

No. 18-5188

IN THE

Supreme Court of the United States

HANK SCHRADER,

Petitioner,

v.

STATE OF NEW TEJAS

Respondent.

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

BRIEF FOR PETITIONER

Team No. 72

Counsel for Petitioner

QUESTIONS PRESENTED

- I. When deciding a motion to dismiss a state criminal prosecution based on immunity under the Supremacy Clause, which exists to protect federal officers from states wishing to subvert federal law, may a district court decide disputed issues of fact as it does in many other constitutional immunity contexts, or must the facts be viewed in the light most favorable to the State?

- II. Does the Supremacy Clause grant immunity when a federal officer acts pursuant to their authority and their actions are objectively necessary and proper?

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OPINIONS BELOW

The opinion of the appeals court is not published in the Federal Supplement but is available at *State of New Tejas v. Schrader*, No. 18-5719 (13th Cir. Oct. 2, 2018). The order of the district court is not published in the Federal Supplement but is available at *State of New Tejas v. Schrader*, Criminal Action No. 17-cr-5142 (M.D.C Sept. 14, 2017).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 2, 2018. The Petition for Certiorari was granted on March 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant constitutional and statutory provisions are reproduced in an appendix to this brief.

STATEMENT OF THE CASE

I. Factual Background

Agent Hank Schrader is a special agent for the Federal Bureau of Investigation. R. at 27a. He has investigated a variety of federal crimes including racketeering, kidnapping, money laundering, among others. *Id.* Throughout his nearly twenty year-long career, Agent Schrader has consistently received positive commendation from his supervisors, despite four dismissed complaints of excessive force and one reprimand unrelated to the case at bar. R. at 28a.

While marijuana remains a Schedule I drug prohibited under federal law, 28 U.S.C. 812, the citizens of New Texas passed a public initiative that legalized possession and consumption of marijuana within the state. R. at 30a. Small stores may grow and sell marijuana to the public provided that the store has proper state licensing. *Id.*

In November of 2016, Agent Schrader traveled with his family to Madrigal, New Texas for a several days long vacation. R. at 28a. The trip was unrelated to Agent Schrader's duties as an FBI agent. *Id.* Early morning on November 8, Agent Schrader and his family drove to downtown Madrigal. *Id.* While driving, a red truck suddenly pulled in front of the Schrader's car, forcing Agent Schrader to "slam on [his] brakes" to avoid a serious collision. R. at 29a. Mr. White was the driver of the red truck. *Id.* The parties dispute whether Mr. White was speeding and dangerously braked in front of Agent Schrader's car, as Agent Schrader testified. *Id.*

Following this incident, the cars stopped at a red light. *Id.* Agent Schrader left his car and approached Mr. White's car. *Id.* Mr. White left his car, and the two men began yelling at each other. *Id.* As the situation escalated, Mr. White shoved Agent Schrader in the chest, and Agent Schrader drew his arm back as if to hit Mr. White. R. at 29–30a. At this point, the stoplight turned green, and both men returned to their cars. R. at 30a. Agent Schrader and his family went about their morning, and “[t]he incident on the drive was the furthest thing from [Agent Schrader’s] mind.” *Id.*

However, later that day, the two ill-fated men crossed paths again. Agent Schrader was walking down the street when he encountered Mr. White coming out of a marijuana dispensary carrying two ounces of marijuana visible in a transparent plastic bag. R. at 30–31a. Agent Schrader saw the marijuana and shouted, “Stop! You’re under arrest!” and began to run towards Mr. White. R. at 31a. After seeing Agent Schrader, Mr. White took off running. *Id.* Agent Schrader tackled Mr. White to the ground, causing Mr. White to break his arm and chip several teeth. R. at 31–32a. Agent Schrader arrested Mr. White for marijuana possession under 21 U.S.C. § 844. *See* R. at 31. After the arrest, Agent Schrader testified that he was not aware that New Texas had legalized marijuana, and in any event, marijuana remains illegal under federal law. R. at 31–32a. In regards to his decision to arrest Mr. White, 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. at 32a.

Madigral citizens “reacted with outrage” in response to the arrest of Mr. White. *Id.* The Madigral County district attorney, District Attorney Wexler, held a rally

following the arrest. *Id.* District Attorney Wexler, elected on a pro-marijuana platform, rallied:

I—and others—regularly consume marijuana and cause no harm to anyone. The federal government has no business interfering with the sovereign will of the people of New Tejas, and I will use every power of this office to prevent federal marijuana laws from being enforced in this great State.

We all know and admire Mr. White. His arrest was illegal and unjustified, and the injuries he suffered were unconscionable. I intend to charge Hank Schrader with aggravated assault, and I intend that he serve a lengthy prison sentence.

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 32–33a.

Following the rally, Agent Schrader was indicted under Sections 22.01 and 22.02 of the Penal Code of New Tejas for assault and aggravated assault arising from the arrest of Mr. White. R. at 33a.

II. Procedural History

Agent Schrader removed the state prosecution to the United States District Court for the District of Madrigal pursuant to 28 U.S.C. § 1442 (2018). *See State of New Tejas v. Schrader*, Criminal Action No. 17-cr-5142 (M.D.C Sept. 14, 2017). Agent Schrader pleaded that he was entitled to immunity from state criminal prosecution under the Supremacy Clause of the United States Constitution because he was a federal agent enforcing federal law. R. at 34. The State did not challenge the removal to federal court. *Id.*

Following the removal, Agent Schrader moved to dismiss the indictment under Federal Rule of Criminal Procedure 12(b) on the grounds that he has immunity from state prosecution. *Id.* After extensive briefing and a hearing on the issues, the District Court granted the motion to dismiss. *See State of New Texas v. Schrader*, Criminal Action No. 17-cr-5142 (M.D.C Sept. 14, 2017). The District Court reasoned that the court can resolve factual disputes at the motion to dismiss stage when the federal officer asserts immunity. R. at 36–37a. The District Court credited Agent Schrader’s testimony that he was solely motivated by his duty to arrest pursuant to federal law when he pursued Mr. White outside of the marijuana dispensary. R. at 38a. While Agent Schrader’s tackle caused Mr. White injuries, Agent Schrader was authorized to arrest under federal law and had sufficiently identified himself as a federal officer. *Id.* The District Court found that Agent Schrader’s subjective motivation to arrest was without criminal intent or malice, and Agent Schrader’s conduct was objectively reasonable given that immunity under the Supremacy Clause is at least equivalent to that of qualified immunity. R. at 40–41a. Additionally, the District Court found that the state prosecution of Agent Schrader was motivated by “hostility to the enforcement of federal marijuana laws” and “the purpose of this prosecution is to frustrate enforcement of federal law and to hinder federal law enforcement officers in the accomplishment of their duties.” R. at 39a. Consequently, the District Court granted the motion to dismiss on the grounds that Agent Schrader was immune to state criminal prosecution under the Supremacy Clause.

The State appealed to the Thirteenth Circuit Court of Appeals. *See State of New Tejas v. Schrader*, No. 18-5719 (13th Cir. Oct. 2, 2018). The Court of Appeals reversed on the grounds that the District Court erroneously resolved factual disputes instead of construing the facts in favor of the non-movant. It found that in light of the facts construed in favor of the state, Agent Schrader was improperly motivated by the prior traffic incident with Mr. White, and the actions involved in the arrest were objectively unreasonable. *See id.* at 9–13a. Thus, the Court of Appeals rejected Agent Schrader’s argument for immunity under the Supremacy Clause. This Court then granted certiorari.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit incorrectly held that district courts may not decide factual disputes on a 12(b) Motion to Dismiss based on Supremacy Clause immunity.

