates a practical issue seen when courts have chosen

to have the jury resolve issues of disputed fact in cases of civil qualified immunity. Divorcing the sub-issues of fact and law “requires the court to determine the jury's thinking on many different factual disputes” and presents a “practical problem of jury trial management.” *Act Up!/Portland v. Bagley*, 988 F.2d 868, 875 (9th Cir. 1992). Because the question of immunity is one of law, the judge will be forced to interpret the factual findings of the jury and apply them to a legal decision. Each of these issues presents logical or practical reasons for this court to allow a district court to make minimal factual findings in the context of immunity. At a minimum, each of these issues represents an inefficiency that demands time and effort – not only of the court, but of the defendant as well. Recognizing the previously addressed importance of avoiding the personal costs of trial, this court should not require a logically and practically unsound rule that ensures wasted time and energy.

iii. Unlike civil suits, defendants seeking Supremacy Clause immunity face heightened risks and burdens necessitating a court's pre-trial decision.

Allowing federal judges to determine the questions of immunity during the pretrial process will provide an initial natural screening of vindictive and politically motivated criminal charges. This Court should endorse a rule that allows district courts to evaluate evidence and make the minimal factual conclusions necessary to an immunity determination because it will provide an initial natural screening of vindictive and criminal charges. This case uniquely represents this reasoning. As the dissenting appellate court opinion notes, Prosecutor Wexler made no attempt to conceal her motivation behind the prosecution of this case. R. 15a. During public

rally (which goes wholly unrecognized by the majority), Prosecutor Wexler said this case should “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. 33a. This threat precisely encapsulates the prohibited obstruction of operational duties of federal officials the Supremacy Clause was intended to prevent. U.S. Const., art. VI, cl. 2; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 427. Threats and actions of hostility taken by a prosecutor cannot be divorced from questions involving the Supremacy Clause. *New York v. DeVecchio*, 468 F. Supp. 2d 448, 466 (E.D.N.Y. 2007). A rule that functionally forces all factual disputes to be weighed by a jury allows a vindictive prosecutor to subject federal officials performing federal functions to full-fledged litigation—placing a heavy burden on the charged agent even if the agent is eventually determined immune. *Horiuchi*, 253 F.3d at 376.

These potential burdens of trial are particularly relevant and distinguishable in the context of criminal liability. While in the civil context, agents are frequently indemnified by the government against suits, this does not (and cannot) occur in criminal cases. *See, e.g.*, John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L.REV. 47, 50 n. 16 (1998). “The agency can't serve prison time for the officer; nor can it restore voting or other civil rights, or make up for the shame that results from a criminal conviction.” *Horiuchi*, 253 F.3d at 376 (9th Cir.). This Court should approach this issue with caution and recognize criminal sanctions are “fundamentally about personal blame and accountability” and thus

weigh entirely on the federal agent. *Id.* Here, State Prosecutor Wexler has openly threatened federal agents who may attempt to perform their duties within the state's borders. This factual scenario involving a direct attempt of intimidation—and others like it— demonstrates the necessity of a rule that allows a federal judge to screen frivolous and intimidating actions thereby providing a necessary safeguard for individual federal agents. If judges are not afforded the ability to evaluate factual disputes during pretrial proceedings, federal agents will inevitably be subjected to otherwise frivolous trials conducted as part of a larger political statement.

This Court should not ignore the systemic disparities faced by federal agents in cases of state criminal law prosecution. First, qualified immunity in the civil context is intended solely to balance the tension between the government and citizen interests. Because governmental agencies frequently indemnify their actors or are included in civil suits as a defendant, qualified immunity places positions the burdens and risks of trial with the governmental enterprise. In contrast, immunity in the criminal law context addresses both the government-citizen tension and dichotomy of the federal and state power. Despite this division of purpose, criminal prosecution of federal agents shifts the entirety of the burden to the individual agent instead of the federal government. This incongruence between the immunity's governmental power balancing purpose and the increased burdens and risks of trial on the individual is significant. Magnifying the fact that defendants personally shoulder the burdens of trial and the risk of severe criminal sanctions, is the fact

that defendants also face a sadly ironic reality that seeking subsequent damage recovery after a wrongful prosecution is usually prevented by prosecutors' absolute personal immunity regarding the decision to prosecute. *See Imbler v. Pachtman*, 424 U.S. 409, 424 (1976). Because criminal liability unlike civil liability is not focused on enterprise accountability, this Court should recognize and protecting federal agents from the severe and personal sanctions of a criminal trial.

