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 PETITIONER

TEAM NUMBER 18
COUNSEL FOR PETITIONER

NOVEMBER 18, 2019

QUESTIONS PRESENTED

I. Whether disputed facts underlying a federal officer's motion to dismiss a state criminal prosecution based on Supremacy Clause immunity are decided by the district court or viewed in the light most favorable to the State.

II. Whether a federal officer is immune from state criminal prosecution under the Supremacy Clause when he acts within the general scope of his duties and does not violate clearly established federal law.

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 2, 2018. The petition was timely filed and granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1442(a)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix contains the text of the following constitutional and statutory provisions relevant to this case: U.S. Const. Art. VI; 18 U.S.C. § 3051; 21 U.S.C. § 844(A); 28 U.S.C. § 1442(a)(1); New Tejas Penal Code § 50.01; New Tejas Penal Code § 50.02.

STATEMENT OF THE CASE

I. Factual Background

A. The Petitioner

The petitioner, Agent Hank Schrader, has served the Federal Bureau of Investigation as a special agent for almost 20 years. R. at 27a. Agent Schrader investigated crimes involving racketeering, wire fraud, money laundering, and kidnapping. R. at 28a. He received several commendations for his work as a federal officer enforcing the law of the United States. R. at 28a. Throughout Agent Schrader's career he has been stationed in New Mexico, Michigan, and (currently) Wisconsin. R. at 28a. In November 2016, Agent Schrader and his family traveled to Madrigal, New Tejas for a vacation. R. at 28a. During the vacation, Agent Schrader, Mrs. Schrader, and her two young children planned to visit the New Tejas History Museum in Downtown Madrigal. R. at 28a.

B. The Lane Change and Confrontation

Just as the family's rented green convertible reached the outskirts of Madrigal, Mr. White, driving a red truck, pulled in front of them. R. at 29a. Agent Schrader testified that Mr. White was speeding dangerously and slammed on his brakes after pulling in front of the convertible driven by Agent Schrader. R. at 29a. Mr. White denies speeding and denies braking after changing lanes in front of Agent Schrader. R. at 29a. Mrs. Schrader was riding in the passenger seat of the vehicle that Agent Schrader was driving and stated that she felt her husband brake sharply. R. at 29a.

Shortly after the lane change, both men came to a stop at the next red light and a confrontation occurred. R. at 29a. Although neither man remembers exactly what was said, they both agree that yelling occurred and that Mr. White pushed Agent Shrader. R. at 29a. Before the violence could escalate further, the stop light turned green, other drives became impatient and honked their horns, and both men returned to their vehicles. R. at 30a.

C. The Arrest

After spending several hours at the New Tejas Museum, Agent Schrader and his family looked for a place to eat lunch. R. at 30a. While looking for a place to eat, Agent Schrader saw Mr. White step out of a building approximately fifteen feet in front of him. R. at 30a. Mr. White was carrying a transparent plastic bag containing what was clearly two ounces of marijuana. R. at 31a. Marijuana, although legal to possess and consume under New Tejas state law, remains a Schedule I drug that is illegal to possess under federal law. R. at 30a. Agent Schrader shouted, "Stop! You're under arrest!" upon seeing Mr. White with the illegal drug. R. at 31a. Mr. White immediately turned and began to run away from Agent Schrader. R. at 31a. To effectuate the arrest of Mr. White for illegally possessing marijuana, Agent Schrader tackled Mr. White from behind. R. at 31a.

Agent Schrader informed Mr. White that he was an FBI agent enforcing federal law, placed Mr. White in handcuffs, and informed him that he was under arrest for the possession of marijuana in violation of Section 844 of Title 21 of the United States Code. R. at 31a. Agent Schrader testified that he was unaware of the

New Tejas state law legalizing the possession and consumption of marijuana, but even if he had been he would not have acted differently R. at 31a. As a federal officer, Agent Schrader took an oath to enforce federal law despite what state law may dictate. R. at 32a. Mr. White's possession of a marijuana was a violation of federal law; therefore, Agent Schrader arrested him. R. at 32a.

D. The Speech

The Madrigal Community reacted with outrage to Agent Schrader's enforcement of federal law. R. at 32a. On the day following Mr. White's arrest, several thousand protestors gathered in Downtown Madrigal to express their anger. R. at 32a. Among the protestors was Madrigal County District attorney, Mrs. Wexler. R. at 32a. DA Wexler, who was elected on a pro-marijuana platform, gave a speech at the rally which included the following excerpt:

> The people of New Tejas, exercising their sovereignty, have determined that possession and consumption of marijuana is and should be legal. 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 32a-33a (emphasis added). At DA Wexler's direction, Agent Schrader was subsequently indicted for assault and aggravated assault arising out of his attempt to enforce federal law by arresting Mr. White. R. at 33a.

II. Procedural History

Agent Schrader removed the instant case to the United States District Court for the District of Madrigal under Section 1442 of Title 28 of the United States Code. R. at 33a. Under Section 1442, an officer of the United States is permitted to remove a "criminal prosecution that is commenced in a State court" against the officer "for or relating to any act under color of such office or on account of any . . . authority claimed under any Act of Congress for the apprehension or punishment of criminals[.]" R. at 33a-34a. In *Mesa v. California*, 489 U.S. 121, 129 (1989), this Court held that an officer removing a proceeding under 28 U.S.C. § 1442 must plead a federal defense to the state prosecution. R. at 34a. Agent Schrader complied with this requirement by moving to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b). R. at 34a. Agent Schrader's motion to dismiss is grounded in his entitlement to immunity from the state prosecution under the Supremacy Clause. R. at 34a.

On September 14, 2017, after conducting an evidentiary hearing, the district court granted Agent Schrader's motion to dismiss the indictment. R. at 27a, 41a. The State timely appealed that decision to the United States Court of Appeals for the Thirteenth Circuit. R. at 3a. On October 2, 2018, the Thirteenth Circuit reversed the district court's decision and remanded the case. R. at 1a, 13a. Agent Schrader

appealed to the United States Supreme Court and this Court granted certiorari on March 18, 2019.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit erred in reversing the District Court's decision to grant the petitioner's motion to dismiss for two reasons. First, the Thirteenth Circuit erred by holding the District Court may not decide factual disputes in a pretrial motion. Second, the Thirteenth Circuit erred by incorrectly applying the test that determines whether a federal officer is entitled to immunity under the Supremacy Clause.

Preliminarily, the immunity held by a federal officer under the Supremacy Clause is an immunity from suit rather than merely a defense to prosecution. Applying the standard offered by the Thirteenth Circuit would give states an avenue to reach a jury merely by alleging disputed issues of fact, even when unfounded or done in effort to frustrate federal law. Requiring that a federal officer be subjected to a trial on the criminal charges brought by the State prior to a ruling on a motion to dismiss would contravene the very immunity in question. Viewing the facts in the light most favorable to the State essentially allows the state to determine whether the question of an officer's immunity reaches a jury. As such, this Court should find that the District Court properly decided issues of fact upon which it ruled that Agent Schrader is entitled to immunity.