District courts must decide all disputed facts in deciding a 12(b) Motion to Dismiss based on Supremacy Clause immunity. The purpose of Supremacy Clause immunity is to protect federal officers from state prosecution, and this broad purpose can only be achieved when district courts decide factual disputes rather than construing facts in favor of the prosecuting state. Additionally, Supremacy Clause immunity protects enforcement of federal law from hostile states hoping to frustrate enforcement within the states' borders. Finally, qualified immunity is an inapposite procedural comparison to Supremacy Clause immunity because Supremacy Clause immunity arises in the criminal context and is constitutionally based.

Even if district courts may not make *all* findings of fact in deciding a 12(b) Motion to Dismiss based on Supremacy Clause immunity, the courts may still do so as long as the factual questions it decides are “entirely segregable” from the evidence to be presented at trial, and it does not invade the province of the jury in determining the general issue of guilt or innocence. Here, the province of a jury at trial would extend only to 1) whether Agent Schrader committed assault, and 2) whether, if he did, he may be acquitted under an “arrest and search” justification defense under the New Texas Penal Code. The factual questions decided by the District Court are entirely segregable from any evidence to be presented at trial regarding these two

issues, whether this Court recognizes an objective or subjective test for Supremacy Clause immunity.

However, even if the factual issues decided by the District Court are found to not be entirely segregable, because they are nonetheless not substantially founded upon nor intertwined with the evidence to be presented at trial, the District Court properly exercised its discretion.

The Supremacy Clause prohibits the states from interfering with the operations of the federal government. But New Texas is seeking to do precisely that by prosecuting Agent Schrader. The district attorney in this case disagrees with federal laws regulating marijuana and hopes prosecuting Agent Schrader will “serve as a warning” to federal officers that they “attempt to enforce these laws at [their] own risk” in New Texas. The Constitution does not allow states to unilaterally nullify federal law, whether by legislative act or by prosecuting federal officers enforcing that law.

Agent Schrader was authorized to arrest Mr. White because he observed Mr. White commit a federal offense in his presence. Agent Schrader is authorized by federal law to make warrantless arrests upon probable cause a federal crime has been committed. He observed Mr. White in open possession of a large quantity of marijuana. Possession alone is a federal offense, but the large amount of marijuana in this case also gave Agent Schrader probable cause to believe Mr. White was in possession with intent to distribute, a serious federal felony. Agent Schrader was therefore authorized to make a warrantless arrest.

Agent Schrader's physical apprehension of the fleeing Mr. White was necessary and proper because it did not violate clearly established law. Due process requires that federal officers acting in the heat of the moment have forewarning of what will and will not expose them to criminal liability. A reasonable officer could conclude that Agent Schrader's actions were authorized by law and therefore Agent Schrader did not have warning that he was exceeding his authority. Consequently, he cannot be convicted consistent with due process. When a state prosecution is ultimately futile, the Supremacy Clause requires the officer be granted immunity to avoid the expense, disruption, and chilling effect that a state prosecution will have on federal law enforcement operations. Agent Schrader's intent is irrelevant because it plays no role in determining whether he had fair warning of the constraints on his discretion. Moreover, this Court has abrogated the intent element of the civil immunity standard and the same rationales underlying that decision apply here. Finally, even if Agent Schrader's intent is relevant, the district court found that he acted purely with the intent of enforcing federal law.

Agent Schrader's actions were authorized by federal law and were also necessary and proper. He is therefore entitled to immunity under the Supremacy Clause.

ARGUMENT

I. THE THIRTEENTH CIRCUIT INCORRECTLY HELD THAT DISTRICT COURTS CANNOT DECIDE DISPUTED FACTS WHEN RULING ON A MOTION TO DISMISS BASED ON SUPREMACY CLAUSE IMMUNITY.

Federal officers have an overriding obligation to enforce federal law without being held accountable for state criminal law. *See Cunningham v. Neagle*, 135 U.S. 1, 75 (1890). Supremacy Clause immunity protects this duty by providing a complete defense for any federal officer criminally prosecuted by a state for acts done in the commission of federal law enforcement. *See* U.S. CONST. art. VI, cl. 2; *see also id.* Federal Rule of Criminal Procedure 12(b) permits parties to raise by pretrial motion any defense to criminal indictment that is “capable of determination without a trial of the general issue,” including any claims for federal immunity. Fed. R. Crim. P. 12(b). Where there are no disputed material facts in a motion to dismiss an indictment, the court may rule on the motion without hearing or taking evidence. Fed. R. Crim. P. 12. However, if there are disputed facts, the court must hold a hearing to resolve the outstanding factual disputes. *Idaho v. Horiuchi*, 253 F.3d 359, 375 (9th Cir.), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001). When the motion to dismiss an indictment involves a claim for Supremacy Clause immunity, the district court should resolve any disputed facts.

a. District Courts May Decide All Factual Disputes Underlying a Claim For Supremacy Clause immunity.

District courts have authority to decide factual disputes given the broad purposes of the Supremacy Clause immunity and also because Supremacy Clause

immunity shares many similarities to other constitutional immunities. Additionally, any comparison to procedures related to qualified immunity is unavailing.

1. *District courts have the authority to decide factual disputes in order to effectuate Supremacy Clause immunity's broad purpose.*

District courts must decide disputed facts involving a claim for Supremacy Clause immunity on a motion to dismiss because the immunity is construed broadly to protect federal officers from state prosecution for acts done under the authorization of federal law.

The Supreme Court has historically recognized the importance of broadly permitting federal courts intervene to protect federal officers tried in state courts. *See Neagle*, 135 U.S. at 75. For example, a federal officer's ability to remove to federal court in criminal cases is a critical component of federalism. *See Tennessee v. Davis*, 100 U.S. 257 (1880); *see also id.* (granting habeas relief to a federal officer from state prosecution); *In Re McShane's Petition*, 235 F. Supp. 262, 275 n. 13 (N.D. Miss. 1964) (holding that it is a "long standing authority that sufficient urgency is shown whenever it is made to appear that a federal officer is detained on charges of violating state law because of acts committed in the performance of his official duties."). The purpose of removal under 28 U.S.C. § 1442 is to ensure that the case is heard in a neutral forum with judges experienced in federal defenses. *Davis*, 100 U.S. at 262–63. The Supreme Court in *Neagle* noted its distrust of states to both prosecute federal officers acting under federal law and judge the federal officers' federal defenses. Ultimately, removal protects federal officers from hostile state prosecutions. Given this important purpose, the Supreme Court stated that operationalizing the ability

to remove federal criminal cases is a critical protection for federal officers, and “a more important question [of federalism] can hardly be imagined.” *Id.* Consequently, regardless of the states’ interest in prosecuting federal officers, the federal government must be able “to interfere at once” to protect federal officers from the state criminal process. *Id.*

Likewise, Supremacy Clause immunity serves the purpose of protecting federal officers from state criminal prosecution. The broad purpose for removal provisions in state criminal cases involving federal officers is “much the same as the purpose underlying” Supremacy Clause immunity. *Kentucky v. Long*, 837 F.2d 727, 753 (6th Cir. 1988); *see also New York v. Tanella*, 374 F.3d 141, 150 n.1 (2d Cir. 2004) (“We note that the Supremacy Clause immunity principles enunciated in the habeas context apply equally to a Rule 12(b) motion to dismiss an indictment in a case removed under 28 U.S.C. § 1442”). Both Supremacy Clause immunity and removal ensure that the federal government can protect its agents from even standing for state criminal charges. Thus, Supremacy Clause immunity and federal removal go hand-in-hand to effectuate this purpose. *See* Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 281 (2011) (noting that “as a practical matter, removal under the federal officer statutes often spells dismissal on the merits” because “the federal defense that would allow for removal might also provide the basis for dismissal of the prosecution, based on the Supremacy Clause”). The threat of state prosecution is not obviated merely because the criminal case is removed to federal court. After removal, the Supremacy Clause

immunity protects the federal agent from ensuring state prosecution in federal courts. Therefore, the broad purpose that the Supreme Court elucidated in *Tennessee v. Davis* is completed only when the courts give the same broad purpose to Supremacy Clause immunity.

