NO. 18-5188

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

Hank SCHRADER,

Petitioner,

— against —

NEW TEJAS,

Respondent.

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

BRIEF FOR PETITIONER

TEAM 62

Attorneys for Petitioner

QUESTIONS PRESENTED

I. When a federal officer invokes the constitutional protections of Supremacy Clause immunity in a motion to dismiss a state criminal prosecution, is a district court correct in resolving any disputed issues of fact?

II. Is the test for Supremacy Clause immunity satisfied when a federal officer is able to show he reasonably believed the conduct in question was in furtherance of his federally authorized duty?

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The United States Court of Appeals for the Thirteenth Circuit's opinion is unreported, but is available at No. 18-5719 and contained within the record beginning on page 1a. The United States District Court for the District of Madrigal's opinion is also unreported, but is available at Criminal Action No. 17-cr-5142 and contained within the record beginning on page 27a.

STATEMENT OF JURISDICTION

The Thirteenth Circuit Court of Appeals entered its final judgment on October 2, 2018. Agent Schrader's petition was timely filed, and this Court granted certiorari on March 18, 2019. This Court's jurisdiction has been properly invoked under 28 U.S.C. § 1254(1) (2018).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Supremacy Clause, which 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.

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

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Agent Schrader's Background. Petitioner, special agent Hank Schrader, has spent nearly two decades serving as a member of the Federal Bureau of

Investigation (FBI). R. at 27a. Agent Schrader has received several commendations for his work, most notably for his involvement in the investigation of a major transnational criminal organization. R. at 28a. Despite never participating in any drug trafficking investigations, Agent Schrader has investigated crimes such as racketeering, wire fraud, money laundering and kidnapping. R. at 28a.

Although Agent Schrader's investigative work has been commended, his record is not wholly unblemished. Throughout his nearly twenty-year career, four complaints of excessive force have been made against Agent Schrader. R. at 28a. None of these complaints have been sustained by his supervisors. R. at 28a. Agent Schrader remained a duly authorized federal officer throughout his trip to New Tejas during November 2016.

Agent Schrader First Encounters Mr. White. Agent Schrader traveled to New Tejas during November of 2016 with his new wife and stepchildren. R. at 28a. On their fifth day in Madrigal, the family was nearly involved in an automobile collision. R. at 29a. The details of the lane change that led to this near collision are disputed by the parties. R. at 29a.

Agent Schrader asserts that a truck, being driven by the later-identified Mr. White, was speeding dangerously through traffic before ultimately cutting in front of his rented convertible and immediately braking. R. at 29a. Agent Schrader claims this action forced him to slam on his brakes and swerve to avoid a severe collision. R. at 29a. Mr. White denies both driving at an excessive speed and braking

suddenly after his lane change. R. at 29a. The conduct that followed this near miss, however, is largely undisputed.

Shortly after the truck driven by Mr. White and the convertible driven by Agent Schrader came to a stop at the next stoplight, both men exited their respective vehicles. R. at 29a. The men then exchanged heated words with one another, and neither party claims to remember what was said. R. at 29a. Mr. White shoved Agent Schrader just before the conclusion of this exchange. R. at 29a. Mrs. Schrader stated that she feared her new husband might retaliate but as the light turned green both men returned to their vehicles without a punch being thrown. R. at 29a–30a.

The Arrest of Mr. White. After the confrontation, Agent Schrader returned to his vehicle and "visibly relaxed" according to his wife. R. at 30. The family then went about their day with no further mention of the earlier incident. R. at 30a. Following a several-hour tour of the New Tejas Natural History Museum, Agent Schrader and his family decided to have lunch in downtown Madrigal. R. at 30a. While walking with his family down a shady boulevard looking for a suitable place to eat, Agent Schrader witnessed a man leaving a building clutching a clear plastic bag full of marijuana just fifteen feet in front of him. R. at 30a–31a. That man turned out to be Mr. White. R. at 30a.

Upon seeing Mr. White with the visible marijuana, Agent Schrader shouted, "Stop! You're under arrest!" and began to run towards him. R. at 31a. At this point, Mr. White turned and ran away from Agent Schrader. R. at 31a. Agent Schrader

caught up to Mr. White and tackled him, which sent both men crashing to the ground. R. at 31a. Mr. White suffered a broken arm and several chipped teeth as a result of the impact. R. at 32a. Agent Schrader then handcuffed Mr. White and placed him under arrest for possession of marijuana in violation of Section 844 of Title 21 of the United States Code. R. at 31a.

The Aftermath of the Arrest. Unbeknownst to Agent Schrader, however, New Tejas had made the possession of marijuana legal under state law earlier that same year. R. at 30a–31a. The building that the agent observed Mr. White exit with the marijuana was actually a dispensary known as Pinkman's Emporium. R. at 31a. In accordance with New Tejas law, this dispensary only bore a small non-descript sign which was absent any indication of the business's purpose. R. at 31a n.3. The owner of this dispensary witnessed Agent Schrader tackle Mr. White, a habitual recreational marijuana user, and called 9-1-1. R. at 31a.

When the local police arrived, Agent Schrader identified himself as an FBI agent enforcing federal law. R. at 31a. The local police officers did not arrest Agent Schrader or hinder him in any way. R. at 31a. Once made aware of the legalization of marijuana, Agent Schrader still asserted that even had he known of the change in New Tejas law it would have made no difference in his decision to arrest Mr. White. R. at 32a. Agent Schrader stated, "No matter what state law says, [he] swore an oath to enforce federal laws. That's what [he] was doing. That's all [he] was doing." R. at 32a. Mr. White was subsequently not charged with any crime. R. at 32a.

The Public Outrage. The day following Mr. White's arrest the Madrigal community reacted with outrage. R. at 32a. Several hundred protestors gathered in downtown Madrigal to express their anger at the arrest. R. at 32a. The newly elected Madrigal county district attorney Mrs. Wexler, who was elected on a pro-marijuana platform, spoke at the impromptu rally. R. at 32a. Mrs. Wexler told the gathered crowd, "The federal government has no business interfering with the sovereign will of the people of New Tejas, and [she would] use every power of [her] office to prevent federal marijuana laws from being enforced in this great state." R. at 32a. Mrs. Wexler further stated that she intended to charge Agent Schrader with aggravated assault and intended for him to serve a lengthy prison sentence. R. at 33a. She concluded this speech with the statement that the prosecution 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." R. at 33a. This speech was well received by the crowd and true to her word, Mrs. Wexler had Agent Schrader indicted for assault and aggravated assault in connection with his attempted arrest of Mr. White. R. at 33a.

