No. 18-5188

IN THE

Supreme Court of the United States

OCTOBER TERM 2019

HANK SCHRADER,
Petitioner,

v.

STATE OF NEW TEJAS,
Respondent.

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

BRIEF FOR THE RESPONDENT

TEAM NUMBER 95
COUNSEL FOR RESPONDENT

November 18, 2019

QUESTIONS PRESENTED

I. When a criminal defendant raises Supremacy Clause immunity in a Rule 12(b) motion to dismiss a state indictment, should the district court view the facts in the light most favorable to the non-moving party, or should the State bear the burden of proving facts in dispute?

II. What is the proper test for determining whether a state criminal defendant is entitled to immunity from prosecution under the Supremacy Clause?

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The decision of the Thirteenth Circuit Court of Appeals is not reported but is available in the record. R. at 1. The order of the District of New Tejas is not reported but is available in the record. R. at 27.

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL PROVISIONS

The Supremacy Clause is central to this case. The Supremacy Clause is contained in Article VI, Section 1, Clause 2 of the United States Constitution.

The Supremacy Clause, in relevant part, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … 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.

STATUTORY PROVISIONS

Several provisions of the United States Code and the State of New Tejas Penal Code are relevant to this case. The relevant federal statutes are set forth in the record, R. at 43–45, and are reprinted in Appendix A. The relevant New Tejas statutes are set forth in the record, R. at 45–46, and are reprinted in Appendix B.

STATEMENT OF THE CASE

A. Defendant Hank Schrader vacations in Madrigal, New Tejas.

In November of 2016, Hank Schrader took a vacation from his job as an agent for the Federal Bureau of Investigation. R. at 28. While on vacation, Schrader travelled from his Wisconsin duty station to New Tejas for a honeymoon with his new wife, Marie. R. at 28. Marie's nine-year-old daughter and eleven-year-old son accompanied the newlyweds to New Tejas. R. at 28.

B. Schrader confronts local resident Mr. White during a road rage incident.

On the morning of November 8th, the fifth day of the family vacation, Schrader drove his family to downtown Madrigal, New Tejas to visit a museum. R. at 28. While driving to Madrigal, a truck changed lanes and cut off Schrader, causing Schrader to slam on his breaks to avoid a collision. R. at 29. After the near-collision, Schrader's vehicle and the truck stopped at a red light. R. at 29.

At the red light, Schrader "lost his temper" and left his vehicle to confront the other driver. R. at 29. The other driver, local resident Mr. White, exited his vehicle and turned to face Schrader as Schrader approached. R. at 29. Schrader was now red-faced and "angry that [White] almost hit [him], [his] wife, and especially the kids." R. at 29. When Schrader came face-to-face with White, Schrader began yelling at White. R. at 29. White responded to Schrader's rage by shoving Schrader in the chest. R. at 29. After the shove, Schrader cocked back his arm to punch White—but, just before Schrader could execute a punch, the light turned green and other cars began honking.

R. at 30. Schrader then retreated to his vehicle and the family continued their vacation. R. at 30.

C. Schrader confronts White again, this time tackling him and breaking his arm and chipping his teeth.

Schrader encountered White again later that same day. R. at 30. While Schrader and his family were looking for lunch in downtown Madrigal, Schrader saw White leaving a local business that sells marijuana. R. at 30. Schrader observed White step out of the business holding two ounces of marijuana in a clear plastic bag. R. at 31. New Tejas residents legalized possession and consumption of marijuana in a widely publicized 2016 ballot initiative. R. at 30.

Standing just five yards from White, Schrader shouted, "Stop! You're under arrest!" and charged toward White without identifying himself as an FBI agent. R. at 31, 38. White turned to run—but before he could move anywhere—Schrader executed a "flying tackle" and crushed White into the concrete underneath Schrader's body weight. R. at 31, 38. White cried out in pain, causing the owner of the marijuana business to come outside and call 9-1-1. R. at 31. Schrader cuffed White and informed him that he was under arrest for possessing two ounces of marijuana in violation of federal law. R. at 31; 21 U.S.C. § 844; 18 U.S.C § 3052. Emergency services rushed White to the hospital for a broken arm and chipped teeth because of Schrader's tackle. R. at 32.

White was never charged with a federal crime. R. at 32. Schrader did not question White about his marijuana possession. R. at 31. Schrader did not investigate how White obtained the marijuana. R. at 31. There is no evidence that Schrader filed

a report or spoke to a superior to refer this case for prosecution. R. at 31–34. When local police arrived at the scene, Schrader informed them that he "swore an oath to enforce federal laws" and "that's all [he] was doing." R. at 32. Schrader has not worked a single drug case in his twenty-year career with the FBI. R. at 28.

D. A New Tejas grand jury indicts Schrader for assault and aggravated assault for his attack on White.

Several hundred citizens protested in downtown Madrigal following Schrader's attack on White. R. at 32. The Madrigal District Attorney appeared at the protest and delivered a speech in which she announced her intention to charge Schrader with aggravated assault. R. at 32. Playing to the emotional crowd whom had just elected her, the District Attorney also stated that federal officers enforcing marijuana laws were not welcome in New Tejas. R. at 32.

Soon after the protest, a New Tejas grand jury indicted Schrader for assault and aggravated assault for attacking White. R. at 33; Penal Code of New Tejas §§ 22.01, 22.02. Schrader does not dispute that White's broken arm and chipped teeth constitute "serious bodily injury" under New Tejas's aggravated assault statute. R. at 33; Penal Code of New Tejas § 22.01.

E. Schrader removes the prosecution to federal district court and the district court dismisses the indictment.

Schrader removed the prosecution to United States District Court for the District of New Tejas pursuant to 28 U.S.C. § 1442. R. at 34. Schrader then moved under Criminal Rule 12(b) to dismiss the indictment based on immunity under the

Supremacy Clause. R. at 34. Schrader also asserted the affirmative defense of justification. R. at 6; Penal Code of New Tejas §§ 50.01, 50.02.

The district court stated that Schrader's entitlement to immunity depended on several disputed material facts. R. at 36. New Tejas argued that the disputed facts should be viewed in the light most favorable to the non-movant; Schrader argued that the district court should sit as factfinder and resolve disputed facts in deciding the motion. R. at 36. The district court concluded that it should resolve disputed facts when determining immunity under the Supremacy Clause. R. at 36. After a hearing, the district court made several factual findings, including that Schrader's subjective intent was to enforce federal law and that the purpose of the prosecution was to impede enforcement of federal drug laws. R. at 37–39. The court used the standard for quality immunity and granted Schrader's motion to dismiss because his actions did not violate clearly established federal law. R. at 40–41.

F. New Tejas appeals and the Thirteenth Circuit reverses.

New Tejas appealed the dismissal to the United States Court of Appeals for the Thirteenth Circuit. R. at 1. The Court of Appeals reversed the district court, holding that: (1) a district court deciding a motion to dismiss under Rule 12 based on immunity under the Supremacy Clause must view disputed material facts in the light most favorable to the State; and (2) when viewing the facts in the light most favorable to the State in this case, Schrader is not entitled to immunity under the Supremacy Clause.

For the first holding, the court reasoned that the district court must view disputed material facts in the light most favorable to the State because Rule 12 does not permit a district court to adjudicate fact issues that overlap with issues for the jury to decide at trial. R. at 8. Here, the disputed facts determining Schrader's immunity defense overlap significantly with Schrader's justification defense, which must be decided by the jury at trial. R. at 6.

For the second holding, the court reasoned that Schrader was not entitled to immunity under the Supremacy Clause because (a) arresting White was not "necessary" to accomplish Schrader's federal duties, (b) arresting White was not "subjectively proper," and, (c) arresting White was not "objectively proper"—rejecting the district court's reliance on qualified immunity rather than Supremacy Clause immunity. R. at 9–11. Schrader appealed, and this Court granted certiorari.

SUMMARY OF THE ARGUMENT

Supremacy Clause immunity protects authorized federal agents who act with an honest and reasonable belief from state prosecution for their actions. This is not the case for Schrader. In the light most favorable to the State, the facts demonstrate that Schrader abused his federal authority. The Supremacy Clause should not prevent New Tejas from proceeding with its prosecution.