iv. Subjecting federal agents to inevitable trials, inconsistent criminal law requirements, and potential liability ensures obstruction of effective federal interest enforcement

When determining the proper method to resolve disputed facts, courts often ignore the real-life implications of a rule that views facts in the light most favorable to the State. When federal agents are subject to trials and increased potential for criminal liability, it becomes increasingly difficult to effectively perform the actions of the federal government. Seth P. Waxman, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2230-31 (2003). Immunity created through Supremacy Clause provides a concrete safeguard that is necessary for federal agents to confidently perform duties that, while sometimes unpopular, are usually important. "If federal agents are to perform their duties vigorously, however, they cannot be unduly constrained by fear of state prosecutions." *Horiuchi*, 253 F.3d at 362. Whether the agent is a deputy marshal protecting a judge from a particularly dangerous litigant, an officer walking a child into her first day of school through a sea of vocal protesters opposing racial integration, or is simply standing-by to deescalate potential violence between

opposing groups outside of a political rally, the agents of the federal must have the ability to enforce federal law without fear of state obstruction. The Court's holding in *Neagle* remains just as important today because "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." Waxman, *supra* at 2230-31. Supremacy Clause Immunity is not intended to create untouchable actors, but rather the immunity to state criminal law provides a predictable and universal set of rules for federal agents. It's not a question of whether the state criminal law is right or wrong. Regardless of the moral grounding of state law, "even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States." *Johnson v. Maryland*, 254 U.S. 51, 56-57 (1920). While federal agents remain subject to the federal laws, regulations, agency guidelines, and civil penalties, the Supremacy Clause immunity ensures the consistent rule that no state may obstruct legitimate actions of the federal government. Providing consistent and efficient pre-trial application of Supremacy Clause immunity by federal court judges is critical to the support of positive governmental actions.

III. ACTIONS WITHIN THE SCOPE OF A FEDERAL AGENT'S DUTIES ARE IMMUNE FROM CRIMINAL PROSECUTION IF THEY ARE NECESSARY AND PROPER.

Laws of the United States are the "supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. Art. VI, Cl. 2. "The United

States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States.” *Neagle*, 135 U.S. at 62. No state may impose or restrict the United States, or its agents, enforcement of federal laws. *See id.*

The United States appoints federal agents to enforce federal laws and those agents must be unimpeded by state laws. The federal government relies on federal officers to enforce federal law and those agents must act within states. *Davis*, 100 U.S. at 262. “If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State,” then “the operation of the general government may at any time be arrested at the will of one of its members.” *Id.*

To protect federal officers from the chilling effect of state prosecution on federal enforcement, Supremacy Clause immunity applies when an officer acts within the scope of their authority and a reasonable officer would believe their acts were necessary and proper to complete those duties. *See Davis*, 100 U.S. at 262. As an agent of the Federal Bureau of Investigation, Agent Schrader’s duties include arresting violators of the federal criminal code. Arresting Mr. White was necessary to further Agent Schrader’s job duties which included enforcing federal criminal drug laws. Agent Schrader employed means an officer could consider reasonable and proper given the circumstances. The Supremacy Clause grants immunity to federal officers acting in furtherance of United States’ law, just as Agent Schrader did in this case.

Standard of Review

The determination of which legal tests should be applied to Supremacy Clause immunity presents a question of law the Court reviews *de novo*. *Livingston*, 443 F.3d at 1226.

A. Supremacy Clause immunity does not require an analysis of a federal officer's subjective intent when carrying out federal duties.