Protection of federal agents from state prosecution through Supremacy Clause immunity serves to protect significant federalism concerns. Given the reality that federal agents enforce federal law physically within the boundaries of states, state law cannot “retard, impede, burden, or in any manner control” the enforcement of federal law. *McCulloch v. Maryland*, 17 U.S. 316 (1819). However, states may prosecute federal agents for state crimes that occur during the commission of federal law enforcement, thereby discouraging other federal agents from dutifully carrying out federal law. Each time the federal law is enforced within that state, the state has the authority to reject federal law by prosecuting the federal agent. State criminal prosecution of any federal agent carrying out federal law gives the states the ability to criminalize—thereby unconstitutionally vetoing—federal law within their borders. Supremacy Clause immunity serves as a safeguard for both the individual federal agent as well as the general enforcement of federal law because it ensures that states cannot simply prosecute federal agents to enjoin enforcement of certain federal laws. *Idaho v. Horiuchi*, 253 F.3d 359, 391 n.12 (9th Cir. 2001) (Hawkins, J. dissenting) (noting that permitting district courts to resolve disputed facts in a motion to dismiss “seems more consistent with the protective purposes of Supremacy Clause immunity” because this approach avoids undue influence by states).

Supremacy Clause immunity also assists in enforcement of federal law by ensuring that federal officers can conduct their duties on a daily basis unimpeded by the knowledge of potential consequences of state law enforcement. Supremacy Clause immunity allows federal officers to enforce federal law without having to consider each states' individual criminal laws in a split second. *See Graham v. Connor*, 490 U.S. 386, 490 (1989) (explaining that a reasonableness calculus must take into account that officers must make quick judgments “in circumstances that are tense, uncertain, and rapidly evolving” regarding the legality of their actions). Barring district courts from resolving factual disputes related to the claim of immunity adds another important consideration to an officer’s mental process during a moment of action. Not only must the officer make a quick decision regarding his compliance with federal law, but he must also consider whether his actions comport with potentially unfamiliar state law in order to guard against the potential of dissolving his federal immunity in a state prosecution. Additional liability considerations may hamper federal agents from enforcing federal law. Supremacy Clause immunity reduces the potential of criminal liability, which therefore allows the federal officer to better focus on federal law enforcement.

Given these broad purposes of Supremacy Clause immunity, district courts must resolve of all disputed facts involving a claim for Supremacy Clause immunity. The Supreme Court implicitly recognized that federal courts must decide material factual disputes in order to determine whether a claim for immunity has been established. *See Neagle*, 135 U.S. at 75 (“The circuit court of the United States was

as competent to ascertain these facts [involving the immunity defense] as any other tribunal, and it was not at all necessary that a jury should be impaneled to render a verdict on them.”). The Supreme Court reasoned that once the claim for immunity is shown, “it is established that [the federal officer] is innocent of any crime against the laws of the state, or of any other authority whatever.” *Id.* Because the officer is innocent under the law, “the federal or state court is . . . stripped of any jurisdiction over the defendant,” thereby ending the criminal process. *Arizona v. Files*, 36 F. Supp. 3d 873, 877 (D. Ariz. 2014). Thus, Supremacy Clause immunity serves the purpose of protecting government officers not only from conviction, but from “liv[ing] through the anxiety of a criminal trial.” *Idaho v. Horiuchi*, 253 F.3d 359, 375 (9th Cir. 2001); *see also Neagle*, 135 U.S. at 75; *Tanella*, 374 F.3d at 147. Supremacy Clause immunity stands distinct from other defenses or justifications in that its purpose is to completely remove the officer from the criminal process rather than provide a defense to be weighed by the jury.

Allowing the district court to resolve factual disputes involving Supremacy Clause immunity strikes the best balance between the federal government’s interest in protecting federal officers to protect enforcement of federal law and the states’ interest in pursuing legitimate criminal charges. The federal court stands “as a fair and neutral arbiter, an image “that is necessary to public confidence in the impartial and objective administration of criminal justice.” *United States v. Bradley*, 455 F.3d, 453, 460–61 (4th Cir. 2006) (quoting *United States v. Werker*, 535 F.2d 198, 203 (2d Cir. 1976)). Even though there is a strong federal interest in protecting federal

officers from state prosecution, granting Supremacy Clause immunity is not automatic. The court can weigh the interests of both parties and fairly resolve factual disputes based on the evidence presented in each individual case. If the state rightfully prosecutes a federal officer, Supremacy Clause immunity would not dissolve the defendant's liability of the criminal charges. Additionally, the court may decide the immunity issue early after the removal of the case rather than after hearing all evidence at a trial like a jury. The court can resolve disputed facts and potentially grant immunity—thereby protecting the duly authorized federal officer from wrongful state prosecution—much earlier in the criminal prosecution than a jury. Therefore, the federal government's and state governments' interests are best served when the federal district resolves disputed facts involving Supremacy Clause immunity.

However, construing disputed facts in light of the state's position destroys the benefit of Supremacy Clause immunity and undermines the broad purpose of shielding federal officers from criminal trial. If states are only required to show some sort of factual dispute to obviate an officer's immunity at the motion to dismiss stage, federal agents have no assurances that the Supremacy Clause immunity will protect them. Indeed, “[a]ll that a local prosecutor would have to do to secure a state court jury trial would be to fabricate a factual allegation.” *Morgan v. Colorado*, 743 F.2d 728, 733 (9th Cir. 1984). Once the state can establish any factual dispute, the court has little ability to grant the immunity defense and grant the motion to dismiss, thereby ensuring that the federal officer must stand trial. The enforcement of federal

law would therefore depend on the state prosecutor's inability to manufacture a factual dispute to defeat immunity, rather than bonafide enforcement of federal law. Moreover, should the jury be responsible for parsing out justifications from immunity claims, there is a high likelihood of jury confusion. Federal district courts have broad experience with federal defenses, which makes them capable of deciding complicated issues of immunity apart from other defenses, which the jury may not have the understanding and knowledge to do. *See Horiuchi*, 253 F.3d at 375–76. Thus, construing disputed facts on a Supremacy Clause immunity claim in favor of the state likely results in the federal officer being subject to trial and also a possibly incorrect jury verdict on his defenses. Compounded by the fact that jury verdicts are “almost entirely opaque” and difficult to review on appeal, the federal officer may never get relief. *Id.* at 376. The result destroys the protective purposes of the Supremacy Clause immunity. Accordingly, the impartial decision of a federal judge safeguards federal officers against a state wishing to subvert federal law by punishing federal agents.

The undisputed facts of this case display the pitfalls of construing disputed facts in favor of the state at the motion to dismiss stage. New Tejas legalized marijuana within the state, despite the federal criminalization of the drug. R. at 30a. The Madrigal district attorney, District Attorney Wexler, was elected on a pro-marijuana platform. R. at 32a. Prior to bringing charges against Agent Schrader, District Attorney Wexler made clear that she was motivated to subvert federal law. District Attorney Wexler explained that “federal government has no business interfering with the sovereign will of the people of New Tejas” and consequently

sought “a lengthy prison sentence” for Agent Schrader in order to let his conviction “serve as a warning to any other federal officers who seek to enforce marijuana laws in the State of New Tejas.” R. at 32–33a. The state has made clear that it is not motivated to duly punish Agent Schrader’s actions, but rather, to use state law to frustrate federal marijuana law by arresting federal agents. Should any factual dispute be viewed most favorably to the state, Agent Schrader will likely be denied immunity and New Tejas may effectively frustrate the enforcement of federal law with clear, demonstrated subversive intent.