The Thirteenth Circuit properly viewed the disputed facts in a light most favorable to the State. Courts are required to assume the allegations of the indictment when ruling on a Rule 12 motion. Rule 12 establishes that only courts may only resolve cases through pretrial motion if those cases can be resolved without

a trial on the merits. Furthermore, when cases arise in an area that is both subject to federal jurisdiction but traditionally regulated by the States—like criminal law—courts must assume that Congress did not supersede the police powers of the States unless it is clear that Congress explicitly intended to do so.

Two safeguards are in place to guard against the potential for state prosecution attempting to thwart effective federal law enforcement. *First*, a federal court may still intervene and find immunity in cases of "peculiar urgency"—when the record supports a finding that the State is not genuinely prosecuting the agent but instead attempting to hinder federal programs. Such a peculiar urgency is not present here. New Tejas is prosecuting an agent who committed a violent crime while off duty and on vacation, thousands of miles away from his field office. *Second*, the federal removal statute provides sufficient protection to federal agents from local bias, ensuring their right to a fair trial. Schrader will receive the benefit of a federal judge and federal jury pool while facing state prosecution.

The correct test for Supremacy Clause immunity is the test courts have applied for over a century. An agent is only shielded from prosecution for a state criminal act when: (1) the agent was *authorized* by federal law to perform the act; and (2) the agent had a *subjectively honest* and an *objectively reasonable* belief that his act was necessary and proper to accomplish a federal duty. Viewing the facts in the light most favorable to New Tejas, Schrader acted with criminal intent and lacked a reasonable belief that crushing White onto the pavement was necessary to enforce federal drug laws.

This two-pronged test balances the delicate state and federal interests at stake in the Supremacy Clause immunity analysis—especially in criminal cases. States have an interest in exercising their reserved constitutional power to enforce criminal law; the federal government has an interest in ensuring that States do not impede federal law enforcement.

The subjective and objective components of the necessary and proper prong balance these important interests. The subjective component allows States to prosecute rogue federal agents who abuse their authority to accomplish personal vendettas while protecting federal agents who execute their duties in good faith. The objective component allows States to prosecute a federal agent that commits a state crime without a reasonable belief that committing the crime was necessary to accomplish a federal duty. At the same time, it protects federal agents who act with reasonable but mistaken beliefs about the propriety of their actions.

Thus, this Court should affirm the long-established Supremacy Clause immunity test. The Thirteenth Circuit correctly denied agent Schrader immunity and this Court should affirm and remand for the prosecution against Schrader to proceed.

ARGUMENT

I. The Thirteenth Circuit correctly held that courts should view factual disputes in the light most favorable to the State when ruling on a motion to dismiss based on Supremacy Clause immunity.

The Thirteenth Circuit properly viewed the disputed facts in a light most favorable to the State when deciding Schrader's motion to dismiss. The dismissal of an indictment raises mixed questions of law and fact, and thus is subject to de novo review. *New York v. Tanella*, 374 F.3d 141, 146 (2d Cir. 2004), *Texas v. Kleinert*, 855 F.3d 305, 314 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 642 (2018).

The plain language of Rule 12 establishes that a court can resolve the question of immunity by pretrial motion only if the district court can rule upon it without a trial on the merits. *See Kleinert*, 855 F.3d at 311. Thus, in cases where the question of immunity turns on facts in dispute, those facts alleged in the indictment should control. A jury should resolve these disputed issues of fact at trial, and not in a pretrial motion.

Accordingly, this Court should follow the circuits that have properly refused to resolve factual issues underlying questions of immunity and have instead viewed federal agents' motions to dismiss in light of the facts asserted in the indictment. *Tanella*, 374 F.3d at 148; *Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006); *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988). Once the defendant raises immunity in a motion to dismiss, the burden shifts to the State to make an evidentiary showing "sufficient at least to raise a *genuine* factual issue whether the

officer was doing … no more than was necessary and proper for him to do in the performance of his duties." *Long*, 837 F.2d 727 at 752.

The State cannot meet this burden "merely by way of allegation," and the district court should grant the defendant's motion absent an affirmative showing by the State that the facts supporting the immunity claim *are in dispute*. *Id.*; *City of Jackson v. Jackson*, 235 F. Supp. 2d 532, 534 (S.D. Miss. 2002). Supremacy Clause immunity is a jurisdictional immunity, meaning that when properly raised, immunity will then deprive the court of its jurisdiction to hear the case. *See Castle v. Lewis*, 254 F. 917, 920 (8th Cir. 1918).

If there is a dispute over the basis for invoking the Supremacy Clause and divesting the State court of jurisdiction, the district court may not decide the relevant facts unless there is a peculiar urgency warranting immediate invocation of federal interference to protect the proper execution of federal law. *United States ex. rel. Drury v. Lewis*, 200 U.S. 1, 6 (1906).

The district court thus improperly resolved genuine disputes of material fact regarding White's arrest, most notably the credibility of Schrader's testimony and the District Attorney's hostility toward the enforcement of federal marijuana laws. R. at 37–39. Neither the text, history, nor purpose of Rule 12 nor the Constitution supports a reading that the district court can resolve factual disputes in immunity cases. Additionally, no peculiar urgency exists to warrant federal intervention into state criminal prosecution, and the federal removal statute utilized by Schrader is a sufficient safeguard to protect against state hostility to the execution of federal law.

A. Neither the Constitution nor Rule 12 permits a district court to resolve factual disputes in immunity cases.

A plain reading of Rule 12, its history, and its purpose, as well as the Constitution, support a restriction on the district court's ability to determine facts at issue in immunity cases. In general, the scope of the district courts' review at the Rule 12 stage is "limited." *United States v. Huet*, 665 F.3d 588, 595 (3d Cir. 2012). There is no criminal corollary to the summary judgment mechanism; a pretrial motion to dismiss in a criminal case must be considered in light of the facts alleged in the indictment. *Boyce Motor Lines, Inc.*, *v. United States*, 342 U.S. 337, 343 (1952); *Tanella*, 374 F.3d at 148.

Thus, when a federal officer's entitlement to immunity turns on disputed questions of fact, the officer must face trial before a jury of his peers, who can resolve these factual disputes with a trial of the merits, as the Framers intended. *See* U.S. Const. amend. VI. While the Supremacy Clause undeniably provides defendants with a substantive right, the Constitution is silent toward the procedure to assert that right, and Schrader has not identified a statute or rule that establishes such a procedure other than Rule 12. Thus, the text, history, and purpose of Rule 12 governs the question.

1. The text and purpose of Rule 12 do not support district court review of facts in contention as they do in civil cases

Based on the text and purpose of Rule 12, the district court in this case is not permitted to resolve factual disputes in order to determine the validity of immunity. A motion to dismiss under Federal Rule of Criminal Procedure 12 on the basis of

immunity should only be granted if there are no genuine issues of material fact. Fed. R. Crim. P. 12. Material facts are those that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact creates a "genuine issue" if the evidence is such that the trier of fact reasonably could resolve the factual dispute in favor of either party. *Id.* at 248–49.

Courts should assume the allegations of the indictment when ruling on a Rule 12 motion. *Boyce Motor Lines, Inc.*, 342 U.S. at 343 n. 16. The text of Rule 12(b)(1) 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). A defense is thus capable of pretrial determination by the district court if "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Covington*, 395 U.S. 57, 60 (1969).

Once a defendant raises a motion to dismiss based on the grounds of immunity, the State must come forward with evidence rebutting the presumption of immunity and raising a genuine dispute of material fact concerning the validity of the defense. *New York v. Tanella*, 281 F. Supp. 2d 606, 612 (E.D.N.Y. 2003), *aff'd*, 374 F.3d 141 (2d Cir. 2004). Once the State has come forward with that evidence, the State is entitled to all reasonable inferences of fact. *Boyce Motor Lines, Inc.*, 342 U.S. at 343.

Additionally, only those issues that the court can determine without a trial on the merits are *required* to be raised by motion before trial under the text of 12(b)(3). Fed. R. Crim. P. 12(b)(3). This provides further indication that those questions that

a court can determine without a trial on the merits are the only questions properly raised by motion and decided upon by a district court.