An officer's subjective intent when acting within the scope of employment should not deprive him of immunity. Requiring a determination of subjective intent creates a cyclical error that swallows the benefit of immunity. Requiring proof of subjective intent shifts the question of immunity to a detailed factual investigation into the life and motivations of the otherwise immune defendant. A subjective state of mind is an allegation that is "easy to allege and hard to disprove," *Crawford-El v. Britton*, 523 U.S. 574, 577 (1998). While the Court has not made a direct determination in the context of criminal cases, the Court explicitly removed the subjective prong in the civil context. The Court explained, "[S]ubstantial costs attend the litigation of the subjective good faith of government officials. Not 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982). Harlow's reasoning is only magnified by the differences between civil and criminal trial. *See Livingston*, 443 F.3d at 1221. Requiring an inquiry into the subjective motivations of an officer would almost certainly set off "broad-ranging discovery" in which "there often is no clear end to the relevant evidence." *Harlow*,

457 U.S. at 817. The heightened stakes of criminal trial necessitates even greater protection than is offered to agents in civil litigation. To give the Supremacy Clause proper effect, federal agents should have the expectation of immunity from criminal prosecution when acting in an objectively reasonable manner.

The rejection of subjective requirement is echoed in other areas of governmental regulatory action as well. First, in *Kingsley v. Hendrickson*, the Court rejected an excessive force jury instruction that asked the jurors to determine whether the officer “reasonably believed there was a threat to the safety of staff or prisoners.” 135 S. Ct. 2466, 2477 (2015). Then in the context of an arrest, the Court held that requiring an analysis of the officer’s subjective analysis would cause the law to inappropriately “vary from place to place and from time to time.” *Devenpeck v. Alford*, 543 U.S. 146, 148 (2004). Also notable is the “almost uniformly rejected invitations to probe subjective intent” seen in the totality of Fourth Amendment context. *Ashcroft v. al-Kidd*, 563 U.S. 731, 731 (2011) (noting the sole exceptions in cases involving special-needs or administrative searches). As the appellate court dissenting opinion noted, this is also see in the context of probable cause. *See, e.g., Devenpeck*, 543 U.S. at 153 (“Our cases make clear that an arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.”). As the Court emphasized this last year, “A particular officer’s state of mind is simply ‘irrelevant,’ and it provides ‘no basis for invalidating an arrest.’” *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019)(citing *Devenpeck*, 543 U.S. at 155). The

subjective nature of the arrest should have no bearing on whether the authorized action can be challenged by the state.

B. Arresting violators of federal criminal law falls within the scope of Agent Schrader's federal law enforcement duties

Agent Schrader's federal law enforcement authority includes arresting individuals violating federal criminal law. Agent Schrader acted within his authority when he attempted to arrest Mr. White for a federal violation. The scope of authority of a federal agent is a question of law for the district court to resolve.

Clifton, 549 F.2d at 726. "It is only necessary that the action bear some reasonable relation to and connection with the duties and responsibilities of the official."

Clifton, 549 F.2d at 726. (quoting *Scherer v. Morrow*, 401 F.2d 204, 205 (7th Cir. 1968) cert. denied, 393 U.S. 1084 (1969)). "[T]he officer must be acting within his power." *Barr v. Matteo*, 360 U.S. 564, 572 (1959) (holding qualified privilege in defamation cases is comparable to immunity) (quoting Judge Learned Hand's opinion in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). Immunity seeks to protect officers carrying out their duties from "the constant dread of retaliation." *Id.*

Here, Agent Schrader acted under express authority granted by statute allowing Special Agents of the FBI to arrest violators of federal law. 18 U.S.C. § 3052. An agent acts under federal authority if the act could be derived from the "general scope of his duties under the law of the United States." *Neagle*, 135 U.S. at 59. Agent Schrader's duties include arresting violators of federal criminal law which included arresting Mr. White in New Tejas. Agent Schrader served nearly 20 years