Further, this Court has developed a two-part test to determine if a federal officer is entitled to Supremacy Clause immunity. Under the two-part test, a federal officer is immune from state prosecution when his acts are (1) authorized by the laws of the United States and (2) necessary and proper to the performance of his duties.

The first prong of the two-part test is satisfied if an officer was acting within the general scope of his federal duties. As the Supreme Court has recognized, the scope of an officer's federal duties includes both mandatory and discretionary acts. Therefore, an officer need not be performing a duty imposed on him by law nor must an officer be performing a duty specifically ordered by a supervisor. The Thirteenth Circuit's assertion that a federal officer must be following a specific direction from their superiors to be entitled to immunity contradicts the well-recognized discretionary authority federal officers may utilize. Such a requirement undercuts federal officers' ability to execute federal law and should not be utilized by this Court.

The second prong of the two-part test is satisfied when the officer's actions were necessary and reasonable. The Thirteenth Circuit incorrectly applied the second prong by considering Agent Schrader's subjective intent and by finding Agent Schrader's actions objectively unreasonable absent a violation of clearly established federal law. As the Supreme Court has appreciated, specifically in the context of immunity, just law enforcement is best achieved by the application of *objective* standards of conduct. Further, the objective reasonableness of Agent Schrader's actions must not be determined by reference to any laws other than those proscribed by the federal government because of the nature of the Supremacy Clause.

ARGUMENT

I. THE DISTRICT COURT PROPERLY RESOLVED DISPUTED ISSUES OF FACT UPON WHICH IT GRANTED AGENT SCHRADER'S MOTION TO DISMISS UNDER THE SUPREMACY CLAUSE.

The Supremacy Clause of the United States Constitution establishes that the Constitution, and federal laws made pursuant to it, are the "supreme law of the land" and thus take priority over any conflicting state laws. U.S. Const. art. VI, cl. 2. Courts have observed that the United States "may, by means of physical force, exercised through its official agents, execute . . . the powers and functions that belong to it." *In re Neagle*, 135 U.S. 1, 60–61 (1890); *see also Tennessee v. Davis*, 100 U.S. 257, 263 (1879). Federal law enforcement officers acting within the scope of their federal duties are, by definition, upholding the "supreme law" of the United States.

The Supremacy Clause ensures that states do not "retard, impede, burden, or in any manner control the execution of federal law." *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819). As such, federal officers are afforded relief from state criminal prosecutions in order to prevent states from nullifying federal laws by attempting to impede enforcement of those laws. *See Morgan v. California*, 743 F.2d 728, 731 (9th Cir. 1984). In the present case, Agent Schrader was acting within the scope of his duties as a federal officer in furtherance of the federal laws against possession of marijuana and is entitled to immunity under the Supremacy Clause. In order to maintain the delicate balance between federal and state laws, states must be prevented from paralyzing the operations of the federal government by punishing

federal officers for enforcing the laws of the United States simply because the federal law is unpopular.

Agent Schrader properly filed a Rule 12(b) motion to dismiss an indictment in a case removed under 28 U.S.C. § 1442. Courts acknowledge that, under the Federal Rules of Criminal Procedure, a district court may make preliminary findings of fact necessary to decide the questions of law presented by pre-trial motion provided the court's findings on the motion do not invade the province of the ultimate finder of fact. *United States v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976); *see also United States v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983). The district court in this case did not decide issues that overlap with those relevant to the state court's ultimate determination in the underlying case. Therefore, the district court, by deciding issues of fact, acted within its power to prevent the state of New Tejas from paralyzing the enforcement of federal laws.

A. The District Court's Resolution of Disputed Issues of Fact Did Not Invade the Province of the Ultimate Fact Finder.

It is well recognized that a motion requiring factual determinations may be decided before trial if a "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). Entitlement to immunity under the Supremacy Clause is properly raised in a motion to dismiss under Federal Rule of Criminal Procedure 12(b). *See* Advisory Committee Note to Rule 12(b) (stating that immunity based on federal supremacy is properly raised in a Rule 12(b) motion); *see also Kentucky v. Long,* 837 F.2d 727, 750 (6th Cir. 1988) (holding that a defense of

federal immunity is properly raised in a pretrial motion under Rule 12(b) and decided before trial). Generally, a pretrial motion may be determined before trial if it involves questions of law rather than fact.[1]

The mere presence of an issue of fact, however, does not mean that Supremacy Clause immunity is an issue that must be decided by a jury. Particularly, and of significance in the present case, district courts often decide factual questions underlying criminal immunity claims prior to a trial on the merits. *See, e.g.*, *United States v. Mendoza,* 78 F.3d 460, 464–65 (9th Cir. 1996); *United States v. Gutierrez–Zamarano,* 23 F.3d 235, 237 (9th Cir. 1994). Rule 12(d)[2] and (f)[3] of the Federal Rules of Criminal Procedure "clearly envision that a district court may make preliminary findings of fact necessary to decide the questions of law presented by pre-trial motion so long as the court's findings on the motion do not invade the province of the ultimate finder of fact."[4] *Jones*, 542 F.2d at 664; *see also United States v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983) (stating the language here "clearly indicates that findings of fact as well as law are within the province of the district court to make in pretrial proceedings").

[1] *See United States v. Korn*, 557 F.2d 1089, 1090 (5th Cir. 1977); *United States v. Miller*, 491 F.2d 638, 642 (5th Cir. 1974); *United States v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976).
[2] Rule 12(d) provides: "The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record."
[3] Rule 12(g) provides: "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."
[4] Although the court in *Jones* cited Federal Rules of Criminal Procedure 12(e) and 12(g), the language formerly appearing in these subsections was moved to 12(d) and 12(f) respectively following the 2002 Amendments to Rule 12. *See* Fed. R. Crim. P. 12 (2002 Amendment Comments).

Admittedly, the factual questions in a case related to immunity under the Supremacy Clause are *sometimes* central to the subject matter of the criminal case. *See Idaho v. Horiuchi*, 253 F.3d 359, 375 (9th Cir.), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001). Even so, "the question of Supremacy Clause immunity, while very similar to the issues presented in the criminal case, is nevertheless quite distinct." *Id.* Therefore, the different, yet similar, legal standards can only lead to jury confusion especially in a case, such as this one, where there is a possibility of pleading justification. Conversely, federal judges—who should decide the preliminary question of immunity—will better understand the subtleties of federal immunity law. The federal judge's decision can be reviewed by an appellate court, such as here. The review is generally *de novo* because Supremacy Clause immunity presents mixed issues of fact and law. *See New York v. Tanella*, 374 F.3d 141, 146 (2d Cir. 2004). Where, by contrast, a jury decision is much more difficult to overturn. *Horiuchi*, 253 F.3d at 375–76.