In this case, New Tejas has fulfilled its burden to come forward with evidence of a genuine dispute of material fact rebutting the presumption of immunity. The State properly called into question: (1) whether Agent Schrader's duties as a federal agent included arresting individuals who committed federal crimes in his presence, (2) whether his motivation in arresting White was solely on the basis of fulfilling his federal duties, (3) whether he properly identified himself to White as a federal agent, (4) whether he intended to injure White, and (5) whether his conduct was justified in light of his federal duties for the purposes of § 50.01 of the New Tejas Penal Code.

Unlike a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the purpose of 12(b) is not to avoid the costs of litigation or increase judicial efficiency. Instead, 12(b) provides an opportunity for defendants to contest deficient indictments. No grounds for 12(b) dismissal reach the substantive merits of the case. Thus, the district court's authority to dismiss indictments cannot be anchored to "a kind of criminal summary judgment procedure." *United States v. Salman*, 378 F.3d 1266, 1268 (11th Cir. 2004). While this "may result in legally meritless cases being sent to trial," it is not for the courts to "filter which criminal cases may reach the trial stage by reviewing the proffered evidence in advance." *Id.* at 1269.

12(b)(3) does not require a party to raise immunity by motion before trial. Furthermore, the State has properly rebutted the presumption, and there is no indication in the text of Rule 12 that immunity can be resolved before a trial on the

merits. While this may result in a "legally meritless case" being sent to trial, it is not for the district court to filter out Schrader's case by reviewing the proffered evidence before trial.

2. If the district court resolves factual disputes, it will necessarily resolve the merits of the case, which should be reserved for a jury.

The factual determinations underlying the question of immunity are also the factual determinations underlying the merits of his case, and thus the district court impermissibly resolved the case prior to trial. Rule 12(b)(4) allows the District Court in its discretion to postpone determination of the motion to trial, and permits factual hearings prior to trial if necessary to resolve issues of fact peculiar to the motion. *Id.* The 1944 advisory committee notes make clear the express intention of Rule 12(b) was to preserve the difference between those issues properly disposed of before trial and those issues that a trial on the merits could resolve. Fed. R. Crim. P. 12(b)(3) advisory committee's note to 1944 amendment. 12(b)(4) thus "preserves the right to jury trial in those cases in which the right is given under the Constitution or by statute. In all other cases it vests in the court authority to determine issues of fact in such manner as the court deems appropriate." *Id.* The advisory committee makes clear that there is a distinction between cases dealing with a Constitutional or statutory right to a jury trial, and those that do not.

This distinction is key. District courts may only determine issues of fact for those pretrial motions that Congress intended to be capable of resolution without a trial on the merits—without a jury trial. Supremacy Clause Immunity does not fall

into this category. While immunity is among those defenses a defendant can raise in a 12(b) motion, the findings of fact required in determining whether immunity exists overlap significantly with elements of the criminal offense indicted. *See* Fed. R. Crim. P. 12(b) advisory committee's note to 1944 amendment.

If a district court resolves disputed facts underlying the question of immunity, it would necessarily resolve those issues that the court should reserve for trial. In such cases, those factual disputes surrounding a federal agent's immunity "must be resolved before it can be determined that the agent was acting under authority of the federal government." *Whitehead v. Senkowski*, 943 F.2d 230, 236 (2d Cir. 1991).

The proper fact-finder for these disputes is a jury. *Id.* The Thirteenth Circuit properly noted that although Supremacy Clause immunity derives from the Constitution and the federal structure of our government, "the Sixth Amendment—and the principle that no official is above the law—is no less a part of our Constitution." R. at 7.

A number of courts have acknowledged this contradiction and reserved ruling on motions asserting immunity only in cases where there are no disputes of material fact. *See, e.g., Texas v. Kleinert*, 143 F. Supp. 3d 551, 557 (W.D. Tex. 2015), *aff'd*, 855 F.3d 305 (5th Cir. 2017) (determining the issue of Supremacy Clause immunity pretrial only because the facts were not in material dispute); *Morgan v. California*, 743 F.2d 728, 733 (9th Cir. 1984) (instructing courts to grant the motion only if it is clear the agent had immunity when viewing the disputed evidence in the light most

favorable to the State); *United States v. Aleman*, 286 F.3d 86, 91 (2d Cir. 2002) (finding that a pretrial hearing on the ultimate factual issue is improper).

In making determinations of fact, the district court in this case overlooked significant evidence and usurped the role of the jury in Schrader's case. A trier of fact could have reasonably concluded that Schrader was acting from personal vendetta outside the scope of fulfilling his federal duties. The resolution of these questions of fact not only determines the validity of his immunity defense but also determines the elements of the offense in question. Thus, the resolution of those facts would necessarily resolve the case as a whole, which does not align with the text or purpose of Rule 12 when it was drafted.

B. Allowing district courts to decide factual disputes during pre-trial disrupts the delicate balance of federalism by overcorrecting the problem of malicious prosecution, for which safeguards are already in place.

If this Court were to allow district courts to resolve factual disputes underlying questions of immunity, the balance of federalism would weigh disproportionately in favor of the federal government. It is fundamental in our federal structure that States have vast residual powers that are often exercised in concurrence with those of the federal government. *United States v. Locke*, 529 U.S. 89, 109 (2000).

However, when cases arise in an area that is both subject to federal jurisdiction and traditionally regulated by the States, courts must "start with the assumption that the historic police powers of the State were not to be superseded … unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). It "goes without saying" that preventing and dealing with crime

is "much more the business of the States than it is of the Federal Government." *Mesa v. California*, 489 U.S. 121, 138 (1989). Thus, the court should apply a "strong judicial policy against federal interference with state criminal proceedings" in immunity cases. *Id.*

This Court must strike a balance in Supremacy Clause immunity cases between state interference with federal action and federal interference into state prosecution. State prosecution of a defendant must not "retard, impede, burden, or in any manner control" the execution of federal law. *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819). However, federal interference in state prosecution is "an extremely delicate jurisdiction given to federal courts" that a court should exercise only in cases of "so exceptional a nature" as to justify the course. *Baker v. Grice*, 169 U.S. 284, 291 (1898). Supremacy Clause immunity was not intended to be "a shield for 'anything goes' conduct by law enforcement officers." *Long*, 837 F.2d at 746.

Petitioners claim that the usefulness of immunity would be severely limited if the availability of relief were to turn entirely on the nonexistence of material fact. *See Morgan*, 743 F.2d at 733; *Long*, 837 F.2d at 752. The dissent below suggested that in cases where no dispute of fact exists, prosecutors could merely allege a dispute in order to retain jurisdiction over the question of immunity; in such cases, the right is effectively lost because the right itself is to avoid requiring a federal officer to run the gauntlet of standing trial and having to wait until later to have the immunity issue decided. R. at 19.

But if a federal agent is in the custody of a state court with competent jurisdiction, he cannot be discharged solely on the ground that he is not guilty of the offense for which he is being held. The court should only discharge him if he is properly immune from the suit; immunity and innocence are two different legal assertions that require different procedures for review. If allowed to resolve factual disputes underlying both questions, a district court may, in believing the defendant to be innocent, believe he is immune.

As the dissent below properly notes, state interference with the execution of federal law is certainly a concern in these contexts. R. at 16. But safeguards are already in place to prevent prosecutors from acting out of contempt against federal programs: peculiar urgency and the federal removal statute.

The case at hand does not demonstrate a peculiar urgency warranting immediate invocation of federal jurisdiction under *Drury* nor *Baker* so as to impose the "exceedingly delicate" federal jurisdiction in state court proceedings. *Drury*, 200 U.S. at 6; *Baker*, 169 U.S. at 291. Any potential for local bias in prosecution of federal agents is properly addressed in the existing federal removal statute, 28 U.S.C. § 1442(a).

1. Peculiar urgency is not present in this case because New Tejas did not purposefully seek to thwart the enforcement of federal drug laws in prosecuting Schrader.

In prosecuting Schrader for assault, New Tejas acted solely to enforce its criminal laws rather than frustrate federal drug enforcement, an action which does not justify federal interference. A district court may properly grant immunity if, with

the facts viewed in a light most favorable to the State, the agent was authorized and did no more than was necessary and proper to accomplish his federal duty. *See Cunningham v. Neagle*, 135 U.S. 1, 75 (1890). Or, a district court may properly grant immunity if there is a finding of peculiar urgency. *Baker*, 169 U.S. at 290.