for the Federal Bureau of Investigation as a special agent of the agency. R. 27a. Agent Schrader investigates crimes of racketeering, wire fraud, money laundering, and kidnapping. R. 28a. He has never personally investigated drug trafficking cases. *Id.* Special agents of the FBI may “make arrests without warrant for any offense against the United States committed in their presence.” 18 U.S.C. § 3052. Marijuana remains a schedule I drug under federal criminal law and illegal to possess. 21 U.S.C. § 812(c)(10); 18 U.S.C. § 844(a). Agent Schrader’s duties explicitly authorize him to arrest violators of federal marijuana laws. Mr. White carried two ounces of marijuana in a transparent plastic bag fifteen feet away from Agent Schrader. R. 30a-31a. Upon witnessing Mr. White violate federal law in his presence, Agent Schrader was authorized to arrest under 18 U.S.C. § 3052. It is irrelevant to the analysis that New Texas legalized marijuana. R. 30a.

The Thirteenth Circuit incorrectly determined Agent Schrader acted without authority because his direct supervisors did not expressly authorize Mr. White’s arrest. R. 9a.

Explicit authority to act is not required to find immunity for federal agent’s actions. *Clifton*, 549 F.2d at 726-27 (citing *Barr*, 360 U.S. at 575). “[T]he same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts” for acts done without explicit authority. *Id.* “It is not unusual, for a legislative act to involve consequences which are not expressed.” *Osborn v. Bank of the United States*, 22 U.S. 738, 865 (1824). “An officer, for example, is ordered to arrest an

individual. It is not necessary, nor it is usual, to say that he shall not be punished for obeying this order.” *Id.* These employees and federal agents carrying out law are impliedly protected while carrying out their duties. *Id.* Immunity applies because it protects the ability of federal agents to complete their jobs adequately and without fear of retaliation. The “necessary and proper” test governs all conduct committed by the federal agent in completing their duties, explicit and implicit.

The Supreme Court reads scope of authority to include acts which further a federal interest. *Neagle* remains the foundational case for immunity granted under the Supremacy Clause when federal agents act on behalf of the United States. Waxman, *supra* at 2195 fn. 1. A federal marshal assigned to protect Justice Fields of the Supreme Court discharged his firearm, killing an aggressor against the Justice. *Neagle*, 135 U.S. at 4. Justice Field was attacked by the aggressor and California charged Neagle, the federal marshal, with murder. *Id.* at 1.

The Court evaluated the record and determined as a matter of law the federal marshal acted in a “necessary and proper” manner in protecting the Justice even if not given explicit permission under a statute to act with force. *Id.* at 58-59. (“It is sufficient to say that the evidence is abundant that both Terry and wife contemplated some attack upon Judge Field during his official visit to California”). The Court’s reasoning established a long-standing principle if the federal agent acted in his duty to 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. Neagle’s scope of authority included implicit authority to further his duties as a federal marshal.

Cases addressing Supremacy Clause immunity broadly view the scope of authority to protect the ability of agents to carry out their job duties without interference from the states. In *Ohio v. Thomas*, Thomas failed to comply with state labeling laws of oleomargarine when serving food to military personnel. *See* 173 U.S. 276 (1899). The Court held Congress authorized the use of oleomargarine when supplying food to the federal facilities in Ohio. *Id.* at 285. In doing so, it allowed Thomas the discretion to serve the oleomargarine without a label without state interference because he was furthering a federal interest. *Id.* “Supremacy Clause immunity does not require that federal law explicitly authorize a violation of state law.” *Livingston*, 443 F.3d 1211, 1227-28 (2006) (citing *Thomas*, 173 U.S. 276; *Neagle*, 135 U.S. 1). “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.*

The Thirteenth Circuit ignores implicit authority granted to agents when carrying out federal duties which places them under Supremacy Clause immunity. Agent Schrader held implicit authorization to violate New Tejas laws to enforce federal criminal laws. In fact, Agent Schrader would be unable to further his federal duties without violating New Tejas law for assault. *See* Section 22.01 of New Tejas Penal Code. Even if this Court finds Agent Schrader acted outside explicit authority because his previous investigations do not include drug trafficking investigations,

Agent Schrader held authority to arrest individuals violating federal law. Scope of authority includes all actions done in furtherance of a federal duty. No case law or federal statute suggests off-duty officers no longer have a duty to uphold the law when they are on vacation or with their family. The appellate court's reliance on such facts to determine he was not under an obligation to fulfill his federal duties is illogical.