II. PROCEDURAL HISTORY

Removal to the District Court. Agent Schrader removed his state prosecution to the United States District Court for the District of Madrigal pursuant to Section 1442 of Title 28 to the United States Code. R. at 33a. The agent then raised the defense of Supremacy Clause immunity and moved to dismiss the indictment under Federal Rule of Criminal Procedure 12(b). R. at 34a. After

receiving extensive briefing from both parties and hearing live testimony, the district court determined that Agent Schrader was entitled to a dismissal. R. at 34a, 41a.

The Appellate Court's Reversal. The State of New Tejas appealed the district court's dismissal to the United States Court of Appeals for the Thirteenth Circuit. R. at 1a. The appellate court reversed the dismissal of the indictment against Agent Schrader, finding that he was not entitled to Supremacy Clause immunity as a matter of law. R. at 13a.

This Court then granted Agent Schrader's petition for certiorari on March 18, 2019. R. at 1.

SUMMARY OF THE ARGUMENT

I.

The Thirteenth Circuit improperly found that Agent Schrader's motion to dismiss his state criminal prosecution based on immunity under the Supremacy Clause should have been viewed in the light most favorable to the State. This ruling completely robbed Agent Schrader of his right as a federal officer to not stand trial or face the burdens of litigation where his claim of immunity is found to be justified. The district court correctly resolved the disputed issues of fact relevant to Agent Schrader's motion. By doing so it not only correctly found that he was entitled to immunity, but it also protected the balance between the general government and the States.

Forcing Agent Schrader to proceed to a jury trial with the issue of his federal immunity still outstanding effectively positions the federal government as subordinate to the States. This is the exact scenario that prompted the founders to originally draft the Supremacy Clause, immortalizing the idea that the national government would always represent the supreme law of the land. A ruling by this Court that State prosecutors can now force federal officers to endure the burdens of a criminal proceeding, so long as that prosecutor can allege a factual dispute on paper, would distort the very balance of power that this Court has sought to protect since its inception.

Supremacy Clause immunity serves as a shield that stands between federal officers who can rightly claim its protections and state prosecutions that cannot be allowed to unduly burden the enforcement of federal law. Agent Schrader was enforcing a federal law at the time of the incident which became the basis of this suit. A district court evaluated his actions, and rightly found that he was entitled to the protections of Supremacy Clause immunity. In undoing that decision in favor of a standard that was much easier for the State of New Tejas to satisfy, the appellate court has placed the supremacy of the federal government in question. This Court should reverse.

II.

The test that governs whether the Supremacy Clause provides a federal officer with immunity from a state criminal prosecution should remain largely identical to what this Court originally articulated in *In re Neagle*. First, a federal officer must

be performing an act which he was authorized to do by the law of the United States. Second, it must be found that in performing that act he did no more than what was necessary and proper for him to do.

This test, as it has been consistently interpreted since *Neagle*, is purposefully straightforward in application. This ensures that federal officers such as Agent Schrader are not needlessly called to State court to answer for what was federally authorized conduct. The appellate court misapplied this test when it found that Agent Schrader was not entitled to Supremacy Clause immunity for his actions in New Tejas. This Court should find that Agent Schrader does qualify for immunity under the correct application of the traditional test for Supremacy Clause immunity.

Agent Schrader easily satisfies the requirement that he was performing an act which he was authorized to do by the law of the United States. As a member of the FBI, Agent Schrader has the authority to make arrests without warrant for any offense against the United States committed in his presence. Mr. White openly possessing marijuana in plain view of Agent Schrader qualifies as the commission of a federal crime in the agent's presence.

Agent Schrader's conduct also satisfies the requirement that he was doing no more than was necessary and proper while carrying out his federal duty. Agent Schrader saw Mr. White in possession of marijuana and made a split-second decision to act pursuant to his federal authority. In that moment of action, Agent Schrader subjectively believed that his actions were justified. He was not acting

with criminal intent or malice, but rather giving chase to what appeared to be a fleeing suspect. This is conduct that is objectively reasonable under this Court's Supremacy Clause immunity precedent.

The correct test to determine whether Agent Schrader's actions were necessary and proper should not include an in-depth inquiry into the subjective element of the analysis. Nor can it require a balancing of the federal law being enforced against the state law purportedly violated. These potential tests risk giving the States power over the federal government and its officers. These were the unnecessary and improper considerations which led the lower court to strip Agent Schrader of his right to immunity. This Court should reverse.

ARGUMENT AND AUTHORITIES

Cases involving Supremacy Clause immunity dismissals present mixed questions of law and fact and are reviewed de novo. *New York v. Tanella*, 374 F.3d 141, 146 (2d Cir. 2004). When a federal officer raises a threshold defense of Supremacy Clause immunity, the state cannot overcome that defense merely by way of allegations. *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988).

When Supremacy Clause immunity is granted on a motion to dismiss, that decision is reviewed by asking two questions: (1) Whether the federal officer had authority for his acts under federal law; and (2) whether the officer had an objectively reasonable basis to believe his actions were necessary and proper in carrying out his duties. *Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006).

I. A District Court Should Resolve All Disputed Issues of Fact When Deciding a Motion to Dismiss a State Criminal Prosecution Based on Supremacy Clause Immunity.

The Thirteenth Circuit incorrectly held that a district court could not decide disputed issues of fact when considering a motion to dismiss predicated on a federal officer's ability to claim immunity under the Supremacy Clause. The lower court instead proffered that "the facts must be viewed in the light most favorable to the State." R. at 5a. If not reversed by this Court, that standard will effectively strip federal officers of the benefits Supremacy Clause immunity is meant to confer. Unless a district court may decide these disputed issues of fact, then this immunity will no longer represent an entitlement "not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Agent Schrader was originally indicted in New Tejas state court on charges of assault and aggravated assault that arose out of his attempted arrest of Mr. White. R. at 33a. Agent Schrader then removed the state prosecution to the federal district court under Section 1442 of Title 28 of the United States Code, which provides for the removal of "criminal prosecution that is commenced in a State court and that is against . . . any officer . . . of the United States or of any agency thereof . . . for or relating to any act under color of such office or on account of any . . . authority claimed under any Act of Congress for the apprehension or punishment of criminals[.]" R. at 33a–34a; 28 U.S.C. § 1442 (2018).

This Court has consistently held that an officer must affirmatively plead a federal defense for removal of a state proceeding to federal court to be proper. *See*

Gay v. Ruff, 292 U.S. 25, 32 (1934). Agent Schrader specifically plead that he was entitled to Supremacy Clause immunity, and following the removal of his case to federal court, moved to dismiss based on the same legal principle. R. at 34a. After hearing the evidence presented by both parties, the district court correctly granted Agent Schrader's motion to dismiss. R. at 41a.