Peculiar urgency exists if "it appeared that the state was prosecuting federal officers in order to frustrate enforcement of federal laws." *Morgan*, 743 F.2d at 733; *Whitehead*, 943 F.2d at 235. If there is "no suggestion in the record that there was any purpose on the part of the state to frustrate federal law enforcement," the motion should be denied. *Morgan,* 743 F.2d at 733*; see also Baker*, 169 U.S. at 294 (refusing federal interference when facts presented no "extraordinary or peculiar circumstances" in favor of such interference); *Birsch v. Tumbleson*, 31 F.2d 811, 816 (4th Cir. 1929) (finding no urgency to release a federal agent in order to avoid delay of enforcement of federal laws).

A long history of state interference with federal policies informs this standard. Before the Civil War, the writ of habeas corpus was necessary to prevent abolitionist States from nullifying fugitive slave laws by prosecuting federal officers attempting to enforce them, and later, to prevent frustration of civil rights laws by hostile Southern States. *See Morgan*, 743 F.2d at 731 (citations omitted); *Cooper v. Aaron*, 358 U.S. 1, 5 (1958).

However, few cases have explicitly dismissed an indictment on a finding of peculiar urgency outside the context of racial unrest. In 2006, the Tenth Circuit affirmed a district court's granting the defendants' motion to dismiss on the basis

that the State's prosecution was an attempt to frustrate a federal program. *Livingston,* 443 F.3d at 1232.

In that case, the State of Wyoming filed misdemeanor charges against the defendants, federal employees involved in a federal action plan to repopulate the State with gray wolves. *Id.* at 1216. The decision to reintroduce wolves was "not surprisingly for a State heavily dependent on livestock for its economic well-being … met with vehement local opposition" that was well documented within the record. *Id.* at 1213–14. During an operation to track the wolves, defendants trespassed on private property. *Id.* at 1216.

The Tenth Circuit affirmed the order denying Supremacy Clause immunity on the grounds that the peculiar urgency of the case warranted federal intervention. *Id.* at 1231. The court found that rather than the prosecution demonstrating a bona fide effort to punish a violation of Wyoming trespass law, the State was instead "attempt[ing] to hinder a locally unpopular federal program." *Id.*

But the same level of peculiar urgency found in *Livingston* is not present in the case at hand. While the record contains evidence that the prosecutor in this case, in an appeal to her constituents, made a speech addressing the tension between federal and state marijuana laws, the prosecution itself was not pursued to hinder federal law. In *Livingston*, the State was using a misdemeanor trespass statute to prevent the actual execution of a federal program. Here, in prosecuting Schrader, New Tejas is not preventing the execution of federal drug law enforcement, but rather,

demonstrating a bona fide effort to enforce its criminal laws in the wake of a violent assault.

Furthermore, the defendants in *Livingston* were on-duty federal agents executing a federal program as part of their professions. Schrader was on vacation, thousands of miles away from his duty station. R. at 28. He was not present in the State due to any orders to enforce federal drug laws. R. at 28. Based on this evidence, New Tejas was not purposefully attempting to thwart the execution of federal drug regulation by prosecuting Schrader. Absent such peculiar urgency, imposing the "exceedingly delicate" federal jurisdiction in State court proceedings is not warranted.

A minority of courts have found peculiar urgency much more easily, "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." *Morgan*, 743 F.2d at 732 (quoting *Clifton v. Cox*, 549 F.2d 722, 729 (9th Cir. 1977) and *In re McShane*, 235 F. Supp. 262, 279 n.13 (N.D. Miss. 1964)).

The standard set out in these minority cases is cyclical and renders the *Neagle* test unnecessary. A case warrants federal interference if, on the undisputed facts, the federal agent was authorized and acted appropriately or, in cases where there is a dispute of material fact, if peculiar urgency exists. The *Clifton* interpretation of peculiar urgency renders the first portion of this test completely useless. If peculiar urgency is found whenever a federal officer is detained for properly performing federal duties, the test for immunity and peculiar urgency would necessarily be the

same, which could not have been the intention of this Court when asserting them as separate considerations in *Drury*. *Drury*, 200 U.S. at 7.

While not explicitly overruling this minority standard, the Ninth Circuit avoided its application and instead considered peculiar urgency to mean state hostility to federal programs. *Morgan*, 743 F.2d at 733. The *Morgan* court explained that "it seems clear that 'peculiar urgency' would exist if it appeared that the State was prosecuting federal officers in order to frustrate enforcement of federal law." *Id.* In applying the peculiar urgency standard, the court simply noted that there was "no suggestion in the record that there was any purpose to frustrate federal law enforcement" and thus peculiar urgency was not present. *Id.*

This Court should follow the overwhelming majority of circuits in determining the existence of peculiar urgency and equate a finding of peculiar urgency to evidence that the state prosecution intended to frustrate federal law. Given that New Tejas' prosecution of Schrader is a genuine attempt to enforce its criminal laws rather than an attempt to thwart federal drug enforcement, peculiar urgency does not exist here and federal interference is inappropriate.

2. Federal removal statutes already strike the proper balance to prevent state interference with enforcement of federal law.

The federal removal statute utilized by Schrader provides an additional safeguard against state interference with the execution of federal law. 28 U.S.C. § 1442(a) provides that a "criminal prosecution that is commenced in a state court and that is against or directed to … [an agent of the United States] … may be removed by them to the district court … embracing the place wherein it is pending." 28 U.S.C.

§1442(a). In addition to giving the defendant a trial free from local interests or prejudice, the federal removal statute also enables the defendant to have the validity of his immunity defense adjudicated in a federal forum. *Id.*

Historically, removal under §1442(a) was meant to ensure a federal forum in any case where an official is entitled to raise a defense arising out of his official duties. *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981). § 1442(a) and its predecessors directly addressed the problem of state hostility to execution of federal laws. Congress passed the earliest statute conferring the right of removal on federal officers in 1815 to protect customs officers in response to the New England States' hostility to the national trade embargo against England. *See* Elizabeth M. Johnson, *Removal of Suits Against Federal Officers: Does the Malfeasant Mailman Merit a Federal Forum?*, 88 Colum. L. Rev. 1098, 1099 (1988). The concept of federal officer removal has only broadened in scope since that time. *Id.*

In enacting this statute, Congress provided all the protection a charged federal agent needs against state prosecution. § 1442(a) provides wide protection to federal employees like Schrader. This Court has commanded that interpretation of the federal removal statute should not be narrow or limited. *Willingham v. Morgan*, 395 U.S. 402, 406 (1969) (citing *Colorado v. Symes*, 286 U.S. 510, 517 (1932)). The federal removal statute is in fact broad enough to cover all cases where federal officers can raise a "colorable defense" arising out of their duty to enforce federal law. *Id.* at 407. This Court has held that the right of removal is absolute for conduct performed under color of federal office and has insisted that the policy favoring removal should not be

frustrated by a narrow, grudging interpretation of § 1442(a)(1). *Manypenny*, 451 U.S. at 242.

Removal serves substantial federal interests. This Court has recognized that one of the most important reasons for removal is to have the validity of immunity tried in a federal court. *Id.* The fact that removal statutes implicate State interests does not impose any additional constitutional barrier to removal.

In enacting § 1442(a), Congress did not go further to include a provision granting the district court the power to resolve disputes of material fact. *Cf. Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 85 (1991) (finding that §1442(a) did not apply to federal agencies and explaining that "Congress could rationally have made such a distinction"). § 1442 is necessary and sufficient to make the enforcement of federal law effective and protect the officers who execute it.

Federal interference with the traditional police power of the State is not warranted here, and any potential for local bias is properly addressed with the "peculiar urgency" and federal removal statute safeguards. Absent some direct evidence to the contrary in the text or purpose of Rule 12, this Court should find that immunity can only be granted in cases where there is no genuine dispute of material fact. In cases where there is a genuine dispute, this Court should follow the traditional Rule 12 analysis and view the in a light most favorable to the non-moving party, in this case, the State.

II. States can prosecute a federal agent unless the agent can prove that he was authorized to perform the prosecuted act and that performing the act was both subjectively and objectively necessary and proper.