The appellate court's ruling requires federal agents to turn a blind eye to criminal activity unless a federal directive explicitly permits the conduct of the federal agent. The appellate court found Agent Schrader's actions improper because he was off-duty at the time of the attempted arrest of Mr. White. R. 9a. "He had no obligation to arrest Mr. White and could (indeed, should) have continued his day with his family." *Id.* "Agent Schrader's federal duties did not require him to arrest Mr. White," and "[n]one of his superiors directed him to arrest Mr. White." *Id.* The appellate court ignores Agent Schrader's implicit authority to enforce all federal criminal laws given under 18 U.S.C. § 3052.

The appellate court incorrectly equated Agent Schrader's vacation status to stripping all law enforcement duties once he took off his badge. "Agent Schrader was off duty, in plain clothes, and on vacation with his family at the time of the arrest." R. 9a. These facts do not require Agent Schrader to ignore federal crimes. Just because Agent Schrader "would have faced no consequences from his employer for failing to arrest Mr. White" does not take away his authority to enforce his general job duties. No where in the statute allowing FBI agents to arrest does it

prohibit the enforcement of federal law once off duty. He held general authority to arrest and when acting under that general authority, it is within the scope of his duty.

There is no limit on the type of offenses FBI agents may arrest individuals for. It would be improbable to believe off-duty officers hold no interest or duty in furthering the law after seeing a direct violation. No evidence suggests Agent Schrader intended to arrest any individual for a violation of the schedule I drug laws until he witnessed Mr. White carry a transparent sandwich bag of marijuana. R. 2a. Agent Schrader fully acted within the scope of his authority when arresting Mr. White after carrying two ounces of marijuana, clearly visible by Agent Schrader.

The district court determined Agent Schrader subjectively believed arresting an individual violating federal law to be within the scope of his authority as an FBI agent and therefore not subject to criminal liability. *See Baucom*, 677 F.2d at 1350 (“Even if the officer makes an error in judgment in what the officer conceived to be his legal duty, that alone will not serve to create criminal responsibility in a federal officer.”). During the evidentiary hearing, Agent Schrader testified “No matter what state law says, I swore an oath to enforce federal laws. That’s what I was doing. That’s all I was doing.” R. 32a. The district court credited this testimony and found Agent Schrader “believed that his duties as an agent of the Federal Bureau of Investigation included arresting individuals who committed federal crimes in his

presence, regardless of state law.” R. 37a. The judge found Agent Schrader was motivated “solely to fulfill his federal duties and enforce federal law.” R. 38a.

Agent Schrader’s arrest of Mr. White, after watching him blatantly violate federal law, fell within his authority as a Special Agent of the FBI. If the Court determines a subjective test should apply, Agent Schrader meets these as well. Agent Schrader reasonably believed to be acting within his authority when arresting Mr. White.

C. Arresting Mr. White for violation of federal drug laws was necessary to perform Agent Schrader’s federal duties as a law enforcement officer.

Agent Schrader’s general federal duties included arresting individuals violating federal law in his presence. *See* 18 U.S.C. § 3052. Necessary acts include acts done to perform an authorized federal duty. It was necessary for Agent Schrader to arrest Mr. White when he witnessed Mr. White violate the federal law he holds a duty to enforce. “Necessary” includes acts useful to achieving an authorized duty. *See McCulloch v. Maryland*, 17 U.S. 316, 413-14 (1819)(“To employ the 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 means, without which the end would be entirely unattainable.”).

The Thirteenth Circuit ignored Agent Schrader’s duty to enforce federal criminal law in his role as an agent of the Federal Bureau of Investigation. “[N]either may state law undertake to limit the extent to which federal authority can be exercised.” *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971) (citing *Neagle*, 135 U.S. 1). The Court evaluates

the record presented to the lower court to determine if, as a matter of law, the federal agent acted out of necessity in their duties as federal agents. *See Neagle*, 135 U.S. 1 (the Supreme Court evaluated the district court judge's findings of fact to determine immunity under the Supremacy Clause). Necessary acts include those done to perform an authorized duty. In this case, the arrest was necessary for Agent Schrader to perform his duty of enforcing federal law.