The appellate court improperly reversed however, asserting that Agent Schrader's motion should have been viewed in the light most favorable to the state. R. at 13a. If that decision stands Agent Schrader will have to return to the district court, select a jury of his peers and proceed with a complete trial of his case. Only at the conclusion of this trial will his ability to claim immunity be decided. The notion that this could be considered an acceptable outcome directly contradicts this Court's prior instruction that where immunity is found proper, "it conveys an entitlement not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U.S. at 526.

This Court should now reverse the lower court's judgment. A standard that forces duly authorized Federal officers to subject themselves to entire criminal proceedings before the immunity issue will be decided is untenable. Over 120 years ago, this Court's seminal decision on Supremacy Clause immunity clarified that "in all matters within the sphere of the general government, that government and the obligations it imposes are supreme, and where any supposed right or claim of a State contravenes such obligation, it must yield." *In re Neagle*, 135 U.S. 1, 40 (1890).

Here, the district court was correct in recognizing that the supposed rights or claims of New Tejas had to yield until Agent Schrader's ability to claim immunity

was determined. Those determinations must necessarily be made at the outset of the proceedings, lest the federal government or its agents be held hostage by a State proceeding for any longer than necessary. As this Court succinctly stated, the federal government cannot allow a State to "obstruct its authorized officers against its will, or withhold from it, *for a moment*, the cognizance of any subject which [the Constitution] has committed to it." *Tennessee v. Davis*, 100 U.S. 257, 263 (1879) (emphasis added).

A. A Determination of Whether Agent Schrader Is Entitled to Supremacy Clause Immunity Must Be Made Promptly.

The Supremacy Clause has long been understood to immunize federal officers from state prosecution when the charges arise from the officer's attempt to carry out official duties. *See In re Neagle*, 135 U.S. at 34. Although Supremacy Clause immunity is considered an affirmative defense, it is better described as a right to true immunity from suit. That right will be rendered meaningless if this Court permits Agent Schrader's case to proceed to trial with the issue of his immunity left unresolved. *See Long*, 837 F.2d at 752.

Due to the uniquely urgent nature of Supremacy Clause immunity, the district court was correct when it originally decided the disputed issues of fact surrounding Agent Schrader's motion. R. at 41a. That court recognized its duty to make a prompt ruling on the immunity issue and acted accordingly. *Id.* This is because where immunity is found proper, "it conveys an entitlement not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U.S. at 526. Agent Schrader was subsequently robbed of this entitlement by the appellate court's ruling. It is illogical

to force Agent Schrader to stand trial and face the burdens of litigation with the issue of his immunity still outstanding. The State of New Tejas could not meet its burden of proof the first time these parties were before the district court, and it should not now be given a second bite at that apple before a jury.

Once a threshold defense of Supremacy Clause immunity is raised by a federal officer such as Agent Schrader, the State's burden of proof shifts. It then bears the burden of putting forth enough evidence to raise a "genuine factual issue" regarding whether the federal officer was doing no more than what was necessary and proper for him to do in performing his duties. *Tanella*, 374 F.3d at 148 (citing *Long*, 837 F.2d at 752). Further, the State cannot meet this burden "merely by way of allegations." *Long*, 837 F.2d at 752; *see also City of Jackson v. Jackson*, 235 F. Supp. 2d 532, 534 (S.D. Miss. 2002) (stating that when a "Supremacy Clause immunity defense [is raised] by way of motion to dismiss, the district court should grant the motion in the absence of an affirmative showing by the state that the facts supporting the immunity claim are in dispute"). Any disputed issues of fact should be within the purview of the district court to resolve, so long as that court is presented with adequate evidence on which to base its conclusions.[1]

Agent Schrader's motion to dismiss was only granted after the district court had received extensive briefing and heard live testimony on behalf of both parties. R. at 34a. With all the relevant evidence before it, the district court was well within

[1] In *Livingston*, the Tenth Circuit was confronted with a situation where the district court had wholly failed to hold any type of evidentiary hearing prior to granting the federal officer's motion to dismiss. 443 F.3d at 1224. In the present case however, the district court had ample evidence on which to base its ruling. R. at 34a, 38a n.7.

its authority when it determined New Tejas had not made an affirmative showing that the relevant facts supporting the claimed immunity were in dispute. By promptly resolving any disputed issues of fact pertaining to the applicability of Supremacy Clause immunity, the district court properly acts as the first line of defense for federal supremacy. The Thirteenth Circuit's determination that Agent Schrader's motion to dismiss should have instead been viewed in the light most favorable to the State was a misinterpretation of Supremacy Clause immunity. This Court should reverse.

1. The relationship between federal and state authority requires a district court be able to resolve issues of fact pertaining to Supremacy Clause immunity.

Concerns over the balance of power that must exist between federal and state authorities date to the founding of this country. In our federal system of government, the individual states and the national government are considered co-sovereigns, but they have never been considered equals. The Supremacy Clause drew this distinction 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. This idea of a supreme national government prevents the possibility that the "authority of the whole society [could] every where [be] subordinate to the authority of the parts." *The Federalist No. 44* (James Madison). As Agent Schrader is tasked with enforcing federal law, it should be a federal judge alone that determines whether he is entitled to immunity.

A duly authorized Federal officer forced to litigate his right to Supremacy Clause immunity before a jury has essentially been stripped of that right altogether. This Court realized the potential hazards that scenario presented when it decided *Tennessee v. Davis*. 100 U.S. at 257. If a federal officer can be arrested and brought to trial for an alleged offence against the laws of a State, yet his actions were warranted by his Federal authority, then "the power of the general government must be *allowed to interfere at once* for that officer's protection." *Id.* at 263 (emphasis added). If this Court were to find the inverse is now true, and federal officers such as Agent Schrader could not immediately seek immunity under the Supremacy Clause, then "the operation of the general government may at any time be arrested at the will of one of its members." *Id.*

The idea of immediate intervention articulated by this Court falls squarely in line with the district court's resolution of any disputed facts in the present case. When that court decided this motion, it correctly allowed Agent Schrader to assert the immunity defense without first having "to run the gauntlet of standing trial and having to wait until later to have the issue decided." *Long*, 837 F.2d at 752. This was the proper disposition of the issue, as "Supremacy Clause immunity merely confirms that the Constitution and laws of the United States are 'supreme' and cannot be obstructed—here, via local prosecution—by the laws of the individual states." *Texas v. Kleinert*, 855 F.3d 305, 320 (5th Cir. 2017) (citing U.S. Const. art. VI, cl. 2). The Thirteenth Circuit misconstrued the true purpose of Supremacy Clause immunity in this case. This Court should reverse.