In this case, Agent Schrader has raised, by pretrial motion, the immunity under Federal Rule of Criminal Procedure 12(b). The appellate court noted that the defense of immunity under the Supremacy Clause may overlap with the defense of "justification" based on "arrest and search" under New Tejas Penal Code §§ 50.01 and 50.02. R. at 6a. This, however, is insufficient to preclude the District Court from deciding Agent Schrader's pretrial motion because although the two standards may be similar, they are not identical.

Under 18 U.S.C. § 3052, a federal officer is authorized by federal law to perfect an arrest without a warrant if the officer had "reasonable grounds to believe that the person to be arrested has committed or is committing [a] felony" or an "offense against the United States." Conversely, Section 50.02 of the Penal Code of New Tejas provides:

> (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.

Looking to the plain language of both provisions, it is clear that the two standards are not the same. First, the federal statute examines whether a federal officer had "reasonable grounds to believe" that a person was committing a felony while the state statute looks at whether the officer believed force was necessary.[5] Thus, the two statutes require examination of two different acts to determine their applicability. Therefore, allowing a federal district judge to determine if a federal officer had reasonable grounds to believe the suspect was committing a felony will not deprive a jury from considering whether the same officer reasonably believed that force was necessary.

[5] The determination of Supremacy Clause immunity only examines objective reasonableness. However, the state statute that examines what "an actor reasonably believes" is an inquiry into subjective intent. Thus, the two determinations also differ at whether subjective intent or objective reasonableness should be considered. *See* discussion *infra* Part II.B.

Additionally, the federal statute provides an officer with immunity from suit, as opposed to the state statute which provides an officer with an affirmative defense to prosecution. The crux of this distinction is that immunity, when it applies, deprives the state criminal court of *jurisdiction* over the officer. *See Long*, 837 F.2d at 742 ("federal courts consistently adhered to the rule that federal supremacy is the principle determinative of the jurisdiction of a state court to try a federal agent for a state crime."); *Ohio v. Thomas*, 173 U.S. 276, 284 (1899) (finding that when Supremacy Clause immunity applies, a federal officer "was not subject to [state] law and the court had no jurisdiction to hear or determine the criminal prosecution in question"). Thus, because Supremacy Clause immunity is jurisdictional, the facts in dispute should be decided at the earliest possible time by the trial court because it will determine if a state court can even hear the case. As such, the issue of whether Agent Schrader is entitled to immunity under the Supremacy Clause is distinct from the ultimate issue of criminal liability brought by the State of New Tejas against Agent Schrader. Under well-settled case law, the District Court was well within its right to resolve issues of fact in the pretrial proceeding.

B. Viewing the Facts in the Light Most Favorable to the State Undermines the Purpose of 28 U.S.C. § 1442 and Federal Rule of Criminal Procedure 12(b) by Restricting the Federal Court's Ability to Provide an Unbiased Safeguard.

Under 28 U.S.C. § 1442, a federal officer is permitted to remove a civil action or criminal prosecution that is commenced in a State court against the officer provided the officer can plead a federal defense to the prosecution. *Mesa v. California*, 489 U.S. 121, 129 (1989). The purpose of the removal statute is to allow certain

federal defendants to remove a case from state court to a more neutral federal court. *See generally Willingham v. Morgan*, 395 U.S. 402 (1969). Further, affording a federal officer relief from state criminal prosecutions prevents states from nullifying federal laws by attempting to impede enforcement of those laws. *Morgan*, 743 F.2d at 731.[6]

1. **A district court is not precluded from deciding issues of fact when the purpose of the state criminal prosecution is to frustrate the enforcement of federal law.**

Courts have recognized that the usefulness and purpose of immunity would be severely limited if the availability of the immunity under the Supremacy Clause were to turn entirely on the nonexistence of a material dispute over the facts. *See generally Morgan,* 743 F.2d at 733. As the Ninth Circuit recognized in *Morgan*, "there are almost invariably matters of factual dispute in cases involving criminal charges." *Id.* The mere existence of such disputes does not automatically preclude a federal officer from asserting immunity when the officer was acting in furtherance of federal law. If this were the case, "all that a local prosecutor would have to do to secure a state court jury trial would be to fabricate a factual allegation that, if true, would negate the officer's reliance on a federal privilege." *Id.*

The Ninth Circuit, in *Morgan*, highlighted the issues that occur when the objective of the state in bringing the charges is obstruction or harassment noting that

[6] Although the Thirteenth Circuit states that *Morgan* is inapposite because it arises in the habeas context, courts have recognized that the purpose of habeas corpus provisions is "much the same as the purpose underlying the removal provisions" and can be applied to a Rule 12(b) motion to dismiss based on Supremacy Clause immunity. *Long*, 837 F.2d 727, 751–52 (6th Cir. 1988); *see also Whitehead v. Senkowski*, 943 F.2d 230, 233 (2d Cir. 1991) (stating that, in the Supremacy Clause context, habeas and removal provisions are "alternatives.").

"it is far too easy to allege the existence of a factual dispute, even when none exists." *Id.* Additionally, the Tenth Circuit in *Wyoming v. Livingston*, 443 F.3d 1211 (10th Cir. 2006), had a similar concern when it concluded:

> The record evidence supports the suspicion that the prosecution of Mr. Jimenez and Mr. Livingston was not a bona fide effort to punish a violation of Wyoming trespass law, which requires knowledge on the part of a trespasser, *see* Wyo. Stat. § 6-3-303(a), but rather an attempt to hinder a locally unpopular federal program. An early grant of immunity reduces the risk that the possibility of state criminal prosecution will deter the performance by federal officers of their federal duties.

Id. at 1230. The present case brings to life the exact issues highlighted in *Morgan* and *Livingston* where the propensity for prosecutorial misconduct is apparent. The court in *Morgan* stated that because the record did not suggest that there was any purpose on the part of the state to frustrate federal law enforcement, the district court improperly decided issues of fact. In the present case, however, there is ample evidence that the purpose of the indictment against Agent Schrader is to impede the enforcement of federal laws prohibiting the possession of marijuana.