Necessary acts include those implicitly authorized to fulfill federal duties. No statute or directive authorized Neagle to employ deadly force when protecting Justice Field. *See Neagle*, 135 U.S. at 98 (“By way of preliminary remark it may be well to say, that so far as the simple fact of Neagle’s attendance on Mr. Justice Field, and the fact of his personal presence, are concerned, no authority, statutory or otherwise, was needed.” Neagle’s use of deadly force became necessary when Justice Field was assaulted by another individual, even if not expressly authorized in his federal duties.

The Supreme Court revisited Supreme Court immunity sixteen years after *Neagle* and followed their “necessary and proper” reasoning when evaluating “necessary” acts in furtherance of a federal duty. *Clifton*, 549 F.2d at 724 (*citing United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906)). Supremacy Clause immunity “was not intended to place beyond the reach of a state’s criminal law federal officials who employ means which cannot honestly consider reasonable in discharging their duties or who otherwise act out of malice or with some criminal intent.” *Clifton*, 549 F.2d at 726.

In *Drury*, the federal officers were charged with protecting a building from thieves stealing copper from the structure. *Drury*, 200 U.S. at 2. The officers were instructed to arrest any individual caught leaving the structure the officers guarded. *Id.* at 3. *Drury*, the officer, saw young men fleeing from the general area of the structure. *Id.* *Drury* aimed and shot his rifle at one of the fleeing men, killing him. *Id.* The Court reviewed the evidence before it and determined the Circuit Court was not required to grant immunity to *Drury* because the actions were not necessary and proper in detaining the man for theft since there was a question of whether he had submitted to *Drury* before being shot. *Id.* at 8 (“But there was a conflict of evidence as to whether Crowley had or had not surrendered, and it is conceded that if he had, it could not reasonably be claimed that the fatal shot was fired in the performance of a duty imposed by the Federal law, and the state court had jurisdiction.”).

In *dicta*, the Court determined if the man fleeing the scene had submitted to the officer’s authority after yelling for him to stop, then the shooting would be unnecessary to detain and arrest him. If the man stopped, the officer no longer needed to shoot the man to complete his task and the force becomes unnecessary. *Long*, 837 F.2d at 745 (citing *Drury*, 200 U.S. at 8).

Supremacy clause immunity seeks to protect federal agents in carrying out their duties. “Even the most dedicated federal servant would be reluctant to do his job conscientiously if he knew it would mean prison time in the state penitentiary.” *See Waxman*, *supra* at 2231 (former United States Solicitor General). The Sixth and

Ninth Circuits recognized the importance of protecting federal agents when furthering their duties even if they exceed the scope of their express authority. *See Long*, 837 F.2d at 745 (citing *Clifton*, 549 F.2d at 727). The question of necessity relies on whether the act was done to complete the authorized federal duty.

Agent Schrader held express authority to arrest individuals violating federal law in his presence. A federal officer could reasonably believe arresting individuals openly violating the law furthers that duty. Agent Schrader carried out necessary means to enforce 18 U.S.C. § 844 which makes it a crime to possess illegal substances, like marijuana.

The Thirteenth Circuit's reliance on exigency and emergency to determine if an action is necessary fails to account for the purpose of Supremacy Clause immunity. R. 10a. (*quoting North Carolina v. Cisneros*, 947 F.2d 1135, 1139 (4th Cir. 1991)(*citing State v. Ivory*, 906 F.2d 999 (4th Cir. 1990))). The exigency and emergency requirement handicap federal agents upholding their duties to the United States. A federal agent would never be able to complete their jobs or responsibilities without threat of prosecution unless conditions create some risk to the agent. Federal agents should be able to enforce federal laws before the need for an emergency.