2. The district court had sufficient evidence before it to support its granting of Agent Schrader's motion to dismiss.

The district court heard live witness testimony and received extensive briefing from both parties before ruling on Agent Schrader's motion to dismiss. R. at 34a. Those actions ensured that the mere presentment of a disputed fact was not enough to warrant a jury trial on the immunity issue. *Idaho v. Horiuchi*, 253 F.3d 359, 376 (9th Cir.) (en banc), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001). This fact makes the present case readily distinguishable from the *Wyoming v. Livingston* case relied on by the Thirteenth Circuit. 443 F.3d at 1211; *see* R. at 6a.

In *Livingston*, the Tenth Circuit specifically noted that no evidentiary hearing had taken place at the district court level. 443 F.3d at 1224. That case centered on the applicability of Supremacy Clause immunity to a member of the United States Fish and Wildlife Services who had inadvertently trespassed onto private land while attempting to carry out his federal duties. *Id.* at 1214–15. The federal duty in question was the tracking of endangered wolves. *Id.* Further, it was undisputed that a trespass, a clear violation of State law, had occurred while this officer was attempting to carry out his federally authorized task. *Id.* at 1225.

Before the Tenth Circuit ultimately held that immunity was proper in *Livingston*, it first wrestled with the question of how disputed issues of fact were to be resolved in the context of a motion to dismiss based on Supremacy Clause immunity. *Id.* at 1226. The court noted that while it was generally tasked with viewing evidence in the light most favorable to the non-movant, that standard

immediately shifts once a defense of Supremacy Clause immunity has been raised. *Id.* In this scenario the State's burden increases greatly, and it must "supply sufficient evidence to raise a 'genuine factual issue' that is supported by more than mere allegations." *Id.* (citing *Long*, 837 F.2d at 752).

There would be no way to discern whether the State had in fact met that burden unless a district court makes factual findings. Here, the district court acted correctly when it did just that. This Court should take this opportunity to clarify that when a motion to dismiss a state criminal prosecution based on Supremacy Clause immunity is made, the district court must decide any disputed issues of fact relevant to that motion as a threshold matter and promptly rule accordingly. *See Long*, 837 F.2d at 752. The implementation of any other standard for adjudicating the potential immunity of a federal officer, such as Agent Schrader, would risk subversion of the fundamental principle that: "[T]he government of the Union, though limited in its powers, is supreme within its sphere of action." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Accordingly, this Court should reverse the judgment of the Thirteenth Circuit.

B. Whether Supremacy Clause Immunity Is Applicable Cannot Turn Entirely on the Nonexistence of a Material Dispute over Relevant Facts.

The Thirteenth Circuit's determination that motions such as Agent Schrader's should be viewed in the light most favorable to the State would prevent federal officers from asserting immunity in virtually all cases. As the dissenting Judge Hamlin pointed out in the lower court, this severe limitation of what should rightly

be a broad protection is exactly what the Ninth Circuit has warned against. R. at 16a. The adoption of this standard does indeed risk "upend[ing] the relationship between state and federal authority," just as the dissenting Judge suggested it did. R. at 15a.

If New Tejas may continue to prosecute Agent Schrader at this juncture due to the mere possibility that a factual dispute might exist, then the State will have been able to obstruct the operation of the federal government by merely presenting allegations against one of its duly authorized agents. *See Long*, 837 F.2d at 752. This cannot be viewed as the correct approach to cases involving Supremacy Clause immunity, as it would seemingly allow "the operation of the general government [to] at any time be arrested at the will of one of its members." *Davis*, 100 U.S. at 263.

1. The inevitability of a factual dispute in a criminal proceeding demonstrates the need for a district court to decide the disputed factual issues.

The Ninth Circuit's approach to claims of federal immunity provides for results still capable of ensuring full "federal protection for federal officers performing federal duties" when an examination of the facts shows those officers are indeed entitled to protection. *Long*, 837 F.2d at 751. That court recognizes that there are "almost invariably matters of factual dispute in cases involving criminal charges," and further that it could be "far too easy to allege the existence of a factual dispute, even when none exists." *Morgan v. California*, 743 F.2d 728, 733 (9th Cir. 1984).[2] As

[2] While the majority of the court below found *Morgan* inapplicable because it arose in the context of a habeas proceeding, other appellate courts have readily accepted "that the Supremacy Clause immunity principles enunciated in the habeas context

such, the Ninth Circuit has held that apparent factual disputes surrounding state charges do not somehow bar federal courts from granting relief where it is otherwise appropriate. *Id.* If after holding an evidentiary hearing it is apparent to a district judge that the relief sought by a federal officer is warranted, then that relief should be granted "even if the judge has to resolve factual disputes to arrive at that conclusion." *Id.*

When this logical approach to adjudicating the issue of Supremacy Clause immunity is juxtaposed with the light most favorable to the State standard proffered by the Thirteenth Circuit, the problems with the latter become readily apparent. Allowing the district court to immediately resolve factual disputes provides adequate protection against the possibility of a State obstructing the operations of the federal government for even a moment longer than is necessary to determine whether a federal officer was entitled to immunity. *See Davis*, 100 U.S. at 263. This is directly in line with the logical inference that "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 (citing

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apply equally to a Rule 12(b) motion to dismiss an indictment in a case removed under 28 U.S.C. § 1442." *Tanella*, 374 F.3d at 149; *see Long*, 837 F.2d at 751–52 (applying *Neagle* principles to a Rule 12(b) motion to dismiss based on Supremacy Clause immunity because the purpose of the habeas corpus provision is "much the same as the purpose underlying the removal provisions"); *Whitehead v. Senkowski*, 943 F.2d 230, 233 (2d Cir. 1991) (describing the habeas and removal provisions in the Supremacy Clause context as "alternative[s]").

Mitchell, 472 U.S. at 526; *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982); *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986)).

Conversely, viewing any disputed question of material fact in the light most favorable to the State and forcing a federal officer to "face trial before a jury of his peers" has the potential to create a myriad of problems. R. at 7a. The gravest of these unintended consequences is the potential this lax standard has to make the operation of the federal government at any time arrestable at the will of one of its members. *Davis*, 100 U.S. at 263. Implementing this standard would effectively allow the prosecution of a federal officer to proceed all the way to a final jury verdict if the State alleged the existence of a factual dispute, even when none existed. *See Morgan*, 743 F.2d at 733.

The proposition that "in the light most favorable to the State" is the correct standard for reviewing Agent Schrader's motion flies directly in the face of this Court's prior holding that: "[E]ven the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States." *Johnson v. Maryland*, 254 U.S. 51, 56–57 (1920). It stands to reason that an easily satisfied legal standard should likewise not be allowed to control the conduct of a duly authorized federal officer of the United States who has been determined by a district court to have been acting under and in pursuance of the laws of the United States.