2. *District courts are capable of resolving factual disputes involving Supremacy Clause immunity at the motion to dismiss stage because they often do so in multiple similar contexts.*

District courts may resolve disputed facts without in empaneling a jury in multiple pretrial contexts. For example, district courts regularly make factual findings for issues of double jeopardy and prosecution immunity deals prior to trial. *See United States v. Gutierrez–Zamarano*, 23 F.3d 235, 237 (9th Cir. 1994) (double jeopardy claims); *see also United States v. Mendoza*, 78 F.3d 460, 464–65 (9th Cir. 1996) (prosecution immunity deals). District courts regularly hold *Kastigar* hearings to make factual findings regarding the government’s burden of proof based on immunized testimony. *Kastigar v. United States*, 406 U.S. 441, 461 (1972). In each of those circumstances, the court rejects construing factual disputes in light of the nonmovant and instead resolves the disputes itself because these circumstances invoke constitutional principles under the Fifth Amendment. Factual disputes that involve constitutional protections arising in pretrial motions demand more protective

procedural considerations because standing trial would otherwise violate constitutional rights of defendants. Similarly, Supremacy Clause immunity is equally grounded in important constitutional rights as federal supremacy is specifically contemplated in Article VI. *See Neagle*, 135 U.S. at 75. Therefore, a claim for such immunity should be subject to the same procedural considerations as other constitutional contexts.

Given the constitutional importance of Supremacy Clause immunity, it is no surprise that the Federal Rules of Criminal Procedure presuppose that the court may resolve factual disputes on pretrial motions. The Advisory Committee notes explain that a criminal defendant may raise issues of any immunity in a Rule 12(b) motion to dismiss. Federal Rule of Criminal Procedure 12(d) explains that a “motion made before trial shall be determined before trial [. . .] Where *factual issues are involved in determining a motion, the court shall state its essential findings on the record.*” Fed. R. Crim. P. 12(d) (emphasis added). This rule allows the district court to make findings of fact in order to resolve legal issues raised in a Rule 12(b) motion, including immunity claims. Federal Rule of Criminal Procedure 12(g) confirms this grant of authority by ensuring that a “verbatim record shall be made of all proceedings at the hearing, including such *findings of fact* and conclusions of law as are made orally.” Fed. R. Crim. P. 12(g) (emphasis added). Read together, these rules suggest that the court must findings of fact regarding claims for immunity rather than construing disputed facts in favor of the state.

3. *The Thirteenth Circuit incorrectly analogized Supremacy Clause immunity to qualified immunity.*

While all federal immunities serve the purpose of shielding federal officers from criminal trial, qualified immunity is an inapposite procedural comparison to Supremacy Clause immunity. Qualified immunity, though similarly granted early in legal proceedings, is not granted where there are disputed material facts regarding whether the officer violated clearly established constitutional rights. *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In other words, for qualified immunity, “[t]he court need not (and should not) resolve any disputed questions of material fact.” *Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987). However, Supremacy Clause immunity is a meaningfully different doctrine and therefore requires different procedural considerations.

Qualified immunity and Supremacy Clause immunity “derive from different sources and serve different purposes, and therefore they need not have the same scope.” Seth P. Waxman, *Federalism, Law Enforcement, and the Supremacy Clause: The Strange Case of Ruby Ridge*, 51 U. KAN. L. REV. 141, 150 (2002). Supremacy Clause immunity is constitutionally based in Article VI whereas qualified immunity stems only from nebulous common law. *See Harlow*, 457 U.S. at 806. Qualified immunity is judge-made law to protect government agents for actions done during the course of their agency. *See Seth P. Waxman & Trevor W. Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2209 (2003). Congress could potentially abolish qualified immunity because it is “not a product of any constitutionally based institutional limitation on the judiciary's remedial power.” *See id.* at 2210. However, Supremacy Clause

immunity directly implicates the balance between state and federal power and affirmatively establishes adverse consequences to state law that stands in opposition to the primacy of federal law. This direct federalism concern suggests a heightened importance for Supremacy Clause immunity. *See generally id.*

Moreover, qualified immunity arises in 18 U.S.C. § 1983 (2018) claims for civil damages, and Supremacy Clause immunity is reserved to criminal prosecutions. *See id.* This is a critically important distinction because the weight of a criminal sanction falls only on the individual officer rather than shouldered by the agency as with civil liability. *See Idaho v. Horiuchi*, 253 F.3d 359, 376 (9th Cir. 2001). Civil liability does not at any point of the litigation take away a federal officer's liberty whereas criminal charges could potentially place federal officers in custody during the duration of the prosecution as well as for a longer prison term after a finding of guilt. The procedures followed in civil contexts are consequently under-protective of federal agents facing criminal charges. Thus, applying qualified immunity standards to claims of Supremacy Clause immunity would violate the purpose of the Supreme Clause immunity.

Qualified immunity and Supremacy Clause immunity also differ substantively. Qualified immunity first focuses on the reasonableness of the officer's action, where Supremacy Clause immunity focuses on the officer's authorization under federal law. This difference in starting points is notable because Supremacy Clause immunity is often resolved at an earlier stage of the litigation. *See Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988); *see also* James Wallace, *Supremacy Clause*

Immunity: Deriving a Willfulness Standard from Sovereign Immunity, 41 AM. CRIM. L. REV. 1499, 1514 (2004). More importantly, qualified immunity and Supremacy Clause immunity both involve the relationship between individuals and the government, but Supremacy Clause immunity always encompasses the tension between federal authority and state government. *See id.* This federalism component heightens the importance of the immunity.

Thus, while the two immunities serve important governmental purposes, Supremacy Clause immunity must reflect a more protective procedure for federal officers.

b. Even If The District Court May Not Make *All* Findings Of Fact In Deciding A 12(b) Motion To Dismiss, It May Still Do So As Long As The Factual Questions It Decides Are “Entirely Segregable” From the Evidence to Be Presented At Trial.

Rule 12 of the Federal Rules of Criminal Procedure states that a “party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Fed. R. Crim. P. 12(b)(1). It is evident from Rule 12 that a district court may make findings of fact when ruling on a Rule 12(b) motion, in at least some circumstances. *See* Fed. R. Crim. P. 12(e) (“...Where factual issues are involved in determining a motion [made before trial], the court shall state its essential findings on the record.”) *and* Fed. R. Crim. P. 12(g) (“A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally”).

Further, courts have found that a district court may make findings of fact necessary to decide the questions of law presented by pre-trial motions as long as it

does not invade the province of the ultimate finder of fact.” *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986); *United States v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976). “As the ultimate finder of fact is concerned with the general issue of guilt, a motion requiring factual determinations may be decided before trial if trial of the facts surrounding the commission of the alleged offense would be no assistance in determining the validity of the defense.” *Shortt Accountancy Corp.*, 785 F.2d at 1452 (citing *United States v. Covington*, 395 U.S. 57, 60 (1969)). Accordingly, “the district court must decide the issue raised in the pretrial motion before trial if it is ‘entirely segregable’ from the evidence to be presented at trial.” *Id.* (internal citations omitted).