Additionally, the emergency and exigency requirement should only apply to acts specifically prohibited by a federal directive. The Fourth Circuit relied upon *Ivory* which imposed an emergency and exigency requirement on federal agents after the federal officer violated his own standing orders. *State v. Ivory*, 906 F.2d

999, 1002 (4th Cir. 1990). Ivory, a military driver, “was instructed that all motor transports were to comply with local traffic laws.” *Id.* Ivory received instructions twice requiring him to follow traffic laws and to only maintain the convoy if safe to do so. *Id.* Ivory also failed to allege any fact or reason “which justified his making the left hand turn without yielding the right of way to oncoming vehicles” when following a convoy. *Id.* The Thirteenth Circuit’s reliance on Fourth Circuit traffic court cases is misplaced. The traffic violations of the military personnel were not necessary to complete their jobs. Both Cisneros and Ivory could complete their convoys and journeys without violating traffic laws.

The facts the Fourth Circuit relied upon in creating their Supremacy Clause immunity test are wholly different than the facts at issue here. Agent Schrader could not have followed his duty to enforce federal law without attempting to arrest Mr. White. The Thirteenth Circuit’s reasoning requirement of emergency directly interferes with a federal agent’s ability to carry out their duties. In every state which decriminalizes or legalizes federally illegal drugs, federal agents would be stopped from enforcing federal laws for fear of violating state law. Any citizen of New Tejas could allege assault if a federal agent attempts to enforce federal drug law.

If this Court finds the subjective test applies when assessing necessity, Agent Schrader reasonably believed his actions were necessary to carry out his duties as a federal law enforcement officer. The “necessary and proper” test the district court applied required it to assess whether Agent Schrader’s actions were objectively

reasonable and whether he believed himself to be acting in good faith, a subjective standard. R. 35a (citing *Clifton*, 549 F.2d at 728). The district court found “Agent Schrader acted in subjective good faith—without criminal intent and without malice—resolves the ‘subjective’ prong of the immunity inquiry.” R. 40a. Mr. White carried two ounces of marijuana in a transparent bag from a poorly marked dispensary. R. 31a. Two ounces of marijuana fills an entire sandwich-sized plastic bag. Agent Schrader’s observations of flagrant violations of the law prompted him to arrest Mr. White in furtherance of his federal duty.

The Thirteenth Circuit improperly determined Mr. White’s arrest was not necessary because it did not further Agent Schrader’s federal duty. It reasons that his possible ill will towards Mr. White and off-duty status removed his general authority. R. 10a. “Immunity does not attach, however, when an officer employs his federal authority for ends unrelated to his federal duties.” *Id.* However, courts broadly define necessary to prevent the chilling effect federal officer’s in their enforcement of federal duties.

Agent Schrader’s action in arresting Mr. White were found to be both objectively and subjectively necessary to carry out his duty of enforcing federal criminal law. A reasonable officer would believe their duties included arresting individuals in violation of federal drug law. If this Court employs the subjective test in determining necessary acts, the district court found Agent Schrader reasonably believed arresting individuals in violation of the law to be necessary in enforcing the law. The district court found no malice or bad faith on behalf of Agent Schrader.

D. Agent Schrader employed means an officer could consider reasonable when enforcing federal law.

The district court must determine if “the official employs means which he cannot honestly consider reasonable in discharging his duties or otherwise acts out of malice or with some criminal intent.” *Clifton*, 549 F.2d at 728. The test requires the court to assess whether the officer’s conduct was reasonable under the existing circumstances. *Id.* It is the state’s burden to prove the means employed by the federal officer were of such a nature they could not be considered reasonable. *See id.* The standard does not require a federal agent to show they employed means “in fact necessary or in retrospect justifiable, only that he reasonably thought it to be.” *Id.*

The Thirteenth Circuit scrutinizes Agent Schrader’s method of arrest in hindsight. Agent Schrader called out to Mr. White, “Stop! You’re under arrest!” and proceeded to chase and tackle him. R. 2a. While the action when viewed after the event appears improper, the question evaluates the actions at the time and does not seek to scrutinize them.