2. A federal judge is better suited to answer the legal question of immunity than would be a jury.

As the lower court correctly stated, "we are a nation of laws, and Agent Schrader's conduct must be governed by those laws." R. at 13a.The law that Agent Schrader is tasked with upholding however is the supreme law of the land, and it is that law which ultimately governs his conduct. Allowing the district court to hear the evidence surrounding his federal actions, and make the appropriate findings relevant to his immunity, provides the requisite safeguard against potentially unfounded or even hostile state criminal charges. *See Horiuchi*, 253 F.3d at 376.

A bright-line rule which interposes "a federal judge between the state prosecutor and the jury will provide a significant restraint on overzealous state prosecutors" moving forward. *Id.* The Ninth Circuit explained why it favored such a rule in its en banc *Horiuchi* decision:

> We also find persuasive modern courts' practice of deciding factual questions underlying criminal immunity claims, rather than submitting them to juries. Having 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. . . . We recognize that none of these provides a perfect analogy because a claim of Supremacy Clause immunity is much more central to the subject matter of the criminal case . . . . Nevertheless, we find significant policy reasons supporting our decision. To begin with, the question of Supremacy Clause immunity, while very similar to the issues presented in the criminal case, is nevertheless quite distinct. While the jury must decide the case under state law, Supremacy Clause immunity is a matter of federal law. The state standard for justification may or may not be the same as the federal standard, and asking the jury to apply two similar—yet distinct—legal standards to the same set of facts can only lead to confusion. By contrast, federal judges, versed in the subtleties of federal immunity law, are well equipped to make factual findings and legal conclusions.

Id. at 375–76. Nearly all concerns and justifications mentioned by the Ninth Circuit in *Horiuchi* are present before this Court.

If Agent Schrader is forced to continue to fight these charges, then he will indeed lose his claim to any possible "entitlement not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U.S. at 526. Yet a federal judge, versed in the subtleties of federal immunity law, already made the relevant factual findings and legal conclusions required to rule on Agent Schrader's claim of Supremacy Clause immunity. R. at 41a. That learned judge's findings and conclusions should not have been overturned by the lower court in favor of a standard which will later ask a jury to apply two similar—yet distinct—legal standards to this same set of facts. This will, as the Ninth Circuit pointed out, only lead to confusion.

Supremacy Clause immunity "is a 'seldom-litigated corner' of constitutional law." *Kleinert*, 855 F.3d at 314 (quoting *Livingston*, 443 F.3d at 1213). But no matter how seldom it does appear on the federal dockets, it is still a right that this Court has continually recognized a federal officer may assert so long as they can show themselves entitled to its protections. *See In re Neagle*, 135 U.S. at 40. As the Ninth Circuit suggested, it should be the district court alone who originally determines whether a federal officer such as Agent Schrader is entitled to the protections of Supremacy Clause immunity. In the present case the district court did exactly that. The Thirteenth Circuit was wrong in disturbing that decision and instead opting for a standard that would charge members of a jury with interpreting an obscure matter of federal law. This Court should reverse.

C. The Federal District Court Provides Agent Schrader with the Correct Forum for a Fair Assessment of His Immunity Against a Prosecution Arising Out of Hostility Toward Enforcement of Federal Marijuana Laws.

Another purpose for providing a federal officer such as Agent Schrader with Supremacy Clause immunity "from state criminal prosecutions is to prevent states from nullifying federal laws by attempting to impede enforcement of those laws." *Morgan*, 743 F.2d at 731. Before having Agent Schrader indicted, the Madrigal County district attorney, Mrs. Wexler, specifically announced in a televised speech that: "The federal government has no business interfering with the sovereign will of the people of New Tejas, and [she] will use every power of [her] office to prevent federal marijuana laws from being enforced in this great State." R. at 32a. She then concluded her speech with the statement, "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.

Unsurprisingly, Agent Schrader is not the first Federal officer who has been targeted by State prosecution for trying to enforce an unpopular law within that State's borders. One court commented that the historical purpose of the removal provisions was to confront just this kind of hostility and "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 751 (emphasis added).

That potential for localized anger towards a federal officer such as Agent Schrader highlights yet another reason why an unelected, appointed for life, federal judge should be the one deciding the issue of Supremacy Clause immunity. A requirement that "the district court hear the evidence and make factual findings before the state prosecution can go forward will act as a substantial safeguard against frivolous or vindictive criminal charges by states against federal officers." *Horiuchi*, 253 F.3d at 376. Such a safeguard would protect federal officers such as Agent Schrader from state prosecutions based more on political motives than any actual perceived wrongdoing.[3]

The district court in the present case was originally correct when it decided the disputed issues of fact surrounding Agent Schrader's motion to dismiss this state prosecution. The appellate court's subsequent reversal robbed Agent Schrader of his right as a duly sworn federal officer to have the issue of his immunity promptly decided. Where immunity is found proper, "it conveys an entitlement not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U.S. at 526. The appellate court contravened everything this Court has held Supremacy Clause immunity provides for when it mandated that Agent Schrader would have to put the issue of his immunity before a jury of his peers. This Court should now reverse.

[3] The Madrigal County district attorney, Mrs. Wexler, was elected to office in 2016 after running on a pro-marijuana platform.

II. THE COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT ERRED WHEN IT FOUND AGENT SCHRADER WAS NOT ENTITLED TO IMMUNITY UNDER THE SUPREMACY CLAUSE BECAUSE IT MISAPPLIED THE RELEVANT STANDARD.

In re Neagle established the proper test for immunity. 135 U.S. 1. Justice Miller, writing for the Court, explained a federal officer is immunized from state prosecution for performing "an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do." *Id.* at 75. Courts later operationalized this language by creating a two part test determinative of immunity under the Supremacy Clause. *Morgan*, 743 F.2d at 731. Once a threshold defense of immunity is raised, the prosecution bears the burden of disproving that a) the conduct which forms the basis of the state's action was within the scope of his authority, and b) the conduct was "necessary and proper to the execution of his responsibilities." *New York v. Tanella*, 374 F.3d at 148; *Morgan*, 743 F.2d at 728. Under proper application of the *Neagle* standard, Agent Schrader is entitled to immunity under the Supremacy Clause because his action was necessary and proper to enforce a law that he had the authority to administer. This Court should reverse.