Here, the jury at trial would be concerned with 1) the general issue of whether Agent Schrader is guilty of assault or aggravated assault, R. at 2a; and 2) whether, if he is found to have committed assault or aggravated assault, Agent Schrader may be acquitted under an “arrest and search” justification defense. R. at 6a. *See Shortt Accountancy Corp.*, 785 F.2d at 1452. These issues are entirely segregable from the fact issues raised and decided in the pretrial motion and “would be of no assistance in determining the validity of the defense” of immunity under the Supremacy Clause, regardless of which test for immunity this Court adopts. *See id.*

1. *If this court recognizes an objective test for determining Supremacy Clause immunity, the factual issues decided by the district court are entirely segregable from the evidence to be presented at trial.*

This court should recognize an objective test for determining Supremacy Clause immunity. *See infra* Section II. Under an objective test, Agent Schrader’s

subjective beliefs and state of mind at the time of his arrest of Respondent would be immaterial. *See Ashcroft v. al-Kidd*, 563 U. S. 731, 737 (2011); *see also Neagle*, 135 U.S. at 1. The objective test would only consider if his conduct was objectively necessary and proper to enforce federal law that he is authorized by federal law to enforce. The issues of fact related to this inquiry overlap with neither the general issue of Agent Schrader's guilt, nor his justification defense to be raised at trial.

Although there is a dearth of case law regarding the "entirely segregable" test in the context of Supremacy Clause immunity specifically, courts have applied the test within the context of other types of immunity as well as pretrial motions based on other defenses. This court should find this authority persuasive. *See supra* I(A)(2).

In *United States v. Bulger*, a criminal defendant charged with murder argued that he had the right to try his claim of immunity from prosecution based on an immunity deal to a jury. 928 F. Supp. 2d 294, 296 (D. Mass. 2013). The government disagreed and filed a Rule 12 motion requesting that the court resolve the issue prior to trial. *Id.* In granting the government's motion, the court first noted that immunity from prosecution is firmly established as a matter of law. *Id.* at 292. Then, acknowledging that Rule 12 permits "the filing of pretrial motions relative to any defense, objection, or request that the court can determine without a trial of the general issue," and determined that a claim of immunity is not the "general issue" to which the Rule refers. *Id.* at 297. Rather, "[t]he general issue in a criminal trial is, of course, whether the defendant is guilty of the offense charged." *Id.* at 297 (citing *United States v. Doe*, 63 F.3d 121, 125 (2d Cir. 1995)); *see also United States v.*

Barletta, 644 F.2d 50, 58 (1st Cir. 1981). Concluding that the defendant's objection to prosecution is “entirely segregable from the evidence to be presented at trial,” the court found that “[w]hile a motion requiring the presentation of a nontrivial quantity of evidence relevant to the question of guilt or innocence constitutes good cause to defer a ruling,” the objection on the grounds of immunity raised by the defendant is neither “substantially founded upon [nor] intertwined with evidence concerning the alleged offense[s].” *Id.* at 300-01 (citing *United States v. Wilson*, 26 F.3d 142, 159 (D.C. Cir. 1994)).

Similar to immunity deals with prosecution, Supremacy Clause immunity has also been recognized to be a matter of law. *See, e.g., Tanella*, 374 F.3d at 142. In the present case, a jury at trial would first consider the general issue of guilt and whether Agent Schrader committed assault or aggravated assault. *See United States v. Doe*, 63 F.3d at 125. In pertinent part, the Penal Code of New Texas states that a person commits “assault” if they intentionally, knowingly, or recklessly cause bodily injury to another. New Tex. § 22.01. In pertinent part, the Code states that a person commits “aggravated assault” if they commit an assault as defined in Section 22.02 and cause serious bodily injury. New Tex. § 22.02.

Agent Schrader has not asserted anywhere in the record that he did not intend to fly tackle Respondent, nor that he did not intend or know that doing so would cause bodily injury to Respondent. *See generally* R. at 32a. Further, he concedes Respondent’s injuries constitute “serious bodily injury” for purposes of “aggravated

assault” as defined by New Texas law. R. at 33a. The only defense he intends to assert at trial is one of justification based on “arrest and search.” R. at 6a.

In order to be justified in using force against another under the New Texas Penal Code, a peace officer must reasonably believe that the force is “immediately necessary to make or assist in making an arrest or search, or to prevent or assist in preventing escape after arrest, if: “(1) the actor reasonably believes the arrest or search is lawful; and (2) before using force, the actor manifests his purpose to arrest or search and identifies himself as a peace officer, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested.” New Tex. § 50.02. Given the facts in dispute and the justification defense to be asserted, evidence presented at trial would likely focus on Agent Schrader’s subjective belief in the necessity of force, lawfulness of the arrest, and the sufficiency of his identification as a peace officer. None of these factual questions are necessary to make a determination on Supremacy Clause immunity under an objective test, and are thus they are entirely segregable and appropriate to be decided by the district court at the pre-trial stage.

The *Bulger* court found that “[r]esolution of defendant's immunity claim requires an inquiry only into the existence, scope, and validity of the alleged agreement he made with [prosecution],” and that [i]t does not require the presentation of evidence regarding the commission of any of the...murders or other crimes with which defendant is charged...[t]he government's motion is thus not only appropriately raised, but calls for pretrial resolution.” *Bulger*, 928 F. Supp. 2d at 301.

Similarly in the present case, resolution of Agent Schrader's immunity claim requires an inquiry only into the objective necessariness needed to complete the arrest of Mr. White for violation of federal law, and does not require presentation of evidence regarding the commission of assault or aggravated assault, or whether he has an affirmative defense of justification. Thus, this court should find that the district court did not invade the province of the jury by making preliminary findings of fact necessary to decide the question of law presented by Agent Schrader's pre-trial motion. *See United States v. Jones*, 542 F.2d 661, 664–665 (6th Cir. 1976).

2. *Even if this court recognizes a subjective test for determining Supremacy Clause immunity, the factual issues decided by the district court were still entirely segregable from the evidence to be presented at trial.*

If a subjective inquiry is found to be necessary to determine Supremacy Clause immunity, that subjective inquiry would be so distinct from the subjective inquiry to be made at trial on the general issue of guilt, that the two would still be entirely segregable. *See Bulger*, 928 F. Supp. 2d at 301.

Courts that have recognized a subjective test for Supremacy Clause immunity consider whether the federal officer asserting immunity acted solely to enforce federal law or if he acted out of some sort of malice. *See Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977) (in looking at the subjective belief of the officer in determining whether his actions were necessary and proper to entitle him to Supremacy Clause immunity, the court considered whether the officer “acted out of malice or with some criminal intent”); *see also* Section II.

For example, in *Files*, a federal Wildlife Services officer claimed Supremacy Clause immunity after being charged with animal cruelty after trapping and injuring his neighbor's dog. 36 F. Supp. 3d 873, 875 (D. Ariz. 2014). The District Court of Arizona, applying a subjective test for Supremacy Clause immunity, found that the officer was not immune because he had been feuding with the neighbor in question and acted out of malice when trapping and injuring the dog. *Id.* at 884. The court denied the officer immunity even though it recognized that dog trapping fell within the scope of his federal officer position because the officer misused his position to further wholly personal interests. *Id.* at 882, 884.

In stark contrast, the subjective inquiries necessary under the New Texas Penal Code to determine guilt of assault and justification based on "arrest and search" do not consider the federal officer's malice, criminal intent, or exploitation of his position to further personal interests at all. New Tex. § 50.02. Instead, in determining guilt, the jury's subjective inquiry would only be whether Agent Schrader "intentionally, knowingly, or recklessly" caused bodily injury to Mr. White when he fly-tackled him during the arrest. New Tex. § 22.01. Whether he did so as a result of malice or criminal intent is immaterial. In determining whether Agent Schrader is entitled to a justification defense based on arrest and search, the jury's subjective inquiry would consider whether and to what degree Agent Schrader "reasonably believe[d] the force [was] immediately necessary to make or assist in making an arrest or search," and whether he "reasonably believe[d] his purpose and identity [as a peace officer]" was known by Respondent at the time of the arrest. New Tex. § 50.02.