Nothing in our Constitution grants federal officials the unbridled privilege to commit state crimes. This Court has long recognized that States have the power to prosecute a federal official for committing a state crime. *Drury*, 200 U.S. at 7. But our Constitution makes federal law "supreme[.]" U.S. Const. art. VI, § 1, cl. 2. And the Supremacy Clause provides immunity to federal officials from state prosecution in certain circumstances. *Neagle*, 135 U.S. at 76. To that end, the test for Supremacy Clause immunity must maintain the "delicate balance between federal and state law enforcement powers." *Long*, 837 F.2d at 749.

The current Supremacy Clause immunity test established in *Neagle* grants immunity to a federal agent from a state criminal only when the agent was: (1) "authorized" to perform that act; and (2) in doing that act, he did no more than what was "necessary and proper for him to do." *Neagle*, 135 U.S. at 76. For an act to be "necessary and proper," the federal official must have acted with a "well-founded belief" that he was "justified in so doing" the act. *Id.* Courts have interpreted the "necessary and proper" prong to require an agent to prove that his act was both *subjectively* necessary and proper and *objectively* necessary and proper. *See, e.g.*, *Long*, 837 F.2d at 745.

For over a century, lower courts have not questioned that this is the proper test. *See Kleinert*, F.3d at 317; *Long*, 837 F.2d at 744; *Tanella*, 374 F.3d at 150; *Livingston*, 443 F.3d at 1220–21; *McShane*, 235 F. Supp. at 275; *Brown v. Cain*, 56 F.

Supp. 56, 58 (E.D. Pa. 1944); *State v. Deedy*, 407 P.3d 164, 188 (Haw. 2017). However, disagreements between how to apply this test have led commentators to quip that the "test is much easier to recite than to apply." *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, 2249–51 (2003).

This Court should affirm this test and clarify exactly how to apply it. A federal agent asserting immunity from a state prosecution under the Supremacy Clause must prove two things: (1) the agent must have been *authorized* by federal law to perform the act; and (2) the agent must have had a *subjectively* honest and an *objectively* reasonable belief that his act was necessary and proper to accomplish a federal duty. The subjective and objective components of the necessary and proper prong strike a constitutional balance between state and federal law enforcement powers.

A. Federal law must have authorized the federal agent to perform the act.

The threshold question for Supremacy Clause immunity is whether federal law "authorized" a defendant to perform the act for which the State is prosecuting him. *Neagle*, 135 U.S. at 75. If federal law does not "authorize" an action, then immunity under the federal constitution is not available because the defendant did not act as an agent of the federal government. *See id.* "Authorized" in this context does not mean that Congress must expressly authorize an agent's action, but rather, whether the action falls within the "general scope" of the agent's duty inferable from federal law. *Id.* at 58.

To illustrate, examine the facts in *Neagle*. There, California charged a United States marshal with murder after he repelled an attempted assassination of Justice Field by shooting and killing the assailant. *Id.* Though no express act of Congress directed Neagle to shoot and kill Justice Field's assailant, protecting Justice Field fell within the "general scope" of Neagle's duties as a marshal. *Id.* Thus, for purposes of the Supremacy Clause, Neagle was "authorized" to kill Justice Field's assailant. *Id.*

The Thirteenth Circuit below overlooked this prong of the test and instead analyzed whether Schrader's conduct was "necessary." R. at 9. This approach is inconsistent with every court that has applied the Supremacy Clause immunity test. *See, e.g.*, *Colorado v. Nord*, 377 F. Supp. 2d 945, 949 (D. Colo. 2005) (citing *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982)). Although arresting White was improper and unnecessary, a federal statute gave Schrader broad authority to perform probable cause arrests. 18 U.S.C. § 3052; R. at 31. Because Schrader was authorized by statute, his case is different from the cases involving reckless driving by federal agents on which the majority below relied. R. at 9–10.

But, even though Schrader satisfies the broad threshold prong of the Supremacy Clause immunity test, the analysis does not end there. Schrader fails the more demanding subjective and objective components of the "necessary and proper" test.

B. The federal agent must have had a subjectively honest and an objectively reasonable belief that his actions were necessary and proper to accomplish his federal duty.

In addition to being "authorized" to perform an action, a federal agent's action must have been "necessary and proper" for that agent to be afforded Supremacy Clause immunity. *See Neagle*, 135 U.S. at 76. The Thirteenth Circuit correctly concluded Schrader is not entitled to immunity because his actions were not "necessary and proper" under *Neagle*.

The term "necessary and proper" used for the Supremacy Clause immunity test has a more restrictive meaning than that same term used in the Necessary and Proper Clause. U.S. Const. Art. I, § 8, cl. 18. In *McCulloch*, 17 U.S. at 421, Chief Justice Marshall held that, so long as the end is "legitimate" and the means are "plainly adapted to that end" and within the "scope of the constitution," Congressional legislation is valid under the Necessary and Proper Clause and a State cannot impede that legislation. *Id.*

McCulloch spoke to the legislative branch's power to legislate under the Necessary and Proper Clause; *Neagle* spoke to an individual executive branch official's immunity from violating State law in furtherance of a federal duty under the Supremacy Clause. *See Neagle*, 135 U.S. at 76. Thus, *Neagle* demanded more scrutiny of the means used by a federal agent to accomplish a federal end than *McCulloch* did of the means Congress used under the Necessary and Proper Clause. *See id.* Courts that have addressed the differences of the language have reached the same conclusion. *See, e.g.*, *Livingston*, 443 F.3d at 1220 n. 4 ("This cannot be the

definition of Supremacy Clause immunity because it would imply that federal officers are virtually unlimited in their choice of appropriate means (including violation of state law) to carry out federal policy. As the cases demonstrate, that is too broad an understanding of the immunity.").

To satisfy the "necessary and proper" prong of the Supremacy Clause immunity analysis, a federal agent must show two things: (1) that the agent had a subjectively "honest" belief that the means he used were justified; and (2) that he had an objectively reasonable belief that the means were justified. *Long*, 837 F.2d at 745; *Kleinert*, 855 F.3d at 317; *Tanella*, 374 F.3d at 149–50.

1. An agent fails the subjective component if he acted out of personal interest or with criminal intent.

Schrader did not hold a subjectively honest belief that his "flying tackle" was justified to accomplish a federal duty. Schrader acted "with malice or with some criminal intent" in arresting White. R. at 10 (citing *Clifton*, 549 F.2d at 728). His subjective mindset bars him from immunity.

The subjective prong turns on whether the agent held "an honest belief that his action was justified." *Long*, 837 F.2d at 745; *see also Tanella*, 374 F.3d at 152 (granting immunity to a federal agent who killed a fleeing suspect because he "honestly believed" the suspect was a threat to his life). An agent is denied immunity where he acted with "personal interest, malice, or actual criminal intent." *See Baucom*, 677 F.2d at 1350. Thus, an agent can satisfy the subjective component by showing he "had *no motive other than* to discharge his duty[.]"). *McShane,* 235 F. Supp. at 274 (emphasis added).

An agent fails the subjective prong if the agent's actions imply criminal intent. *See Drury*, 200 U.S. at 8. In *Drury*, Pennsylvania indicted an Army officer for murder after he ordered the shooting of a man accused of stealing from the federal arsenal. *Id.* There was a dispute as to whether the thief was fleeing or had already surrendered at the time of the shooting. *Id.* In denying the officer a writ of habeas corpus, the court implicitly acknowledged that knowingly executing an unarmed man who had surrendered would not be a proper reason for immunity. *Id.*; *see also In re Lewis*, 83 F. 159, 160 (D. Wash. 1897) (stating that immunity turns on "whether the officers acted wantonly and with criminal intent, or whether, in so far as their acts may be regarded as wrongful, they were mere errors of judgment.").

An agent also fails the subjective prong if he wields his authority to satisfy a personal dispute. *See Morgan*, 743 F.2d at 734. In *Morgan*, California charged two DEA agents with drunk driving and assault. *Id.* at 733. The agents claimed they were on their way to meet with an informant when they crashed into another car, but the facts suggested they were actually on their way for drinks at the police academy. *Id.*

After crashing into the car, the accounts of the story dramatically diverged. The agents claimed that they confronted the car's owner and the owner brandished a concealed gun and threatened one of the agents. *Id.* at 730. The owner countered that the agents exited their car and physically struck both him and his wife in a heated altercation. *Id.* Either way, the agents then pursued the couple to a nearby jewelry store where they arrested the car owner. *Id.*

While the agents had the authority to arrest the owner (because threatening a federal agent is a crime), the arrest would not have been necessary and proper if it was in retaliation to a fight initiated by the agents. *Id.* Reversing the lower court's finding that the agents acted in good faith, the Ninth Circuit held that the disputed facts suggested the agents' motive was not to pursue their official duties. *Id.* at 734. After all, it would not be necessary and proper if the agents sought to use the "tools of [the] job and the authority of [a federal agent] to satisfy a personal problem." *See Files*, 36 F. Supp. 3d at 884 (denying immunity where a federal officer used federal resources and his authority to satisfy a personal grievance).

The facts here suggest that Schrader sought to satisfy a personal vendetta when he tackled White. Similar to the traffic dispute in *Morgan*, Schrader and White were involved in a traffic dispute hours before the arrest. R. at 29. Both individuals exited their vehicles and the situation escalated to physical contact. R. at 29–30. Furthermore, just like how the agents in *Morgan* later sought to arrest the individual at a jewelry shop, Schrader later arrested White outside of a lawful business. R. at 31. The agents in *Morgan* pretensed their arrest on the individual's threat to a federal agent—normally, a legitimate ground for an arrest. Likewise, Schrader proffered a legitimate reason for a federal agent to arrest White: White possessed a small bag of marijuana. R. at 31–32. And, while the parties in *Morgan* disputed whether the agents had been on-duty, here, Schrader was on vacation thousands of miles away from his duty station. R. at 28.

The facts also suggest that Schrader acted with criminal intent when he assaulted White. Hours before this arrest, Schrader and White had nearly come to blows in front of Schrader's new wife and two young children. R. at 29. When Schrader saw White harmlessly holding a bag of marijuana five yards away from him, Schrader did not calmly approach White to inform him that he was violating federal law. R. at 31. Schrader did not even identify himself as a federal agent. R. at 31. Instead, Schrader employed a "flying tackle" to arrest someone walking on a public sidewalk for possessing a meager amount of marijuana. R. at 31, 38. He charged at White and crushed him onto the concrete, breaking his arm and chipping his teeth. R. at 31.

Schrader's contentions paint the picture of an overzealous agent enforcing federal law. But the facts viewed in the light most favorable to the State suggest that Shrader used the shield of federal authority as a sword in retaliation for White cutting him off in traffic. Schrader lacked an honest belief that his actions were justified to enforce federal law. Thus, the Thirteenth Circuit correctly determined that Schrader is not entitled to immunity.

2. An agent fails the objective component if he lacked a reasonable belief that the means he used were necessary to accomplish his federal duty.

In addition to having an *honest* belief, a federal agent seeking immunity must have acted with a *reasonable* belief that the means used were necessary to accomplish a federal duty. *See, e.g.*, *Kleinert*, 143 F. Supp. 3d at 565 ("For the objective prong …, the court's focus is on the reasonableness of [the agent's] belief that his actions were necessary and proper."). Schrader fails this objective prong because he could not have

reasonably believed that tackling and crushing White was necessary to enforce federal drug laws.

Lower courts have uniformly applied an objective component when evaluating Supremacy Clause immunity. *See Kleinert*, 143 F. Supp. 3d at 565; *Tanella*, 374 F.3d at 150; *Long*, 837 F.2d at 745. Even courts that question the subjective prong acknowledge that the objective prong is indispensable to the test. *See Livingston*, 443 F.3d at 1222; *Idaho v. Horiuchi*, 253 F.3d 359, 373 (9th Cir. 2001), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001).

But courts have articulated this objective standard differently. Most courts evaluate objective reasonableness of the agent's *belief* that the means used were necessary to accomplish the federal duty. *See Kleinert*, 143 F. Supp. 3d at 565; *Tanella*, 374 F.3d at 150; *Long*, 837 F.2d at 745; *Livingston*, 443 F.3d at 1222. Some courts appear to evaluate the reasonableness of the *means* themselves. *See Tennessee v. Dodd*, No. 1:08-CR-10100, 2009 WL 32886, at *7 (W.D. Tenn. Jan. 6, 2009). And some courts conflate these standards. For example, the Thirteenth Circuit below stated that Agent Schrader "employed means that could not … *be considered reasonable*," while also stating that federal agents are entitled to immunity "only when they employ *reasonable means* in accomplishing their federal duties." R. at 11–12 (emphasis added).

This Court should affirm the long-applied objective component as part of the Supremacy Clause immunity test and establish a uniform set of factors for applying this component. Cases evaluating Supremacy Clause immunity reveal three common

factors by which a court should evaluate the reasonableness of an agent's belief: (a) whether the agent used means that were in fact reasonable; (b) whether the federal agent was acting within the scope of his ordinary duties; and (c) whether the alleged state law violation was excessive in relation to the federal duty the agent sought to accomplish.

a. Unreasonable means weigh against an agent satisfying the objective component.

Courts should consider whether the agent used means which were in fact reasonable when determining whether an agent reasonably believed those means were necessary to accomplish a federal duty. Clarifying that actual reasonableness of the means is a factor in evaluating an agent's reasonable belief will solve lower court confusion about how to apply the objective prong. Courts often consider whether the means a federal agent used were in fact reasonable when evaluating whether the agent reasonably believed the means were necessary. *See*, *e.g.*, *Horiuchi*, 253 F.3d at 373.

For example, in *Horiuchi*, the Ninth Circuit scrutinized whether a federal agent's fatal sniper shot was *in fact* reasonable when analyzing whether the agent *believed* taking the shot was reasonable. *Id.* The court denied the agent immunity because disputed evidence suggested that the shot was unreasonable. *Id.* And because the evidence suggested the shot was unreasonable, the court could not "conclude that a reasonable agent in [his] position" would have believed that deadly force was reasonable. *Id.*; *see also Files*, 36 F. Supp. 3d at 882 (considering the testimony of an official's former superior explaining the "various ways" in which the

official acted inappropriately in holding that the agent failed the objective component of the Supremacy Clause immunity test).

Here, the "flying tackle" Schrader used was unreasonable and reckless. R. at 38. White was not a threat to Schrader; White was not a threat to the public; and White turned to run only because the man who confronted him in traffic earlier that day began charging at him from five yards away, without identifying himself as a federal agent.

b. An agent acting outside the scope of his ordinary duties weighs against the agent satisfying the objective component.

Courts should also consider the scope of the agent's ordinary duties when evaluating the reasonableness of an agent's belief. Courts have been less likely to hold that an agent satisfies the objective component when the agent acted outside the scope of his ordinary duties. *Horiuchi*, 253 F.3d at 359 (Hawkins, J., dissenting) ("The only cases in which immunity has been denied are cases in which there is clear evidence of malice *or evidence that the officer was not on official duty*.") (emphasis added); *Whitehead*, 943 F.2d at 234 (the defendant must have "reasonably believed that his actions were necessary to perform *his tasks* at the time of the charged improper conduct.") (emphasis added).

Recall *Morgan*, the case in which California charged two DEA agents with drunk driving and assault. *Morgan*, 743 F.2d at 733. There, the Ninth Circuit denied the agents immunity when the disputed facts suggested that the agents had been on their way to the police academy for drinks when they crashed into another car and later assaulted the driver of that car. *Id.* Even if the agents' claim that they had been

on their way to meet with an informant was true, driving drunk could not be "necessary and proper" to carrying out this official duty. *Id.*

Contrast *Morgan* with a case in which federal agents acted pursuant to their ordinary duties. *See Livingston*, 443 F.3d at 1230. In *Livingston*, the Tenth Circuit affirmed a grant of immunity when the State charged two federal Wildlife Services officials with trespass for going onto private land while on duty in furtherance of their wolf capture operation. *Id.* The Wildlife officials satisfied the objective component because they "were attempting to fulfill their federal duty to monitor the wolves through a capture and collar operation [and] they confined their acts to an objectively reasonable view of the scope of their authority." *Id.*; *see also McShane*, 235 F. Supp. at 275 (holding that a United States marshal charged with breach of the peace satisfied the objective component when he deployed tear gas into a crowd while acting in his official capacity pursuant to an order from the Attorney General to respond to school integration riots in Mississippi).

Further, an agent's *ordinary duties* are different from an agent's *authority*. *See Files*, 36 F. Supp. 3d at 882. In *Files*, a district court denied immunity to a federal Wildlife Services official charged with animal cruelty for trapping his neighbors' dog. *Id.* In denying Files immunity, the court acknowledged that Files had the federal "authority" to trap the dog. *Id.* at 883. But Files was still not entitled to immunity because trapping his neighbors' dog as part of a personal feud with his neighbors fell outside the scope of his job—he trapped the dog "*not because he felt it was part of his job to do so*, but because he sought to use the tools of his job and the authority of an

urban specialist to satisfy a personal problem." *Id.* at 884 (emphasis added). Thus, an agent acting outside the scope of his ordinary duties weighs heavily against the agent holding a reasonable belief.

Here, Schrader was acting far outside the scope of his ordinary duties. Schrader's focus at the FBI is on organized crime—he has never made a drug arrest in his twenty-year career. R. at 27–28. Schrader was also on the fifth day of his honeymoon—touring New Tejas with his wife and two young children. R. at 28. Reasonable off-duty federal agents do not make probable cause arrests for minor drug offenses. And they certainly do not make these arrests while on a family vacation. Like the Wildlife Services official in *Files* who trapped his neighbors' dog, Schrader acted outside the scope of his ordinary duties to arrest White.

c. An agent committing a severe state offense to accomplish a trivial federal duty weighs against the agent satisfying objective component.

Finally, courts should consider the severity of the state offense versus the gravity of the federal duty. Courts have denied immunity to federal agents who used their authority to commit a violent state offense to accomplish a minor federal duty. *See Drury*, 200 U.S. at 8. In *Drury*, this Court denied immunity to an Army officer in a prosecution for murder after he ordered a fellow soldier to shoot someone who had allegedly surrendered after stealing copper. *Id.*; *see also Castle*, 254 F. at 919 (denying immunity to federal agents charged with murder after shooting at a car they suspected of illegally transporting whiskey).

Some courts have suggested this balancing test could become the stand-alone test for immunity. *Livingston*, 443 F.3d at 1222 n. 5. In *Livingston*, the Tenth Circuit articulated this balancing test in the context of federal officials being charged with misdemeanor trespass while acting in the course of their official duties. *Id.* Ultimately, the court left "for another day whether federal officers are entitled to Supremacy Clause immunity where their state law violation was disproportionate to the federal policy, they were carrying out[.]" *Id.* Judge Skyler concurring below denied Schrader immunity on the basis of this test, reasoning that Schrader committed the "grievous state offense" of aggravated assault for the purpose of enforcing a "trivial" regulatory offense. R. at 14.

But rather than a stand-alone balancing test, balancing should be a factor to weigh as part of the objective component. The severity of the state offense and the importance of a given federal policy are objective factors. When a federal officer commits a *severe* state offense to enforce only a *trivial* federal policy, it is less likely that an agent would reasonably believe such extreme measures to be necessary to accomplish the duty. But, as the gravity of the federal duty becomes greater—such as an agent protecting his own life—an agent is much more likely to reasonably believe that taking action which could amount a severe state offense is necessary. *See, e.g.*, *Tanella*, 374 F.3d at 150 (shooting a suspect based on a reasonable fear that the suspect could harm the agent). Likewise, when an agent only violates a trivial state offense to accomplish a federal duty, an officer may reasonably believe that committing a nominal violation of state law is necessary to accomplish that duty. *See,*

e.g., *Livingston*, 443 F.3d at 1222 n. 5 (trespassing on private land to enforce the federal wolf capture program).

Here, Schrader assaulted someone for possessing two ounces of marijuana—a petty federal offense. Even worse, Schrader hardly accomplished a federal duty. He arrested White, but nothing indicates he filed an incident report; he arrested White, but nothing indicates that he referred White for federal prosecution; he arrested White for possessing two ounces of marijuana in plain view, but never investigated how White obtained the marijuana. R. at 29–31. An agent acting with a *reasonable* belief that his arrest was necessary to accomplish a federal duty would have taken these routine next steps after the arrest. Schrader did not.

All three factors point to one conclusion: Schrader fails the objective prong. The Thirteenth Circuit correctly determined that Schrader is not entitled to immunity under the Supremacy Clause because he lacked an objectively reasonable belief that the "flying tackle" was necessary to accomplish a federal duty.

C. This test strikes the proper balance between the state and federal interests at stake in the Supremacy Clause immunity analysis.

Supremacy Clause immunity involves "a delicate question of federal-state relationships." *Clifton*, 549 F.2d at 729. The test governing Supremacy Clause immunity must account for this delicate relationship. On the one hand, States have an interest in enforcing their criminal laws. On the other hand, the federal government has an interest in preventing States from impeding enforcement of federal law. *See* Waxman & Morrison, 112 Yale L.J. at 2249–51.

The Constitution reserves criminal law enforcement to the States. *See* U.S. Const. amend. X; *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1871 (2016). When a person violates a State's criminal law, that State has vested constitutional authority to punish that individual for that individual's transgression. *See Sanchez Valle*, 136 S. Ct. at 1871.

Congress also has the power to create criminal laws. U.S. Const. Art 1, § 8, cl. 18; *McCulloch*, 17 U.S. at 421. And when Congress passes a criminal law, the Supremacy Clause preempts state law in conflict with that federal law and prevents States from impeding enforcement of that law. U.S. Const. Art. VI, § 1, cl. 2; *McCulloch*, 17 U.S. at 396.

But individual federal executive branch agents do not have the authority to unilaterally preempt state criminal law in furtherance of their federal duties. Thus, the Supremacy Clause immunity test must strike a balance between preserving the States' rights to enforce criminal law while not inhibiting the federal government's ability to enforce criminal law. The Court recognized this important point when it established subjective and objective components in *Neagle* in 1890. 135 U.S. at 76.

The *Neagle* two-pronged Supremacy Clause immunity test adequately balances the States' power to enforce criminal laws with the federal government's Supremacy Clause interest in enforcing federal law. The dissent below suggested abandoning the subjective and objective prongs altogether, R. at 21–24, while the district court suggested adopting the qualified immunity standard for the Supremacy

Clause test. R. at 40–41. Adopting either approach would knock the delicate-federal state relationship out of balance.

1. The subjective prong protects federal agents who act in good faith but ensures that federal agents do not abuse their powers for personal gain.

Examining a federal agent's subjective intent ensures that the agent properly acts under the color of federal law and does not use the Supremacy Clause as "a shield for 'anything goes' conduct by federal law enforcement officers." *Long*, 837 F.2d at 746. Affording immunity without regard for subjective intent would provide a license for rogue federal agents to abuse their authority to further personal interests under the guise of duty.

As early as *Neagle*, courts have looked to the subjective intent of the agent in determining whether to give the agent Supremacy Clause immunity. *Clifton*, 549 F.2d at 728 (explaining that the *Neagle* Court focused on the agent's belief that the decedent was reaching for a knife even though he was not); *Lewis*, 83 F. at 160 (stating that immunity turns on "whether the officers acted wantonly and with criminal intent, or whether, in so far as their acts may be regarded as wrongful, they were mere errors of judgment."). The subjective analysis appropriately ensures that federal agents are not hiding behind broad-sweeping statutory authority to justify actions delivered from a malicious intent.

Conversely, the subjective analysis affords federal agents leeway where they honestly believe their actions were justified even if they in fact were not. *See, e.g.*, *Clifton*, 549 F.2d at 727 (determining that a federal agent who mistakenly shot and

killed an individual honestly believed he acted lawfully). Thus, the subjective intent does not chill effective federal law enforcement. Quite oppositely, it encourages good-faith enforcement of federal law.

The dissent below relied on this Court's probable cause jurisprudence to argue against using a subjective component in the Supremacy Clause immunity test. R. at 22 (citing *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *Whren v. United States*, 517 U.S. 806, 814 (1996); *Horton v. California*, 496 U.S. 128, 138 (1990)). Similarly, both the Ninth and Tenth Circuits questioned the use of the subjective prong in response to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), a civil qualified immunity case. *Livingston*, 443 F.3d at 1220–21; *Horiuchi*, 253 F.3d at 366 n. 11. However, neither court analyzed the implications of abandoning the subjective prong. *See Livingston*, 443 F.3d at 1220–21; *Horiuchi*, 253 F.3d at 366 n. 11.

Qualified immunity makes federal agents immune from a civil suit unless the officer violated an individual's federal constitutional or statutory rights. *Harlow*, 457 U.S. at 818. In *Harlow*, this Court eliminated the subjective intent analysis from the qualified immunity test, leaving only an objective component. *Id.* at 817–18. This Court concluded that "bare allegations of malice should not suffice to subject government officials to either the cost of trial or to the burdens of broad-reaching discovery." *Id.*

Analogizing to other areas of law enforcement misses the point. Probable cause cases and qualified immunity cases are fundamentally different from Supremacy Clause immunity cases. In probable cause cases, a court is assessing whether the

government had constitutionally required probable cause to arrest or search an individual charged with a crime. *See Horton*, 496 U.S. at 139. In qualified immunity cases, a federal officer faces a *civil cause of action* for violating *federal* statutory and constitutional rights. But in the Supremacy Clause immunity context, an individual federal agent is being charged with violating state criminal law. While qualified immunity and Supremacy Clause immunity both operate to "reduce the inhibiting effect that a civil suit or prosecution can have on effective exercise of official duties," they nonetheless "have different sources and functions." *Livingston*, 443 F.3d at 1221–22.

Federalism is not a concern in qualified immunity cases—but federalism is at the heart of the Supremacy Clause. Comparisons between Supremacy Clause immunity and qualified immunity erroneously magnify one common function of immunity while minimizing crucial differences. Though it is important to "reduce the inhibiting effect" criminal prosecution and civil suits could have on federal agents, *id.*, to focus solely on this goal ignores the sensitive state interests present in the Supremacy Clause immunity context that are absent from the qualified immunity context.

Adopting the qualified immunity analysis would eliminate the crucial function of subjective component. Failing to assess the subjective intent of federal agents would deprive the States of the ability to enforce valid criminal laws against persons who act with criminal intent. Analyzing the subjective intent of federal agents, like

Schrader here, ensures that agents cannot wield the Supremacy Clause shield as a sword to commit state crimes.

Keeping in mind the need for balance, the subjective prong also protects federal agents and promotes effective federal law enforcement. Take Schrader's case as a prime example. Assume for the sake of argument that Schrader acted in good faith. Schrader would meet the subjective prong. The subjective prong would succeed in protecting the effective enforcement of federal law by shielding an officer who pursued his duties in good faith.

Assume now that there is no subjective prong. Assume further that the facts here prove that Schrader intended to severely injure White. Schrader could then escape prosecution. In this scenario, a federal agent who was on vacation, with zero expertise or experience in the particular area of law he sought to enforce, R. at 28, could lawfully assault someone intentionally, simply because he observed a minimal, nonviolent federal offense occur in his presence.

This result would not promote effective federal law enforcement—it would simply shield derelict agents behind the cloth of federal authority and enable them to evade the just consequences of their intentional actions. And it would ignore the State's constitutional interest in vindicating a severe violation of its sovereign authority.

2. The objective component balances the need for federal agent discretion with the State's power to vindicate violations of its criminal law.

The objective component of necessary and proper prong is indispensable to balancing state and federal interests. This prong balances the need to give federal agents discretion to perform their duties while allowing States to enforce their criminal laws when federal agents commit state crimes on the basis of unreasonable beliefs that their actions were warranted.

Discretion is important for enforcing federal law. *See Barr v. Mateo*, 360 U.S. 564, 575 (1959). States do not have the power to second-guess every decision a federal agent makes in the course of the agent's work. Such a high bar for federal officers would certainly chill effective law enforcement. *See id.*

At the same time, a State should not be "made to tolerate unwarranted interference with its duty to protect the health and welfare of its citizens." *Long*, 837 F.2d at 749. But adopting a qualified immunity standard as the district court below suggested would do just that. *See* R. at 40–41. If this Court adopted the qualified immunity test, the objective analysis would change. Rather than asking if an officer reasonably believed his actions were justified, the question would instead become whether that officer violated "clearly established federal law." *Harlow*, 457 U.S. at 818.

As discussed with the subjective component, the qualified immunity standard ignores the role of federalism in the Supremacy Clause immunity analysis. *See id.* In a private civil suit against a federal officer, it makes sense that immunity turns on

whether the officer violated the federal constitutional or statutory rights. But why—when a federal agent is accused of committing a *state* crime—should the agent's conduct be judged solely against *federal* law?

Analyzing whether an agent had a reasonable belief that his action was justified to accomplish a federal duty still accomplishes the goals of qualified immunity. After all, privilege with respect to discretionary acts applies to "the *sound exercise* of discretionary authority." *Barr*, 360 U.S. at 575 (emphasis added). The objective component of the necessary and proper test allows a court to determine whether a federal agent's exercise of discretionary was "sound" or not.

Furthermore, "qualified immunity provides ample protection to all but the *plainly incompetent* or those who *knowingly violate the law*." *Malley v. Briggs*, 475 U.S. 335, 335 (1986) (emphasis added). So too does the necessary and proper prong of the Supremacy Clause test. The subjective component covers those agents who knowingly violate the law, while the objective component covers agents who are "plainly incompetent[.]" *Id.*

Consider again the three factors relevant under the objective analysis: (1) whether the means were in fact reasonable; (2) whether the agent was acting within the scope of his ordinary duties when he violated state law; and (3) whether the violation of state law was excessive in relation to the asserted federal duty. If all three of these factors weigh against an agent—like they do here against Schrader—then that agent's action was in all likelihood "incompetent." *Briggs*, 475 U.S. at 335. And the Supremacy Clause should not shield incompetent agents from prosecution, given

the States' reserved constitutional power to enforce criminal law. This standard is not a high bar. It adequately balances federal interests by protecting agents who act with a reasonable belief that their actions were justified—even if that reasonable belief turns out to be mistaken.

Adopting the "clearly established federal law" analysis would tilt the Supremacy Clause balance too heavily in favor of the federal government. In the course of protecting broad federal agent discretion in implementing federal law, it would turn the rule of law on its head. It would give federal executive branch agents—even off-duty, vacationing federal agents not acting pursuant to any official duty—unilateral and unbridled authority to preempt *state* criminal law, so long as they do not violate *federal* constitutional or *federal* statutory rights.

Such a holding would make federal agents "virtually unlimited in their choice of appropriate means … to carry out federal policy." And "this cannot be the definition of Supremacy Clause immunity." *Livingston*, 443 F.3d at 1221 n. 4. To hold that in the "administration of criminal law" so long as "the end justifies the means" would be to declare that the government "may commit crimes in order to secure the conviction of a private criminal[.]" *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). In a country governed by the rule of law, "decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen." *Id.*

This Court should affirm the long-established Supremacy Clause immunity test and hold that (1) an agent must have been *authorized* by federal law to perform

the act, and (2) the agent must have had a *subjectively* honest and an *objectively* reasonable belief that his act was necessary to accomplish a federal duty. Schrader failed to satisfy this test. As such, he is not entitled to immunity under the Supremacy Clause.

CONCLUSION

For the foregoing reasons, this Court should affirm the Thirteenth Circuit Court of Appeals and remand the case for further proceedings.

Respectfully submitted,

/s/ Team #95
Team #95
Counsel for Respondents

CERTIFICATE OF SERVICE

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

/s/ Team #95
Team #95
Counsel for Respondent
November 18, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33.1, the undersigned certifies that the Brief of Respondent, the State of New Tejas, contains 12,688 words typed in Century Schoolbook 12pt. font, beginning with the Statement of Jurisdiction through the Conclusion, including all headings, but excluding the Certificate of Service, Certificate of Compliance, and the attached Appendices.

/s/ Team #95
Team #95
Counsel for Respondent
November 18, 2019

Appendix A

28 U.S.C. § 1442—Removal

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

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

18 U.S.C. § 3052—Powers of Federal Bureau of Investigation

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

21 U.S.C. § 844—Penalties for Simple Possession

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order. . . .

21 U.S.C. § 802—Definitions

As used in this subchapter:

. . .

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.

21 U.S.C. § 812—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

Appendix B

Section 22.01 of the Penal Code of New Tejas—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—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 Justification

(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.