A. Agent Schrader Was Authorized by Federal Law to Enforce the Prohibition of Recreational Marijuana Use.

The State also cannot satisfy its burden of disproving the first element of Supremacy Clause immunity: that the conduct forming the basis of the State's action was within the scope of Agent Schrader's authority. Supremacy Clause jurisprudence affords "grants of federal authority a generous sway" when

determining the scope of an officer's authority. *Livingston*, 443 F.3d at 1219. Acts may be within a federal officer's authority when they are not expressly directed or even if of "questionable legality." *Arizona v. Files*, 36 F. Supp. 3d 873, 878 (D. Ariz. 2014) (quoting *Clifton v. Cox*, 549 F.2d 722, 727 (9th Cir. 1977) ("In two early decisions, notwithstanding the questionable legality of a federal officer's actions, courts recognized the general rule that errors of judgment in what one conceives to be his legal duty will not, alone, serve to create criminal responsibility of a federal officer.")). But Agent Schrader need not rely on implied authority because his conduct is statutorily authorized. His disposition as a plain-clothed tourist does not destroy this.

18 U.S.C. § 3052 empowers FBI agents to "make arrests without warrant for any offense against the United States committed in their presence[.]" This statute states the constitutional standard, because the Fourth Amendment commands that "no warrants for either searches or arrests shall issue except 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'" *Henry v. United States*, 361 U.S. 98, 100 (1959) (quoting U.S. Const. amend. IV).

Mr. White possessed an illegal substance in Agent Schrader's presence. Thus, Agent Schrader had statutory authority to arrest him. The lower court concluded to the contrary because it erred on this matter twice. First, it considered that no superior directed Agent Schrader to perform the arrest and that he was off duty; and second, it reasoned Agent Schrader could not use force against Mr. White

because there was no exigency or emergency. The former interpretation is irrelevant to this case, and the latter is not correct.

A federal officer need not be directed to do a specific task by a superior in order for that task to be within the scope of his duties. *Clifton*, 549 F.2d at 726–27 ("[T]he fact that a petitioner is not *required* by law or by direction of his superiors to act as he did is not controlling."); *see also Files*, 36 F. Supp. at 878 ("While the case law does not endorse an "anything goes" approach to fixing the authority of federal officers, ... it does not limit the defense to actions specifically directed by statute or by rule."). Nor must a FBI agent be "on duty" to warrant enforcement of the law. The statute from which Agent Schrader derives his authority states no such requirement. The only requirement imposed is an offense be committed in front of the officer, and that is what happened.

Agent Schrader's authority to arrest Mr. White is further supported by the federal Controlled Substances Act. The act expressly grants immunity to federal officers engaged in the enforcement of "any law . . . relating to controlled substances." 21 U.S.C. § 885(d). Because 21 U.S.C. § 884 penalizes marijuana possession, and Agent Schrader sought to enforce this provision, he is statutorily entitled to immunity. *See State v. Kama*, 39 P.3d 866 (Or. Ct. App. 2002) (finding the Controlled Substances Act applied to specifically immunity under the Supremacy Clause where federal and state marijuana laws conflicted).

Additionally, the lower court improperly found that Agent Schrader could not use force to detain Mr. White because no exigency or emergency existed.[4] R. at 10a. The lower court relies on *Lilly v. West Virginia* to demonstrate this point, but the case instead supports a contrary conclusion. 29 F.2d 61 (4th Cir. 1928). In *Lilly*, an officer reasonably believed a vehicle transported contraband. *Id*. at 62. In pursuing the vehicle, the officer exceeded the speed limit and struck and killed a pedestrian. *Id*. The court found the officer was immune from a manslaughter charge because ordinances governing speed that are unyielding to "firemen or officers engaged in duties" render themselves "void for unreasonableness." *Id*. at 64. The officer's reasonable belief that the suspect was engaged in committing a crime coupled with the suspect's decision to flee arrest created circumstances where it was reasonable for the officer to drive recklessly. *Id*. As in *Lilly*, Mr. White's commission of a crime and his decision to evade arrest created circumstances in which it was reasonable for Agent Schrader to use physical means to detain him.

B. Agent Schrader's Conduct Was Necessary and Proper to Enforce the Prohibition of Recreational Marijuana Use.

The lower court erred when it found Agent Schrader's conduct was not "necessary and proper" to execute his responsibilities. Courts generally find this second prong is satisfied when the actor meets two conditions: 1) he subjectively

[4] The use of force relates to the "necessary and proper" prong of the *Neagl*e test. *Texas v. Kleinert*, 855 F.3d at 318 (holding an officer's use of deadly force was necessary and proper). But the lower court used Agent Schrader's force to conclude his conduct was not within the scope of his duties, so it is addressed in this portion of the brief.

believed his actions were justified and 2) his belief was objectively reasonable. *Whitehead v. Senkowski*, 943 F.2d 230, 234 (2d Cir. 1991). The actor need not "show that his action was in fact necessary or in retrospect justifiable, only that he reasonably thought it to be." *Clifton*, 549 F.2d at 728. The lower court erred by misapplying both elements.

1. Agent Schrader acted in subjective good faith; or, in the alternative, a subjective element is not necessary to a proper immunity analysis.

Because disputed issues of fact should be decided by the district court, its finding that Agent Schrader's subjective good faith "resolves the 'subjective' prong of the immunity inquiry." R. at 40a. But should this Court find that disputed issues of fact must be resolved in the light most favorable to the State, Agent Schrader's conduct remains necessary and proper.

a. Agent Schrader subjectively believed his action was justified because it was employed without criminal intent or malice.

In re Neagle is the seminal case for immunity under the Supremacy Clause. There, a man attacked Supreme Court Justice Stephen Field in a train car. 135 U.S. at 53. David Neagle, the United States deputy marshal tasked with protecting Justice Field, observed the attacker reach for his bosom. *Id.* Believing the attacker reached for a knife, Neagle shot him twice, killing him. *Id.* The state of California prosecuted Neagle for murder. *Id.* at 54. This Court held the constitutionally dictated supremacy of the federal government inherently protected Neagle from state prosecution where he was faithfully executing his federal duties. *Id.* at 58.

Like David Neagle, Agent Schrader believed his conduct necessary and proper because he acted in good faith. *In re McShane*, 235 F. Supp. 262, 273 (N.D. Miss. 1964). A federal officer's good faith may be questioned because of "personal interest, malice, actual criminal intent, or for any other reason than to do his duty as he saw it." *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982). The lower court relied on *Arizona v. Files* to support the finding that Agent Schrader's conduct manifested malice or criminal intent. R. at 11a.