This determination is also independent of any malice or criminal intent Agent Schrader may have had.

Even if the test for Supremacy Clause immunity and trial issues share the need for the jury to make subjective inquiries, the natures of each of these subjective inquiries are distinct. The “malice inquiry” that would be required to determine Supremacy Clause immunity is entirely segregable from the “reasonable belief” inquiry required to determine guilt or justification, because it is neither “substantially founded upon [nor] intertwined with evidence” concerning the “reasonable belief” inquiry. *See Bulger*, 928 F. Supp. 2d 294, 300-01 (D. Mass. 2013) (citing *United States v. Wilson*, 26 F.3d 142, 159 (D.C. Cir. 1994)).

3. *In the case that this Court finds that these facts are not entirely segregable, the trial court still acted within its own province.*

“[I]f an issue raised in a pretrial motion is not entirely segregable from the evidence to be presented at trial, but also does not require review of a substantial portion of that evidence, the district court has *discretion* to defer decision on the motion.” *Shortt Accountancy Corp.*, 785 F.2d at 1452 (citing *Barletta*, 644 F.2d at 58) (emphasis added).

In *Shortt*, a CPA firm was convicted on several counts of making and subscribing false tax returns in violation of the Internal Revenue Code. *Id.* at 1450. Before trial, the lower court declined to decide issues of fact necessary to rule on a motion to dismiss and deferred the issues for jury consideration; the Court of Appeals affirmed. *Id.* at 1453. The Court of Appeals recognized that ruling on the defendant’s motion to dismiss would have required the lower court to determine, among other fact

issues, the individual subjective intention of the tax preparer to break the law, his understanding of the IRS, and his involvement in handling Defendant's tax filings. *Id.* Even though it found that these issues, though not entirely segregable, were not "substantially founded upon and intertwined with" evidence concerning the general issues of whether Defendant was guilty of making and subscribing false tax returns, the Court affirmed the lower court decision on the grounds that it had acted within its discretion. *Id.* at 1453.

When the fact issues raised by a pretrial motion are entirely segregable from the evidence to be raised at trial, a trial court must decide issues of fact. *Id.* at 1452 ("the district court must decide the issue raised in the pretrial motion before trial if it is 'entirely segregable' from the evidence to be presented at trial") (citing *United States v. Covington*, 395 U.S. at 60).

However, in grey area circumstances, where the fact issues raised by a pretrial motion are neither entirely segregable nor substantially founded upon and intertwined with the evidence to be presented at trial, lower courts may rightfully choose to decide issues of fact or punt them to the jury for determination at trial. *See Barletta*, 644 F.2d at 58.

In the present case, although there may be little if any overlap between the fact issues raised by Agent Schrader's motion to dismiss based on Supremacy Clause immunity and the issues of guilt or innocence to be raised at trial, *see supra* I(b)(1)—(2), the lower court engaged in a permissible exercise of discretion in choosing to decide the issues of fact.

II. AGENT SCHRADER IS ENTITLED TO IMMUNITY.

Supremacy Clause immunity protects federal agents from state prosecution for acts done during the enforcement of federal law. Under *Neagle*, a federal officer is immune from state prosecution when: (1) the federal officer was authorized by federal law to commit the act; and (2) the federal officer's actions were necessary and proper.

a. Agent Schrader's Actions Were Authorized by Federal Law.

As an agent of the Federal Bureau of Investigations ("FBI"), Hank Schrader is empowered to make warrantless arrests upon probable cause of a federal offense. 18 U.S.C. § 3052 (2018). Mr. White's open possession of two ounces of marijuana, R. at 31a, was in violation of federal law. 21 U.S.C. § 844 (2018). Agent Schrader was therefore authorized to arrest Mr. White.

While Agent Schrader was outside of his home jurisdiction when he arrested Mr. White, an FBI Agent has authority to make arrests for federal offenses committed in his presence anywhere within the United States. *See* 18 U.S.C. § 3052 (2018). Nor were Agent Schrader's powers of arrest limited because he was off-duty at the time. *See id.* A federal law enforcement officer who "observes criminal activity, but 'let[s] the violator] go,' violates the officer's general 'obligation to enforce the laws of the United States . . . and oath to do so.'" *State v. Kleinert*, 855 F.3d 305, 315 (5th Cir. 2017) (omission in original) (quoting with approval the testimony of an FBI Supervisory Special Agent). Indeed, Congress has recognized that off-duty law

enforcement officers play an important role in protecting our communities and have accordingly granted them special privileges. *See, e.g.*, 18 U.S.C. § 926B (2018) (authorizing off-duty police officers to carry weapons regardless of state law). Unlike in *Morgan v. Colorado*, 743 F.2d 728 (9th Cir. 1984), where the Ninth Circuit reversed a trial court's determination that federal agents had acted in the scope of their authority, there is no dispute here that a federal crime was being committed in the presence of Agent Schrader. *See R.* at 31a.

It is also immaterial that New Texas does not prohibit the possession of marijuana because it remains a federal offense to possess or distribute this destructive drug. *See Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding Congress's authority to regulate marijuana under the U.S. Constitution's Commerce Clause, even in states that have legalized it).

The Department of Justice's then-operative policy on marijuana enforcement made clear: "marijuana is a dangerous drug and the distribution and sale of marijuana is a serious crime." Memorandum from Deputy Attorney General James Cole to All United States Attorneys Regarding Marijuana Enforcement 1 (August 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. True, that same memorandum instructed law enforcement personnel to generally defer to state enforcement decisions in cases involving "possession of small amounts of marijuana for personal use." *Id.* at 2. But that guidance was not mandatory and, in any event, was inapplicable here. Mr. White was carrying two ounces of marijuana which is not a "small amount." *See R.* at 31a. Indeed, Agent Schrader's observation

that Mr. White was in possession of two ounces of a controlled substance was probable cause to suspect him of possession with intent to distribute. *See, e.g., United States v. Chauncey*, 420 F.3d 864, 870 (8th Cir. 2005) (affirming conviction for possession with intent to distribute when defendant discovered with two ounces of marijuana). Possession of marijuana with intent to distribute is a serious felony carrying a maximum sentence of five years. *See* 21 U.S.C. § 841 (2018).

Agent Schrader is authorized by federal law to make warrantless arrests for federal offenses. He observed Mr. White commit a federal misdemeanor and had probable cause to suspect Mr. White of possession with intent to distribute, a serious felony under federal law. His decision to arrest Mr. White was therefore authorized by federal law.

b. Agent Schrader's Actions Were Necessary and Proper Because He Did Not Violate Clearly Established Law

A federal agent only exceeds the “necessary and proper” bounds of their authority when their conduct objectively violates clearly established law. Although the Supremacy Clause protects federal interests and not the interests of an individual officer, it nonetheless encompasses that officer's other constitutional rights for the purpose of shielding the federal government from insubstantial litigation. An officer acting on a reasonable interpretation of existing law does not have “fair warning” he is violating the law and, so, cannot be convicted in a later trial. *Screws v. United States*, 325 U.S. 91, 105 (1945). Denying immunity in these circumstances would only allow ultimately futile prosecutions to proceed, frustrating federal law enforcement efforts and wasting judicial and executive branch resources. *See supra* Section I(A).