To start, Madrigal County district attorney, Mrs. Wexler—who notably was elected in 2016 on a pro-marijuana platform—spoke at a rally days after the event. R. at 32a. At the rally, Mrs. Wexler stated "the federal government has no business interfering with the sovereign will of the people of New Tejas" and promised to "use every power of this office to prevent federal marijuana laws from being enforced" in New Tejas. R. at 32a. Not only are Mrs. Wexler's statements contrary to the power given to the federal government through the Supremacy Clause, they are a clear indicia of malice against federal officers. In light of Mrs. Wexler's statements, it is

difficult to turn a blind eye to the obstructive and harassing objective underlying the charges brought against Agent Schrader. By disallowing a district court to decide factual issues, a situation is created where all that "a local prosecutor would have to do to secure a state court jury trial" is allege that facts are disputed. *Morgan*, 743 F.2d at 733.

The Thirteenth Circuit attempted to minimize the previously noted concerns by pointing out that if immunity is not granted, "the interests of the federal government are fully protected against state hostility because trial will occur in federal court before a federal district judge and be reviewed in a federal court of appeals." R. at 7a. However, the entitlement held by federal officers under the Supremacy Clause is an *immunity from suit* rather than a mere defense to liability. *See Tanella*, 374 F.3d at 147 ("Indeed, by providing immunity from suit rather than a mere shield against liability, the defense of federal immunity protects federal operations from the chilling effect of state prosecution,"); *see also Davis*, 100 U.S. at 262–63 (1879) (noting the need to prevent states from "paralyzing" operations of the federal government). Naturally, if a case is erroneously permitted to go to trial, the immunity from suit is effectively erased. *Long*, 837 F.2d at 749. Having to live through the anxiety of a criminal trial destroys most of the benefits of immunity.

2. The criminal liability at stake further necessitates the need for the district court to act as a safeguard.

The State's assertion, that immunity under the Supremacy Clause should be treated the same as qualified immunity, is valid to the extent that the purpose behind both types of immunity is to "provide a federal forum in any case where a federal

official might raise a defense arising from his official duties, and to permit any state law question to be tried upon the merits in an environment free of local interests or prejudice." *See Arizona v. Manypenny,* 451 U.S. 232, 241–42 (1981); *Willingham*, *395* U.S. at 405; *Davis,* 100 U.S. at 257. Notably, this assertion fails to account for the inherent differences between civil liability and criminal liability. While both Supremacy Clause immunity and qualified immunity cases are removable under 28 U.S.C. § 1442, a federal officer's entitlement to raise immunity under the Supremacy Clause "is not only to avoid the possibility of *conviction,* but also to avoid the necessity of undergoing the entire process of the state criminal procedure." *Long*, 837 F.2d at 752.

It is undisputed that, in the civil context, courts have held that the disputed factual issues underlying the immunity defense must be put to the jury. *See, e.g.*, *Act Up!/Portland v. Bagley,* 988 F.2d 868, 873 (9th Cir. 1993). As courts have recognized, "the principal aim of civil suits is not to punish the officers as much as it is to force law enforcement agencies to internalize social costs imposed by its officers, so that the agency will weigh those costs against the benefits it seeks to achieve." *Horiuchi*, 215 F.3d at 989. Civil damages against law enforcement officers are primarily about enterprise accountability. *Id.* In stark contrast, criminal liability "is fundamentally about personal blame and accountability." *Id.*

Criminal liability carries with it the possibility of an officer being stripped of voting or other civil rights, and, if found criminally liable, an officer will likely serve jail time. *Horiuchi*, 215 F.3d at 989. When the weight of the criminal sanctions an

officer is facing is balanced against civil damages, it becomes remarkably evident that "the procedures we follow in a civil context will not sufficiently protect officers from the risk of state prosecution." *Id.* The effects that follow enduring a criminal prosecution fall solely on the officer rather than on the agency and lean in favor of the district court acting as a safeguard.

The Thirteenth Circuit's view that the facts must be viewed in the light most favorable to the state contravenes the purpose behind 28 U.S.C. § 1442 in providing the officer with an unbiased forum and, further, destroys the safeguard afforded to federal officers against criminal prosecutions altogether. As such, in accordance with the purpose of the immunity, the District Court properly disposed of factual questions underlying Agent Schrader's immunity defense prior to allowing the jury to deliberate on criminal liability.

II. SUPREMACY CLAUSE IMMUNITY ONLY REQUIRES THAT A FEDERAL OFFICER ACTS WITHIN THE SCOPE OF HIS GENERAL DUTIES AND NOT VIOLATE CLEARLY ESTABLISHED FEDERAL LAW.

The United States Court of Appeals for the Thirteenth Circuit legally erred in determining the proper application of the two-part test, developed by this Court in *In re Neagle*, that governs whether a federal officer is entitled to immunity under the Supremacy Clause. 135 U.S. 1 (1890). From the earliest days of our republic, Americans have understood that our federal government is "supreme within its sphere of action." *McCulloch*, 17 U.S. at 405. But, the federal government "can act only through its officers and agents, and they must act within the States." *Davis*, 100 U.S. at 263. To preserve the ability of the federal government to function, this Court

has held that federal officers and agents are immune from prosecution under state law when taking necessary and proper actions to carry out their federal duties. *Neagle*, 135 U.S. at 75.

The seminal case on Supremacy Clause immunity, *In re Neagle*, exemplifies the Supreme Court's desire to maintain a balance between state and federal law enforcement powers. This Court's holding in *Neagle* set forth a two-part test to determine whether a federal officer is entitled to immunity under the Supremacy Clause. Under the test, an officer is immune if the following are met: "(1) the federal agent was performing an act which he was authorized to do by the law of the United States and (2) in performing that authorized act, the federal agent, did no more than what was necessary and proper for him to do." *Long*, 837 F.2d at 744. Stated more succinctly, "this analysis examines whether the officer's acts have some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law." *Denson v. United States*, 574 F.3d 1318, 1348 (11th Cir. 2009).

A. The First Prong of the Two-Part Test is Satisfied if an Officer Was Acting Within the Scope of His Federal Duties.

The first step in deciding whether a federal officer will receive Supremacy Clause immunity is to determine whether the officer was authorized to undertake the actions that violated state law. Applying the first prong of the two-part test, the Thirteenth Circuit incorrectly disregarded the long-settled discretionary authority afforded to federal officers when performing their duties. *See Neagle*, 135 U.S. at 59 (holding "any duty of the marshal to be derived from the general scope of his duties

under the law of the United States, is a 'law' within the meaning" of the Supremacy Clause).

The proper view—adopted by the Thirteenth Circuit's dissent and numerous circuit courts—requires only that an officer was acting within the general scope of his authority as authorized by federal law. *See Wyoming v. Livingston*, 443 F.3d 1211, 1219 (10th Cir. 2006) (noting that relevant Supreme Court authority gives "grants of federal authority a generous sway."); *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982) ("[T]he necessary authority [to support invocation of the defense] could be derived from the general scope of the officer's duties."); *see also Connecticut v. Marra*, 528 F. Supp. 381, 385–86 (D. Conn. 1981) (collecting cases finding sufficient authorization for an action in "general statutes authorizing an agency to function," in agency regulations, and in congressional appropriation). This approach ensures that federal officers will not face unreasonable impediments in discharging their duties and supports the idea that federal officers are free from state control when acting in furtherance of the laws of the United States. In contrast, the restrictive view adopted by the Thirteenth Circuit effectively places a roadblock on federal officers by holding that a federal officer will only be protected under this doctrine when performing a duty explicitly imposed on the officer by law or by a superior. The Thirteenth Circuit's rigid and narrow approach impedes effective enforcement of the laws of the United States. As such, and in accordance with this Court's prior jurisprudence, the less restrictive view should be adopted.

1. The narrow approach adopted by the Thirteenth Circuit is unsupported by jurisprudence and impedes the execution of United States laws.

The Thirteenth Circuit erred in applying the first prong by requiring a federal officer be ordered by a superior, directed by a general policy, or face "exigency or emergency" related to an officer's federal duties to find immunity under the supremacy clause. R. at 10a. Such a narrow application of the first prong of the two-part test is unsupported by Supreme Court jurisprudence and is rejected by a majority of circuit courts who have addressed the issue.

a. The seminal case on Supremacy Clause immunity demonstrates the Supreme Court's rejection of the restrictive application adopted by the Thirteenth Circuit.

The restrictive view has already been rejected by the United States Supreme Court. This Court, in *Neagle*, stated "any duty of the marshal to be derived from *the general scope of his duties* under the laws of the United States, is 'a law' within the meaning of this phrase." *Id.* at 59 (emphasis added). Further, the *Neagle* court rejected the argument that a federal officer must be authorized by an act of Congress in "exact terms" to be entitled to immunity. *Id.* (stating that such a "view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit . . . to persons imprisoned for the performance of their duties."). Therefore, at least as early as 1890, the Supreme Court recognized that a federal officer need only be acting within "the general scope of his duties" to be shielded from state prosecution. *Id.*

b. Several circuit courts do not follow the restrictive application adopted by the Thirteenth Circuit.

Like the Supreme Court in *Neagle*, numerous circuit courts have declined to follow a restrictive view of when a federal officer is authorized to act. For example, in *Wyoming v. Livingston*, the Tenth Circuit stated that "Supremacy Clause immunity does not require that federal law explicitly authorize a violation of state law." 443 F.3d 1211, 1227 (10th Cir. 2006). In *Livingston*, two federal Fish and Wildlife Service officers were charged with littering and trespass. *Id.* at 1216. They had crossed over onto private land when tranquilizing and marking wolves in an attempt to reintroduce the wolves into their natural habitat. *Id.* at 1213–14. The Tenth Circuit noted that Untied States Federal Wildlife Services (USFWS) regulations "do not merely authorize, but impose an obligation on the USFWS to monitor wolves." *Id.* at 1227. However, the Court noted that "the regulation does not grant an explicit grant of authority for USFWS staff to trespass." *Id.* Thus, the Tenth Circuit found that the federal officers were working within the confines of their authority, even though the federal regulation did not authorize them to violate state law. *Id.* Under these facts, the Tenth Circuit held "there is no question that the Defendants had federal authorization for the capture and collar operation." *Id.* at 1228.

More recently, the Fifth Circuit unequivocally rejected the restrictive view urged by the majority in the Thirteenth Circuit's opinion in this case. *See Texas v. Kleinert*, 855 F.3d 305, 315 (5th Cir. 2017) (rejecting Texas's argument that "unless a superior officer of the FBI specifically directs a task force officer to investigate potential criminal activity, doing so is without federal authorization."). In *Kleinert*,

the State of Texas "sought to prosecute federal task force officer Charles Kleinert for unintentionally shooting an unarmed suspect as Kleinert tried to arrest him." *Id.* at 309. Kleinert was an FBI agent that was investigating a bank robbery on the morning of July 26. *Id.* During Kleinert's investigation, a suspicious man—Larry Johnson—attempted to enter the bank and withdraw funds by using a fake name. *Id.* After Kleinert confronted Johnson, Johnson attempted to flee. *Id.* at 310. After chasing the suspect, the two men got into an altercation and Kleinert unintentionally shot Johnson. *Id.*

In *Kleinert*, the State argued that Agent Kleinert operated under a "Memorandum of Understanding" that he was only allowed to investigate "violent crimes," and thus, Kleinert acted outside of his federal authority. *Id.* at 315. Specifically, "the State argues, unless a superior officer of the FBI specifically directs a task force officer to investigate potential criminal activity, doing so is without federal authority." *Id.* The Court rejected Texas's position, finding "that federal law authorized [. . .] task force officers, who were subject to the memorandum, to make warrantless arrests," and agreed with the testimony of Kleinert's superior officer "that a task force officer how observes criminal activity, but let[s the person] go violates the officer's general obligation to enforce the laws of the United States . . . and oath to do so." *Id.*

The Sixth Circuit, in *Long*, found that "even though an agent exceeds his express authority, he does not necessarily act outside the authority conferred by the laws of the United States." 837 F.2d at 745 (citing *Clifton v. Cox*, 549 F.2d 722 (9th

Cir. 1977)). The court went on to say "the necessary authority of an agent can be derived from the general scope of his duties, *i.e.*, to assist in federal law enforcement by detecting and prosecuting federal crime." *Id.* at 749. Therefore, under Sixth Circuit jurisprudence a federal officer is protected from state prosecution even when he exceeds his express authority so long as does not exceed the authority granted by the general scope of his duties under the laws of the United States.

The Eleventh Circuit has expressed the most expansive view of what it considers to be an "authorized act." In *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982), the court stated, in dicta, that, "[e]ven if the officer makes an error in judgment in what the officer conceives to be his legal duty, that alone will not serve to create criminal responsibility in a federal officer." *Id.* at 1350; *see also Clifton v. Cox*, 549 F.2d at 727–28, n.12 (finding that an officer's conduct may be within scope of his authority even if of "questionable legality" or taken without specific direction of a superior.). Although the Court found that Agent Baucom had both authorization in law and supervisor authorization, the Court went state, citing *Neagle*, that "the necessary authority could be derived from the general scope of the officer's duties." *Baucom*, 677 F.2d at 1350. Specifically, the Court found that 28 U.S.C. § 533(1)[7] was sufficient to authorize a federal agent to act. *Id.* at 1350, n.6.

In sum, even when a federal officer's conduct is not explicitly authorized by the officer's superior or enumerated by Congress in exact terms the conduct is authorized when it is part of the federal officer's general duties. Requiring that a federal officer

[7] 28 U.S.C. § 533(1) states: "The Attorney General may appoint officials—(1) to detect and prosecute crimes against the United States."

not act absent some explicit grant of authority by a superior or act of Congress substantially impedes the officers' ability to further the laws of the United States. In fact, although this Court need only apply the standard utilized by the Tenth, Fifth, and Sixth Circuits for Agent Schrader's acts to be authorized, the Eleventh Circuit has adopted an even more expansive view to protect federal officers from state prosecution when performing their duties.