The role of the district court is not to scrutinize actions of the agent in hindsight. *See Tanella*, 374 F.3d at 151-52. Analysis of “proper” means when enforcing a federal duty should take into consideration the high stress officers face. *See id.* (citing *Graham*, 490 U.S. at 396-97). “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*, 490 U.S. at 396. The broad view of proper includes the method Agent Schrader employed in a split-second decision when arresting Mr. White. Mr. White continued to run even after being

warned and there appeared to be no other method of enforcing federal law in the moment then to stop him with a “flying tackle.”

“The substance of the standards applied in the foregoing cases is that of honest and reasonable belief.” *Long*, 837 F.2d at 745. An error of judgment is assessed differently than an act done “wantonly or with criminal intent.” *Id.* (citing *Clifton*, 549 F.2d 722). The district court specifically determined Agent Schrader’s actions and “flying tackle” were not done with malicious or criminal intent. R. 38a. (“Agent Schrader did not intend to injure Mr. White or to commit a crime.”). The district court, after hearing the evidence provided by the state and Agent Schrader, determined Agent Schrader’s “means of the arrest satisfie[d] the ‘objective’ prong of the immunity inquiry.” R. 41a.

The concurrence of the appellate court would impose a balancing test upon actions of a federal agent to determine if they were proper. The concurrence would require Supremacy Clause immunity to balance the “federal need against the gravity of the state offense.” R. 14a. (citing *Livingston*, 443 F.3d at 1222 n.5). *Livingston* did not answer the question “whether federal officers are entitled to Supremacy Clause immunity where their state law violation was disproportionate to the federal policy they were carrying out—where, for example, they commit a grievous state offense for the purpose of enforcing trivial federal policy.” *Livingston*, 443 F.3d at 1222 n. 5. This view ignores the right of the United States to enforce its federal laws through its agents and to be subject to state law. The concurrence continues that “Mr. White had committed, at most, a minor regulatory offense,

which the sweeping tide of public opinion (as evidence by the recent ballot initiative in New Tejas) no longer considers appropriate for criminalization at all.” R. 14a. This essentially gives the state the power to determine which laws federal agents have a right to enforce within their borders, a conflict with the Supremacy Clause purpose.

Holding New Tejas criminal law controls the means allowed by a federal officer directly conflicts with the Supremacy Clause. “The State of New Tejas could not require Agent Schrader to use a taser in arresting a suspect, forbid him from using handcuffs, require him to identify himself in a particular manner, or (as it attempts here) prosecute him for employing a flying tackle during arrest.” R. 25a. (J. Hamlin, dissent). Federal law provides a means for the federal government to control the means by which federal agents employ when carrying out their law enforcement function. See 18 U.S.C. § 242 (provides a punishment for officers acting under color of law who commit bodily injuries when carrying out their duties). It is not the place of New Tejas to question the means employed by Agent Schrader because federal law directly speaks to the issue of overzealous or forceful arrests. *See 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 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.”). Agent Schrader’s conduct when enforcing federal law are not a matter to be prosecuted by the state but rather the federal government.

CONCLUSION

Special Agent Schrader of the Federal Bureau of Investigation acted within his federal authority when arresting Mr. White after witnessing him carry a federally illegal substance and was immune from state criminal prosecution. The Supremacy Clause protects federal agents carrying out their law enforcement duties to prevent the chilling effect a state's laws may have on federal law enforcement. To protect the ability of the United States to carry out its laws and functions, immunity under the Supremacy Clause should be read broadly. This Court should reverse the decision of the Thirteenth Circuit Court of Appeals and affirm the District Court's dismissal of Respondent's criminal case.

Respectfully submitted,
/s/ Team #60
Team #60
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 forwards to Respondent, New Tejas, through the counsel of record by certified U.S. mail, return receipt requested, on this, the 18th day of November, 2019.

/s/ Team #60
Team #60
Counsel for Petitioner
November 18, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33, the undersigned hereby certifies that the Brief of Petitioner, Hank Schrader, contains 11,326 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the attached Appendix.

/s/ Team #60
Team #60
Counsel for Petitioner
November 18, 2019

APPENDIX

Article VI of the Constitution of the United States of America 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.

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

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

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

18 U.S.C. § 3052 provides that:

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:

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

18 U.S.C. § 242 provides in part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

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 manifest 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.