The Supremacy Clause protects against these burdens, and so immunity will only be denied to a federal official acting pursuant to their authority when they clearly and objectively overstep that authority. *See Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977) (“Proper application of this standard does not require a petitioner to show that his action was in fact necessary or in retrospect justifiable, only that he reasonably thought it to be.”). Agent Schrader did not violate clearly established law, R. at 11a, and his actions were therefore “necessary and proper,” *Neagle*, 135 U.S. at 75.

1. *1. The State’s Prosecution of Agent Schrader is Ultimately Futile Because He Did Not Violate Clearly Established Law.*

Due Process requires “fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.” *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *see also Davis v. Scherer*, 468 U.S. 183 (1984) (holding that Due Process requires that agents “reasonably can anticipate when their conduct may give rise to liability.”). No clearly established law prohibited Agent Schrader’s actions, R. at 11a, and so he necessarily did not have “fair and clear warning” of possible criminal liability and cannot be convicted. *See United States v. Lanier*, 520 U.S. 259, 271 (1997).

Due Process prohibits conviction unless the governing laws have “been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.” *Screws*, 325 U.S. 104. In most criminal prosecutions, this requirement is vindicated through the rule of lenity which “ensures fair warning [to a defendant] by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.” *Lanier*, 520 U.S. at 266. Sometimes,

however, criminal liability turns on elements beyond the four corners of an otherwise unambiguous statute. For example, federal law criminalizes certain conduct depriving individuals of their “rights, privileges, or immunities secured or protected by the Constitution.” 18 U.S.C. § 245 (2018). All agree the statute is unambiguous, but at the same time the Constitution’s broad terms often offer little practical guidance. *See, e.g.*, U.S. Const. amend. IV (prohibiting “unreasonable” seizures). Similarly, all agree that New Tejas’s charging statute is clear but the substantive law controlling Agent Schrader’s conduct was not. *See R.* at 11a.

This Court has long held it is the substantive law governing an individual’s conduct, and not simply the text of the charging statute, which must provide fair warning of criminal liability. In *Screws*, for example, the Court concluded that the above referenced civil rights statute—unambiguous in its terms—could only be applied when case law had “made specific” the rights protected by the Constitution’s broad sweep. *Screws*, 325 U.S. at 104. Only then would citizens have “adequate advance notice that they would be visited with punishment” for certain conduct, as required by due process. *Id.* at 105. The same is true here. Agent Schrader’s criminal liability turns on whether he exceeded his constitutional authority, and thus the bounds of his authority must have been “made specific” for liability to lie. *Id.*¹

¹ It is not relevant that *Lanier* and *Screws* dealt with federal prosecutions while Agent Schrader is at risk from a state prosecution. For one thing, his case has been removed to federal court, which is bound by the Fifth Amendment’s Due Process Clause, just as in *Lanier* and *Screws*. For another, the sweep of the Fifth Amendment’s Due Process Clause against the Federal Government is just as broad as the sweep of the Fourteenth Amendment’s Due Process Clause against the states. *See Hurtado v. California*, 110 U.S. 516, 535 (1884) (holding the Clause has the same meaning in both Amendments).

This “fair warning” requirement is functionally equivalent to the familiar “clearly established” qualified immunity standard. As this Court noted in *Lanier*, “both serve the same objective” of insuring officials can “reasonably can anticipate when their conduct may give rise to liability.” 520 U.S. at 270. The *Lanier* Court reasoned “the qualified immunity test is simply the adaptation of the fair warning standard” to the civil context, *id.*, rejecting the argument one has a greater scope than the other. *See id.* It is easy to see why—a different standard would expose officials to criminal liability for conduct that they cannot be held civilly liable for, or vice versa. It simply cannot be the case that the same set of facts could entitle an officer to civil, but not criminal, immunity.

Whatever their procedural differences, the fair warning requirement and the qualified immunity “clearly established” standard are functionally equivalent in terms of their substance. New Tejas’ concession that Agent Schrader did not violate clearly established law is therefore fatal to its prosecution.

2. Allowing Insubstantial Prosecutions to Proceed to Trial Would Frustrate Federal Interests Protected by the Supremacy Clause.

The Supremacy Clause grants immunity when an officer’s authorized actions do not violate clearly established law because allowing insubstantial state prosecutions to proceed to trial undermines substantial federal interests. Here, continued litigation will distract Agent Schrader from his federal duties and tie up federal law enforcement and judicial resources. *See supra* Section I(A). More broadly, the threat of state prosecution will deter able citizens from federal service and “dampen the ardor” of federal officials “in the unflinching discharge of their duties.”

Harlow, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949)). The supremacy clause shields the federal government from this unfounded interference in its operations by granting immunity from prosecution when there is no possibility of conviction because a federal officer did not violate clearly established law.

New Tejas' prosecution cannot result in a conviction, but its continuance can and will undermine the federal government's interest in the robust enforcement of its laws. True, Agent Schrader could present his due process arguments at trial rather than receive immunity from suit. Although formally the outcome would be the same either way, the denial of immunity in such circumstances would have a significant impact on federal interests.

The threat of state criminal prosecution results in "distraction of [federal] officials from their governmental duties, inhibition of [their] discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816. Indeed, the state brought these criminal charges against Agent Schrader *precisely* for the purpose of hindering the federal government's efforts at enforcing the Controlled Substances Act. *See R.* at 33a. The state's prosecutor intends this prosecution to "serve as a warning" to federal officers that they "are not welcome [in New Tejas]." *Id.* She wants federal officials to know they "attempt to enforce [federal] laws at [their] own risk." *Id.* Allowing this prosecution to proceed will necessarily interfere with federal law enforcement efforts.

State action is prohibited by the Supremacy Clause when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Not only do individual officers have an interest in avoiding liability when the law is unclear, but the federal government has an interest in avoiding “distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.” *Harlow*, 457 U.S. at 816. Thus, this Court has recognized the importance of immunity in protecting important governmental interest in suits for money damages. *See, e.g., Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) (recognizing federal officials may claim qualified immunity).

Application of the “clearly established” rule is necessary, not only in the field of civil liability, but also in the field of criminal immunity, to secure the federal government’s interest in enforcing its laws. In the civil context, the clearly established standard strikes a balance between personal rights and the needs of government. The application of the clearly established rule in the Supremacy Clause immunity context similarly balances the needs of the federal government with the legitimate interests of the state. Where a state prosecution is ultimately futile because the officer did not violate clearly established law, the state has no reason to pursue prosecution other than to undermine federal interests. The Supremacy Clause prohibits this needless interference with federal interests. Thus, a clearly established standard draws the appropriate line between protecting federal agents in the

reasonable exercise of their duties and allowing states to prosecute clearly lawless behavior occurring within their territory.

A rule that allowed criminal liability to attach when an agent acts on a reasonable but mistaken belief of the law's limits would violate the fair warning rights of federal officers and also "retard, impede, [and] burden" the execution of federal law. *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819). It cannot be true that a federal officer's protection from civil liability sweeps broader than their protection from criminal liability. At the very least, the scope of Supremacy Clause immunity in the criminal context is as broad as the scope of qualified immunity in the civil context. See Waxman & Morrison, *What Kind of Immunity?*, *supra* at 2209.

Agent Schrader's arrest of a fleeing suspect was objectively necessary and proper because his actions were reasonable "as measured by reference to clearly established law." *Harlow*, 457 U.S. at 818. Agent Schrader's behavior was reasonably within the bounds of his authority, and so he had no "fair warning" that he was exposing himself to criminal liability. *Screws*, 325 U.S. 104. The state of New Tejas therefore has no legitimate interest in pursuing criminal charges against him because he cannot be convicted pursuant to due process. Continued prosecution of his case will undermine federal law enforcement efforts. The Supremacy Clause protects the federal government from such unfounded interference by granting immunity to Agent Schrader, and to all other federal officials whose actions are authorized and who do not violate clearly established law.

c. Agent Schrader's Intent is Irrelevant, But in Any Event He Acted To Enforce Federal Law and Not from Personal Malice

Circuits that have considered the federal officer's intent during the enforcement of federal law when judging a claim for Supremacy Clause immunity have done so incorrectly. However, even if subjective intent is a necessary consideration of Supremacy Clause immunity, Agent Schrader acted with the intent only to enforce federal law, and the district court made no clear error in making that finding.

1. Agent Schrader's Intent is Irrelevant

An officer otherwise entitled to immunity does not lose that immunity simply because of their subjective motivations. For one thing, an officer's subjective motivations play no role in the fair warning inquiry discussed above. *See, e.g., Screws*, 325 U.S. at 10. Thus, an officer who acts with malice but otherwise stays within the clearly established bounds of their authority is still be safe from conviction, undermining any legitimate interest in taking the case to trial. For another, a subjective inquiry into the motivations of law enforcement carries serious costs for society and consequently this Court has abolished such inquiries in the civil immunity context. *See Harlow*, 457 U.S. at 817. The same costs are present in the criminal context, mitigating against the creation of a subjective exception here.²

² The Court need not decide today whether a subjective inquiry is never appropriate. It is conceivable an officer's motivations are relevant where a constitutional violation turns on the officer's subjective intentions, such as in cases arising under the Eight Amendment. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 104 (1976). But New Tejas argues Agent Schrader exceeded his authority under the Fourth Amendment, a purely objective inquiry in which this Court has "almost uniformly rejected invitations to probe subjective intent." *Ashcroft*, 563 U. S. at 737. Thus, the Court can

An officer's subjective motivations have no bearing on whether he had fair warning that his conduct could subject him to criminal sanctions. As discussed above, fair warning is a *necessary* condition for criminal liability and therefore an officer's motivations are simply immaterial to whether he may ultimately be convicted by the state, consistent with due process. *See supra* Section II(B)(1). True, denial of immunity would penalize ill-intentioned officers by forcing him to litigate fair warning at the trial stage. But he would still be safe from conviction. The only effect of denying immunity would be to increase the cost, disruption, and chilling effect on federal law enforcement caused by the state's prosecution. Perversely, then, denying immunity and forcing the officer to proceed to a futile trial would impose a significant penalize on the federal government for an officer's "bad" motivations, but imposes only a minimal burden on the officer himself. The outcome of such a rule would seem particularly absurd when it is remembered that the purpose of Supremacy Clause immunity is to protect the operations of the federal government from disruption rather than to protect individual officers themselves. *Neagle*, 135 U.S. 1 (1890).

Indeed, this Court recognizes the federal government's strong interest in avoiding insubstantial litigation justifies a purely objective immunity standard in the civil context. In *Harlow*, the Court abrogated the subjective element of the civil qualified immunity defense because it found "that substantial costs attend the litigation of the subjective good faith of government officials." 457 U.S. at 817. The Court noted the social cost of insubstantial suits, such as "distraction of officials from

objectively resolve the Fourth Amendment inquiry in this case and leave for another day the question of whether subjective intent is ever relevant.

their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.” *Id.* But it also noted the “special costs” associated with a subjective inquiry—noting that litigation of such claims requires significant intrusion into official decision making and can be “peculiarly disruptive of effective government.” *Id.* These costs are also present in the criminal context, where, if anything, they are magnified by the parties’ greater access to compulsory process.

An officer’s subjective motivations have no bearing on whether he can ultimately be convicted at trial under the due process “fair warning” requirement. It makes no sense to penalize ill motivated officers by denying them immunity because the significant social costs arising from the prosecution will fall on the federal government, and not upon the officer with the “bad” motivations. The Court has recognized the costs such insubstantial suits impose on the government in the civil context necessitates a purely objective immunity standard, and that logic should govern here as well. Thus, Agent Schrader’s intent is irrelevant to whether he should receive immunity.

Despite causing Mr. White harm during the arrest, Agent Schrader’s actions were objectively reasonable to warrant Supremacy Clause immunity. Agent Schrader undoubtedly had probable cause to arrest Mr. White for a violation of federal law. Agent Schrader sufficiently identified himself as an officer by shouting to Mr. White to stop as he was under arrest. R. at 38a (district court holding that an instruction to stop is sufficient identification as an arresting officer). Finally, Mr. White attempted to flee Agent Schrader following his command to stop, which warrants higher use of

force to complete the arrest. *See Tennessee v. Garner*, 471 U.S. 1 (1985). Even though the district court here found that Agent Schrader's actions could have foreseeably caused harm, the action was no more than objectively necessary and proper to ensure that Mr. White could not flee and evade arrest.

2. *Even Were Agent Schrader's Intent Relevant, He Acted to Enforce Federal Law and Not Out of Malice*

Even if Agent Schrader's motivations are relevant, they are a question of fact involving credibility determinations by the district court and that court's findings are consequently reviewed for clear error. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575–76 (1985). The district court found Agent Schrader “was motivated solely to fulfill his federal duties and enforce federal law.” R. at 38a. The record amply supports this conclusion, and this Court should defer to the district court's factual findings. *See id.*

True, Agent Schrader and Mr. White had met each other earlier that day when a traffic altercation led to raised voices and visible signs of anger. R. at 2a. But Agent Schrader never invoked or referenced his federal authority during this confrontation. *Id.* Moreover, Mrs. Schrader testified that Agent Schrader visibly relaxed after the disagreement with Mr. White and largely forgot about it during the hours he spent with his family in a museum. R. at 30.

Agent Schrader only drew upon his federal authority several hours later when he observed Mr. White commit a federal crime. Unlike in *Arizona v. Flies*, there is no suggestion that Agent Schrader engineered a situation that allowed him to use his federal authority. *See* 36 F. Supp. 3d 873, 884 (D. Ariz. 2014). Indeed, he was out for

a walk with his family and happened upon Mr. White by coincidence. R. at 31a. Upon observing that Mr. White was violating federal law, Agent Schrader identified himself as a federal officer and informed Mr. White he was under arrest. R. at 31. Mr. White then attempted to flee. *Id.* It was only at this point, and not before, that Agent Schrader tackled Mr. White. This demonstrates Agent Schrader tackled Mr. White to prevent his escape rather than to “to satisfy a personal problem.” *Files*, 36 F. Supp. 3d at 873, 884.

The only evidence that Agent Schrader acted with malice is his prior altercation with Mr. White. But it cannot be true that a prior altercation with a person deprives a law enforcement officer of immunity when they later apprehend that same person in the commission of a crime. By necessity, officers operate in the same spaces as the criminals they police and repeat interactions between the two are likely. Such a rule would therefore be hugely detrimental to law enforcement efforts.

The district court, after observing the demeanor and candor of the witnesses, reasonably concluded that Agent Schrader acted with an appropriate subjective motivation. R. at 37a. Even if there were “two permissible views” of the evidence in the record, “the factfinder's choice between them cannot be clearly erroneous.” *Anderson*, 470 U.S. 564, 574 (1985) (noting “even greater deference” owed when “findings are based on determinations regarding the credibility of witnesses”). If Agent Schrader’s motivations are indeed relevant, then this Court should defer to the district court’s amply supported findings.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Thirteenth Circuit on both issues.

Dated: November 18, 2019

Respectfully submitted,

Team No. 72

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APPENDIX**U.S. CONST. art. VI, cl. 2**

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, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. CONST. amend. 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

28 U.S.C. § 1442

(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.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

18 U.S.C. § 3052

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. § 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

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:

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:

Arrest and Search

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

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