This finding is improper even if the evidence is viewed in the light most favorable to the State. The court in *Arizona v. Files* hinged its conclusion on the knowing misrepresentations made by federal defendant to find his actions constituted bad faith. 36 F. Supp. 3d at 873. There, defendant and Wildlife Services employee Russel Files trapped a neighbor's dog which resulted in serious injury to the animal. *Id.* at 882. The State of Arizona prosecuted Files for animal cruelty. *Id.* at 875. Files moved to dismiss the charges, claiming immunity under the Supremacy Clause. *Id.* at 876. The court denied the motion, focusing on Files' approach to his supervisors in gaining permission to set the trap. *Id.* at 884. Files requested authorization to trap free-roaming, feral dogs on his property. *Id.* at 880. Files did not disclose that his intent was to trap the dog of his neighbor for whom he had requited "sour feelings." *Id.* at 879. Further, in the execution of the exercise, Files disregarded several specific procedural steps required of all Wildlife Services employees. *Id.* at 884. The court looked at Files' failure to disclose key facts and

misrepresentation of purpose to his supervisor, and his refusal to comply with procedure to find bad faith. *Id.*

Here, Agent Schrader's intent cannot be analogized to the deceptive bad faith manifested in *Arizona v. Files*. He did not withhold information or misrepresent his intentions because he was not seeking to use "the tools of his job . . . to satisfy a personal problem." *Id.* Agent Schrader instead reacted as any law enforcement agent would to seeing a pedestrian unabashedly possessing federally criminalized drugs. The evidence, even when viewed in the light most favorable to the State, is devoid of contrivance, scheming, or forethought misuse of the tools of the federal government. Because of this, Agent Schrader manifested subjective good faith in the carrying out of his duties.

This distinction between a federal agent responding to a situation in a way that incidentally violates a state's laws and an agent who plots such a violation is recognized in *Baucom v. Martin*. There, special agent Baucom of the FBI participated in investigating an underground gambling ring supported by governmental corruption. *Baucom*, 677 F.2d at 1347. A confidential informant alleged the local District Attorney associated with gamblers and officially protected them. *Id.* Baucom, with the authority of his supervisors, initiated an undercover bribe attempt. *Id.* The District Attorney was not amenable to the bribe, and the State prosecuted Baucom for the attempt. *Id.* at 1348.

Baucom claimed his conduct was immunized by the Supremacy Clause. In addressing the necessity and propriety of the conduct, the Eleventh Circuit Court of

Appeals distinguished between an officer reacting to the heat of a moment and an officer enacting a "scheme planned in advance." *Id.* at 1350. The court compared Baucom's predetermined intent to break state laws with the defendant in *Clifton v. Cox*, who instead "acted under the stress of the situation." *Id.* In Baucom's case, where a "deliberate violation of state law" is contemplated, the court found a federal agent would not be entitled to immunity when the violation only served to make federal law enforcement more "convenient." *Id.* But because the court could not identify an alternative means to achieve the same ends, it found Baucom's plan to be necessary and proper.

This case instead falls squarely in line with *Clifton v. Cox*. In *Clifton*, a federal officer Lloyd Clifton arrived at a ranch via helicopter to carry out search and arrest warrants. 549 F.2d at 724. A fellow officer tripped while approaching the ranch, and Clifton believed the company to be under fire. *Id.* Clifton fired at a fleeing suspect, killing him. *Id.* Because a federal officer's error in judgment does not create criminal responsibility, the Court of Appeals for the Ninth Circuit found Clifton subjectively believed he did what was necessary and proper under the circumstances of the situation. *Id.* at 727. The court emphasized Clifton did not need to "show that his action was in fact necessary or in retrospect justifiable, only that he reasonably thought it to be." *Id.* at 728.

Agent Schrader similarly reacted to a moment of criminality in a manner intended to effectuate compliance with federal law. The lower court supported its finding to the contrary by simply stating "the evidence supports the inference" that

Agent Schrader acted out of malice or criminal intent in tackling Mr. White. R. at 10a. But a federal officer's right to Supremacy Clause immunity may not be destroyed "merely by way of allegations," and that is all that has been presented against Agent Schrader. His belief that his conduct was necessary and proper aligns with the intent of other federal officers courts have found entitled to immunity under the Supremacy Clause. A finding to the contrary undermines the rationale that supports the doctrine: protection of officers from the chilling effect of state prosecution so they may effectively execute their duties. *Tanella*, 374 F.3d at 147. The record portrays Agent Schrader as an officer who judged his actions necessary to the dutiful execution of federal law, and such a man poses no threat. The real danger before this Court lies in a ruling against him because it will create a belief in all officers that diligent apprehension of an individual openly possessing contraband will result in a state criminal proceeding.

b. Alternatively, a subjective inquiry undermines an officer's right to a prompt ruling of immunity.

Though Agent Schrader maintained the requisite subjective intent, he requests this Court to use this opportunity to expressly jettison the subjective element imposed onto an immunity analysis by lower courts. The addition of a subjective element is improper for two reasons: first, it has not been required by this Court's precedent, and second, it belies the principles that support the doctrine in the first place.

This Court addressed whether the federal defendant in *Neagle* possessed the proper intent. 135 U.S. at 69. In finding he did, this Court characterized the

defendant's belief that his action was necessary as "justifiable," "correct," and "well-founded." *Id.* at 68, 76. Notably, the defendant's authenticity of this belief was not questioned. In the last century, district courts inferred a subjective requirement from *Neagle*, and began looking to whether the actor's proposed belief is honest.

Though this additional requirement is unnecessary, the real issue lies in the element's frustration of the doctrine's purpose. Immunity under the Supremacy Clause not only guarantees a properly situated federal officer the right to avoid trial, but the right for a court to make a prompt ruling on the issue. *Kentucky v. Long*, 837 F.2d at 752. The effects of a trial on a federal officer include a distraction from duties, inhibition of discretion, and a general disincentivization of public service. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Consequently, this Court sought to protect appropriate federal officers from conviction, but also from the process of a state criminal proceeding. *Long*, 837 F.2d at 752. Under this Court's reasoning in *Harlow v. Fitzgerald*, a subjective element is incompatible with such goals because an accessory subjective inquiry comes at too high a cost for the defendant:

> Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments 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. Yet they also 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. Inquiries of this kind can be peculiarly disruptive of effective government.

457 U.S. at 816. Though *Harlow* addresses qualified immunity, and not immunity under the Supremacy Clause, the underlying similarities of the doctrines permit application of the *Harlow* rule here. *See Horiuchi*, 253 F.3d at 366 n.11 (*"Harlow*'s reasoning would seem to apply equally to Supremacy Clause immunity."); *Livingston*, 443 F.3d at 1222 ("Just as the Supreme Court jettisoned the subjective element of the qualified immunity test . . . it may also be appropriate to reject a subjective element of the Supremacy Clause immunity test.").

2. The lower court erred when it found that the objective unreasonableness of Agent Schrader's conduct is dispositive to the defense of immunity under the Supremacy Clause.