2. The Supreme Court routinely looks to the general scope of duties when determining authorized acts in immunity cases.

A review of the jurisprudence surrounding immunity demonstrates that it is enough for an officer to be acting under the exercise of discretionary authority in furtherance of a governmental objective. This view of determining when a federal officer's acts are authorized is harmonious with Supreme Court jurisprudence on other varieties of immunity. For example, in *Barr v. Mateo*, when deciding the extent of federal authorization for absolute immunity this Court held "[t]he fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint." 360 U.S. 564, 575 (1959) (plurality opinion). In *Barr*, the Acting Director of the Office of Rent Stabilization released an allegedly libelous press release which defamed two former employees of the Office. *Id.* at 565. These two employees sued, and the Acting Director replied that he was barred from suit either by qualified immunity or absolute immunity. *Id.* at 568. This Court noted that it has always "imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers." *Id.* at 572. Although "[t]he question is a close one[,]" this Court held that a

federal officer acting pursuant to powers conferred by a federal statute, shall be granted immunity. *Id.* at 574. This Court concluded *Barr* by stating "as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good." *Id.* at 576.

Additionally, in *Harlow v. Fitzgerald*, this Court held, *inter alia*, that qualified immunity applies to "government officials performing discretionary functions." 475 U.S. 800, 818 (1982). Therefore, to hold that a federal officer must be specifically authorized by a superior to act to receive Supremacy Clause immunity would create an unnecessary divide between the various types of immunity.

Based on prior jurisprudence and several circuit court decisions, this Court should hold that the correct test to determine if a federal agent was "authorized to act" should look at whether the agent was acting generally within the scope of his duties. From this Court's pronouncement of Supremacy Clause immunity in *Neagle* to the 2017 Fifth Circuit case, *Kleinert*, it is apparent that an officer need only act within his general scope of authorities whether specifically authorized or not. The realities of a federal officer's job do not allow for prior approval of every action, and thus, to hold otherwise, would essentially vitiate the constitutional protection that is Supremacy Clause immunity.

B. The Second Prong of The Supremacy Clause Immunity Analysis Should Only Consider Whether A Federal Officer Violated Clearly Established Federal Law.

After determining that a federal officer's act was authorized by federal law, a court must next examine "if, in doing that act, [the officer] did no more than what was necessary and proper for him to do." *Neagle*, 135 U.S. at 75. If so, the officer cannot be guilty of a crime under the law of the state. *Id.* Because this Court did not set out a clear standard in *Neagle* or the cases that followed, jurisprudence developed in lower courts that is both harmful and contrary to the doctrine's core tenets.

Accordingly, to determine if a federal officer's conduct was "necessary and proper" a court should examine whether it was objectively unreasonable. The correct standard to measure objective unreasonableness is whether a federal officer violated clearly established federal law. This standard is derived from this Court's holding in *Harlow*, 457 U.S. at 818. Although *Harlow* addressed qualified immunity, the principle underlying Supremacy Clause immunity and qualified immunity are analogous, such that the same standard should apply in both contexts. *See Livingston*, 443 F.3d at 1221 ("Although qualified immunity and Supremacy Clause immunity have different sources and functions, there is a functional similarity between these two doctrines.") Further, as this Court has previously held that states may not control the manner and means that an officer carries out his federal duties, it follows that looking to clearly establish federal law is the only appropriate standard. *See Ohio v. Thomas*, 173 U.S. 276 (1899). Although some circuit and district courts have looked at the officer's subjective intent, this was not part of the original

analysis in *Neagle*, and thus, should not be part of the inquiry. *See Livingston*, 443 F.3d at 1221 (noting that the subjective element "was not present in the Supreme Court's decisions. The subjective element first appeared in district court decisions in the mid-twentieth century.").

1. The Thirteenth Circuit improperly considered Agent Schrader's subjective intent.

In sum, a proper analysis of Supremacy Clause immunity should not consider an officer's subjective intent. This Court has never endorsed an inquiry into an officer's state of mind, and thus, the later incorporation of subjectivity determination is the result of judicial activism by district courts. As this Court has appreciated, specifically in the context of immunity, just law enforcement is best achieved by the application of *objective* standards of conduct, rather than the subjective state of mind of the officer. *See Harlow*, 457 U.S. at 818. ("Reliance on the object reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.").

a. The Supreme Court has never examined an officer's subjective intent for Supremacy Clause immunity.

Interestingly, the Supreme Court did not discuss an officer's subjective intent in *Neagle*, but throughout the years, district and circuit courts have read a subjective requirement into the "necessary and proper" analysis. *See Livingston*, 443 F.3d at 1221 (noting that the subjective element "was not present in the Supreme Court's decisions. The subjective element first appeared in district court decisions in the mid-

twentieth century."). Therefore, the incorporation of a subjective element is the end result of decades of judicial activism, and this Court should use this case as an opportunity to rein in the circuit courts that have gone astray.

b. The Ninth and Tenth Circuits join the Supreme Court in not examining a federal officer's subjective intent.

The Supreme Court is not alone in its hesitation to adopt a subjective element with respect to immunity under the Supremacy Clause. The Tenth Circuit, in *Livingston*, stated "[w]e are also concerned with the incorporation of a subjective element into the reasonableness of a federal officer's actions." 443 F.3d at 1221. In noting its concern, the circuit court recognized that the subjective element did not come from the Supreme Court, but instead, "[t]he subjective element first appeared in district court decisions in the mid-twentieth century." *Id.* Further, the circuit courts that have adopted the subjective element have not provided persuasive justification, or any analysis at all, for why the element should be incorporated. *Id.* However, after noting skepticism, the Tenth Circuit declined to affirmatively hold that it would not consider subjective intent in the future because the State of Wyoming did not dispute the officers' subjective belief. *Id.* at 1222.

In *Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir.) (en banc), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001),[8] the Ninth Circuit also discussed its hesitation with

[8] Although this case was vacated when the prosecutor subsequently dropped the criminal charges against the federal agent, numerous district courts have looked to the reasoning in the case for guidance. *See e.g.,* Arizona v. Files, 36 F. Supp. 3d 873, 876 (D. Az. Jul. 31, 2014) (Court and parties agreed "this Court should follow the procedural framework endorsed by the plurality opinion in *Idaho v. Horiuchi*"); Jackson v. Jackson, 235 F. Supp. 2d 532 (S.D. Miss. 2002); *see also* Wyoming v. Livingston, 443 F.3d at 1221 (expressing skepticism of subjective intent based on *Horiuchi*'s holding).

considering subjective intent. The Ninth Circuit, in considering this Court's jettisoning of the subjective intent for qualified immunity, stated:

> Supremacy Clause immunity cases hold that the test is both subjective and objective: The officer is denied immunity unless he demonstrates that he believed both reasonably *and* honestly that his conduct was lawful. However, none of these cases consider the impact of *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 . . . (1982), which rejected the subjective prong for the qualified immunity defense and held that immunity requires only a showing that the conduct was objectively reasonable. *Harlow*'s reasoning would seem to apply equally to Supremacy Clause immunity.

Id. Therefore, the Ninth Circuit only examined whether the federal officer acted in an objectively reasonable manner in carrying out his duties.

c. The Supreme Court consistently does not examine a subjective element in other immunity cases.

As the Ninth and Tenth Circuits opined, any appropriate immunity analysis should start with this Court's previous opinion in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). There, this Court articulated persuasive reasons for the dismissal of a subjective element for qualified immunity. For the same reasons articulated in *Harlow*, Supremacy Clause immunity—like qualified immunity—should not include consideration of subjective intent. In fact, because Supremacy Clause immunity deals with more severe consequences (*i.e.* criminal prosecutions) and is based on a constitutional provision instead of a common law doctrine, Supremacy Clause immunity should extend at least as far as qualified immunity.

In *Harlow*, this Court remarked that litigation, involving qualified immunity, has "cost not only . . . the defendant officials, but . . . society as whole." *Id.* at 814. Further, "[t]hese social costs include the expense of litigation, the diversion of official

energy from pressing public issues, and the deterrence of able citizens from acceptation of public office." *Id.* Likewise, in Supremacy Clause immunity cases, a subjective element would add fiscal cost to litigation because an official's mental state can only be determined through expansive, expensive discovery. Additionally, when federal officials, such as FBI agents, are litigating pending criminal litigation, they are prevented from serving the interest of the general public. Finally, allowing inquiry into subjective intent deters able citizens from pursuing a career in federal law enforcement. This Court recognized "there is a danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.'" *Id.* (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)); *see also* Seth P. Waxman and Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L. J. 2195, 2231 (2003) ("[S]ubjecting federal officers to state criminal sanctions for carrying out their federally appointed duties could made it extremely difficult, if not impossible for the federal government to function. Even the most dedicated federal servant would be reluctant to do his job conscientiously if he knew it could mean prison time in the state penitentiary."). Surely, the fear of facing criminal sanctions would do the same.

Additionally, this Court in *Harlow* noted "the judgments surrounding discretionary action almost inevitably are influenced by decisionmaker's experiences, values, and emotions." 457 U.S. at 816. Therefore, "question[s] of subjective intent so rarely can be decided on summary judgment." *Id.* at 816–17. These questions

surrounding subjective intent often have "no clear end to the relevant evidence" which means they "may entail broad-ranging discovery and the deposing of numerous persons." *Id.* at 817; *see, e.g.*, *In re McShane's Petition*, 235 F. Supp. 262, 269 (N.D. Miss 1964) (detailing conflicting expert opinions about whether the use of tear gas was subjectively reasonable, even though it was objectively reasonable, in the Ole Miss. riot of 1962). Consequently, subjective elements "frequently ha[ve] prove[n] incompatible with our admonition . . . that insubstantial claims should not proceed to trial." *Id.* at 815–16.

Accordingly, using a subjective element is just as unreasonable, if not more unreasonable, in a Supremacy Clause immunity as it is in a qualified immunity inquiry. The economic cost associated with the litigation, social cost of removing agents from their crime prevention duties, and the deterrence of qualified individuals from this line of work are all exacerbated if a subjective element is applied to Supremacy Clause immunity.

2. A federal officer's actions are objectively reasonable absent a violation of clearly established federal law.

The Thirteenth Circuit erroneously stated how the objective reasonableness of Agent Schrader's actions should be determined. To truly give meaning to the Supremacy Clause, and thus Supremacy Clause immunity, a state should not be able to, by laws or otherwise, regulate the manner and means a federal officer uses in pursuance of his federal duties. *See In re Waite*, 81 F. 359, 371 (N.D. Iowa 1897) *aff'd sub nom. Campbell v. Waite*, 88 F. 102 (8th Cir. 1898) ("The mode or manner in which the officer or agent undertakes to perform a duty imposed upon him by the laws or

authority of the United States is not a matter of state cognizance."). Thus, the correct inquiry to determine if a federal agent was objectively reasonable is to determine if he violated clearly established federal laws.

a. The Supreme Court recognizes that state governments should not regulate the manner and means by which a federal officer carries out his duties.

By virtue of the Supremacy Clause, "the laws of the United States…shall be the supreme law of the land" and "every state shall be bound thereby…laws of any State to the contrary notwithstanding." U.S. Const. art VI, cl. 2. Soon after the passage of our Constitution, this Court stated that the purpose of the Supremacy Clause was to ensure that states do not "retard, impede, burden, on in any manner control" the execution of federal law. *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819); *see also Gibbons v. Ogden*, 22 U.S. 1, 211 (1824) (Marshall, C.J.) ("[A]cts of the State Legislature . . . [that] interfere with, or are contrary to the laws of Congress [are to be invalidated because] [i]n every such case, the act of Congress . . . is supreme, and the law of State, though enacted in the exercise of powers not controverted, must yield to it."). Accordingly, it is not enough that state laws should not be contrary to federal law, they also may not even impede, burden or interfere with federal laws.

Twice this Court has found that even basic state laws dictating the manner and mode in which a federal agent carries out his federal duties run afoul of the Supremacy Clause. In the late nineteenth century in *Ohio v. Thomas*, 173 U.S. 276 (1899), the State of Ohio attempted to prosecute a federal agent operating a soldiers' home for a violation of state law. Ohio law required that any establishment serving or using oleomargarine must display that fact on a large sign. *Id.* at 278. The federal

officer operating the soldiers' home refused, and subsequently, he was imprisoned and ordered to pay a fifty dollar fine. *Id.* at 280. This Court found that because the federal officer was authorized by the Secretary of War to serve oleomargarine, the State of Ohio was without jurisdiction to enforce their signage law. *Id.* at 282. Although this holding appears to be relatively minor, the Tenth Circuit explained the gravity of it:

> This holding gives grants of federal authority a generous sway. Mr. Thomas was not prosecuted for serving oleomargarine, but for failing to notify patrons he was doing so. This requirement was not incompatible with Mr. Thomas's federal authorization to serve oleomargarine; Mr. Thomas could have complied with the state law without shirking his federal duty. Nevertheless, the Court concluded that the grant of federal authority was sufficient not only to permit serving oleomargarine, but to prevent Ohio from regulating the manner and circumstances of service as well.

Livingston, 443 F.3d at 1219 (citing *Ohio v. Thomas*, 173 U.S. 276, 282 (1899). Therefore, as early as 1899, this Court recognized that a state government could not directly interfere with a federal agent's duties, but the state could also not dictate the manner in which the federal agent performed his duties.

Additionally, in *Johnson v. Maryland*, 254 U.S. 51 (1920), this Court held that a state has no power to require a federal post office employee to obtain a state driver's license in order to deliver the mail. The Court stated that "[s]uch a requirement does not merely touch the [federal] Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient." *Id.* at 57. This Court, through Justice Holmes, went on to distinguish between laws

that are incidental to the federal officer's duties and those which attempt to control the officer's conduct in carrying out his duties. *Id.* at 56. Incidental laws may not run afoul of the Supremacy Clause "when the United States has not spoken, [and] the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out them employment." *Id.* Justice Holmes likened an incidental law to one "for instance, a statute or ordinance regulating the mode of turning at the corners of streets." *Id.* However, incidental laws are wholly separate from controlling the conduct of federal officers which give way to "even the most unquestionable and most universally applicable state laws, such as those concerning murder." *Id.*

Accordingly, a State cannot regulate the manner and mode of a federal officer in the course of his duty. Therefore, the balancing test advocated for by Judge Skyler's concurrence, R. at 14a, is incompatible with this Court's previous opinions in *Waite*, *Thomas* and *Johnson*. Thus, the correct test to determine if a federal agent was objective unreasonable is to determine if he violated clearly established federal law.

b. The regulation of a federal officer's duties may only come from federal law.

Again, a subjective element for Supremacy Clause immunity is unworkable and not found in this Court's jurisprudence. However, if the Court finds that a federal officer's conduct must be objectively reasonable then this Court should use the same standard that was articulated in *Harlow*, 457 U.S. 800 (1982), to determine if a federal officer was objectively reasonable. The same reasoning behind shifting objective reasonableness to being measured by violation of clearly established federal law is equally applicable to qualified immunity as it is Supremacy Clause immunity.

A close reading of *Neagle* suggests "that entitlement to Supremacy Clause immunity is to be ascertained by looking only at federal law." Waxman & Morrison, *supra*, at 2233. This Court in *Neagle* only considered whether the Agent Neagle "was authorized to do [what he did] by *the law of the United States*." 135 U.S. at 75 (emphasis added); *see also id.* at 58 (looking only to whether "it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Fields for a murderous attack upon him."). Thus, any consideration of state law in determining objective reasonableness would be contrary to this Court's prior jurisprudence.

This Court has stated that "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow*, 457 U.S. at 818. As discussed above, one of the key tenants of Supremacy Clause immunity is to "reduce the risk that the possibility of state criminal prosecution will deter the performance by federal officers of their federal duties," especially when the prosecution is "an attempt to hinder a locally unpopular federal program." *Livingston*, 443 F.3d at 1231. Therefore, measuring an officer's conduct against clearly established federal law will fulfill this goal by preventing local prosecutors from hindering federal agents from enforcing lawful, yet unpopular, federal programs and policies.

Although qualified immunity and Supremacy Clause immunity serve different functions, the Tenth Circuit in *Livingston* noted "there is a functional similarity

between these two doctrines." 443 F.3d at 1221. Both immunities "reduce the inhibiting effect that a civil suit or prosecution can have on the effective exercise of official duties by enabling government officials to dispose of cases against them at an early stage of litigation." *Id.*

Additionally, the Sixth Circuit in *Kentucky v. Long* found that qualified immunity and Supremacy Clause immunity shared these same inherent characteristics. 837 F.2d 727, 752 (6th Cir. 1982). Specifically, the court stated that Supremacy Clause immunity "is also analogous to the qualified immunity situation, in that there comes a point early in the proceeding where the federal immunity defense should be decided in order to avoid requiring a federal officer to run the gauntlet of standing trial." *Id.* Further, the Sixth Circuit recognized that both immunities goal is "not only to avoid the possibility of *conviction* of a federal agent, but also to avoid the necessity of undergoing the entire process of the state criminal procedure." *Id.*

In sum, this Court should rule that a federal agent's actions satisfy the "necessary and proper" requirement from *Neagle* if the agent did not violate clearly established federal law. Federal law must be used as the standard because states cannot control the means and manner in which federal agents pursue their duties. Further, examining subjective intent has proved unworkable in qualified immunity cases and would be equally unworkable in regard to Supremacy Clause immunity. To hold otherwise would turn back the wheels of time on the defense of immunity.

CONCLUSION

Agent Schrader acted within the scope of his authority as a federal officer of the United States and did not violate any clearly established federal law when he arrested Mr. White for possessing marijuana in violation of 21 U.S.C. § 844. The Supremacy Clause is clear that where a state and federal law are in conflict, the federal law will prevail. Accordingly, the district court properly decided issues of fact upon which it concluded Agent Schrader is entitled to immunity under the Supremacy Clause and forbade the State of New Tejas from prosecuting Agent Schrader for enforcing the law of the United States. This Court should reverse the decision of the Thirteenth Circuit Court of Appeals and affirm the District Court's grant of Agent Schrader's 12(b) motion to dismiss.

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

CERTIFICATE OF SERVICE

The undersigned, counsel for the Petitioner, certifies that a true and correct copy of Petitioners' brief on the merits was forwarded to Respondent, the State of New Tejas, through the counsel of record by certified U.S. mail, return receipt requested, on this, the 18th day of November, 2019.

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

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for the Petitioner, hereby certifies that, in compliance with Competition Rule 2.5 and Supreme Court Rule 33.1, the Brief of the Petitioner contains 10,496 words beginning with the Jurisdictional Statement through the Conclusion.

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

APPENDIX A: CONSTITUTIONAL PROVISIONS

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

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

APPENDIX B: STATUTORY PROVISIONS

FEDERAL STATUTORY PROVISIONS

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

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

18 U.S.C. 3052 provides:

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

21 U.S.C. 844 provides in pertinent part:

(a) **Unlawful acts; penalties**

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

STATE STATUTORY PROVISIONS

Section 50.01 of the Penal Code of New Tejas provides:

> **Justification as a Defense**.
>
> It is a defense to prosecution that the conduct in question is justified under this chapter.

Section 50.02 of the Penal Code of New Tejas provides:

> **Arrest and Search**
>
> (a) A peace officer is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest or search, or to prevent or assist in preventing escape after arrest, if:
>
> (1) the actor reasonably believes the arrest or search is lawful; and
>
> (2) before using force, the actor manifests his purpose to arrest or search and identifies himself as a peace officer, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested.