(ORDER LIST: 586 U.S.)

MONDAY, MARCH 18, 2019

CERTIORARI GRANTED

18-5188 SCHRADER, HANK V. NEW TEJAS

The petition for writ of certiorari is granted limited to the following questions: 1) When deciding a motion to dismiss a state criminal prosecution based on immunity under the Supremacy Clause, are disputed issues of fact decided by the district court or viewed in the light most favorable to the State? 2) What test governs whether the Supremacy Clause provides a federal officer with immunity from a state criminal prosecution?

Appendix to
Petition for Writ of Certiorari

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

No. 18-5719

STATE OF NEW TEJAS,
Plaintiff-Appellant,

v.

HANK SCHRADER,
Defendant-Appellee.

Filed: October 2, 2018

Appeal from the United States District Court
for the District of New Tejas
(D.C. No. 17-cr-5142)

Before FRING, SKYLER, and HAMLIN, Circuit Judges.

OPINION

FRING, Circuit Judge.

This case presents a delicate issue involving the relationship between state and federal authority: Under what circumstances can the States enforce their criminal laws against federal officers purportedly acting to enforce federal law? Although we acknowledge the federal government's interests in not having its operations impeded by state criminal law, we conclude that the district court erred in dismissing the indictment. Accordingly, we reverse.

Background

On November 8, 2016, while on vacation with his family in Madrigal, New Tejas, Agent Schrader of the Federal Bureau of Investigation observed Mr. White leaving a marijuana dispensary carrying a bag of marijuana.

Although possession of marijuana is not illegal under the laws of New Tejas, it remains illegal under federal law. 21 U.S.C. §§ 802, 812, 844. Agent Schrader denies having any knowledge of the well-publicized ballot initiative that led to legalization of marijuana in New Tejas. Consistent with New Tejas laws regulating marijuana dispensaries, the store was not clearly marked in a way that was visible to Agent Schrader.

After observing Mr. White with the marijuana, Agent Schrader shouted, "Stop! You're under arrest!", and charged at Mr. White. When Mr. White turned to run, Agent Schrader tackled him from behind onto the concrete sidewalk, resulting in serious injuries—including a broken arm and chipped teeth—to Mr. White.

This incident was not the first encounter between the two men. Several hours earlier, after a traffic incident between the two of them, Mr. White and Agent Schrader both stepped out of their vehicles and nearly came to blows. Even Agent Schrader's wife, Marie, testified that her husband was visibly angry—shouting and yelling at Mr. White—during this traffic incident.

Following the altercation outside the marijuana dispensary, the State of New Tejas indicted Agent Schrader for assault and (given the severity of the injuries to Mr. White) aggravated assault. Agent Schrader removed the case to federal court, 28 U.S.C. § 1442, where he moved to dismiss the indictment under

Rule of Criminal Procedure 12(b), asserting that the Supremacy Clause provides him with immunity from this prosecution.

Following an evidentiary hearing, the district court issued findings of fact and conclusions of law and granted Agent Schrader's motion to dismiss the indictment. The State appeals.

The parties present diametrically opposed narratives of this prosecution. Agent Schrader portrays himself as an innocent federal officer, victimized by a state prosecutor with a vendetta against the enforcement of federal marijuana laws. The State, in contrast, contends that it merely seeks to enforce its criminal laws against an individual who exploited his status as a federal officer to pursue a personal grudge. Our task is not to resolve these competing narratives but to determine whether the prosecution may proceed to trial.

Discussion

In reviewing a motion under Rule 12(b), we review the district court's legal conclusions *de novo*. To the extent that the district court's findings of fact are relevant, we review those findings for clear error.

This appeal requires us to resolve two related questions concerning immunity from criminal prosecution under the Supremacy Clause that are novel within this Circuit: (1) When a defendant moves to dismiss an indictment based on immunity under the Supremacy Clause and evidence demonstrates disputed issues of material fact, must a district court view those facts in the light most favorable to the non-movant (*i.e.*, the prosecution) or must the court, as a fact-finder, resolve those disputed issues of fact; and (2) What is the

test for whether the Supremacy Clause provides a federal officer with immunity to state criminal prosecution?

The State first argues that the district court erred by resolving disputed issues of fact, contending that any disputed issues of fact should be resolved by a jury at trial. On the merits, the State argues that the district court erred in granting the motion to dismiss on three independent grounds: (a) Agent Schrader's arrest of Mr. White was not necessary to his federal duties; (b) viewing facts in the light most favorable to the State, Agent Schrader's subjective intent was not to enforce federal law but to pursue a personal vendetta; and (c) the force used by Agent Schrader was objectively unreasonable, and whether that use of force violated clearly established federal law is irrelevant to his entitlement to immunity.[1]

Agent Schrader, in turn, argues that the district court properly resolved disputed issues of fact in ruling on his motion to dismiss. He contends that he is entitled to immunity because: (a) his use of force was necessary to accomplish his federal duty of arresting Mr. White for violating federal law; (b) as the district court found, his subjective motivation was to enforce federal law;[2] and

---

[1] The State contends, in the alternative, that Agent Schrader should be denied immunity because the violation of state law (*i.e.*, aggravated assault) was grossly disproportionate to the federal duty that Agent Schrader violated the state law to accomplish (*i.e.*, arrest of a suspect for a minor regulatory offense).

[2] Agent Schrader contends, in the alternative, that his subjective intent is irrelevant to his entitlement to immunity.

(c) the force he employed did not violate clearly established federal law.[3]

Agent Schrader also contends that the subjective motivation of the prosecution—hostility to the enforcement of federal law—strongly supports his entitlement to immunity.

We first address whether the district court properly resolved disputed issues of fact and then consider whether Agent Schrader is entitled to immunity.[4]

I. The Facts Must Be Viewed in the Light Most Favorable to the State.

Agent Schrader urges us, as he persuaded the district court, to adopt the analysis of the en banc Ninth Circuit. *See Idaho v. Horiuchi*, 253 F.3d 359, 376 (9th Cir.) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001) (holding that courts should decide factual questions related to immunity defenses), *id.* at 390 n.12 (Hawkins, J., dissenting) (same).

---

[3] Agent Schrader contends, in the alternative, that the reasonableness of his use of force is irrelevant to his entitlement to immunity.

[4] An argument could be made that this Court should begin with the substantive standard for immunity, identify any disputed issues of fact, and then determine whether those fact disputes should be decided by the court or viewed in the light most favorable to the State. In light of the complexity of the substantive standard for immunity, however, we find it most straightforward to begin, as the district court did, with determining the body of facts to which we must apply the standard.

The State, analogizing immunity under the Supremacy Clause to qualified immunity, suggests that this Court should follow the approach of the Second Circuit, Tenth Circuit, and (apparently) Sixth Circuit and view any disputed facts in the light most favorable to the State. *New York v. Tanella*, 374 F. 3d 141, 148 (2d Cir. 2004) ("In reviewing this matter, we view the evidence in the light most favorable to the State and assume the truth of the allegations in the indictment."); *see also Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006); *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988).

Rule of Criminal Procedure 12(b) permits a party to "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). The Advisory Committee Notes indicate that "immunity" is among those defenses that can be raised in such a motion. *See id.*, Advisory Committee Notes.

The defense of immunity under the Supremacy Clause, however, often overlaps significantly with the elements of the offense. In this case, for example, Agent Schrader has asserted the defense of "justification" based on "arrest and search." New Tejas Penal Code §§ 50.01, 50.02. If a jury concludes that Agent Schrader "reasonably believe[d] the arrest . . . [wa]s lawful" and that Agent Schrader only used force that was "immediately necessary to make or assist in making an arrest," then he will be acquitted of any crime under state law.

The findings of fact made by the court below thus overlap significantly with the issues that a jury would decide in any trial of this matter.

Under the plain language of Rule 12, a court can resolve an immunity defense by pretrial motion only if it can be determined without trial on the merits. Agent Schrader's motion could be determined without trial on the merits only if, viewing the evidence in the light most favorable to the State, immunity is warranted.[5]

This rule strikes the proper balance between federal and state interests. When a federal officer is charged with a crime under state law, the officer will receive immunity from trial if the uncontroverted facts provide the officer with the right to immunity. The federal government is thus protected from state prosecutors seeking to interfere with its operations.

In contrast, when a federal officer's entitlement to immunity turns on disputed questions of material fact, the officer must face trial before a jury of his peers, who can resolve these factual disputes during a trial of the merits of the case, as the Framers intended. *See* U.S. Const., 6th Amend. In these circumstances, 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. 28 U.S.C. 1442.

Although it is true, as the dissent notes, that immunity under the Supremacy Clause 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.

---

[5] *Morgan v. California*, 743 F.2d 728 (9th Cir. 1984), cited by the dissent, is inapposite. The case arises in the habeas context, not in the context of removal and a motion to dismiss an indictment.

There is no question that, as the Supreme Court has held, the Constitution affords federal officers with a substantive right to immunity. But the Constitution says nothing about procedure: how such a right must be enforced, by whom, or when. These issues of the form of adjudication must be governed by rule and statute (subject, of course, to due process). For example, the right to remove this criminal prosecution to federal court is found in a federal statute, not in the Constitution. 28 U.S.C. § 1442.

Agent Schrader identified no rule or statute that would permit him to evade a jury trial. He moved to dismiss this indictment under Rule of Criminal Procedure 12. And as discussed above, Rule 12 does not permit a district court to adjudicate fact issues that overlap with the issues to be decided at trial.

Accordingly, we disregard the findings of fact rendered by the court below and, for the purposes of our analysis, construe any disputed facts in the light most favorable to the State.

II. Agent Schrader Is Not Entitled to Immunity.

The court below recited the correct standard for immunity: whether Agent Schrader did "no more than what was necessary and proper" in fulfilling his federal duties. *In re Neagle*, 135 U.S. 1, 75 (1890). It erred, however, in its application of that standard, particularly when the facts are viewed in the light most favorable to the State.

We conclude that the State has carried its burden to disprove the defense of immunity on three, independent grounds.[6]

A. Arresting Mr. White was not "necessary" to accomplish Agent Schrader's duties.

We begin with the "necessity" of Agent Schrader's conduct. There is no question that immunity protects a federal officer who acts at the direct orders of a superior: "An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself." *Osborn v. Bank of U.S.*, 22 U.S. 738, 865 (1824) (Marshall, C.J.). But Agent Schrader's conduct falls far outside this rule.

Agent Schrader's federal duties did not require him to arrest Mr. White, much less employ the particular force that he used in doing so. None of his superiors directed him to arrest Mr. White. Nor has Agent Schrader identified any general policy of his employment requiring him to arrest Mr. White or make a "flying tackle."

Agent Schrader was off duty, in plain clothes, and on vacation with his family at the time of the arrest. He had no obligation to arrest Mr. White and could (indeed, should) have continued his day with his family. He would have faced no consequences from his employer for failing to arrest Mr. White.

Cases involving alleged reckless driving by federal officers confirm this analysis. An officer is immune to prosecution for an on-duty traffic accident caused by

---

[6] We address all three grounds to provide guidance regarding the law. Under this Court's precedent, alternative holdings bind future panels.

reckless driving only if "the accident resulted from an exigency or emergency related to his federal duties which dictated or constrained the way in which he was required to, or could, carry out those duties." *North Carolina v. Cisneros*, 947 F.2d 1135, 1139 (4th Cir. 1991); *see also Puerto Rico v. Torres Chaparro*, 738 F. Supp. 620, 621 (D.P.R. 1990), *aff'd* 922 F.2d 59 (1st Cir. 1991) (immunity to speeding when it was necessary "to proceed as fast as possible"); *Lilly v. West Virginia*, 29 F.2d 61, 64 (4th Cir. 1928) ("where speed and the right of way are a necessity").

The evidence presented below, viewed in the light most favorable to the State, establishes that there was no "exigency or emergency" related to Agent Schrader's federal duties that required him to employ any force whatsoever against Mr. White.

Federal officers are immune to prosecution under State criminal laws when they act in a manner necessary to the accomplishment of their federal duties. Immunity does not attach, however, when an officer employs his federal authority for ends unrelated to his federal duties.

B. Arresting Mr. White was not subjectively "proper."

Viewed in the light most favorable to the State, Agent Schrader's subjective motivations deprive him of immunity. Given the earlier confrontation between Mr. White and Agent Schrader, the evidence supports the inference that in tackling Mr. White, Agent Schrader "act[ed] out of malice or with some criminal intent" in arresting Mr. White. *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977).

Given the earlier conflict between Agent Schrader and Mr. White, the facts of this case are remarkably similar

to *Arizona v. Files*, 36 F.Supp.3d 873 (D. Ariz. 2014), in which a federal Wildlife Services employee was denied immunity for trapping the dog of a neighbor with whom he had been feuding. *Id.* at 884. In that case, the district court denied immunity because it was "convinced that Files set out to trap Zoey [the dog] not because he felt it was part of his job to do so, but because [Files] sought to use the tools of his job and the authority of an urban specialist to satisfy a personal problem." *Id.*

In this case, viewing the evidence in the light most favorable to the State, this Court is convinced that Agent Schrader tackled Mr. White during the arrest not because he felt that 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 FBI agent to satisfy a personal problem. There is no immunity to prosecution under these circumstances.

C. Arresting Mr. White was not objectively "proper."

Similarly, viewing the evidence in the light most favorable to the State, we conclude that Agent Schrader employed means that could not honestly be considered reasonable in arresting Mr. White. *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977).

With respect to the objective prong, the parties agree (and the district court recognized) that the force employed by Agent Schrader (1) was objectively unreasonable but (2) did not violate clearly established federal law.

The question before us, then, is whether a federal officer's entitlement to immunity under the Supremacy

Clause turns (like entitlement to qualified immunity) on whether the officer violated clearly established law.[7]

We agree with the State that immunity does not depend on whether the law was clearly established. There is no reason that the "clearly established" test for qualified immunity should apply in this context. Qualified immunity is a common-law doctrine, derived from the Supreme Court's (oft-criticized) view of the law when Section 1983 was enacted. *See, e.g.*, *Owen v. Independence*, 445 U.S. 622, 638 (1980) ("Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity."). In contrast, the immunity invoked by Agent Schrader derives from the Supremacy Clause of the Constitution. All that the doctrines share in common is the word "immunity."

Federal officers are protected from state prosecution only when they employ reasonable means in accomplishing their federal duties. Overcoming this immunity does not require the State to demonstrate that the officer's conduct was proscribed by clearly established federal law.

The district court found that Agent Schrader's conduct was "improper and reckless," and on appeal, the parties

---

[7] We reject out of hand the dissent's suggestion that the Supremacy Clause wholly forbids scrutiny of the officer's use of force. No circuit court has adopted such a sweeping view of immunity, and the Supreme Court has emphasized that, for an officer to be entitled to immunity, the officer's conduct must be not only "necessary" but also "proper."

do not dispute that Agent Schrader's conduct was objectively unreasonable. Because Agent Schrader employed unreasonable means in accomplishing his federal duties, Agent Schrader is not entitled to immunity from prosecution under the Supremacy Clause.

Conclusion

Agent Schrader is not entitled to avoid trial for his assault of Mr. White. A jury may well find that his use of force was justified and acquit him, but we are a nation of laws, and Agent Schrader's conduct must be governed by those laws. Accordingly, we reverse the order dismissing the indictment and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

SKYLER, Circuit Judge, concurring.

I join Judge FRING's excellent opinion in full. I write separately to note the wise suggestion of the Tenth Circuit that the appropriate test for immunity under the Supremacy Clause may require balancing the federal need against the gravity of the state offense. *Wyoming v. Livingston*, 443 F.3d 1211, 1222 n.5 (10th Cir. 2006) ("We also leave 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—where, for example, they commit a grievous state offense for the purpose of enforcing a trivial federal policy.").

Mr. White had committed, at most, a minor regulatory offense, which the sweeping tide of public opinion (as evidenced by the recent ballot initiative in New Tejas) no longer considers appropriate for criminalization at all. Even the district court recognized the unreasonableness of the force employed by Agent Schrader when he performed a flying tackle of Mr. White onto a concrete sidewalk.

Even if Agent Schrader were entitled to immunity under the traditional test set forth in the majority opinion, I would hold that he cannot receive immunity because he committed a grievous state offense for the purpose of enforcing a trivial federal policy.

HAMLIN, Circuit Judge, dissenting.

The State of New Tejas has admitted precisely why it is prosecuting Agent Schrader. In a speech by Prosecutor Wexler, which goes notably unmentioned by the majority, she proudly proclaimed that her prosecution of Agent Schrader is based on hostility to enforcement of federal marijuana laws and on intimidating federal agents not to enforce federal law.[8]

By permitting this prosecution to proceed, the majority upends the relationship between state and federal authority, leading to precisely what the Supremacy Clause was intended to prevent: the "inversion of the fundamental principles" that would result if "authority of the whole society [were] every where subordinate to the authority of the parts." THE FEDERALIST No. 44 (James Madison); *see also Tennessee v. Davis*, 100 U.S. 257, 263 (1879) ("If, when thus acting, and within the scope of their authority, [federal] officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, . . . the operations of the general government may at any time be arrested at the will of one of its members."). I dissent, and I urge the Supreme Court to intervene.

---

[8] Because I conclude that Agent Schrader is entitled to immunity based on the "necessary and proper" test, I need not consider the legal significance, if any, of the district court's findings regarding the motive for the prosecution.

The majority errs on both issues that it addresses. First, protection of the operation of the federal government against interference by the States requires that district courts deciding motions to dismiss to resolve any disputed issues of material fact. Second, the majority views the scope of federal duties far too narrowly and errs by permitting state law to second-guess the means by which federal officers accomplish those duties.

I. The District Court Must Resolve Any Disputed Facts.

The majority first goes astray when it concludes that facts must be viewed in the light most favorable to the State. The Ninth Circuit long ago recognized the errors of the majority's approach:

> [Immunity] would be severely limited if the availability . . . were to turn entirely on the nonexistence of a material dispute over the facts. First, there are almost invariably matters of factual dispute in cases involving criminal charges. Second, when the objective is obstruction or harassment it is far too easy to allege the existence of a factual dispute, even when none exists. 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. While we are confident that such attempts would be infrequent, we do not read the relevant cases as preventing the federal courts from responding effectively should one occur.
>
> . . . If, after holding an evidentiary hearing, it is apparent to the district judge

> that the state criminal prosecution was [intended to frustrate enforcement of federal law], the writ should be granted even if the judge has to resolve factual disputes to arrive at that conclusion.

Morgan v. California, 743 F.2d 728, 733 (9th Cir. 1984).[9] The majority's approach imposes these severe limitations on immunity by permitting local prosecutors to fabricate factual allegations that, if true, would negate immunity.

The Ninth Circuit's later en banc decision in *Idaho v. Horiuchi* explained the need for district judges to decide these issues of fact:

> While there is practically no law, and very little guidance, we conclude that if Horiuchi renews his motion to dismiss, factual issues must be resolved by the district court prior to trial; and if there continues to be conflicting evidence pertaining to key aspects of Horiuchi's immunity claim, as we expect there will be, the factual disputes must be resolved by the district court.
>
> . . .
>
> We also find persuasive modern courts' practice of deciding factual questions underlying criminal immunity claims,

---

[9] Although, as the majority notes, this case arises in the context of habeas, the Supremacy Clause immunity principles enunciated in the habeas context apply equally to a Rule 12(b) motion to dismiss an indictment in a case removed under 28 U.S.C. § 1442. *New York v. Tanella*, 374 F. 3d 141, 149 n.1 (2d Cir. 2004).

> rather than submitting them to juries. Having to live through the anxiety of a criminal trial destroys most of the benefits of immunity, and so courts often dispose of factual questions underlying immunity defenses prior to allowing the jury to deliberate on criminal liability. We have recognized that courts may decide the facts underlying a double jeopardy claim or the scope of an immunity deal with the prosecution. . . . And, of course, courts routinely decide any factual disputes underlying attorney-client privilege, executive privilege, probable cause and other evidentiary matters.

Idaho v. Horiuchi, 253 F.3d 359, 375 (9th Cir.) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001) (internal quotation marks omitted).

I find the Ninth Circuit's policy analysis persuasive: "[H]aving the district court hear the evidence and make factual findings before the state prosecution can go forward will act as a substantial safeguard against frivolous or vindictive criminal charges by states against federal officers." *Id.* at 376. "[I]nterposing a federal judge between the state prosecutor and the jury will provide a significant restraint on overzealous state prosecutors and ensure such prosecutions remain an avenue of last resort in our federal system." *Id.* This view attracted a majority of the Ninth Circuit. *See id.* at 390 n.12 (Hawkins, J., dissenting) ("[R]esolution of the factual issues pertaining to immunity by the judge seems more consistent with the protective purposes of Supremacy Clause immunity.").

My colleagues focus myopically on the particular rule that authorizes a district court to resolve motions in criminal cases. They lose sight of the broader issue: the structural concerns of our Constitution and its allocation of state and federal authority.

How a right is asserted (and that assertion adjudicated) is often as important as the substantive standard. Consider, for example, absolute and qualified immunity. The Supreme Court has held that orders denying these immunities are immediately appealable because they constitute "an entitlement not to stand trial under certain circumstances" that cannot be vindicated after trial has occurred. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

The Supremacy Clause dictates that Agent Schrader's assertion of immunity receive similar treatment. The Constitution does not, as the majority suggests, merely provide him with a post-trial right to avoid liability. Instead, the Constitution prohibits state governments from using state criminal laws to scrutinize and second-guess the operation of the federal government. Rule 12 provides an appropriate mechanism for this motion to be raised pretrial (and Agent Schrader acted properly in invoking it), but even if Rule 12 were removed from the federal rules, the Constitutional would still require—and empower—district judges to rule on and decide any disputed issues of fact related to the assertion of immunity.

The majority errs by failing to give federal officers the protection of interposing a federal judge between the state prosecutor and the jury. The court below acted properly in resolving disputed issues of fact.

II. Agent Schrader Is Entitled to Immunity.

Notwithstanding the State's arguments, my colleagues do not suggest that the order dismissing the indictment should be reversed if the district court acted properly in resolving those disputed issues of material fact. Under the facts as found by the district court,[10] Agent Schrader acted properly, employing means that were necessary and proper in accomplishing his duties. The district court's analysis was correct, and I would affirm based on the analysis in that opinion.

Moreover, even if the majority were correct that the facts must be viewed in the light most favorable to the State, the dismissal of the indictment should be affirmed.

A. Agent Schrader's arrest of Mr. White was "necessary" to accomplish his federal duties.

The majority begins with a legal error regarding the scope of a federal officer's duties. The Supreme Court has held, in the context of privilege and immunity, that an officer's duties include both mandatory duties and discretionary acts. *See Barr v. Mateo*, 360 U.S. 564, 575 (1959) ("That petitioner was not required by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority.").

---

[10] The State does not challenge these findings as clearly erroneous.

The federal government empowered Agent Schrader to make warrantless arrests for individuals committing federal crimes in his presence. 18 U.S.C. § 3052. Making the arrest in this case was therefore within the scope of his federal duties, and he receives as much protection from state criminal liability as if he had been specifically directed to make the arrest by a supervisor at the scene.

The alternative—the majority's holding—virtually nullifies immunity. Federal officers will receive protection from criminal liability only if they are following a specific direction from their superiors. It is difficult to imagine a greater chill on federal law enforcement than to expose officers to state criminal liability for exercising any initiative in enforcing federal law.

B. The Correct Test for Immunity Does Not Involve an Officer's Subjective Intent.

The district court found that Agent Schrader's subjective intent was to enforce federal law. As discussed above, the district court properly resolved these disputed facts, and under these findings, the "subjective" prong provides no barrier to immunity.

In the alternative, however, even viewing the facts in the light most favorable to the State, Agent Schrader's subjective intent cannot deprive him of immunity. The "subjective" prong should not be included in the test for immunity under the Supremacy Clause.

I recognize that many of our sister circuits have, without explanation, incorporated the subjective motivations of federal officers into the immunity analysis. This approach is inconsistent with the general approach of the Supreme Court to evaluation of law enforcement

actions and, specifically, with the Supreme Court's guidance regarding immunity.

In the context of probable cause, the Supreme Court has repeatedly emphasized the need for objective analysis of officers' conduct. *See, e.g.*, *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause."); *Whren v. United States*, 517 U.S. 806, 814 (1996) ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."). This approach, the Supreme Court admonishes, serves important policy goals: "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton v. California*, 496 U.S. 128, 138 (1990).

And indeed, the Supreme Court has specifically applied this rule in the context of immunity. Qualified immunity, like immunity under the Supremacy Clause, once included an inquiry into the officer's subjective intent: whether the officer acted "with the malicious intention to cause a deprivation of constitutional rights or other injury." *Wood v. Strickland*, 420 U.S. 308, 322 (1975). But the Supreme Court rejected this test as unworkable:

> [S]ubstantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their

> governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. . . . [T]he judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government

Harlow v. Fitzgerald, 457 U.S. 800, 816-17 (1982). The Supreme Court therefore held that qualified immunity should be determined solely based on the "objective reasonableness of an official's conduct." *Id.* at 818.

I have no doubt that the Supreme Court would reach a similar holding regarding immunity under the Supremacy Clause. *See also Wyoming v. Livingston*, 443 F.3d 1211, 1221 (10th Cir. 2006) (expressing "concer[n] with the incorporation of a subjective element into the reasonableness of a federal officer's actions"). I suspect that aberrational persistence of the subjective element in immunity under the Supremacy Clause exists merely because the Supreme Court has not spoken to the doctrine in decades.

Immunity under the Supremacy Clause cannot depend on an officer's subjective intent. Thus, even viewing the facts in the light most favorable to the State, Agent Schrader's subjective intent does not deprive him of immunity.

C. State Prosecutors Cannot Second-Guess the Means Employed by Federal Prosecutors to Accomplish Their Duties.

Nor, I would hold, does any objective unreasonableness of Agent Schrader's use of force deprive him of immunity.

I agree with the district court's conclusion that immunity under the Supremacy Clause must provide at least as much protection to an officer as qualified immunity provides. The alternative would vitiate the purpose of qualified immunity, permitting criminal liability to be imposed on federal officers based on precisely the sort of hindsight and second-guessing condemned by the Supreme Court.

Although the decision below could be affirmed on this ground, I would go further and hold that immunity under the Supremacy Clause—which arises out of our constitutional structure and the relationship of federal and state authority—sweeps far more broadly than qualified immunity.

There is no question that (1) Agent Schrader had probable cause to arrest Mr. White for violation of federal marijuana laws; and (2) Agent Schrader's federal duties included arresting Mr. White for committing a federal crime in his presence.

In my view, these facts should end the immunity inquiry. When a federal officer is enforcing federal law,

state criminal laws cannot regulate how that duty is accomplished: "An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself." *Osborn v. Bank of U.S.*, 22 U.S. 738, 865 (1824) (Marshall, C.J.). The government of the Union "is supreme within its sphere of action." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

Our constitutional structure leaves no room for the States to regulate—whether through imposition of criminal liability or otherwise—how federal officers must accomplish their duties. The State of New Tejas could not require Agent Schrader to use a taser in arresting a suspect, forbid him from using handcuffs, require him to identify himself in a particular manner, or (as it attempts here) prosecute him for employing a flying tackle during the arrest.

Regardless of the wisdom of the means of arrest employed by Agent Schrader, any regulation of those means (and any accompanying punishment) could come only through the federal government, the sovereign that employed him. Strains of this view can be found in decisions in this area. *See In re Waite*, 81 F. 359, 371 (N.D. Iowa 1897), *aff'd sub nom. Campbell v. Waite*, 88 F. 102 (8th Cir. 1898) ("The mode or manner in which the officer or agent undertakes to perform the duty imposed upon him by the laws or authority of the United States is not a matter of state cognizance."); *In re McShane*, 235 F.Supp. 262, 274 (N.D. Miss. 1964) ("For the mode or manner in which he performed the duty imposed upon him by the laws of the United States he cannot be called to account in a criminal case brought in a state court,

based upon provisions of a state statute." (internal quotation marks omitted)).

Federal officers' immunity to criminal prosecution under state law derives from the Supremacy Clause and from the federal structure created by our Constitution. Even if other circuits have gone astray, I would adopt the correct view of immunity.

The district court should be affirmed, either because it acted properly by resolving disputed issues of fact or, alternatively, because Agent Schrader is entitled to immunity even viewing the facts in the light most favorable to the State. I respectfully dissent, and I urge the Supreme Court to provide much-needed clarification to this area of the law.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MADRIGAL

Criminal Action No. 17-cr-5142

STATE OF NEW TEJAS,
Plaintiff

v.

HANK SCHRADER,
Defendant

Filed: September 14, 2017

ORDER

JAMES MCGILL, Judge.

This matter is before the Court on a motion to dismiss based on the Supremacy Clause of the Constitution of the United States of America. For the reasons detailed below, having reviewed the extensive briefing and evidence submitted by the parties and having received live testimony at a hearing, the Court grants the motion and dismisses the indictment of Agent Schrader.

Background[1]

Defendant Hank Schrader has served for nearly 20 years as a special agent with the Federal Bureau of Investigation. Over the course of his career, he has been

[1] The facts recited in this portion of the opinion are either stipulated or undisputed. I address the material disputed facts later.

stationed in New Mexico, Michigan, and (at present) Wisconsin. Agent Schrader investigated crimes such as racketeering, wire fraud, money laundering, and kidnapping, but he was never personally involved in any drug trafficking investigations.

Agent Schrader received several commendations for his work, including for his investigation of a major transnational criminal organization. Although complaints of excessive force were made against him on four occasions, none of these complaints was sustained by his supervisors. On another occasion, Agent Schrader was reprimanded for reckless discharge of a firearm.

In November 2016, Agent Schrader traveled with his family on vacation to Madrigal, New Tejas. Agent Schrader was recently married, and the trip was his honeymoon, although he and his wife were accompanied by her nine-year-old daughter and eleven-year-old son from a previous marriage. The trip was unrelated to any of Agent Schrader's official duties.

The family spent the first four days of their trip swimming in Lake Madrigal, visiting a local amusement park, and visiting historical sights. On the fifth day—November 8—Agent Schrader and his family planned to drive to downtown Madrigal to visit the New Tejas History Museum.

The family woke up early and by approximately 8 a.m.,[2] reached the outskirts of Madrigal. Agent Schrader was driving. As they drove down Salamanca Avenue in

[2] The parties dispute the precise time of this incident, but it is immaterial to my ruling on this motion.

their rented green convertible, a red truck pulled in front of them.

The details of the lane change are disputed. Agent Schrader testified that the red truck was speeding dangerously, pulled in front of his vehicle, and immediately braked, causing Agent Schrader to "slam on [his] brakes" to narrowly avert a collision and risking a serious collision with the car driving behind him. Mrs. Schrader, who was sitting in the front passenger's seat, was looking backwards to speak with her children and did not observe the lane change, although she heard her husband shout an expletive and felt him brake sharply. Mr. White, the driver of the red truck, denies speeding and denies braking after changing lanes in front of Agent Schrader.

What is undisputed is what occurred next. Shortly after the lane change, the vehicles stopped at a stoplight. Agent Schrader left his car and walked to Mr. White's vehicle. Agent Schrader admits that he was angry: "I just lost my temper." Mrs. Schrader described him as 'furious" and his face as "red."

As Agent Schrader approached, Mr. White also left his vehicle and turned towards him. Agent Schrader began yelling. Neither man remembers precisely what was said. According to Agent Schrader, "I was angry that this guy almost hit me, my wife, and especially the kids. We were on vacation. I just married their mother. You know, I was just trying to keep them safe." Mr. White responded in kind: "I was telling him, like, back off, you're crazy, but if you wanna [sic] fight, I ain't backing down." He admits shoving Agent Schrader in the chest.

Mrs. Schrader was worried that violence would break out. After he was shoved, she thought she saw Agent

Schrader drawing back his arm, as if to punch Mr. White. At that point, however, the light turned green, and the cars behind them began to honk. Both men returned to their vehicles, and the confrontation ended.

Agent Schrader "visibly relaxed" when he returned to the car. He apologized to his wife and children, and he and his family continued to downtown Madrigal and the New Tejas Natural History Museum, where they spent several hours exploring the museum's extensive collection of New Tejas artifacts.

According to Mrs. Schrader, Agent Schrader said nothing more about his confrontation with Mr. White: "He loved the museum. The incident on the drive was the furthest thing from his mind." After leaving the museum, the family decided to have lunch in downtown Madrigal. As they walked along a shady boulevard looking for a restaurant, Agent Schrader had his second encounter with Mr. White, who was leaving a marijuana dispensary.

In 2016, the citizens of New Tejas—in a well-publicized ballot initiative—made possession and consumption of marijuana legal under state law. The law permits (with appropriate licensing) small, independently-owned stores to grow and sell marijuana directly to the public. Marijuana remains, of course, a Schedule I drug that is illegal to possess under federal law.

Mr. White stepped out of a building approximately fifteen feet in front of Agent Schrader. As state law requires, the marijuana dispensary that Mr. White was

leaving had only minimal, non-descript advertising: a small[3] sign stating, "Pinkman's Emporium."

At the store, Mr. White, a habitual recreational marijuana user, had purchased two ounces of marijuana, which was clearly visible in a transparent plastic bag. It is undisputed that Mr. White's purchase and possession of the drug fully complied with New Tejas law.

When Agent Schrader observed Mr. White carrying the bag of marijuana, he shouted, "Stop! You're under arrest!", and began running towards him.

Mr. White, observing Agent Schrader, turned and began to run. Agent Schrader tackled Mr. White from behind, landing heavily atop him and sending him crashing onto the concrete sidewalk. Mr. White cried out in pain and ceased struggling.

The owner of Pinkman's Emporium called 9-1-1 after witnessing Agent Schrader's actions. Local police arrived at the scene shortly afterwards, to find Mr. White in handcuffs and Agent Schrader informing him that he was under arrest for possession of marijuana in violation of Section 844 of Title 21 of the United States Code. Agent Schrader identified himself as an FBI agent enforcing federal law—he was not arrested or otherwise hindered by the local police.

Agent Schrader testified before this Court that he was unaware that New Tejas had legalized marijuana but

---

[3] State law limits any signage of a marijuana dispensary to a single plain-text, black-and-white sign, with letters no larger than six inches tall, in Times New Roman or similar font. New Tejas Admin. Code § 51.014. The word "marijuana" cannot be used on the sign. *Id.*

that even if he had been aware, it would have made no difference in his decision to arrest Mr. White: "No matter what state law says, I swore an oath to enforce federal laws. That's what I was doing. That's all I was doing."

Mr. White was transported by ambulance to a local hospital, where it was discovered that he had a broken arm and several chipped teeth. He was not charged with any crime.

The Madrigal community reacted with outrage. Mr. White was one of the leaders of the Madrigal marijuana community and had been instrumental in rallying support of legalization. The day after the incident, several hundred protestors gathered in downtown Madrigal, complaining angrily that Mr. White had been injured while legally purchasing marijuana under state law.

The Madrigal County district attorney, Mrs. Wexler, who was elected in 2016 on a pro-marijuana platform, spoke at the rally. Her remarks were videotaped by a local news station, and the videotape was entered into evidence at the hearing on the motion to dismiss. Her speech included the following excerpts:

> 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.

The speech was well-received by the crowd. At Mrs. Wexler's direction, Agent Schrader was subsequently indicted for assault and aggravated assault[4] arising out of his attempted arrest of Mr. White.

Agent Schrader removed the state prosecution to this Court based on Section 1442 of Title 28 of the United States Code, which permits removal of a "criminal prosecution that is commenced in a State court and that is against . . . any officer . . . of the United States or of any agency thereof. . . for or relating to any act under color of such office or on account of any . . . authority claimed under any Act of Congress for the apprehension or

---

[4] It is undisputed that the injuries to Mr. White—specifically, the broken arm and chipped teeth—constitute "serious bodily injury" for purposes of "aggravated assault" as defined in Section 22.02 of the Penal Code of New Tejas.

punishment of criminals[.]" 28 U.S.C. § 1442.[5] The Supreme Court has held that an officer removing under this statute must plead a federal defense to the prosecution. *Mesa v. California*, 489 U.S. 121, 129 (1989). Agent Schrader pleaded that because he was a federal officer enforcing federal law, the Supremacy Clause provided him with immunity to state criminal prosecution. The State did not challenge removal or this Court's jurisdiction.

Agent Schrader moved to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b), arguing that he is immune to state prosecution. The Court received extensive briefing from both parties and heard live testimony and argument at hearing. The Court commends both parties on their excellent presentations of these difficult issues.

Analysis

The Supreme Court first held that the Supremacy Clause provides an individual federal officer with defense to state criminal prosecution in a mandamus proceeding in 1890: [6] "[I]f the prisoner is held in the state court to

---

[5] Agent Schrader is being represented by private counsel in this proceeding. The federal government has taken no position on whether Agent Schrader is entitled to immunity.

[6] The Supreme Court had previously upheld the constitutionality of an act permitting removal of criminal prosecutions of federal officials into federal court. *See Tennessee v. Davis*, 100 U.S. 257, 263 (1879) (rejecting the possibility that "operations of the general government may at any time be arrested at the will of one of its members").

answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under [state] law When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever." *In re Neagle*, 135 U.S. 1, 75 (1890); *see also Ohio v. Thomas*, 173 U.S. 276 (1899) (holding that a federal officer was immune to state prosecution "because the act complained of was performed as part of [his] duty . . . as a Federal officer in and by virtue of valid Federal authority, and in the performance of that duty he was not subject to the direction or control of the legislature of Ohio.").

Although the Thirteenth Court of Appeals has not addressed the issue, the courts of appeals have generally held that the question of whether an officer's conduct was "necessary and proper" requires an inquiry into "whether the official employs means which he cannot honestly consider reasonable in discharging his duties or otherwise acts out of malice or with some criminal intent." *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977). This inquiry, in turn, requires consideration of both (1) objectively, whether the officer's conduct was reasonable; and (2) subjectively, whether the officer believed himself to be acting in good faith. *Id.*

When a defendant invokes immunity under the Supremacy Clause, the prosecution bears the burden to present evidence disproving the defense: "[T]he State cannot meet its burden merely by way of allegations." *New York v. Tanella*, 374 F.3d 141, 148 (2d Cir. 2004) (internal quotation marks omitted).

Whether this Court Can Resolve Disputed Facts

Before addressing the merits of the motion, I must first consider a point of procedure. As detailed below, there are numerous disputed issues of fact that might be material to whether the motion to dismiss should be granted. The State urges that any disputed issues of fact must be taken in the light most favorable to the State (the non-movant), as this Court does in ruling on motions for summary judgment. Agent Schrader contends that this Court can sit as a factfinder, resolving any factual disputes in deciding the motion, as this Court does in ruling on motions to suppress evidence and in bench trials.

There is a dearth of authority on the issue, and the Thirteenth Court of Appeals has provided no guidance. At least two courts of appeals appear—albeit with little analysis—to have adopted the State's view. *See Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006) ("The appellate court must review the evidence in the light most favorable to the nonmoving party and assume the truth of the allegations in the indictment."); *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988) (suggesting that material disputed facts can prevent a court from deciding immunity issues).

I am persuaded, however, by the reasoning of the en banc Ninth Circuit in *Idaho v. Horiuchi*. Although the opinion has been withdrawn and the votes were divided regarding the proper outcome, a majority of the en banc Ninth Circuit concluded—and persuasively explained—that in resolving motions to dismiss grounded on immunity arising out of the Supremacy Clause, a district court should decide any disputed issues of material fact. *See Idaho v. Horiuchi*, 253 F.3d 359, 376 (9th Cir.) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001)

(holding that courts should decide factual questions related to immunity defenses), *id.* at 390 n.12 (Hawkins, J., dissenting) ("[R]esolution of the factual issues pertaining to immunity by the judge seems more consistent with the protective purposes of Supremacy Clause immunity.").

Accordingly, I will resolve any disputed issues of fact that may be material to immunity, including the credibility of witnesses. If I am mistaken, I am confident that my colleagues on the appellate bench will correct me.

Findings of Fact and Conclusions of Law

There is no question that Agent Schrader acted foolishly, in a manner ill-befitting a federal law enforcement officer. The question before this Court, however, is whether Agent Schrader's conduct exposes him to criminal liability under state law.

I conclude that it does not, and in support of this conclusion I make the following findings of fact and conclusions of law. If any finding is in truth a conclusion of law or any conclusion stated is in truth a finding of fact, it shall be deemed so, labels notwithstanding.

Findings of Fact

1. Agent Schrader testified clearly and without contradiction. I find him credible.

2. I credit Agent Schrader's testimony and find that he believed that his duties as an agent of the Federal Bureau of Investigation included arresting individuals who committed federal crimes in his presence, regardless of state law.

3. I credit Agent Schrader's testimony and find that when he attempted to arrest Mr. White, he was motivated solely to fulfill his federal duties and enforce federal law.

4. Agent Schrader did not intend to injure Mr. White or to commit a crime. Agent Schrader's intent was to arrest an individual for violating federal laws.

5. Mr. White was the first individual that Agent Schrader had encountered in open, public possession of marijuana. I credit Agent Schrader's testimony that he would have attempted to arrest Mr. White even if the two men had not been involved in the earlier confrontation.

6. The flying tackle of Mr. White onto concrete posed obvious and foreseeable risks. [7]

7. The flying tackle resulted in severe injuries to Mr. White.

8. Although Agent Schrader never expressly identified himself as a law enforcement officer, his instruction to Mr. White that he was under arrest manifested a purpose to arrest Mr. White and under the circumstances, identified Agent Schrader as a peace officer.

9. District Attorney Wexler has expressed hostility to the enforcement of federal marijuana laws. Based on her speech following the incident, I find that the purpose of this prosecution is to frustrate enforcement of federal law and to hinder federal law enforcement officers in the accomplishment of their duties. I do not credit District

---

[7] In addition to the testimony of Mr. White and several bystanders, the State presented expert testimony that the use of a flying tackle was improper and reckless under these circumstances. I credit this testimony.

Attorney Wexler's testimony stating that her sole motivation in seeking the indictment of Agent Schrader was to enforce state laws regarding assault.

10. Permitting this prosecution to proceed would interfere with the enforcement of federal marijuana laws in the State of New Tejas.

Conclusions of Law

1. As an agent of the Federal Bureau of Investigation, Agent Schrader's duties included making arrests without warrant for any offense against the United States committed in his presence. 18 U.S.C. § 3052.

2. Mr. White committed an offense against the United States—specifically, possession of marijuana, 21 U.S.C. § 844—in the presence of Agent Schrader.

3. Agent Schrader had probable cause to arrest Mr. White for possession of marijuana.

4. Agent Schrader's federal duties included the arrest of Mr. White for possession of marijuana. It is irrelevant to the immunity analysis that Agent Schrader was on vacation and that Agent Schrader was not specifically commanded by a superior to arrest Mr. White.

5. In the alternative, even if Agent Schrader's federal duties did not include arresting Mr. White for possession of marijuana, Agent Schrader's belief that his duties included arresting Mr. White was reasonable. *See Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982) ("Even 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.").

6. Agent Schrader's conduct was "necessary and proper" in the accomplishment of his federal duties.

7. As the word "necessary" is used by the Supreme Court in *Neagle*, an act is "necessary" if it is useful to achieving an end. *See McCulloch v. Maryland*, 17 U.S. 316, 413-14 (1819) ("To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.").

8. My finding that Agent Schrader acted in subjective good faith—without criminal intent and without malice—resolves the "subjective" prong of the immunity inquiry.

9. With respect to the "objective" prong, immunity under the Supremacy Clause necessarily provides protection against criminal liability that is at least as great as the protection against civil liability provided by qualified immunity. *Cf.* 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, 2202 (2003) (urging a standard for immunity that "[p]roperly applied, . . . is effectively coextensive with qualified immunity").

10. Qualified immunity arises from a need to "protect [public officials] 'from undue interference with their duties and from potentially disabling threats of liability.'" *Elder v. Holloway*, 510 U.S. 510, 514-15 (1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982)). It "allow[s] government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002). If (as the State contends) immunity under the Supremacy Clause provided lesser protection than qualified immunity, then the purpose of qualified immunity would be defeated. Government

officials could not carry out their discretionary duties without the fear of personal criminal liability.

11. Agent Schrader's conduct did not violate clearly established federal law.[8]

12. Accordingly, the means of the arrest satisfies the "objective" prong of the immunity inquiry.

13. Agent Schrader therefore "employed means which he could consider reasonable in the discharge of his duty," *Clifton*, 549 F.2d at 728, and is entitled to immunity under the Supremacy Clause because the conduct for which the State seeks to impose liability is conduct that was necessary and proper in the accomplishment of his federal duties.

Conclusion

For the foregoing reasons, the Supremacy Clause forbids the State of New Tejas to prosecute Agent Schrader for the acts charged in the indictment. Accordingly, Agent Schrader's motion is GRANTED, and it is hereby ORDERED that the indictment is DISMISSED.

---

[8] The State disputes that the test for qualified immunity has any relevance to immunity under the Supremacy Clause but concedes that if the test for qualified immunity applies, Agent Schrader's conduct did not violate clearly established federal law.

DATED this 14th day of September 2017.

BY THE COURT:

/s/ James McGill
James McGill
United States District Judge

APPENDIX C

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.

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. . . .

21 U.S.C. 802 provides in pertinent part:

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

21 U.S.C. 812 provides in pertinent part:

Schedule I

. . .

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

. . .

(10) Marijuana

Section 22.01 of the Penal Code of New Tejas provides:

Assault

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another;

(2) intentionally or knowingly threatens another with imminent bodily injury; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

(b) An offense under this section is a Class A misdemeanor.

Section 22.02 of the Penal Code of New Tejas provides:

Aggravated Assault

(a) A person commits an offense if the person commits assault as defined in Sec. 22.01 and the person causes serious bodily injury to another.

(b) An offense under this section is a felony of the second degree.

Section 50.01 of the Penal Code of New Tejas provides:

Justification as a Defense.

It is a defense to prosecution that the conduct in question is justified under this chapter.

Section 50.02 of the Penal Code of New Tejas provides:

Arrest and Search

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

(1) the actor reasonably believes the arrest or search is lawful; and

(2) before using force, the actor 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.