All courts that address what is "necessary and proper" to warrant Supremacy Clause immunity agree there is an objective element to the analysis. Rebecca E. Hatch, *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 (2019). The lower court erred when it found the objective unreasonableness of Agent Schrader's *conduct* precluded him from immunity. R. at 13a. Because the appropriate standard is whether an actor's belief, and not his conduct, was reasonable, the lower court's analysis misapplied the law. Further, the gravity of the federal offense should not be weighed against the state offense violated in a Supremacy Clause immunity determination.

a. A proper objective analysis determines whether an officer's belief was reasonable, and not his conduct.

In *New York v. Tanella*, the Court of Appeals for the Second Circuit demonstrated appropriate application of this standard. There, two DEA agents observed an alleged drug dealer engage in suspicious activity. *Tanella*, 374 F.3d at 143. When the suspect's car stopped at a red light, the agent boxed his vehicle in with their own and turned on their flashing red lights. *Id.* The suspect initially escaped by ramming one of the officer's vehicles before driving on the sidewalk. *Id.* The suspect, after nearly hitting a mother and child on the sidewalk, wedged his car between a telephone pole and a fire hydrant and subsequently fled on foot. *Id.* Agent Tanella, whose car was not rammed, initiated a foot chase. *Id.* The suspect eventually tripped, and Tanella jumped on top of him. *Id.* The two struggled, and Tanella fired one shot from his gun that killed the suspect. *Id.*

Tanella raised immunity from prosecution for murder, and the Court of Appeals for the Second Circuit granted it. *Id.* at 152. The court addressed the objective prong of the "necessary and proper" analysis by looking at what Tanella knew about the suspect. *Id.* at 151. At the time of the encounter, Tanella knew that a) the suspect was a seasoned drug dealer capable of violence, b) the suspect decided to flee an officer instead of submitting to arrest, and c) the suspect was reckless in his evasion of arrest. *Id.* Because these known facts pointed to the criminal capacity of the suspect, the court found the totality of the circumstances that created Tanella's "split-second" decision made the belief that it was necessary objectively reasonable. *Id.*

Similarly, the facts Agent Schrader knew about Mr. White create circumstances which make his belief objectively reasonable. Agent Schrader testified that his first encounter with Mr. White involved Mr. White speeding dangerously, cutting him off, and slamming on his brakes. R. at 29a. When Agent Schrader addressed Mr. White's recklessness, Mr. White shoved him. R. at 29a. This initial encounter placed Agent Schrader on notice of Mr. White's recklessness and openness to physical confrontation. Hours later, when Agent Schrader observed Mr. White possessing marijuana, Mr. White fled to evade arrest. R. at 30a, 31a. The open possession of a federally criminalized drug compounded by non-compliance with law enforcement demonstrate Mr. White's criminal capacity. The totality of these circumstances supports the conclusion that Agent Schrader's belief was an objectively reasonable one.

b. The enforcement of a federal offence should not be weighed against the gravity of the violated state offense.

Judge Skyler, in his concurring opinion below, suggested an immunity analysis should take into account a balancing of the federal policy enforced against the state offense alleged. This elemental addition to an immunity analysis is inappropriate. First, the standard proposed is unworkable. Second, it undermines federal sovereignty by creating an improper path for states to protest federal policy, as evidenced by the case at bar.

This Court addressed a similar proposal in *United States v. Jones*. 565 U.S. 400 (2012). There, law enforcement placed a GPS tracker on a car without a warrant.

Id. at 400. The car owner moved to suppress the information in a criminal proceeding brought against him. *Id*. This Court granted the motion, holding the act constituted a search under the Fourth Amendment. Justice Alito concurred, and suggested courts should incorporate the "nature of the crime being investigated" into a Fourth Amendment analysis. *Id*. at 412. The majority rejected the idea, stating this "novelty" would lead courts "needlessly into additional thorny problems." *Id*. The unavoidable issues that would follow this test manifested in that case directly. Justice Alito did not consider the drug-trafficking conspiracy under investigation in *Jones* to be an "extraordinary offense"; the majority disagreed. *Id*. The subjectivity required for such an assessment is unavoidable and renders the standard unworkable.

The same issues would follow if this element were applied to Supremacy Clause immunity. If courts injected this ingredient into an immunity analysis, a federal officer's immunity would hinge on the political opinions of the fact finder deciding his case—in fact, that is exactly what happened to Agent Schrader. Judge Skyler's concurrence refers to marijuana prohibition as "trivial federal policy" and cites the enthusiasm for marijuana decriminalization in the state of New Tejas. R. at 14a. But many in our country find marijuana prohibition to be of huge import.[5] A

[5] For example, former United States Attorney General believes the recent and fashionable wave of drug tolerance in this country should not dictate drug policy because "too many lives are at stake." Janice Williams, *Jeff Sessions on Marijuana: Drug Is 'Only Slightly Less Awful' Than Heroine*, newsweek.com (Mar. 15, 2017), https://www.newsweek.com/jeff-sessions-marijuana-legalization-states-heroin-opioids-568499.

federal officer's duties need not include guesswork regarding regional preferences for what laws are enforced, and that is what the lower court is suggesting.

Further, this process would grant states a mechanism to undermine federal sovereignty. If states could successfully allege that certain federal policies are worth ignoring, it creates a new route in which they may protest unpopular laws—and that is exactly what Prosecutor Wexler seeks to do here. Prosecutor Wexler made it clear that the real issue is not with Agent Schrader's means in detaining Mr. White, but the law he was attempting to enforce. R. at 15a. When the individuals of a state disagree with a particular federal rule, they may engage in the democratic law-making process to achieve a change. Agent Schrader's unfortunate interposition between state and federal tension should not make him vulnerable to criminal liability. This demonstrated disregard for federal supremacy strikes at the heart of the immunity doctrine. This Court warned against this exact scenario in *Tennessee v. Davis*:

> The argument so much pressed upon us, that it is an invasion of the sovereignty of a State to withdraw from its courts into the courts of the general government the trial of prosecutions for alleged offences against the criminal laws of a State, even though the defence presents a case arising out of an act of Congress, ignores entirely the dual character of our government. It assumes that the States are completely and in all respects sovereign. But when the national government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered the sovereignty of the States ceased to extend. Before the adoption of the Constitution, each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government

> created, and so far as thus vested it was withdrawn from the sovereignty of the State.

100 U.S. at 266–67. The State of New Tejas, like every other state, submitted to the federal sovereign when the Constitution was signed. It may not use Agent Schrader as a chess piece to dismantle this system.

CONCLUSION

This Court should reverse the judgment of the Thirteenth Circuit Court of Appeals and find that Hank Schrader was entitled to the full protections of Supremacy Clause immunity.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER