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## Solidifying Supremacy Clause Immunity

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# SOLIDIFYING SUPREMACY CLAUSE IMMUNITY

Judge Leslie A. Gardner\* and Justin C. Van Orsdol\*\*

## ABSTRACT

States have often taken different approaches to polarizing issues such as the legalization of marijuana, voting rights, and gun safety. Generally, the federal government has stayed out of the fray honoring the concept of the “states as laboratories.” That is, until recently. With increasing debate among political leaders and diverging viewpoints among Department of Justice officials, clashes between federal officers and state governments have increased. But what happens to a federal officer caught in the crossfire, charged by a state prosecutor for breaking state criminal law while attempting to enforce federal law? The answer lies in the doctrine of Supremacy Clause immunity. As the issue has seldom arisen, scholarship and case law on the subject is limited. In light of the rise in federal-state disputes, and considering the competing constitutional concerns and the criminal charges federal officers could face, a solidified framework for handling these types of cases is desperately needed. Moreover, these cases often involve motions to dismiss under Federal Rule of Criminal Procedure 12(b)(6), which presents a unique procedural question: whether a judge or jury should decide disputed issues of material fact. We propose a framework wherein juries should decide disputed issues of material fact in Supremacy Clause immunity cases. Further, we propose a Supremacy Clause immunity test that more thoroughly defines when (1) a federal officer is authorized by federal law to take certain actions, and (2) when a federal officer’s actions are “necessary and proper.” While our proposals do not solve every foreseeable problem in a Supremacy Clause immunity case, they do prevent the issues associated with the patchwork approach adopted by Supremacy Clause immunity’s cousin—qualified immunity.

INTRODUCTION . . . . .	568
I. BREAKING BAD: THE CASE OF <i>SCHRADER V. NEW TEJAS</i> . . . . .	572
II. DEMYSTIFYING THE MOTION TO DISMISS STANDARD IN SUPREMACY CLAUSE IMMUNITY CASES . . . . .	576

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A.	<i>The Meaning of Rule 12</i> . . . . .	578
1.	Immunity From Suit or a Matter of Defense? . . . . .	579
2.	The Plain Language of Rule 12 . . . . .	581
B.	<i>Lack of Jury Confusion Under Equivalent Federal Rules and Other Analogues</i> . . . . .	583
C.	<i>Easing Tension With Other Constitutional Amendments</i> . . . . .	585
1.	Fifth Amendment Tensions . . . . .	586
2.	Sixth Amendment Tensions . . . . .	586
3.	Tenth Amendment Tensions . . . . .	590
D.	<i>Adequacy of Other Protections for Federal Officers</i> . . . . .	592
1.	Federal Officer Removal Statute . . . . .	592
2.	Appeals . . . . .	594
3.	Supremacy Clause Immunity Burden Shifting Framework . . . . .	595
III.	THE PROPER SUPREMACY CLAUSE IMMUNITY TEST . . . . .	597
A.	<i>The Meaning of “Authorized”</i> . . . . .	598
B.	<i>The Two-Step Necessary and Proper Dance</i> . . . . .	599
1.	The Meaning of “Necessary”: Mandatory v. Discretionary . . . . .	600
2.	The Meaning of “Proper”: Objective v. Subjective Reasonableness . . . . .	603
3.	Clearly Established, if so by What Kind of Law? . . . . .	607
	CONCLUSION . . . . .	612

You know the greatest danger facing us is ourselves, and irrational fear of the unknown. There is no such thing as the unknown. Only things temporarily hidden, temporarily not understood.

—William Shatner as Captain James T. Kirk<sup>1</sup>

#### INTRODUCTION

In the summer of 2020, our country witnessed the tragic deaths of Breonna Taylor,<sup>2</sup> George Floyd,<sup>3</sup> and over 160 others.<sup>4</sup> As a result, the issue of how we deal

<sup>1</sup> *Star Trek: The Corbomite Maneuver* (NBC television broadcast Nov. 10, 1966).

<sup>2</sup> See generally Richard A. Opiel, Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/QGC9-T9NP>].

<sup>3</sup> See generally Luis Andres Henao et al., *For George Floyd, A Complicated Life and A Notorious Death*, APNEWS (June 10, 2020), <https://apnews.com/article/a55d2662f200ead0da4fed9e923b60a7> [<https://perma.cc/UMK4-7MDQ>].

<sup>4</sup> *Police in the U.S. Killed 164 Black People in the First 8 Months of 2020. These Are Their Names*, CBS NEWS (Sept. 10, 2020, 4:39 PM), <https://www.cbsnews.com/pictures/black-people-killed-by-police-in-the-u-s-in-2020/> [<https://perma.cc/E8EN-B4NG>] (listing the names of victims of police shootings).

with officer-involved fatalities made national headlines. As calls for investigations and criminal charges increased and television commentators tried to explain the barriers to civil lawsuits to the general public, most people became familiar with the doctrine of qualified immunity.<sup>5</sup> Many, however, are unfamiliar with the hidden and less understood doctrine of Supremacy Clause immunity.<sup>6</sup> For those unacquainted, Supremacy Clause immunity protects federal officers from “allegedly criminal conduct undertaken in [the] discharge of [their] federal duties,”<sup>7</sup> if the officer was: (1) authorized by federal law and (2) “did no more than what was necessary and proper” in discharging his or her duties.<sup>8</sup> With increasing polarization among the states on how to handle issues such as immigration,<sup>9</sup> marijuana legalization,<sup>10</sup> gun safety,<sup>11</sup>

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<sup>5</sup> See Jay Schweikert, *Police Immunity Highlighted by George Floyd Protestors Must End, and Officers Must Pay*, NBC NEWS (June 15, 2020, 2:27 PM), <https://www.nbcnews.com/think/opinion/police-immunity-highlighted-george-floyd-protesters-must-end-officers-must-pay-ncna1225281> [<https://perma.cc/D5RR-WGSF>] (explaining qualified immunity in the wake of George Floyd’s death).

<sup>6</sup> See Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2197 (2003) (stating that “there is little case law and virtually no scholarly commentary addressing” Supremacy Clause immunity). Waxman notes only one Supreme Court case and two scholarly articles. *Id.* at n.1–2. Since Waxman & Morrisons’ article was written, we count only two more articles that touch the subject. See generally Stephen A. Cobb, Note, *Jettisoning “Jurisdictional”: Asserting the Substantive Nature of Supremacy Clause Immunity*, 103 VA. L. REV. 107 (2017); James Wallace, *Supremacy Clause Immunity: Deriving a Willfulness Standard From Sovereign Immunity*, 41 AM. CRIM. L. REV. 1499 (2004).

<sup>7</sup> Waxman & Morrison, *supra* note 6, at 2197; see also Rebecca E. Hatch, *Construction and Application of United States Supreme Court Decisions in Cunningham v. Neagle*, 135 U.S. 1, 10 S. Ct. 658, 34 L. Ed. 55 (1890), *Establishing Standard for Supremacy Clause Immunity as to Actions of Federal Officers or Agents Alleged to Be in Violation of State Law*, 53 A.L.R. Fed. 2d 269, 280–81 (2011) (“[E]stablishing the standard for immunity under the Supremacy Clause as to actions of federal officers or agents alleged to be in violation of state law (sometimes referred to as ‘Supremacy Clause immunity’).”).

<sup>8</sup> *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890). This two-pronged test is colloquially referred to as the *Neagle* test.

<sup>9</sup> See Jake Grovum, *Many States Have Their Own Immigration Policies*, GOVERNING (Jul. 22, 2014), <https://www.governing.com/news/headlines/many-states-have-their-own-immigration-policies.html> [<https://perma.cc/RJ3A-FDUN>] (comparing different immigration policies of various states).

<sup>10</sup> See JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10482, STATE MARIJUANA “LEGALIZATION” AND FEDERAL DRUG LAW: A BRIEF OVERVIEW FOR CONGRESS 3 (2020) (detailing the divide between federal and state marijuana laws); Thomas Fuller, *Oregon Decriminalizes Small Amounts of Heroin and Cocaine; Four States Legalize Marijuana*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/us/ballot-measures-propositions-2020.html> (discussing Oregon’s recent legalization of several schedule one drugs).

<sup>11</sup> *Guide to the Interstate Transportation of Firearms*, NAT’L RIFLE ASS’N–INST. FOR LEGIS. ACTION, <https://www.nraila.org/gun-laws> [<https://perma.cc/4RLC-LP2V>] (showcasing an interactive map explaining the differences in right to carry laws among the United States).

and voting laws,<sup>12</sup> it is only a matter of time before we see an uptick in conflicts between federal officers and state prosecutors. Unfortunately, courts are ill-equipped to handle these cases as the current Supremacy Clause immunity test leaves much to be desired and case law is quite sparse.<sup>13</sup> While other scholars have explored the history of Supremacy Clause immunity and the sources from which the immunity is derived,<sup>14</sup> a more solidified framework is needed to address the intricacies these cases can present.<sup>15</sup> Otherwise, we may find ourselves in the quagmire of ambiguity that currently plagues qualified immunity.<sup>16</sup> The continuing development of this doctrine will shape the evolving dichotomy between the Supremacy Clause and other constitutional amendments.

Current case law is divided as to the correct application of the Supremacy Clause immunity test.<sup>17</sup> Moreover, the current test fails to answer questions that courts are likely to face. For example, federal officers often assert their Supremacy Clause immunity in pretrial motions to dismiss.<sup>18</sup> Where the state does not dispute material facts, district courts can easily resolve the question of Supremacy Clause immunity pretrial.<sup>19</sup> But when the state does dispute material facts, should district court judges or juries determine the facts when there is overlap between the criminal charges and the immunity? And should Supremacy Clause immunity provide federal officers with the same level of protection as qualified immunity? Or, is a modified framework more appropriate?

To answer these questions, this Article explores a fictional case that was presented to law students during the 2020 Hunton Andrews Kurth National Moot Court

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<sup>12</sup> *State Voting Laws*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/en-sure-every-american-can-vote/voting-reform/state-voting-laws> [<https://perma.cc/4CCE-76LZ>] (last visited Mar. 28, 2022) (archiving various state voting laws).

<sup>13</sup> See Hatch, *supra* note 7, at 278–80 (listing a total of only fifty-two cases dealing with Supremacy Clause immunity).

<sup>14</sup> See Cobb, *supra* note 6; Wallace, *supra* note 6.

<sup>15</sup> See *supra* note 6 and accompanying text.

<sup>16</sup> See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 60 (2017) (quoting Charles R. Wilson, “*Location, Location, Location*”: *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000) (internal quotations omitted)) (“Wading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face.”).

<sup>17</sup> See *id.* at 36–37.

<sup>18</sup> A recent search on WestLaw reflects sixteen cases where Supremacy Clause immunity was raised through a motion to dismiss. See WESTLAW, [https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)) (search the following: “supremacy clause immunity”/50 “motion to dismiss”) (search last run Feb. 12, 2022).

<sup>19</sup> See *Texas v. Kleinert*, 143 F. Supp. 3d 551, 557 (W.D. Tex. 2015), *aff’d* 855 F.3d 305 (5th Cir. 2017) (“A motion to dismiss based on Supremacy Clause immunity should be granted only if the underlying facts supporting the defense are not in dispute.”). Notably, Judge Elrod who sat on the Fifth Circuit panel that decided *Texas v. Kleinert* was a judge in the final round of the competition.

Championship.<sup>20</sup> The problem involved an FBI Agent, Hank Schrader, who was vacationing in the fictional state of New Tejas.<sup>21</sup> New Tejas recently legalized the sale of marijuana.<sup>22</sup> Agent Schrader executed a flying tackle during the arrest of a person who purchased marijuana from a dispensary.<sup>23</sup> The state prosecutor then brought criminal charges against Agent Schrader to prevent the federal government from enforcing its drug laws.<sup>24</sup> Agent Schrader, of course, asserted Supremacy Clause immunity.<sup>25</sup>

This Article proceeds in three parts. In Part I, this Article describes the details of the illustrative case and the different approaches used by district and circuit courts to answer the questions laid out above.<sup>26</sup> Part II delves into our answer on the first question—who decides disputed issues of material fact on a motion to dismiss when a federal officer raises a Supremacy Clause immunity defense?<sup>27</sup> Further, Part II investigates the meaning of Federal Rule of Criminal Procedure 12 and compares analogues between habeas corpus, qualified immunity cases, and Federal Rule of Civil Procedure 56's standards.<sup>28</sup> This analysis ends here with arguments as to why our solution best balances the competing tensions between the Supremacy Clause and other constitutional amendments and why federal officers are already well protected by other legal doctrine and statutes.

In Part III, this Article answers the second question of whether federal officers who raise Supremacy Clause immunity defenses are entitled to the same level of protection offered under qualified immunity. Specifically, this Article focuses on whether Supremacy Clause immunity should provide protection for both mandatory and discretionary actions. Next, this Article examine when a federal officer is authorized to act and what sources courts can look to in determining whether the federal officer's actions were mandatory or discretionary in the first place. Later, this Part explores whether the officer's subjective intent is relevant to the immunity. This Part concludes this discussion by analyzing and recommending an approach which better defines the meaning of the "necessary and proper" prong of the *Neagle* test.<sup>29</sup> More precisely, it scrutinizes whether courts should look only to the objective

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<sup>20</sup> The co-author of this Article, Justin Van Orsdol, and his teammates Adeline Kennerly Lambert and Spencer Woody, argued this case in the 2020 Hunton Andrews Kurth Moot Court National Championship. See *Hunton Andrews Kurth Moot Court National Championship*, UNIV. OF HOUSTON L. CTR., <https://www.law.uh.edu/blakely/mcnc/2020/homepage.asp> [<https://perma.cc/J4JU-KXTJ>].

<sup>21</sup> *Hunton Andrews Kurth Moot Court National Championship: 2020 Competition Problem*, UNIV. OF HOUSTON L. CTR., 2a, <https://www.law.uh.edu/blakely/mcnc/2020/2020%20MCNC%20Problem.pdf> [<https://perma.cc/8LU9-K2NT>].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 2a–3a.

<sup>25</sup> *Id.*

<sup>26</sup> See *infra* Part I.

<sup>27</sup> See *infra* Part II.

<sup>28</sup> See *infra* Part II.

<sup>29</sup> *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890).

reasonableness of the officer's actions or if courts should continue the analysis by determining whether the officer violated clearly established law. Finally, this Article also explores what sources of law should be used to give officers "fair warning."

### I. BREAKING BAD: THE CASE OF *SCHRADER V. NEW TEJAS*

On November 8, 2016, FBI Agent Hank Schrader was on vacation with his family in Madrigal, New Tejas.<sup>30</sup> Agent Schrader had served the FBI for nearly twenty years and was stationed in Wisconsin.<sup>31</sup> He primarily investigated white collar crimes like wire fraud, money laundering, and kidnapping, but was never involved in drug trafficking investigations.<sup>32</sup> While driving one morning in Madrigal, Agent Schrader was involved in a traffic altercation with a local resident, Mr. White.<sup>33</sup> Agent Schrader claimed Mr. White was speeding dangerously, pulled in front of his vehicle, and slammed on the brakes.<sup>34</sup> Agent Schrader was forced to slam on his breaks to avoid a serious collision that could have endangered his family.<sup>35</sup> Shortly after this incident, at a red light, both men exited their vehicles and angrily exchanged words.<sup>36</sup> The altercation ended with Mr. White shoving Agent Schrader.<sup>37</sup> Before Agent Schrader could respond, the traffic light turned green and both men returned to their vehicles.<sup>38</sup> The Schrader family then proceeded to tour a local museum.<sup>39</sup>

Later that day, Agent Schrader observed Mr. White leaving a marijuana dispensary with a bag of marijuana.<sup>40</sup> Consistent with New Tejas law, the dispensary, Pinkman's Emporium, was not clearly marked in a visible way.<sup>41</sup> New Tejas recently legalized the sale of marijuana, though it remains illegal under federal law.<sup>42</sup> Agent Schrader denied having any knowledge of the state's legalization but later testified that he would have taken the same action regardless.<sup>43</sup>

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<sup>30</sup> The facts of this fictional case are taken from the district court record found in the "2020 Moot Court Problem." See *supra* note 21. Fans of AMC's *Breaking Bad* will notice that the parties and judges are all named after characters from the show. See *Breaking Bad*, IMDB, <https://www.imdb.com/title/tt0903747/> [<https://perma.cc/85SJ-G67J>] (listing character names from the show). While the problem was fictional, its development was predicated on various real Supremacy Clause immunity cases.

<sup>31</sup> See *supra* note 21, at 27a–28a.

<sup>32</sup> See *id.* at 28a.

<sup>33</sup> See *id.* at 28a–29a.

<sup>34</sup> See *id.* at 29a.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* at 29a–30a.

<sup>39</sup> See *id.* at 30a.

<sup>40</sup> See *id.* at 30a.

<sup>41</sup> See *id.* at 30a.

<sup>42</sup> 21 U.S.C. §§ 802, 812, 844 (2012).

<sup>43</sup> See *supra* note 21, at 31a–32a.



After Agent Schrader observed Mr. White with the marijuana, he shouted at him to stop and told Mr. White that he was under arrest.<sup>44</sup> Agent Schrader then ran toward Mr. White.<sup>45</sup> Alarmed, Mr. White took flight in the opposite direction.<sup>46</sup> After a short chase, Agent Schrader tackled Mr. White from behind onto the concrete sidewalk, breaking Mr. White's arm and chipping his teeth.<sup>47</sup> It was then that Agent Schrader identified himself as an FBI agent, handcuffed Mr. White, and told him that he was under arrest for possession of marijuana.<sup>48</sup>

The next day the Madrigal County District Attorney, who was elected on a pro-marijuana platform, spoke at a rally of hundreds of pro-marijuana protestors gathered to complain of what happened to Mr. White.<sup>49</sup> The DA stated that the federal government had no right to interfere with New Texas state law and vowed to use her power to prevent federal marijuana laws from being enforced in the state.<sup>50</sup> Agent Schrader, she said, would serve as a warning to others who might try to enforce federal drug laws.<sup>51</sup>

Subsequently, the DA indicted Agent Schrader for both assault and aggravated assault under New Texas criminal statutes in state court.<sup>52</sup> Agent Schrader then removed the case to federal court under the federal officer removal statute.<sup>53</sup> Next, he filed a motion to dismiss the indictment under Federal Rules of Criminal Procedure 12(b) claiming that he was immune from the prosecution because he had Supremacy Clause immunity.<sup>54</sup>

The district court reviewed extensive briefing and held hearings on the immunity claim.<sup>55</sup> The parties disputed three key facts: (1) whether Agent Schrader's arrest of Mr. White was necessary to his federal duties, (2) whether Agent Schrader's subjective intent was to enforce federal law or carry out a personal vendetta from the prior traffic altercation,<sup>56</sup> and (3) whether the force used by Agent Schrader was objectively unreasonable.<sup>57</sup> The district court first determined that it should resolve material factual disputes when deciding motions to dismiss based on Supremacy

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<sup>44</sup> *See id.* at 31a.

<sup>45</sup> *See id.*

<sup>46</sup> *See id.*

<sup>47</sup> *See id.* at 31a–32a.

<sup>48</sup> *See id.* at 31a.

<sup>49</sup> *See id.* at 32a.

<sup>50</sup> *See id.*

<sup>51</sup> *See id.* at 33a.

<sup>52</sup> *See id.*

<sup>53</sup> 28 U.S.C. § 1442 (2012); *see supra* note 21, at 33a–34a.

<sup>54</sup> *See supra* note 21, at 34a.

<sup>55</sup> *See id.*

<sup>56</sup> *See id.* at 37a–38a. The district court and majority opinion included a subjective good faith analysis. Agent Schrader's mental state overlapped with the New Texas assault statute's "intentionally, knowingly, or recklessly" causing bodily injury to another. *Id.* at 45a.

<sup>57</sup> *See id.* at 38a.



Clause immunity claims.<sup>58</sup> After doing so, the court found that Agent Schrader was protected by Supremacy Clause immunity and dismissed the case.<sup>59</sup>

A split panel of the fictional Thirteenth Circuit reversed.<sup>60</sup> First, the Thirteenth Circuit held that, on a Rule 12 motion, the facts must be viewed in the light most favorable to the state (i.e., the nonmoving party) and disregarded the district court's findings.<sup>61</sup> The court relied on holdings from the Second,<sup>62</sup> Sixth,<sup>63</sup> and Tenth Circuits.<sup>64</sup> Additionally, the court found that because the disputed issues of material fact overlapped with issues a jury would decide, the district court was not in a position to decide those issues.<sup>65</sup> The court's opinion was also based on a phrase in Rule 12, which only permits parties to raise pretrial motions that the court "can [] determine[] without [a] trial on the merits."<sup>66</sup> Ultimately, the court decided that this framework best balanced the tensions between the Supremacy Clause and the Fifth, Sixth, and Tenth Amendments.<sup>67</sup> The Thirteenth Circuit then held that Agent Schrader was not entitled to Supremacy Clause immunity.<sup>68</sup> The court found that Agent Schrader's arrest was not necessary to accomplish his federal duties, was not subjectively proper, and was not objectively proper.<sup>69</sup> The majority, however, declined to utilize qualified immunity's "clearly established" test in its objective reasonableness analysis because, unlike qualified immunity, which is based on common law doctrine and interpretation of 42 U.S.C. § 1983, Supremacy Clause immunity is based in the Constitution.<sup>70</sup>

The dissenting opinion, of course, held the opposite.<sup>71</sup> In his dissent, Judge Hamlin, citing the Ninth Circuit's approach, opined that district court judges should decide disputed issues of material fact on Rule 12 motions under Supremacy Clause immunity because Supremacy Clause immunity is not just a mere defense but immunity from suit altogether.<sup>72</sup> Moreover, the dissent claimed that it would be too

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<sup>58</sup> *See id.* at 37a.

<sup>59</sup> *See id.* at 41a.

<sup>60</sup> *See id.* at 13a.

<sup>61</sup> *See id.* at 8a.

<sup>62</sup> *See id.* at 6a; *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.").

<sup>63</sup> *See supra* note 21, at 6a; *Kentucky v. Long*, 837 F.2d 727, 751 (6th Cir. 1988).

<sup>64</sup> *See supra* note 21, at 6a; *Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006).

<sup>65</sup> *See supra* note 21, at 8a.

<sup>66</sup> *See id.* at 7a.

<sup>67</sup> *See id.* at 7a–8a.

<sup>68</sup> *See id.* at 8a–9a.

<sup>69</sup> *See id.* at 9a–13a.

<sup>70</sup> *See id.* at 12a.

<sup>71</sup> *See id.* at 15a–26a.

<sup>72</sup> *See id.* at 16a–17a; *see also Morgan v. California*, 743 F.2d 728, 731 (9th Cir. 1984) ("[U]nder the Supremacy Clause, federal protective immunity will shield a federal agent from state prosecution.").

easy for the state to fabricate a factual dispute.<sup>73</sup> Judge Hamlin also relied on *Idaho v. Horiuchi*, in which the Ninth Circuit cited myriad examples of other immunity defenses that district court judges decide without involving juries including double jeopardy, immunity deals, privilege, and other evidentiary matters.<sup>74</sup> Lastly, the dissent argued that judges are better positioned to restrain overzealous state prosecutors.<sup>75</sup> As one would expect, Judge Hamlin found that Agent Schrader was entitled to Supremacy Clause immunity.<sup>76</sup> He found that Agent Schrader's actions were necessary to accomplish his federal duties, because federal officers' duties include both mandatory and discretionary acts.<sup>77</sup> Next, Judge Hamlin held that Supremacy Clause immunity should not include subjective intent,<sup>78</sup> in line with established Fourth Amendment<sup>79</sup> and qualified immunity precedent.<sup>80</sup> Finally, the dissent stated that Agent Schrader's actions were objectively proper because Supremacy Clause immunity should provide as much protection as qualified immunity.<sup>81</sup> According to the dissent, Agent Schrader did not violate clearly established law.<sup>82</sup>

The concurring opinion offered yet another approach based off dicta from a Tenth Circuit opinion in *Wyoming v. Livingston*.<sup>83</sup> In her concurrence, Judge Skyler suggested that Supremacy Clause immunity may require balancing between the federal need and the gravity of the offense.<sup>84</sup> She found that Mr. White had—at most—committed a minor regulatory offense, given the recent change in public opinion on the criminalization of marijuana.<sup>85</sup> Judge Skyler, however, concluded that Agent Schrader had committed a grievous offense for the purpose of enforcing a trivial federal policy.<sup>86</sup>

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<sup>73</sup> See *supra* note 21, at 17a.

<sup>74</sup> See *id.* at 17a–18a; see also *Idaho v. Horiuchi*, 253 F.3d 359, 375 (9th Cir.) (en banc) (discussing resolution of factual disputes under immunities), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001).

<sup>75</sup> See *supra* note 21, at 18a.

<sup>76</sup> See *id.* at 20a.

<sup>77</sup> See *id.* at 20a–21a.

<sup>78</sup> See *id.* at 21a–24a.

<sup>79</sup> See *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *Whren v. United States*, 517 U.S. 806, 813–14 (1996); *Horton v. California*, 496 U.S. 128, 138 (1990).

<sup>80</sup> See *Wood v. Strickland*, 420 U.S. 308, 322 (1975); *Harlow v. Fitzgerald*, 457 U.S. 800, 816–17 (1982).

<sup>81</sup> See *supra* note 21, at 24a.

<sup>82</sup> See *id.* at 24a–26a.

<sup>83</sup> 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.”); see *supra* note 21, at 14a.

<sup>84</sup> See *supra* note 21, at 14a.

<sup>85</sup> See *id.* at 14a.

<sup>86</sup> While beyond the scope of this Article, we believe this third approach is improper

The case was appealed to Supreme Court.<sup>87</sup> There, the following questions were certified: (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; and (2) what test governs whether the Supremacy Clause provided a federal officer with immunity from state criminal prosecution?<sup>88</sup> It is these questions, and others implicitly raised, that this Article seeks to answer.<sup>89</sup>

## II. DEMYSTIFYING THE MOTION TO DISMISS STANDARD IN SUPREMACY CLAUSE IMMUNITY CASES

With a broad sketch of Supremacy Clause immunity on our canvas, we can now paint in the details. Before one can examine the appropriate test for Supremacy Clause immunity, one must decide whether a district court judge or a jury should decide disputed issues of material fact when a defendant raises Supremacy Clause immunity on a Federal Rule of Criminal Procedure 12(b) motion to dismiss. This question is a fundamental starting point because the power of most immunity defenses, like qualified immunity, is that they function as a dual-layered shield.<sup>90</sup> The first layer protects the defendant from suit altogether while the second acts as a back-up, offering protection from liability should the first layer fail.

While disputed issues of material fact are a relatively rare phenomena when it comes to Supremacy Clause immunity cases, the question is an important one.<sup>91</sup> The fact that the issue has been raised in past Supremacy Clause immunity cases, and has resulted in different approaches, makes it necessary to discuss.<sup>92</sup> Generally, in a Supremacy Clause immunity case, a Rule 12 motion is handled in three steps. First,

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because states cannot interfere with federal law regardless of the state law's importance. *See id.*; *see also* *Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986) ("There can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress.").

<sup>87</sup> *See supra* note 21, at 1.

<sup>88</sup> *See id.*

<sup>89</sup> *See id.* The fictional Supreme Court was comprised of actual former justices of Supreme Court of Texas, and judges from the Fifth and Seventh Circuits. The panel did not offer a written opinion, but did hold in favor of Agent Schrader.

<sup>90</sup> *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (describing qualified immunity as an "immunity from suit rather than a mere defense to liability"); Michael L. Wells, *Scott v. Harris and the Role of the Jury in Constitutional Litigation*, 29 *REV. LITIG.* 65, 95 (2009) ("Police officers are ordinarily entitled to qualified immunity, which means that they are shielded from suits for damages . . .").

<sup>91</sup> We know of only two cases that have squarely dealt with this issue. *See Idaho v. Horiuchi*, 253 F.3d 359, 374–75 (9th Cir. 2001) ("The only case to speak directly to this issue comes from the early part of the last century." (citing *West Virginia v. Laing*, 133 F. 887, 891 (4th Cir. 1904))). We discuss why this is rare throughout Part II.

<sup>92</sup> *See id.* at 374–76 (discussing the difficulty in deciding whether a judge or a jury should decide disputed issues of material fact for a motion to dismiss based on Supremacy Clause immunity).

the court examines the evidence “in the light most favorable to the state and the court assumes the truth of the allegations in the indictment.”<sup>93</sup> Second, the federal officer makes a “threshold showing” of Supremacy Clause immunity.<sup>94</sup> Last, the state then “bears the burden of coming forward with an evidentiary showing sufficient to raise a material issue of fact concerning the validity of Supremacy Clause immunity.”<sup>95</sup> If there is no dispute of a genuine issue of material fact or the state fails to meet its burden, all courts agree that the district court should grant the motion to dismiss.<sup>96</sup> The problem arises when there are genuine factual issues in dispute. Most courts have been able to evade this question, but the Ninth Circuit addressed it in *Idaho v. Horiuchi*.<sup>97</sup> In *Horiuchi*, the Ninth Circuit decided that judges, rather than juries, should decide disputed issues of material fact.<sup>98</sup> Though the decision was later vacated on other grounds, its reasoning provides insight as to how courts might deal with disputed facts in Supremacy Clause immunity cases.

The *Horiuchi* court reasoned that judges were the proper arbiters of disputed issues of fact because Supremacy Clause immunity should function as immunity from suit altogether, just like other immunity defenses.<sup>99</sup> Additionally, the court was concerned with potential jury confusion between state and federal law.<sup>100</sup> Last, the court believed that judges should serve as a “substantial safeguard against frivolous or vindictive criminal charges by states against federal offices.”<sup>101</sup>

With Supremacy Clause immunity, however, this dual-layered shield is unnecessary for several reasons. First, the plain language of Federal Rules of Criminal Procedure 12(b)’s “without a trial on the merits”<sup>102</sup> language prohibits judges from ruling in the face of material factual disputes. Second, the other types of immunities

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<sup>93</sup> *Texas v. Kleinert*, 143 F. Supp. 3d 551, 557 (W.D. Tex. 2015), *aff’d* 855 F.3d 305 (5th Cir. 2017), *cert. denied* 138 S. Ct. 642 (2018) (citing *New York v. Tanella*, 374 F.2d 141, 148 (2d Cir. 2004)).

<sup>94</sup> *See id.*; *California v. Dotson*, No. 12-CR-0917-AJB, 2012 WL 1904467, at \*2 (S.D. Cal. May 25, 2012) (citing *Kentucky v. Long*, 837 F.2d 727, 751 (6th Cir. 1988)) (“When a federal officer seeks to use Supremacy Clause immunity he must first establish a threshold defense of immunity.”). It is unclear what evidence standard is used in this showing, but the courts appear to treat it like a preliminary question. *See* FED. R. EVID. 104(a) (2011).

<sup>95</sup> *Kleinert*, 143 F. Supp. 3d at 557; *Long*, 837 F.2d at 751.

<sup>96</sup> *City of Jackson v. Jackson*, 235 F. Supp. 2d 532, 534 (S.D. Miss. 2002) (“The district court should grant the motion in the absence of an affirmative showing by the state that the facts supporting the immunity claim are in dispute.”).

<sup>97</sup> 253 F.3d 359, 367, 378 (9th Cir. 2001). Waxman gives a more in-depth analysis of *Horiuchi*. *See* Waxman & Morrison, *supra* note 6, at 2203–06.

<sup>98</sup> *Horiuchi*, 253 F.3d at 378.

<sup>99</sup> *Id.* at 375 (analogizing supremacy clause immunity to immunity deals, double jeopardy, and privilege).

<sup>100</sup> *Id.* (“[A]sking the jury to apply two similar—yet distinct—legal standards to the same set of facts can only lead to confusion.”).

<sup>101</sup> *Id.* at 376 (noting that officers cannot be immunized from criminal liability in the same way that they can from damages in the qualified immunity context).

<sup>102</sup> FED. R. CRIM. P. 12(b)(1).

cited by the Ninth Circuit are not proper analogies to Supremacy Clause immunity.<sup>103</sup> Third, the Ninth Circuit's lack of faith in juries to decide disputed issues of material fact is undermined when comparing treatment under other similar federal rules and contexts. Fourth, allowing juries, rather than judges, to decide these issues best eases tension with other constitutional amendments. Finally, federal officers are already adequately protected from overzealous state prosecutors by the federal officer removal statute, state law, and the burden shifting framework inherent in the motion to dismiss standard.

#### A. *The Meaning of Rule 12*

Under Rule 12, “[a] party may raise by pretrial motion any defense, objection, or request that the court can determine *without a trial on the merits*.”<sup>104</sup> Proponents of the dual shield theory argue that Supremacy Clause immunity is a distinct jurisdictional question to be determined before a state can pursue the case on the merits.<sup>105</sup> Further, these proponents contend that extra protection is required because, unlike civil cases, criminal liability calls for a more cautious approach.<sup>106</sup> In the civil context, government agencies may, and regularly do, indemnify officers against suits.<sup>107</sup> This theoretically forces law enforcement agencies to internalize social costs imposed by their officers. Put differently, civil damages are about both enterprise and personal accountability.<sup>108</sup> In Supremacy Clause immunity cases, however, the government agency cannot fully indemnify the agent because “criminal liability threatens the officer personally in a way that civil liability does not.”<sup>109</sup>

This application of Rule 12, in our view, is incorrect for two reasons. First, the Supreme Court has already opined that conflicts of evidence transform immunities into a “matter of defense” rather than a bar to suit altogether.<sup>110</sup> And second, the plain language of Rule 12 demands a different result.

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<sup>103</sup> *Horiuchi*, 253 F.3d at 375.

<sup>104</sup> FED. R. CRIM. P. 12(b)(1) (emphasis added).

<sup>105</sup> See *Clifton v. Cox*, 549 F.2d 722, 730 (9th Cir. 1977) (noting that when Supremacy Clause immunity is established “the prosecution has no factual basis upon which to prosecute [the federal officer] and the entire proceeding is a nullity”); *Horiuchi*, 253 F.3d at 375 (“[T]he question of Supremacy clause immunity, while very similar to the issues presented in the criminal case, is nevertheless quite distinct.”).

<sup>106</sup> See *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) (noting that, in civil cases, disputed issues of material fact “prevent[] a determination of . . . immunity at summary judgment, the case must proceed to trial”).

<sup>107</sup> John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 n.16 (1998).

<sup>108</sup> Alexander Volokh, *The Modest Effect of Minneci v. Polard on Inmate Litigants*, 46 AKRON L. REV. 287, 294–95 (2013) (stating that § 1983 “lawsuits are against the government in all but name”).

<sup>109</sup> *Horiuchi*, 253 F.3d at 376.

<sup>110</sup> *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 8 (1906).

### 1. Immunity From Suit or a Matter of Defense?

Prior to enacting the Federal Officer Removal Statute,<sup>111</sup> Supremacy Clause immunity cases were brought by a writ of habeas corpus.<sup>112</sup> An early example is *United States ex rel. Drury v. Lewis*.<sup>113</sup> Ralph W. Drury was a second lieutenant in the U.S. Army who commanded twenty soldiers.<sup>114</sup> Lt. Drury and his men were stationed at Allegheny Arsenal in Pittsburgh.<sup>115</sup> Some of the buildings at the arsenal had copper downspouts, which were targeted by thieves in the area.<sup>116</sup> To thwart any further thefts, Lt. Drury ordered his men to patrol the arsenal.<sup>117</sup> That decision would ultimately land him in jail.<sup>118</sup> One night, Lt. Drury received reports of thieves stealing copper and ordered a few of his men to apprehend them.<sup>119</sup> A chase ensued and one of Lt. Drury's soldiers shot the suspect in his thigh, resulting in the man's death.<sup>120</sup> Lt. Drury and the soldier were indicted by the state for murder and manslaughter.<sup>121</sup> The circuit court denied Lt. Drury's writ because it found that there were disputed facts as to whether the suspect had surrendered before he was shot.<sup>122</sup> The court concluded that it was "not competent for the court to determine upon conflicting evidence whether the person under indictment in the state court is guilty or innocent of the offense of which he is accused."<sup>123</sup> That jurisdiction belonged to the state court. When the case finally reached the Supreme Court it was faced with the question: "[S]hould this court interfere to prevent the trial of the petitioners upon indictment in the state court[?]"<sup>124</sup> In affirming the circuit court, Chief Justice Fuller, found that there were disputed issues of material fact and those disputed issues transformed Lt. Drury's

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<sup>111</sup> 28 U.S.C. § 1442 (2012).

<sup>112</sup> *Wyoming v. Livingston*, 443 F.3d 1211, 1222 (10th Cir. 2006) (noting that "early Supremacy Clause immunity cases were based on habeas corpus statutes that provided for a grant of the writ"). As the Tenth Circuit points out in *Livingston*, there is one earlier case where the Supreme Court on direct appeal determined that a post office employee was immune from a state criminal conviction for driving in Maryland without a state license. *See Johnson v. Maryland*, 254 U.S. 51, 57 (1920).

<sup>113</sup> *See generally Drury*, 200 U.S. 1.

<sup>114</sup> *Id.* at 2.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 4.

<sup>119</sup> *Id.* at 2–3.

<sup>120</sup> *Id.* at 3.

<sup>121</sup> *Id.* at 2.

<sup>122</sup> *See United States ex rel. Drury v. Lewis*, 129 F. 823, 825 (C.C.W.D. Pa. 1904) (noting the soldier testified he warned the suspect to stop but other witnesses testified that the suspect had surrendered), *aff'd* 200 U.S. 1 (1906).

<sup>123</sup> *Id.* at 827.

<sup>124</sup> *Drury*, 200 U.S. at 4.



immunity into a “matter of defense,” meaning his status as a federal officer did not provide him with immunity from suit.<sup>125</sup>

A few decades later, the Fourth Circuit came to the same conclusion.<sup>126</sup> In *Birsch v. Tumbleson*,<sup>127</sup> a federal game warden attempted to arrest three hunters who allegedly shot wild ducks out of season in violation the federal Migratory Bird Act Treaty.<sup>128</sup> Like the attempted arrest in *Drury*, the arrest here did not go according to plan and the warden killed two of the three hunters.<sup>129</sup> And the court again was faced with a “he-said, he-said” situation. The warden testified that the hunters shot at him after being told they were under arrest.<sup>130</sup> The surviving hunter testified that they received no warning and that it was the warden and his officers who immediately opened fire.<sup>131</sup> The Fourth Circuit found itself answering a similar question: Should the warden be immune from suit because of his status as a federal officer executing federal duties?<sup>132</sup> Relying on *Drury*, the Fourth Circuit found that the warden was not immune because there was conflicting evidence.<sup>133</sup>

Viewing Supremacy Clause immunity as a jurisdictional issue (i.e., immunity from suit) rather than a substantive defense presents other problems. First, if the immunity is treated as a jurisdictional issue, it would give courts the power to raise the issue *sua sponte*, which could prevent states from enforcing state criminal law against federal officers altogether.<sup>134</sup> Second, viewing the immunity as jurisdictional prevents courts from invoking principles of equity and fairness.<sup>135</sup> This would all but exclude the approach of the concurrence from the moot court problem, that is balancing the severity of the violation of the state law against the need of the federal policy that was being carried out. Such an approach forecloses courts from considering the state’s interest based on preemption grounds, which invariably “takes into account the state interest embodied in the challenged law.”<sup>136</sup> And last, for those concerned

<sup>125</sup> *Id.* at 8.

<sup>126</sup> *Birsch v. Tumbleson*, 31 F.2d 811, 816 (4th Cir. 1929).

<sup>127</sup> *Id.* at 811.

<sup>128</sup> *Id.* (citing 16 U.S.C. §§ 703–711 (1936)).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 811–12.

<sup>131</sup> *Id.* at 812.

<sup>132</sup> *See id.* at 814 (“The present case involves the question of the right to discharge on habeas corpus proceedings in advance of trial on the merits federal officials who claim protection of the laws of the United States from prosecution . . . because of their official status in connection with the alleged offense with which they are charged, seek to be discharged from custody and not subjected to a trial on the merits.”).

<sup>133</sup> *Id.* at 813 (deciding that where “material facts are established . . . are involved in uncertainty and the subject of conflicting testimony . . . naturally invokes the verdict of the jury”).

<sup>134</sup> *See Cobb, supra* note 6, at 141–42.

<sup>135</sup> *See id.* at 145.

<sup>136</sup> *See id.*; *see also* *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) (noting that “where the regulated conduct touched interests so deeply rooted in local feeling and responsibility” preemption may not apply).



with the fate of federal officers in Supremacy Clause immunity cases consider this: viewing the immunity as jurisdictional rather than substantive could eliminate the invocation of the Double Jeopardy Clause. As Stephen Cobb explains,<sup>137</sup> if courts declines to hear, or dismiss, the case based on the idea that Supremacy Clause immunity is jurisdictional, that is not a final decision protected by the Double Jeopardy Clause.<sup>138</sup> A final decision is “any ‘ruling that the prosecution’s proof is insufficient to establish criminal liability for the offense.’<sup>139</sup> This includes *substantive* defenses.”<sup>140</sup> Thus, viewing Supremacy Clause immunity as jurisdictional—rather than substantive—reduces the protections afforded to federal officers. For those who view Supremacy Clause immunity as “immunity from suit altogether,” this creates quite the conundrum and could subject federal officers to multiple suits.<sup>141</sup>

## 2. The Plain Language of Rule 12

Assuming that Supremacy Clause immunity is a defense—rather than immunity from suit altogether—this section will turn to how this factors into Rule 12 itself. Those in the *Horiuchi* camp might argue that Rule 12 encourages district courts to resolve immunity defense on a pretrial motion to dismiss. In fact, the Advisory Committee Notes explains that Rule 12(b)(1)’s “group of objections and defenses” includes determining whether the federal officer has immunity from criminal prosecution.<sup>142</sup> Moreover, Rule 12 “creates a presumption that motions filed prior to trial will be resolved prior to trial.”<sup>143</sup> Rule 12(d) requires courts to “decide every pretrial motion before trial unless it finds good cause to defer a ruling.”<sup>144</sup>

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<sup>137</sup> Cobb is a former law clerk to Judge Pamela Reeves of the Eastern District of Tennessee and is now a trial attorney at the Department of Housing and Urban Development. *See Stephen Cobb*, LINKEDIN, <https://www.linkedin.com/in/sacobbva/> (last visited Mar. 28, 2022).

<sup>138</sup> Cobb, *supra* note 6, at 149 (citing *United States v. Gustavason*, 454 F.2d 677, 678 (7th Cir. 1971) (en banc)). Cobb goes on to explain that “where a court dismisses on the basis of a defense that goes to the merits—a substantive defense—the defendant is protected from future prosecution by the Double Jeopardy Clause.” *See also* Cobb, *supra* note 6, at 150.

<sup>139</sup> Cobb, *supra* note 6, at 149.

<sup>140</sup> Cobb, *supra* note 6, at 150 (emphasis added).

<sup>141</sup> We do not necessarily agree with Cobb’s reasoning here. Arguably, if a defendant is immune, he is immune and the Double Jeopardy Clause would not come into play. We mention his argument because it is possible that courts could agree, and if so, Cobb’s reasoning bolsters our argument that the correct view of Supremacy Clause immunity is substantive—not jurisdictional.

<sup>142</sup> *See* FED. R. CRIM. P. 12(b)(1) Advisory Comm.’s Notes to 1944 Amend. (stating that Rule 12(b)(2) includes all “defenses and objections . . . includ[ing] such matters as . . . immunity . . .”).

<sup>143</sup> 1A CHARLES ALAN WRIGHT & ARTHUR MILLER, *Federal Practice and Procedure Criminal* § 195 (5th ed. 2020).

<sup>144</sup> FED. R. CRIM. P. 12(d). Rule 12(d) also requires courts to “state its essential findings on the record” when there are “factual issues . . . involved in deciding [the] motion.” *Id.*

This analysis, while appropriate for other *collateral* immunities such as double jeopardy and immunity deals, fails to capture the nuances at play when Supremacy Clause immunity cases intersect with Rule 12.<sup>145</sup> A further reading of the Advisory Committee Notes supports our view that Supremacy Clause immunity operates as a substantive defense—not a procedural bar.<sup>146</sup> To start, the 1944 amendment labels Rule 12(b) as “defenses and objections,” which would mean that Supremacy Clause immunity is a *type* of defense.<sup>147</sup> And, in the 2014 amendment, the Advisory Committee emphasizes that pretrial motions to dismiss are subject to important limitations.<sup>148</sup>

The critical limitation for Supremacy Clause immunity cases is that “the motion must be one that the court can determine ‘*without a trial on the merits.*’”<sup>149</sup> Therein lies the problem. Supremacy Clause immunity claims are not collateral, instead they can overlap with the state criminal charge especially on the issue of reasonableness and self-defense. For example, suppose in our hypothetical case Agent Schrader testified that Mr. White was charging at him, but Mr. White testified that he had surrendered. Agent Schrader’s use of a flying tackle might be objectively reasonable under his version of the facts but not under Mr. White’s. That reasonableness decision would be determinative in both the state criminal assault charge and in Agent Schrader’s Supremacy Clause immunity defense. Moreover, allowing a judge to resolve these factual disputes could result in cognitive dissonance problems, which are part of the reason that people are uncomfortable in qualified immunity decisions where judges hold that a defendant’s actions violate the constitution but do not violate clearly established law.<sup>150</sup> For instance, assume a judge resolves a factual dispute finding the officer’s actions unreasonable and at the pretrial stage allows the criminal trial to proceed. The jury could still conclude the officer’s actions were reasonable under state law, or the jury could feel psychologically pressured to convict based on the judge’s prior finding that the officer’s actions were not reasonable for Supremacy Clause immunity purposes. While lawyers and judges might understand the nuances of this, cognitive dissonance would not be an issue if juries dealt with factual disputes. To complicate matters further there is the issue of credibility: whose version of the

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<sup>145</sup> Even the Ninth Circuit recognized these analogies were imperfect. *See Idaho v. Horiuchi*, 253 F.3d 359, 375 (9th Cir. 2001) (“We recognize that none of these provides a perfect analogy because a claim of Supremacy Clause immunity is much more central to the subject matter of the criminal case than, for example, a claim of double jeopardy.”).

<sup>146</sup> *See* FED. R. CRIM. P. 12(b)(1) Advisory Committee’s Notes to 1944 Amendment (“These two paragraphs classify into two groups *all objections and defenses* to be interposed by motion prescribed by Rule 12(a).”) (emphasis added).

<sup>147</sup> *Id.*

<sup>148</sup> FED. R. CRIM. P. 12 Advisory Comm. Notes to the 2014 Amend.

<sup>149</sup> *Id.* (emphasis added) (noting that “without a trial on the merits” has been substituted for the more archaic phrase “trial of the general issue” but that no change in meaning is intended).

<sup>150</sup> This cognitive dissonance problem is discussed more thoroughly below. *See infra* note 355.

facts to believe. And the Supreme Court has made it abundantly clear that credibility determinations are a jury issue.<sup>151</sup> At bottom, because an overlap often exists between the state law at issue and Supremacy Clause immunity,<sup>152</sup> the plain language of Rule 12 mitigates against judges deciding the immunity issue when there are disputed issues of material fact.<sup>153</sup>

*B. Lack of Jury Confusion Under Equivalent Federal Rules and Other Analogs*

In recognizing the faulty analogies of double jeopardy and immunity deals, the Ninth Circuit relied on the adage that judges are superior arbiters when overlaps exist because “asking the jury to apply two similar—yet distinct—legal standards to the same set of facts can only lead to confusion.”<sup>154</sup> According to the Ninth Circuit, only judges “versed in the subtleties of federal immunity law” are equipped to handle these nuances.<sup>155</sup> Besides, if the judge is incorrect, the state could always appeal the decision, which is easier than appealing a jury verdict.<sup>156</sup>

While judges have superior legal training and expertise, the Ninth Circuit’s view underestimates the ability of juries to handle complex matters.<sup>157</sup> The Ninth Circuit’s view also contradicts their approach to the same issue in the civil context.<sup>158</sup> After all, it was the Ninth Circuit that said: “Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their task, which is rarely equaled in other areas of public service.”<sup>159</sup> Unfortunately, the Supreme Court has yet to give an affirmative answer in the civil context.<sup>160</sup> Juries are well-qualified to handle the complexity of Supremacy Clause immunity cases because they have done so in equally complex matters involving mixed questions of law and fact.<sup>161</sup>

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<sup>151</sup> See *United States v. Scheffer*, 523 U.S. 303, 313 (1998) (“A fundamental premise of our criminal trial system that ‘the jury is the lie detector.’” (citation omitted)).

<sup>152</sup> See *Idaho v. Horiuchi*, 253 F.3d 359, 362, 364–65, 375 (9th Cir. 2001).

<sup>153</sup> See FED. R. CRIM. P. 12, Advisory Comm. Notes to the 2014 Amend.

<sup>154</sup> *Horiuchi*, 253 F.3d at 375.

<sup>155</sup> *Id.* at 376.

<sup>156</sup> *Id.*

<sup>157</sup> There are certainly arguments against allowing juries even in complex civil cases. See generally Hugh H. Bownes, *Should Trial by Jury Be Eliminated in Complex Cases?*, 1 RISK 75 (1990) (outlining arguments against juries in complex cases); *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1088–89 (3d Cir. 1980) (describing cases where striking jury trial demands may be appropriate).

<sup>158</sup> See *In re United States Fin. Sec. Litig.*, 609 F.2d 411, 430 (9th Cir. 1979).

<sup>159</sup> *Id.*

<sup>160</sup> *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1496–97 (1997).

<sup>161</sup> See Richard O. Lempert, *Civil Juries and Complex Cases: Let’s Not Rush to Judgment*, 80 MICH. L. REV. 68, 68 (1981) (discussing whether the seventh amendment protects the right to trial by jury in complex civil cases); see also Judge Kathleen M. O’Malley, *Trial by Jury: Why it Works and Why it Matters*, 68 AM. U. L. REV. 1095, 1096 (2019) (“I am an

Juries, for example, are generally empowered to decide mixed questions of law and fact in qualified immunity cases,<sup>162</sup> or at least have been given avenues to decide factual issues.<sup>163</sup> In *Lore v. City of Syracuse*,<sup>164</sup> for instance, the Second Circuit was faced with the issue of how to handle unresolved factual issues surrounding a police officer's § 1983 complaint stemming from alleged employment discrimination.<sup>165</sup> The case was quite complex and involved multiple issues and parties, state and federal law, and a cross appeal.<sup>166</sup> The Second Circuit, however, held that "[i]f there are unresolved factual issues which prevent an early disposition of the defense, the jury should decide these issues on special interrogatories."<sup>167</sup> The Ninth Circuit has handled these complex mixed questions by way of jury instructions.<sup>168</sup> In *Sloman v. Tadlock*,<sup>169</sup> the district court combated the complexity issue by giving detailed jury instructions, which the Ninth Circuit ultimately upheld.<sup>170</sup> While the district court was able to handle many of the plaintiff's claims on summary judgment, two of the claims were submitted to the jury because there was conflicting evidence.<sup>171</sup> With proper instructions, jurors will understand and be able to determine why an action might be unreasonable for the Supremacy Clause immunity determination but reasonable under the state law standard. Allowing juries to deliberate on the issues would alleviate some of the cognitive dissonance problems that might otherwise accrue.

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unabashed believer in the jury system . . . juries can sort out even complex issues when given the proper tools . . .").

<sup>162</sup> *Zellner v. Summerlin*, 494 F.3d 344, 367 (2d Cir. 2007) ("Whether a defendant officer's conduct was objectively reasonable is a mixed question of law and fact."). The same is true in the criminal context. *See United States v. Gaudin*, 515 U.S. 506, 510 (1995) (determining that "materiality" in criminal fraud was a mixed question of law and fact that has "typically been resolved by juries").

<sup>163</sup> *See, e.g., Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 875 (10th Cir. 2014) (affirming district court's summary judgement decision denying the defendant qualified immunity as a matter of law because there were disputed issues of material fact); *Snyder v. Trepangnier*, 142 F.3d 791, 800 (5th Cir. 1998) (upholding the district court's ruling to submit "important factual questions" on the "issue of qualified immunity to the jury").

<sup>164</sup> 670 F.2d 127, 128 (2d Cir. 2012).

<sup>165</sup> *Id.* at 142.

<sup>166</sup> *Id.* at 141–43.

<sup>167</sup> *Id.* at 162 (emphasis added) (internal quotations omitted) (quoting *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990), *cert. denied*, 498 U.S. 967 (1990)).

<sup>168</sup> *See Sloman v. Tadlock*, 21 F.3d 1462, 1470–71 (9th Cir. 1994) (discussing the review of jury instructions in a qualified immunity case).

<sup>169</sup> *Id.*; *see also Morgan v. California*, 743 F.2d 728, 732 (9th Cir. 1984) ("facts are 'involved in uncertainty and the subject of conflicting testimony' they should be resolved by the verdict of a state court." (citation omitted)).

<sup>170</sup> *Tadlock*, 21 F.3d at 1472 ("Considering the [jury] instructions as a whole, we find no abuse of discretion.").

<sup>171</sup> *Id.* at 1466 (noting that plaintiff's claims for conspiracy against the police officers and his claim against the city were sent to the jury).

Another potential guidepost in answering the “judge versus jury” question are motions for summary judgment under Federal Rule of Civil Procedure 56.<sup>172</sup> Like Federal Rule of Criminal Procedure 12, motions for summary judgment have the same practical effect of resolving a case entirely.<sup>173</sup> Under Rule 56, if “there are no genuine disputes of material fact and the movant is entitled to judgment as a matter of law,” the judge can decide the immunity question.<sup>174</sup> This is similar to how the Western District of Texas in *Kleinert* explained Rule 12 motions under Supremacy Clause immunity.<sup>175</sup> And under Rule 56 motions the courts have been clear that, “[t]he issue of whether a [defendant] is entitled to . . . immunity cannot be resolved as a matter of law [when there is a] factual conflict surrounding the circumstances.”<sup>176</sup> Because “at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”<sup>177</sup> Further, the Supreme Court has said that Rule 56 “is not a rule specific to qualified immunity; it is simply an application of [a] more general rule.”<sup>178</sup> The Supreme Court has compared civil and criminal rules before, and, given the similarities, could and should do so here.<sup>179</sup> Adopting a “Rule-56-like approach” could serve as the template for allowing juries to resolve disputed issues of material fact in Supremacy Clause immunity cases.

### *C. Easing Tension With Other Constitutional Amendments*

Allowing juries to decide disputed issues of material fact on Rule 12 motions to dismiss for Supremacy Clause immunity claims also eases tension with other constitutional amendments. In particular, this framework relieves conflicts with the Fifth, Sixth, and the Tenth Amendments.

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<sup>172</sup> See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242–43 (1986) (stating that the question for summary judgment is whether the evidence is so contradictory that a jury is needed); *Tolan v. Cotton*, 572 U.S. 650, 650 (2014) (holding that the court failed to consider contradicting evidence under Rule 56(a)).

<sup>173</sup> See, e.g., *Anderson*, 477 U.S. at 246 (referencing the district court using summary judgement to enter judgement in favor of the petitioners).

<sup>174</sup> FED. R. CIV. P. 56(a).

<sup>175</sup> See *Klienert*, *supra* note 19 and accompanying text.

<sup>176</sup> *Ting v. United States*, 927 F.2d 1504, 1511 (9th Cir. 1991).

<sup>177</sup> *Anderson*, 477 U.S. at 249.

<sup>178</sup> *Tolan v. Cotton*, 572 U.S. 650, 656 (2014).

<sup>179</sup> *Anderson*, 477 U.S. at 252–53 (comparing motions for summary judgement with motions for acquittal in criminal cases). Justice Rehnquist, however, has voiced opposition to such comparisons. See *id.* at 271 (Rehnquist, J., dissenting) (“[T]here is no exact analog in the criminal process to the motion for summary judgment in a civil case. Perhaps the closest comparable device for screening out unmeritorious cases in the criminal area is the grand jury proceeding, though the comparison is obviously not on all fours.”).

## 1. Fifth Amendment Tensions

“Chipping away at the right to trial by jury in *any* context seems ill-advised,”<sup>180</sup> and that is particularly true when it comes to clashes between federal and state powers. It is vital to uphold the balance between these warring factions of power and it is at least equally important to preserve our constitutional amendments, such as due process. Although federal officers enjoy a substantive right to immunity,<sup>181</sup> the Constitution says nothing about procedure: how such a right must be enforced, by whom, or when. Such issues of adjudication are often governed by rules and statutes not found in the Constitution.<sup>182</sup> It follows then, that courts should form a solution to the Rule 12 problem that best balances these competing interests—without violating existing constitutional rights—including due process.

The Fifth Amendment states “[n]o person shall be held to answer for a capital, or otherwise infamous crime . . . without due process of law . . . .”<sup>183</sup> And the Supreme Court has held that the Due Process Clause “require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.”<sup>184</sup> Allowing judges, rather than juries, to determine disputed issues of material fact curtails the role of the jury and erodes the Due Process Clause. Moreover, it is the “jury’s constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts and draw ultimate conclusions of guilt or innocence.”<sup>185</sup> Not only would a judge be depriving the jury of its responsibility to determine facts, they would also be preventing them from applying those facts to the law and drawing a conclusion of guilt or innocence.

## 2. Sixth Amendment Tensions

Letting juries decide disputed issues of material fact on Rule 12 motions to dismiss raised under Supremacy Clause immunity also prevents conflicts with the Sixth Amendment. To begin, let us address the elephant in the room because the oddity

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<sup>180</sup> O’Malley, *supra* note 161, at 1109.

<sup>181</sup> Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982) (holding that federal officers are entitled to qualified immunity as a matter of public policy).

<sup>182</sup> For example, the federal officer removal statute describes the removal process when a civil or criminal action is commenced against a federal officer. *See* 28 U.S.C. § 1442 (1969).

<sup>183</sup> U.S. CONST. amend. V.

<sup>184</sup> United States v. Gaudin, 515 U.S. 506, 510 (1995); *see also* Sullivan v. Louisiana, 508 U.S. 275, 277–78 (1993); 4 WILLIAM BLACKSTONE, COMMENTARIES 343 (1769) (“[T]he truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbors . . .”).

<sup>185</sup> *Gaudin*, 515 U.S. at 514.



of this argument is not lost on us. Most people think of the Sixth Amendment right to trial by jury in terms of a right held solely by defendants,<sup>186</sup> however, that is not the complete story. In operation, the defendant's Sixth Amendment right functions in tandem with the Federal Rules of Criminal Procedure.<sup>187</sup> Thus, the right to a jury trial is held not only by defendants, but also by the court, and the state—via its prosecutors.

The Constitution provides that: “The Trial of all Crimes . . . shall be by jury; and such Trial shall be held in the State where the said Crimes have been committed.”<sup>188</sup> The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state.”<sup>189</sup> Federal Rule of Criminal Procedure 23 has codified the interest in jury trials for judges and prosecutors, along with criminal defendants.<sup>190</sup> Rule 23 requires a jury trial unless: “(1) the *defendant* waives a jury trial in writing; (2) the *government* consents; and (3) the *court* approves.”<sup>191</sup> Therefore, the ability to waive a jury trial is a tripartite decision—even if it is usually initiated by defendants.<sup>192</sup> In fact, the prosecutor's right is equally as powerful to that of the accused.<sup>193</sup>

Those who would support judges making the decision on factual disputes in Supremacy Clause immunity cases might argue that the Supreme Court left open a door for defendants, in our case federal officers, to waive a jury trial despite Rule 23.

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<sup>186</sup> See U.S. GOV'T PUBL'G OFF., SIXTH AMENDMENT—RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS 1612 (2014), <https://www.govinfo.gov/content/pkg/GPO-CONAN-REV-2014/pdf/GPO-CONAN-REV-2014-10-7.pdf> [<https://perma.cc/F6DG-5BA8>] (“A right to jury trial is granted to criminal *defendants* in order to prevent oppression by the Government.” (emphasis added)); Jessica A. Roth, *The Constitution Is On Pause in America's Courtrooms*, THE ATLANTIC (Oct. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/constitution-pause-americas-courtrooms/616633/> [<https://perma.cc/Z6KS-ZL22>] (discussing the effect of COVID-19 on “the constitutional rights of . . . defendants” to “exercise their right to jury trial”).

<sup>187</sup> Jocelyn Simonson, *The Place of the People in Criminal Procedure*, 119 COLUM. L. REV. 249, 274 (2019) (noting judges often perform a balancing test—based on the rules of Criminal Procedure—when considering a defendant's Sixth Amendment rights).

<sup>188</sup> U.S. CONST. art. III, cl. 2.

<sup>189</sup> *Id.* amend. VI.

<sup>190</sup> See Richard L. Peterson, *Unintelligent Jury Waivers: A Call to Amend Federal Rule of Criminal Procedure 23(A)*, 21 GEO. MASON C.R. L.J. 441, 449–51 (2011) (discussing the incentives defendants face in waiving trial by jury); Zachary Buda, Note, *A Critique of Federal Rule of Criminal Procedure 23(B)(2)(B) and a Proposal to Level the Playing Field for Defendants*, 42 CARDOZO L. REV. 1549, 1566 (2021) (explaining the considerable power enjoyed by the government under Rule 23(B)(2)(B)). See generally Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983); FED. R. CRIM. P. 23.

<sup>191</sup> FED. R. CRIM. P. 23(a)(1)–(3) (emphasis added).

<sup>192</sup> *Singer v. United States*, 380 U.S. 24, 37 (1965) (upholding the rights of prosecutors to demand jury trials under Criminal Procedure Rule 23).

<sup>193</sup> Fred Anthony DeCicco, *Waiver of Jury Trials in Federal Criminal Cases: A Reassessment of the “Prosecutorial Veto,”* 51 FORDHAM L. REV. 1091, 1094 (1983) (describing the withholding of a prosecutor's consent under Rule 23 as “essentially . . . a veto power”).



In *Singer v. United States*, the Court noted that “a defendant’s reasons for wanting to be tried by a judge alone are so compelling that the Government’s insistence on trial by jury would result in the denial to a defendant of an impartial trial.”<sup>194</sup> This dicta has been interpreted to mean that “a court [may] [] override a prosecutor’s withholding of consent . . . if forcing a jury trial upon the defendant would result in a denial of his right to a fair trial.”<sup>195</sup> Overcoming the Government’s objection to jury trials has been exceedingly rare and granted only in extreme cases such as conflicts with the defendant’s religious beliefs,<sup>196</sup> or more recently due to complications with COVID-19.<sup>197</sup> If other cases involving prejudice from suspected compromised jurors or prejudice from a defendant’s past crimes do not rise to the requisite level to overcome the Government’s objection to a jury trial, then neither should cases involving Supremacy Clause immunity. Instead, the opposite is true, as federal officers enjoy other protections—such as the federal officer removal statute—which guard against perceived unfairness in state court jury trials.<sup>198</sup>

Further, other arguments in favor of judge-made determinations, like those made in § 1983 cases, do not apply when dealing with criminal cases. For example, some scholars suggest that judges are better suited to make determinations of reasonableness in Fourth Amendment excessive force cases, first, because jurors tend to award damages based on whether they think the defendant has money, and second, because juries tend to favor some plaintiffs over others, especially when the defendant is a police officer and where jurors have had unpleasant experiences with police.<sup>199</sup> Unlike § 1983 cases, Supremacy Clause immunity cases do not involve making a plaintiff whole, so damages become a non-issue.<sup>200</sup> And unlike state police, it is less likely those in jury pool have had experience with federal officers.<sup>201</sup> Additionally, nearly all Supremacy

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<sup>194</sup> *Singer*, 380 U.S. at 37.

<sup>195</sup> DeCicco, *supra* note 193, at 1093–94 (citations omitted); *see also* *United States v. Ceja*, 451 F.2d 399, 401 (1st Cir. 1971) (explaining how impartial jurors might satisfy a defendant’s burden in overriding a prosecutor’s insistence on a jury trial); *United States v. Harris*, 314 F. Supp. 437, 438–39 (D. Minn. 1970) (stating that hypothetical prejudice of a defendant’s past crimes does meet defendant’s burden).

<sup>196</sup> *United States v. Lewis*, 638 F. Supp. 573, 567–77 (W.D. Mich. 1986) (ordering a bench trial over the government’s objection where jury trial violated defendant’s religious beliefs).

<sup>197</sup> *United States v. Cohn*, No. 19-CR-097, 2020 WL 5050945, at \*10–11 (E.D.N.Y. Aug. 26, 2020) (finding that conditions arising from COVID-19, combined with defendant’s health profile, could effectively rob defendant of testifying on his own behalf which—along with other factors—warranted defendant’s waiver of a jury trial over the Government’s objection).

<sup>198</sup> *See infra* Section II.D.

<sup>199</sup> *See Wells*, *supra* note 90, at 90 (describing arguments in favor of judges in Fourth Amendment cases).

<sup>200</sup> *See generally* *Wallace*, *supra* note 6 (clarifying recovery sought in Supremacy Clause immunity cases is usually injunctive, declaratory, or habeas corpus relief).

<sup>201</sup> The Department of Justice reports that there are around 132,000 federal officers authorized to make arrests, while there are reportedly 701,169 state police authorized to make

Clause cases would be removed to federal court, so it is unclear how sentencing would be carried out.<sup>202</sup> That said, assuming a federal court carried out sentencing similar to the way it carries out state law crimes on federal lands under the Assimilative Crimes Act,<sup>203</sup> the judge—not the jury—would impose the sentence and, furthermore, the sentence would be guided by the U.S. Sentencing Guidelines and state law mandatory maximums and minimums.<sup>204</sup> Thus, the fear of excessive penalties based on hypothetical bad blood toward the officer based on past experience is negated.

Last, allowing judges rather than juries to decide disputed issues of material fact premised solely on the defendant being a federal officer deprives the public<sup>205</sup>—here state citizens—of its right to “perform its accustomed role as the arbiter of factual disputes.”<sup>206</sup> The public’s interest in performing this role in Supremacy Clause immunity claims is extraordinary, at least if you subscribe to President Theodore Roosevelt’s belief that “no man is above the law.”<sup>207</sup> Surely a federal officer breaking state law would garner public interest in enforcing the state law against that officer.<sup>208</sup> Further,

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arrests. *See* CONNOR BROOKS, U.S. DEP’T OF JUST., OFF. OF JUST. STATS., FEDERAL LAW ENFORCEMENT OFFICERS, 2016—STATISTICAL TABLES, at 1 (2019), <https://www.bjs.gov/content/pub/pdf/fleo16st.pdf> [<https://perma.cc/7VV9-764Z>]; SHELLEY HYLAND, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, FULL-TIME EMPLOYEES IN LAW ENFORCEMENT AGENCIES, 1997–2016, at 1 (2018).

<sup>202</sup> Based on our research, no federal officer has been found guilty and sentenced after removing the case to federal court, at least in the relatively few modern cases.

<sup>203</sup> 18 U.S.C. § 13. It is also possible that states could bring charges under a converse § 1983 action, however, Congress could easily preempt these types of laws. *See* Waxman & Morrison, *supra* note 6, at 2247.

<sup>204</sup> *See* *United States v. Montigue*, 357 F. Supp. 2d 939, 941 (E.D. Va. 2005) (discussing that federal courts imposing penalties under the Assimilative Crimes Act must fall within the state statutory limits but that punishment must be similar, not identical) (citing *United States v. Harris*, 27 F.3d 111, 115 (4th Cir. 1994); *United States v. Smith*, 574 F.2d 988, 991–92 (9th Cir. 1978)).

<sup>205</sup> *See* *Zedner v. United States*, 547 U.S. 489, 501 (1976) (interpreting the Speedy Trial Act to be “designed with the public interest firmly in mind”).

<sup>206</sup> *United States v. Bailey*, 444 U.S. 394, 416 (1980) (quoting *United States v. Bailey*, 585 F.2d 1087, 1096 (D.C. Cir. 1978)). Note that the Court stated this holding in the context of affirmative defenses which, if we are correct about Supremacy Clause immunity, would apply there as well.

<sup>207</sup> President Theodore Roosevelt, Third Annual Message to Congress (Dec. 7, 1903) (transcript available at <https://millercenter.org/the-presidency/presidential-speeches/december-7-1903-third-annual-message> [<https://perma.cc/CF4X-UCZL>]).

<sup>208</sup> The public interest has been used as a factor in considering whether to overrule the Government’s objections to a defendant’s waiver of a jury trial. *See, e.g., United States v. Cohn*, No. 19-CR-097, 2020 WL 5050945, at \*6 (E.D.N.Y. Aug. 26, 2020) (citations omitted) (listing the four factors as: (1) whether the government’s purpose is proper; (2) whether a jury trial “interferes with the defendant’s exercise of a separate constitutional right”; (3) whether a jury trial “implicates the public’s right to a speedy trial”; and (4) whether “case-specific factors . . . would render obtaining an impartial jury trial difficult or unworkable”).

the default position in criminal cases is trial by jury.<sup>209</sup> After all, the Supreme Court found that “the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions” that the three-party consent requirements under Rule 23 must be met before it can be waived.<sup>210</sup>

### 3. Tenth Amendment Tensions

Lastly, there is the obvious tension with the Tenth Amendment. If judges are allowed to decide disputed issues of material fact, the likelihood that the state will be able to enforce its laws against federal officers would decline if the high grants of immunity in § 1983 and *Bivens* cases are any indication.<sup>211</sup> Additionally, as described above, the jury is comprised of citizens of the state. And giving judges the sole power to resolve disputed issues of material fact deprives state citizens of an active role in enforcing state criminal law.

The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively or to the people.”<sup>212</sup> And the Supreme Court has recognized both dual sovereignty and the power of States to enforce criminal laws.<sup>213</sup> The Court has

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<sup>209</sup> *Patton v. United States*, 281 U.S. 276, 312 (1930) (“Trial by jury is the normal and . . . preferable mode of disposing of issues of fact in criminal cases.”), *abrogated on other grounds*, *Williams v. Florida*, 399 U.S. 78 (1970).

<sup>210</sup> *Id.* at 312. See generally KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 7 (2019).

<sup>211</sup> WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS 4 (noting that recent studies suggest that “appellate courts have shown an increasing tendency to grant qualified immunity . . . [in] 57 percent [of] excessive force cases decided from 2017 to 2019”); Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> [<https://perma.cc/NBX8-MBUZ>] (comparing grants of qualified immunity in favor of police between 2005–2007 and 2017–2019). Unsurprisingly, the Fifth Circuit granted qualified immunity in 64% of its cases while the Ninth Circuit “granted just 42% of police requests for qualified immunity.” Debra Cassens Weiss, *Which Appeals Court Is Most Likely to Grant Qualified Immunity to Police?*, ABA JOURNAL (Aug. 25, 2020, 12:17 PM), <https://www.abajournal.com/news/article/grants-of-qualified-immunity-to-police-vary-widely-by-appeals-court> [<https://perma.cc/8CNJ-7UGQ>].

<sup>212</sup> U.S. CONST. amend. X.

<sup>213</sup> See *United States v. Lopez*, 514 U.S. 549, 577 (1997) (Kennedy, J., concurring); *New York v. United States*, 505 U.S. 144, 188 (1992) (noting that the Constitution “divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location”); see also THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (“Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others . . .”).

also said that “[w]ere the federal government to take over the regulation of the entire areas of traditional state concern . . . the boundaries between the sphere of federal and state authority would blur and political responsibility would become illusory.”<sup>214</sup>

Some, like former Solicitor General Seth Waxman, argue that granting Supremacy Clause immunity in cases where a federal officer clearly exceeds his authority reads the federal interest too narrowly and overstates the state interest at stake.<sup>215</sup> While it is true that States should not be able to “retard, impede, burden, or in any matter control”<sup>216</sup> the federal government, this truth does not give federal officials the power to obviate state criminal law. Waxman argues that the “integrity of federal law depends on its sound execution, which in turn depends on the actions of federal officers.”<sup>217</sup> Consequentially, he believes that, like the policy aims of qualified immunity, federal officers should be protected against the fear of personal liability that might “unduly inhibit officials in the discharge of their duties.”<sup>218</sup> This view, however, fails to consider the Supreme Court’s consistent stance that the “Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.”<sup>219</sup> Where federal law enforcement officers have arguably abused their authority,<sup>220</sup> the States have a vested interest in not only enforcing their own laws but also in protecting the sanctity of the system of government. Federal officers should not be given a “get out of jail free card” merely because they are enforcing federal law, especially where they have clearly exceeded their authority.

Likewise, making federal officers accountable to states through juries does not overstate the state interest at stake. States, of course, do not have a license to arrest federal officers like Agent Schrader, simply to inhibit the federal government from enforcing federal law. But federal officers should think twice about how they execute those duties and should be cognizant of the state in which they are performing those duties. And, where state and federal law conflict on how to enforce the law, only federal officers acting *within the bounds of their authority* should be able to bypass state law. Waxman argues that the Constitution “did not confer the

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<sup>214</sup> *Lopez*, 514 U.S. at 577.

<sup>215</sup> See Waxman & Morrison, *supra* note 6, at 2251.

<sup>216</sup> *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819).

<sup>217</sup> Waxman & Morrison, *supra* note 6, at 2251.

<sup>218</sup> *Id.*

<sup>219</sup> *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

<sup>220</sup> See Sinéad Baker, *Black Lives Matter and the ACLU Are Suing the Trump Administration for Forcing Peaceful Protestors Out of His Way with Tear Gas Before His Church Photo Op*, BUS. INSIDER (June 5, 2020, 6:46 AM), <https://www.businessinsider.com/trump-photo-op-black-lives-matter-aclu-sue-protest-clearing-2020-6> [<https://perma.cc/6UDB-GTEK>] (describing the ACLU’s complaint which “asserts that the steps taken to ‘shut down the Lafayette Square demonstration is the manifestation of the very despotism against which the First Amendment was intended to protect.’”).

authority to exercise . . . [its police power] against the federal government.”<sup>221</sup> But to essentially give the federal government *cart blanche* authority to do whatever it wants contradicts what the Supreme Court has said and what the Framers attempted to establish. For the Framers, the “solution to governmental power and its perils was simple: divide it. To prevent the ‘gradual concentration’ of power in the same hands they enabled ‘[a]mbition . . . to counteract ambition’ at every turn.”<sup>222</sup> That is why the Framers “split[] the atom of sovereignty” into the Federal Government and the States.<sup>223</sup>

#### *D. Adequacy of Other Protections for Federal Officers*

Yet another argument in favor of judges deciding disputed issues of material fact is that federal judges can guard against hostile state prosecutors—like the prosecutor in our fictional case—who seek to interfere with the enforcement of federal law.<sup>224</sup> At the competition, many of the judges were concerned with state prosecutors simply alleging disputed issues of fact in order to force a trial.<sup>225</sup> These concerns, while valid, are not sufficient to interpose a judge between the state prosecutor and juries because federal officers already enjoy significant protections besides the inherent state law defenses.

##### 1. Federal Officer Removal Statute

One of the strongest protections already afforded to federal officers is the Federal Officer Removal Statute.<sup>226</sup> The Federal Officer Removal Statute allows federal

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<sup>221</sup> Waxman & Morrison, *supra* note 6, at 2251.

<sup>222</sup> *Seila Law LLC, v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 (2020) (citing THE FEDERALIST NO. 51, at 349 (James Madison) (J. Cooke ed. 1961)).

<sup>223</sup> *Alden v. Maine*, 527 U.S. 706, 751 (1999) (quoting *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999)).

<sup>224</sup> This was also of concern to the Ninth Circuit when it decided *Horiuchi*. *See Idaho v. Horiuchi*, 253 F.3d 359, 375 (9th Cir. 2001) (en banc) (“[W]e believe interposing 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.”). The issue has also been briefed as late as 2019. *See Appellant’s Reply Brief at 2, California v. Clay*, 778 F. App’x 548 (9th Cir. 2019) (mem.) (No. 18-55297), 2018 WL 6606017, at \*2 (arguing that the state charges for perjury for applying for false driver’s license was an “adequately alleged . . . colorable federal defense to the criminal charges based on supremacy clause immunity and vindictive or selective prosecution” (citing *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1167 (9th Cir. 1982))).

<sup>225</sup> *See, e.g., Horiuchi*, 253 F.3d at 377 (providing an example of the kind of concerns judges have about the forcing of trials in these kinds of cases).

<sup>226</sup> *See generally* 28 U.S.C. § 1442.

officers the power to remove any “civil action or criminal prosecution that is commenced in a State Court and that is against” the United States or a federal agency or any federal officer “act[ing] under color of such office” to the district court “embracing the place wherein [the action] is pending.”<sup>227</sup> The statute was primarily enacted “to protect the Federal Government from the interference with its ‘operations’ that would ensue were a State able, for example to ‘arres[t]’ and bring ‘to trial in a State cour[t] for an alleged offense against the law of the State.’”<sup>228</sup>

This statute provides a number of important protections in Supremacy Clause immunity cases.<sup>229</sup> First, and most obvious, the statute replaces a state judge with a federal judge.<sup>230</sup> The idea here is that a federal judge, with life tenure, is not beholden to the state and its constituents.<sup>231</sup> Therefore, a federal judge has the freedom, without the pressures that an elected state judge would have, to fairly manage the case, rule on motions, and conduct a trial. This also helps protect against other “perils” that some scholars argue exist in state courts.<sup>232</sup> Second, but less obvious, the statute provides for a broader jury pool.<sup>233</sup> In a pro-marijuana state, such as the fictional state of New Tejas, pooling from juries in an entire district rather than from a local county could draw a more diverse and representative jury. This claim is true because not all counties in a state may be in favor of whatever state law is at issue.<sup>234</sup> Last, the statute

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<sup>227</sup> *Id.* § 1442(a).

<sup>228</sup> *Watson v. Phillip Morris Co.*, 551 U.S. 142, 150 (2007) (alterations in original) (quoting *Willingham v. Jarvis*, 395 U.S. 402, 406 (1969)).

<sup>229</sup> *See generally* 28 U.S.C. § 1442.

<sup>230</sup> *Id.* § 1442(a).

<sup>231</sup> *See Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (May 8, 2015), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [<https://perma.cc/DAX5-S7PV>] (noting that thirty-nine states “use some form of election at some level of court”).

<sup>232</sup> *See* Willy E. Rice, *Allegedly “Biased,” “Intimidating,” and “Incompetent” State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly “Impartial” and “Competent” Federal Courts—A Historical Analysis of Class Action Dispositions in Federal and State Courts, 1925–2011*, 3 WM. & MARY BUS. L. REV. 419, 436 (2012) (noting that some defendants “often accuse state courts of being incompetent to decide mixed federal and state controversies”).

<sup>233</sup> *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 387, 421 (1992) (noting 28 U.S.C. § 1442 allows removal outside those normally available to parties, thereby providing a more diverse jury pool and discussing the importance of jury selection generally as a considerable motivating factor behind removal actions). *See generally* 28 U.S.C. § 1442.

<sup>234</sup> *See* German Lopez, *Live Results for 2020’s Marijuana Legalization Ballot Measures*, VOX (Nov. 4, 2020, 1:29 PM), <https://www.vox.com/policy-and-politics/2020/11/3/21546635/marijuana-legalization-ballot-measures> (noting voting variations for states with legalization propositions on the 2020 ballot); *see also* *California Proposition 64—Legalize Marijuana—Results: Approved*, N.Y. TIMES (Aug. 1, 2017, 11:24 AM), <https://www.nytimes.com/elections/2016/results/california-ballot-measure-64-legalize-marijuana> (noting that nearly 43%



increases the odds that a different prosecutor altogether would be involved in the relevant litigation,<sup>235</sup> which could control for bias on the part of the prosecutor.

## 2. Appeals

Like qualified immunity,<sup>236</sup> federal officers who are denied Supremacy Clause immunity may lodge an interlocutory appeal.<sup>237</sup> That is, if a federal officer was denied Supremacy Clause immunity in district court, he or she could immediately file an interlocutory appeal.<sup>238</sup> If the federal officer lost the appeal and also lost at trial, he or she could also appeal the jury verdict.<sup>239</sup> In the vast majority of cases, however, the state appeals because Supremacy Clause immunity is granted more often than it is denied.<sup>240</sup> Regardless, the right to an interlocutory appeal acts as an additional shield

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voted against legalization). The Central District of California, for example, had counties that voted in favor and against legalization. *See id.*

<sup>235</sup> *See* Dan Schweitzer, *Who Argues for the States in the U.S. Supreme Court?*, 2 NAT'L ASS'N ATT'YS GEN. (2017), <https://web.archive.org/web/20200726182347/https://www.naag.org/publications/nagri-journal/volume-2-issue-4/who-argues-for-the-states-in-the-u.s.-supreme-court.php> [<https://perma.cc/JZ2X-39HE>] (noting that at the Supreme Court, most cases are argued by state solicitor generals). In fact, some county district attorney's offices have entirely different divisions in charge of federal cases. *See, e.g.*, DALLAS COUNTY, <https://www.dallascounty.org/government/district-attorney/divisions/federal.php> [<https://perma.cc/JLU8-LT5G>] (last visited Mar. 28, 2022); *About the Office of the Maryland Attorney General*, MARYLAND ATT'Y GEN. OFF., <https://www.marylandattorneygeneral.gov/Pages/About.aspx> [<https://perma.cc/EN5N-8YAU>] (last visited Mar. 28, 2022) (noting that the "Criminal Appeals Division represents the State in all criminal matters" in the federal courts at all levels); *Divisions*, ALABAMA ATT'Y GEN. OFF., <https://www.alabamaag.gov/Divisions> [<https://perma.cc/G8K3-PSFS>] (last visited Mar. 28, 2022) (describing Alabama's "Constitutional Defense" Division which handles cases in state and federal courts).

<sup>236</sup> *See* *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996) (holding that defendants claiming qualified immunity may file an interlocutory appeal both on motions to dismiss and motions for summary judgment); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) ("[W]e hold that a district court's denial of a claim of qualified immunity . . . is an appealable "final decision.").

<sup>237</sup> *See* Brief of Appellant at 8, *Virgin Islands v. Clark* (3d Cir. 2010) (No. 093569), 2010 WL 4851705, at \*8 (noting that the defendant filed an interlocutory appeal when the territorial court denied Supremacy Clause immunity on the grounds that it was inapplicable to the Virgin Islands).

<sup>238</sup> *See* *Wyoming v. Livingston*, 443 F.3d 1211, 1216–26 (10th Cir. 2006) (noting Supremacy Clause immunity is an issue capable of interlocutory appeal and mentioning Supremacy Clause immunity denials are reviewed de novo); *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004) (holding one of the purposes of Supremacy Clause immunity is to have cases decided quickly and prevent the chilling effect of state law, thereby justifying interlocutory appeals).

<sup>239</sup> *See, e.g.*, *State v. Deedy*, 407 P.3d 164, 188 (Haw. 2017) (appealing a jury verdict partially on grounds of Supremacy Clause immunity).

<sup>240</sup> *See* *Puerto Rico v. United States*, 490 F.3d 50, 68 (1st Cir. 2007) (citing *Neagle v. Cunningham*, 135 U.S. 1, 75 (1890); *Livingston*, 443 F.3d at 1211; *Tanella*, 374 F.3d, at 142).



for a federal officer even if juries are allowed to decide disputed issues of material fact. This gives the federal officer two bites at the apple, just like with qualified immunity.

### 3. Supremacy Clause Immunity Burden Shifting Framework

Last, but more hidden, is the inherent benefit of the burden shifting framework for disputed issues of material fact embedded in Supremacy Clause immunity cases. During the moot competition, judges were keen to ask what would prevent a state prosecutor from manufacturing disputed issues of fact to move the case forward to trial. The same question was also at the forefront of the Ninth Circuit in *Horiuchi*.<sup>241</sup> Manufacturing or simply alleging disputed issues, however, is easier said than done. In the limited case law, it is practically unheard of for two reasons. First, “manufacturing” a statement of fact or failing to “correct a false statement of material fact” violates ethics rules.<sup>242</sup> Second, Federal officers asserting Supremacy Clause immunity must first show that their actions were necessary and proper by “so great a preponderance of evidence . . . [and only] if there is a *substantial conflict* of evidence as to basic or controlling facts the Federal Court should refuse to” grant the immunity.<sup>243</sup> That substantial conflict is key. Contrary to what the moot judges and Ninth Circuit alleged,<sup>244</sup> state prosecutors would not be able to simply manufacture any disputed issue of fact; rather, they would have to put forth evidence “sufficient at least to raise a *genuine* factual issue whether the federal officer . . . was doing no more than what was necessary and proper.”<sup>245</sup> Put differently, mere allegations of disputed facts are not enough to overcome a Rule 12 motion to dismiss.<sup>246</sup> This

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(“[F]ederal officials are generally granted Supremacy Clause immunity from state prosecution . . .”).

<sup>241</sup> See *Idaho v. Horiuchi*, 253 F.3d 359, 376 (9th Cir. 2001) (en banc) (“As experience with qualified immunity cases shows, if merely presenting a disputed issue of fact were sufficient to get to a jury, then state prosecutions of federal agents could become quite common. Such prosecutions—whether successful or not—place a heavy burden on the agent charged and the agency that employs him.”).

<sup>242</sup> MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1) (A.B.A. 2019); see also *id.* r. 3.1 (“A lawyer shall not bring . . . or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . .”).

<sup>243</sup> *Brown v. Cain*, 56 F. Supp. 56, 59 (E.D. Pa. 1944) (emphasis added). Note, this was a federal habeas case but the same standard of evidence seems to remain the norm today as evidenced in the *Kleinert* decision. See *Texas v. Kleinert*, 143 F. Supp. 3d 551, 557 (W.D. Tex. 2015), *aff’d* 855 F.3d 305 (5th Cir. 2017).

<sup>244</sup> See *Horiuchi*, 253 F.3d at 376.

<sup>245</sup> *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988).

<sup>246</sup> See *Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006) (“[O]nce a defendant raises the defense of Supremacy Clause immunity the burden shifts to the state to supply sufficient evidence to raise a ‘*genuine* factual issue’ that is supported by more than *mere*

standard has proven quite difficult for state prosecutors to surmount because, while disputed issues of fact may be common, they are largely irrelevant in that they have generally not involved *material* facts surrounding the immunity issue.<sup>247</sup>

Ultimately, our recommendation that juries rather than judges should decide disputed issues of material fact could be handled via Congressional legislation.<sup>248</sup> Congress could, and perhaps should, codify statutes to address this issue like they did with the Federal Tort Claims Act (FTCA)<sup>249</sup> and the Citizens Protection Act (CPA).<sup>250</sup> In contrast to Waxman, both of these laws suggest an approach to the “judge-jury” issue that favors greater state involvement and authority to enforce state laws over federal officers.<sup>251</sup> Under the FTCA, for instance, civil suits against the government and federal officers for tort violations are analyzed under state law “where the act or omission occurred.”<sup>252</sup> To be sure, FTCA claims that proceed to trial are “generally ‘tried by the court without a jury.’”<sup>253</sup> But, even FTCA cases allow for “advisory juries” to render non-binding verdicts.<sup>254</sup> And courts have increasingly employed “advisory juries” to serve as fact-finders.<sup>255</sup> If Congress was concerned with state

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*allegations.*” (second emphasis added) (citing *Long*, 443 F.3d at 752)); *City of Jackson v. Jackson*, 235 F. Supp. 2d 532, 534 (S.D. Miss. 2002).

<sup>247</sup> See, e.g., *New York v. Tanella*, 374 F. 3d 141, 151 (2d Cir. 2004) (finding the relative positions of a FDA officer and a suspect were not material to whether the officer acted reasonably under the second prong of the Supremacy Clause immunity test). In the roughly fifty-three Supremacy Clause immunity cases, there are only three that we are aware of where disputed issues of fact were material to the immunity issue. See *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 232 (1906) (finding there was a genuine dispute of whether a fleeing suspect surrendered before the federal officer shot him); *Morgan v. California*, 743 F.2d 728, 729–30 (9th Cir. 1984) (finding a material dispute whether federal officers were intoxicated and thus acting within the scope of their duties); *Birsch v. Tumbleson*, 31 F.2d 811, 812–13 (4th Cir. 1929) (affirming district court’s dismissal of a federal game warden’s habeas petition because of conflicting evidence whether hunters were pointing weapons at him).

<sup>248</sup> Waxman & Morrison, *supra* note 6, at 2243 (citing *Westfall v. Erwin*, 484 U.S. 292, 295 (1988)) (noting that the statutory arrangement of the Federal Tort Claims Act is illustrative of “the extent to which state law may constrain federal officers is ultimately up to Congress”).

<sup>249</sup> 28 U.S.C. § 2674.

<sup>250</sup> *Id.* § 530B.

<sup>251</sup> Waxman & Morrison, *supra* note 6, at 2245 (arguing that “in the absence of express congressional instruction . . . a measure of officer immunity akin to qualified immunity is necessary to ensure that federal law and policy is effectuated free from state interference”).

<sup>252</sup> 28 U.S.C. § 1346(b)(1).

<sup>253</sup> *LEWIS*, *supra* note 210 (quoting 28 U.S.C. § 2402) (citing *Carlson v. Green*, 446 U.S. 14, 22 (1980)).

<sup>254</sup> Matthew L. Zabel, *Advisory Juries and Their Use and Misuse in Federal Tort Claims Act Cases*, 2003 BYU L. REV. 185, 205 (citing 92 CONG. REC. 10,092 (1946) (statement of Rep. Scrivner)).

<sup>255</sup> *Id.* at 193 (“[C]ourts have increasingly chosen to impanel advisory juries in FTCA cases.”); see also *Andrade v. United States*, 116 F. Supp. 2d 778, 781 (W.D. Tex. 2000) (ordering an advisory jury to be empaneled).

overreach, it could have written distinct federal standards rather than relying on state law. Moreover, under the CPA, federal government attorneys are “subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”<sup>256</sup> Again, Congress chose to subject federal employees to state law. Permitting juries to decide disputed issues of material fact allows states—through their citizens and prosecutors—to better enforce their laws against rogue federal officers. This methodology is congruent with how Congress has handled federal employee/agency violations of state laws in the civil and ethical contexts.

### III. THE PROPER SUPREMACY CLAUSE IMMUNITY TEST

Procedural issues aside, the next question is: what test governs whether a federal officer is protected by Supremacy Clause immunity? The Supreme Court gave us a starting point. First, courts look to whether the federal officer was performing an act that federal law authorized such officer to perform. Second, courts ask whether the officer’s actions were necessary and proper to fulfilling his or her federal duties.<sup>257</sup> But this test is incomplete and has resulted in a patchwork of responses from lower courts.<sup>258</sup> As Waxman explains, courts and practitioners have formulated various positions as to how much protection Supremacy Clause immunity should provide, ranging from minuscule protection to absolute immunity.<sup>259</sup> Unlike Waxman and the Ninth Circuit assert, Supremacy Clause immunity should not provide the same scope of protection as qualified immunity and *Bivens*.<sup>260</sup> While this equation is helpful, it

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<sup>256</sup> 28 U.S.C. § 530B(a).

<sup>257</sup> *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890).

<sup>258</sup> Many courts, for example, have debated the meaning of “necessary and proper.” *Compare* *Clifton v. Cox*, 549 F.2d 722, 1227 (9th Cir. 1977) (“[E]ven though his acts may have exceeded his express authority, this did not necessarily strip [him] of his lawful power to act under the scope of authority given to him under the laws of the United States.”) and *In re McShane*, 235 F. Supp. 262, 275 (N.D. Miss. 1964) (granting immunity for discretionary decision to use tear gas), and *Wyoming v. Livingston*, 443 F.3d 1211, 1227–28 (10th Cir. 2006) (“[T]he question is not whether federal law expressly authorizes violation of state law, but whether the federal official’s conduct was reasonably necessary . . .”), with *North Carolina v. Cisneros*, 947 F.2d 1135, 1139 (4th Cir. 1991) (granting Supremacy Clause immunity for reckless driving in off-duty traffic accident because “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.” (emphasis added)), and *Puerto Rico v. Torres Cahparro*, 738 F. Supp. 620, 621 (D.P.R. 1990), *aff’d* 922 F.2d 59 (1st Cir. 1991) (granting Supremacy Clause immunity because “the order required [the federal officer] to proceed as fast as possible” (emphasis added)).

<sup>259</sup> See Waxman & Morrison, *supra* note 6, at 2238–39 (discussing the diverging views in the *Horiuchi* briefs).

<sup>260</sup> See Waxman & Morrison, *supra* note 6, at 2239.

is not precise,<sup>261</sup> and it leaves unanswered questions. First, how does the Court determine whether an action was authorized? Second, how does one determine whether action was necessary and proper? Last, should the necessary and proper prong also include the “clearly established by law” test, and if so what sources of law should be considered in that analysis? This Article proposes clarifications and alterations to the equation to answer these questions and define the outer boundaries of the immunity to avoid the complications associated with qualified immunity.

### A. *The Meaning of “Authorized”*

The first prong of the Supremacy Clause immunity tests asks whether the federal officer was authorized to act under federal law.<sup>262</sup> There is generally no debate as to the meaning of “authorized.”<sup>263</sup> And most federal officers will likely meet this first prong of the test so long as they can point to a federal statute that gives them the power to carry out an action.<sup>264</sup> So, Agent Schrader, despite being on vacation, and despite his primary job of enforcing white collar crimes, would meet this prong simply by pointing to 18 U.S.C. § 3052, which permits agents of the FBI to “make arrests without [a] warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States.”<sup>265</sup> Because marijuana is a controlled substance under federal law<sup>266</sup> and because possession of a controlled substance is a felony,<sup>267</sup> Agent Schrader would be “authorized” to carry out the arrest.

That said, there are rare situations where federal officers will not be saved even if they point to a federal law granting them authorization. It turns out—like property values in real estate—that determining whether a federal officer was authorized turns on “location, location, location.”<sup>268</sup> For instance, if Agent Schrader was vacationing in

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<sup>261</sup> See Wallace, *supra* note 6, at 1514–15 (discussing three subtle differences between Supremacy Clause immunity and qualified immunity).

<sup>262</sup> See Waxman & Morrison, *supra* note 6, at 2237 (noting the first prong of the Supremacy Clause immunity test).

<sup>263</sup> See Waxman & Morrison, *supra* note 6, at 2234–38.

<sup>264</sup> *Cunningham v. Neagle*, 135 U.S. 1, 59 (1890) (“In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible [sic] from that instrument, or any duty . . . to be derived from the general scope of his duties under the laws of the United States, is ‘a law’ within the meaning of th[e] phrase.”).

<sup>265</sup> 18 U.S.C. § 3052.

<sup>266</sup> See 21 U.S.C. § 802(6) (“The term ‘controlled substance’ means a drug or other substance . . . included in schedule I, II, III, IV, or V of part B of this title.”); 21 U.S.C. § 812(c)(10) (listing marijuana as a schedule I drug).

<sup>267</sup> See 21 U.S.C. § 844(a) (“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 . . .”).

<sup>268</sup> William Safire, *Location, Location, Location*, N.Y. TIMES MAG. (June 26, 2009), <https://>

a U.S. territory, he could not claim that he was authorized to execute federal law.<sup>269</sup> The rationale here is that unincorporated territories are not always preempted by the Constitution, therefore, unless preemption applies, a federal officer cannot claim Supremacy Clause immunity.<sup>270</sup> Although preemption can exist in U.S. territories, it “is *not* pursuant to the ‘Supremacy Clause’”<sup>271</sup> because U.S. territories already “march[] to the beat of a single sovereign drum major—Congress.”<sup>272</sup>

### B. *The Two-Step Necessary and Proper Dance*

Most mysterious is what the Supreme Court meant by “necessary and proper.”<sup>273</sup> Courts are split on whether necessity includes both mandatory and discretionary actions.<sup>274</sup> Moreover, some courts have included subjective intent while others only use objective reasonableness.<sup>275</sup> And while most courts agree that some variant of “fair notice” is required, like with qualified immunity, none have affirmatively outlined what sources of law provide fair notice in Supremacy Clause immunity cases.<sup>276</sup>

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[www.nytimes.com/2009/06/28/magazine/28FOB-onlanguage-t.html](http://www.nytimes.com/2009/06/28/magazine/28FOB-onlanguage-t.html) (crediting the phrase “location, location, location” to Lord Harold Samuel, a real estate tycoon in Britain).

<sup>269</sup> See *Virgin Islands v. Clark*, 53 V.I. 183, 205 (Super. Ct. 2010) (holding that Supremacy Clause immunity is inapplicable in U.S. territories).

<sup>270</sup> *Id.* at 203 (holding that the Supremacy Clause did not preempt laws in the Virgin Islands because “Supremacy Clause” was omitted from the Revised Organic Act of 1954).

<sup>271</sup> *Id.* at 200.

<sup>272</sup> *Id.* at 199 (internal quotation marks omitted); see also *Simms v. Simms*, 175 U.S. 162, 168 (1899) (holding that the Virgin Islands is an instrumentality of the U.S. government); *Binns v. United States*, 194 U.S. 486, 491–92 (1904) (stating that Congress has plenary power within the U.S. Territories).

<sup>273</sup> See *Waxman & Morrison*, *supra* note 6, at 1500–02 (expressing confusion at the “necessary and proper” language in the Supremacy Clause immunity test); see also Randy Barnett, *Necessary and Proper*, 44 *UCLA L. REV.* 745 (1997) (discussing the historical context of and competing views surrounding the Necessary and Proper Clause).

<sup>274</sup> *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993); see also 4 *WILLIAM BLACKSTONE, COMMENTARIES* 343 (1769) (“[T]he truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbors . . .”).

<sup>275</sup> Compare *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977) (including both a subjective and objective reasonableness element), with *Wyoming v. Livingston*, 43 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”). Some scholars have classified this as a “willfulness v. reasonableness” debate. See *Wallace*, *supra* note 6, at 1528–29 (arguing that “Congress should codify Supremacy Clause immunity” and require a willfulness standard instead of a reasonableness standard).

<sup>276</sup> See *Wallace*, *supra* note 6, at 1531; *Livingston*, 43 F.3d at 1220.

### 1. The Meaning of “Necessary”: Mandatory v. Discretionary

The first subpart of the “necessary and proper” prong examines whether the federal officer’s actions were necessary. But when is an action “necessary” for purposes of Supremacy Clause immunity? This question plagued judges at the moot competition and has been debated in actual case law. In our view, courts on one end of the spectrum have been too rigid finding “necessary” to mean *only* mandatory actions. Other courts, however, have been too lax including broad discretionary actions. The better approach lies somewhere in the middle. In a purely mandatory world, federal officers likely would be chilled because they would fear acting without specific instructions or a statute directing them. And because the federal government “can act only through its officers and agents[] and they must act within the States,”<sup>277</sup> this view would suppress the federal government. On the opposite end of the spectrum, merely pointing to a statutory authority is not enough. Not only does that conflate the “authority” prong with the “necessary” prong, it also provides too much protection for officers, like Agent Schrader, and opens up opportunities for rogue federal officers to exploit Supremacy Clause immunity without limits. For example, providing protection for an officer for actions contrary to established agency policy and regulations. In short, the proper definition of mandatory provides flexibility for “heat of the moment” decision-making and emergency situations if the federal officer is required to carry out the action.

There is no question that Supremacy Clause immunity protects a federal officer who acts at the direct order of a superior. As Chief Justice Marshall said: “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.”<sup>278</sup> This is not to say that the inclusion of protection for discretionary actions is unsupported.<sup>279</sup> The Supreme Court has said that: “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.”<sup>280</sup> There should be, however, an “outer perimeter”<sup>281</sup> to protections for discretionary actions because “[a]n act cannot simultaneously be necessary to the execution of a duty . . . and a[] [criminal] offense to the laws of a state.”<sup>282</sup> To be fair, courts that have found

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<sup>277</sup> *Tennessee v. Davis*, 100 U.S. 257, 263 (1879).

<sup>278</sup> *Osborn v. Bank of United States*, 22 U.S. 738, 865 (1824).

<sup>279</sup> *See Barr v. Matteo*, 360 U.S. 564, 575 (1959) (“[T]he concept of duty encompasses the sound exercise of discretionary authority.”).

<sup>280</sup> *McCulloch v. Maryland*, 17 U.S. 316, 413–14 (1819) (emphasis added).

<sup>281</sup> *See Barr*, 360 U.S. at 575 (“The fact that the action here taken was within the outer perimeter of petitioner’s line of duty is enough to render the privilege applicable . . .”).

<sup>282</sup> *Denson v. United States*, 574 F.3d 1318, 1347 (11th Cir. 2009); *see also Arizona v. Files*, 36 F. Supp. 3d 873, 878 (D. Ariz. 2014) (citing *Colorado v. Symes*, 386 U.S. 510, 518



discretionary actions protected by Supremacy Clause immunity have said that it would not protect against deliberate violations of state law or where a federal officer “acted because of any personal interest, malice, actual criminal intent, or for any other reason than to do his duty as he saw it.”<sup>283</sup> But this limitation bleeds into the “objective v. subjective” debate, and, as discussed below,<sup>284</sup> subjectivity should not be a part of Supremacy Clause immunity. Thus, clearer limitations are needed to define the perimeter of the immunity.

What these “clearer limitations” should look like is open to debate. One author of this Article, Justin Van Orsdol, proposes that, outside of emergencies or direct commands from a superior, a federal officer’s actions are “necessary” if the officer is: (1) on duty,<sup>285</sup> (2) in the jurisdiction where they are assigned (either temporarily or permanently), (3) executing a federal law that they have directly been tasked with, and (4) acting in line with agency regulations or guidance.<sup>286</sup> His concern lies in officers overextending their authority where state officers would or could better handle the situation.

Judge Gardner, the other author of this Article, proposes that the fourth element is a sufficient limitation, as the first three could operate to dissuade federal agents from appropriately confronting crime outside of their set duty-hours, jurisdiction, or current job focus. Many federal agents, like FBI agents “[i]n the U.S. and its territories,”<sup>287</sup> are authorized to “make arrests for any federal offense committed in their presence or when they have reasonable grounds to believe that the person to be arrested has committed, or is committing, a felony violation of U.S. laws.”<sup>288</sup> The charge of federal agents is, by definition, broader than that of state and local authorities to whom such restrictions might appropriately apply. But federal agents are charged to

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(1932)) (“While the case law does not endorse an ‘anything goes’ approach to fixing the authority of federal officers, it does not limit the defense to actions specifically directed by statute or by rule.”).

<sup>283</sup> *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982).

<sup>284</sup> *See infra* Section III.B.2.

<sup>285</sup> Justin would also allow federal officers who “slip[] into [their] police roles” to respond to emergencies qualify as on duty, such as violent crimes and threats to life and bodily injury. *See Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1432–33 (10th Cir. 1984) (citation omitted), *vacated sub nom.* *City of Lawson v. Lusby*, 474 U.S. 805 (1985). We would not allow immunity where a federal officer was acting under a separate employer. *See, e.g., Traver v. Meshriv*, 627 F.2d 934, 940 (9th Cir. 1980) (assuming that qualified immunity would apply to an off-duty police officer working as security at bank).

<sup>286</sup> This would include actions taken “in any manner contrary to [agency] rules and regulations” or policy. LEGAL HANDBOOK FOR FBI SPECIAL AGENTS, FED. BUREAU INV., 5 (2003).

<sup>287</sup> *What Authority Do FBI Special Agents Have to Make Arrests in the United States, Its Territories, or on Foreign Soil?*, FED. BUREAU INV., <https://www.fbi.gov/about/faqs/what-authority-do-fbi-special-agents-have-to-make-arrests-in-the-united-states-its-territories-or-on-foreign-soil> [<https://perma.cc/64S3-RKCW>].

<sup>288</sup> *Id.*



enforce national laws even if they are temporarily assigned to a specific jurisdiction.<sup>289</sup> To withdraw the protection of the Supremacy Clause based on the time of day or the location of the officer is impractical and would act to dissuade agents from fully discharging their sworn duties. Moreover, Justin's first three proposed limitations do not take into account the practicalities of the work and career of a federal agent. In addition to frequently changing duty stations, federal officers often change areas of expertise and focus. For example, a federal officer may start out investigating violent crime in Washington and later be reassigned to a section focusing on complex business crimes based in Georgia. While they may no longer be working in a section directly tasked with addressing violent crime in Washington, the agent retains the knowledge and experience to effectively enforce those laws in Georgia. Not to mention the fact that there frequently is overlap between types of crime. Besides, while their main duties may shift, their overall responsibility and oath to enforce federal law does not.<sup>290</sup> Finally, regardless of whether they are technically on duty, in their assigned jurisdiction, or if the crime witnessed is in their current assignment, the Constitution and laws of the United States, along with agency regulations, like standard operating procedures or policy memorandums, operate to effectively limit agents.<sup>291</sup> Thus, a requirement that they must be operating within these is sufficient to establish the contours of what is "necessary."

An officer acting within these boundaries (either under Judge Gardner's or Justin's version) could still invoke Supremacy Clause immunity while having limited discretionary freedom, subject to the "proper" prong. Either formulation balances the concerns from both ends of the spectrum by curtailing would-be rogue federal officers and thawing the chilling effect that a "mandatory only actions" test would create. They also have the added benefit of preventing federal officers from acting contrary to agency policies or rules thereby preserving agency flexibility and resources in enforcing federal law.<sup>292</sup> So, under either formulation, Agent Schrader's

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<sup>289</sup> See *What Tasks Do FBI Agents Typically Perform?*, FED. BUREAU INV., <https://www.fbi.gov/about/faqs/what-does-an-fbi-agent-do-on-a-typical-day> [<https://perma.cc/XS5B-RDUP>] ("Special agents are always on call to protect their country and may be transferred at any time, based on the needs of the FBI.").

<sup>290</sup> All federal employees, including federal law enforcement, swear an oath of office prior to starting employment. See, e.g., Jonathan L. Rudd, *Our Oath of Office*, FED. BUREAU INV. (Sept. 2009), <https://www2.fbi.gov/publications/leb/2009/september2009/oath.htm> [<https://perma.cc/Z3W9-N38S>] (quoting the oath and describing its origins and meaning).

<sup>291</sup> See, e.g., Memorandum from Claire M. Grady, Acting Deputy Sec'y of Homeland Sec., Department Policy on the Use of Force (Sept. 7, 2018) (requiring DHS officers to first identify themselves and give a verbal warning, similar to New Texas' law, limiting when and how firearms can be discharged, and informing officers that violate DHS policy that they will be subject to both administrative and criminal penalties).

<sup>292</sup> See, e.g., Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) [hereinafter Cole Memo], <https://>

arrest would not be “necessary” because he was acting contrary to official agency policy.<sup>293</sup>

## 2. The Meaning of “Proper”: Objective v. Subjective Reasonableness

The second subpart of the “necessary and proper” prong looks to whether the federal officer’s actions were proper. Again, courts and scholars have diverged as to the meaning of proper.<sup>294</sup> Waxman, for instance, argues that a subjective inquiry *and* an objective analysis are required.<sup>295</sup> Others, like James Wallace, argue that courts should adopt a pure willfulness standard.<sup>296</sup> The authors of this Article, however, favor a third approach, arguing that an officer should be protected only if his or her actions were objectively proper—like qualified immunity but with a caveat. The caveat is a narrower interpretation of what is objectively proper under the “clearly established law” prong, which is discussed below.<sup>297</sup>

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[www.justice.gov/iso/opa/resources/3052013829132756857467.pdf](http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf) [https://perma.cc/2X2R-8FLC] (guiding DOJ attorneys and law enforcement to “focus their enforcement resources and efforts”).

<sup>293</sup> At the time of the events in the hypothetical, the Cole Memo was in effect, which declared that the “enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.” *See id.* Moreover, Supreme Court precedent supports adding this element to definition of “necessary.” *See* Wallace, *supra* note 6, at 1504 (citing *Boske v. Comingore*, 177 U.S. 459 (1900); *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 466–67 (1951)) (“[T]he Court’s precedent on the relationship between federal law enforcement and their authority derived from statute . . . reaffirms the Court’s commitment to the Supremacy Clause in an immunity context.”).

<sup>294</sup> Compare *Wyoming v. Livingston*, 443 F.3d 1211, 1221 (10th Cir. 2006) (expressing “concer[n] with the incorporation of a subjective element into reasonableness of a federal officer’s actions”), with *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004) (“To meet [the necessary and proper prong], two conditions must be satisfied: (1) the actor must subjectively believe that his action is justified; and (2) that belief must be objectively reasonable” (citations omitted)).

<sup>295</sup> Waxman & Morrison, *supra* note 6, at 2202 (“Accordingly, we argue that federal officers acting within the scope of their employment should be immune from state prosecution for taking any action that they reasonably believe is necessary and proper to the performance of their federal functions. Properly applied, this standard is effectively coextensive with qualified immunity.”).

<sup>296</sup> Wallace, *supra* note 6, at 1530–31 (“Either the Supremacy Clause control, leaving the judge to determine whether the officer acted willfully, or the court must shift to the reasonableness standard, with potentially devastating consequences.”). Note, Wallace argues that “Supremacy Clause immunity resembles sovereign immunity more than qualified immunity,” which explains his argument against a reasonableness standard. *Id.* at 1531. The Supreme Court’s creation of the *Neagle* test, which more resembles qualified immunity, casts doubt on this argument.

<sup>297</sup> *See infra* Section III.B.3.

The Supreme Court eliminated the subjective intent inquiry in civil suits because it was unworkable with the aims of qualified immunity.<sup>298</sup> And qualified immunity standards have already applied to federal officers.<sup>299</sup> Further, a version of qualified immunity has been applied in criminal cases.<sup>300</sup> Because our Supremacy Clause immunity test is based upon qualified immunity, requiring a subjective intent analysis in Supremacy Clause immunity cases would be inconsistent with qualified immunity precedent and would create incongruent protections for federal and state officers—despite the presence of similar social and financial costs.

Although Supremacy Clause immunity is not jurisdictional and operates more like a defense than immunity from suit altogether, an inquiry into an officer's subjective state of mind creates "substantial costs," which would undoubtedly "entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues."<sup>301</sup> A subjective inquiry *would* create a situation where nearly every Supremacy Clause immunity case would have to go to the jury because "an official's subjective good faith has been considered a question of fact . . . regarded as inherently requiring resolution by a jury."<sup>302</sup> Put differently, a subjective inquiry would create a situation where a nefarious state prosecutor could manufacture disputed issues of material fact, which is precisely what federal officers asserting Supremacy Clause immunity want to avoid.

Additionally, most Supremacy Clause immunity claims arise out of excessive force scenarios which implicate the Fourth Amendment.<sup>303</sup> And including subjective intent is inconsistent with Fourth Amendment precedent. The Supreme Court has already held that "excessive force [violations] in the course of making an arrest . . . are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard."<sup>304</sup> Indeed, the Supreme Court has found that "an arresting officer's state

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<sup>298</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 815–16 (1982) ("The subjective element of the good-faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial.").

<sup>299</sup> See *id.* at 807 ("For executive officials in general, however, our cases make plain that qualified immunity represents the norm.").

<sup>300</sup> See, e.g., *United States v. Lanier*, 520 U.S. 259, 270 (1997) (applying a heightened version of qualified immunity standards to a claim under 18 U.S.C. § 242). Even when analyzing "willfulness" under 18 U.S.C. § 242, the Supreme Court required an objective analysis. See *Screws v. United States*, 325 U.S. 91, 107 (1945) ("And in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances . . .").

<sup>301</sup> *Harlow*, 457 U.S. at 816–17.

<sup>302</sup> *Id.* at 816.

<sup>303</sup> See, e.g., *Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977); *In re McShane*, 235 F. Supp. 262 (N.D. Miss. 1964).

<sup>304</sup> *Graham v. Connor*, 490 U.S. 386, 388 (1989); see also *Tennessee v. Garner*, 471 U.S. 1, 7–22 (1985) (analyzing an excessive force claim under the Fourth Amendment's "objective reasonableness" standard).

of mind . . . is irrelevant to the existence of probable cause”<sup>305</sup> And the legal justification for making an arrest is not invalidated because of an officer’s state of mind.<sup>306</sup> Moreover, Courts that have included a subjective inquiry in Supremacy Clause immunity cases did so before the Supreme Court decided *Harlow v. Fitzgerald*,<sup>307</sup> or do not bother to distinguish *Harlow*.<sup>308</sup>

Wallace’s inclusion of a willfulness standard and Waxman’s inclusion of a reasonable belief standard do address the issue, but to rely solely on willfulness or to include reasonable belief creates an unnecessary strain on the judicial system, federal officers, and the state to try to prove an officer’s subjective intent at the Supremacy Clause immunity stage of the case.<sup>309</sup> Interestingly, Wallace critiques Waxman’s reasonableness standard for essentially the same reason.<sup>310</sup> To be sure, if the state prosecutor has evidence showing a federal officer acted with criminal intent, “the officer’s conduct [would] certainly fall outside the scope of the [Supremacy Clause immunity] defense.”<sup>311</sup> This is not say that an officer will always evade an inquiry into his or her intent,<sup>312</sup> it only means that this inquiry is postponed until

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<sup>305</sup> *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (citing *Whren v. United States*, 517 U.S. 806, 812–13 (1996); *Arkansas v. Sullivan*, 523 U.S. 769, 771 (2001) (per curiam)).

<sup>306</sup> *Whren*, 517 U.S. at 813 (1996) (“[T]he legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.” (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)). Compare *Seiner v. Drenon*, 304 F.3d 810, 813 (8th Cir. 2002) (holding it was objectively reasonable for an officer to shoot a suspect even though he had a mistaken understanding that the suspect shot him), with *Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 2001) (holding it was objectively unreasonable to shoot an unarmed man).

<sup>307</sup> See, e.g., *Clifton v. Cox*, 549 F.2d 722, 730 (9th Cir. 1977). *Clifton* was decided five years before *Harlow*.

<sup>308</sup> See *Arizona v. Files*, 36 F. Supp. 3d 873 (D. Ariz. 2014). While the *Files* court stated that the “necessary and proper” test included a subjective component, it proceeded to state that “a state opposing a Supremacy Clause immunity defense need not necessarily show the federal officer acted with malice.” *Id.* at 878 (citing *Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir. 2001)).

<sup>309</sup> See, e.g., Dan Svirsky, *The Cost of Strict Discovery: A Comparison of Manhattan and Brooklyn Criminal Cases*, 38 N.Y.U. REV. L. & SOC. CHANGE 523, 524 (2014) (explaining the wasted costs and legal resources during suppression hearings in criminal cases); Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. CRIM. L. & CRIMINOLOGY 237, 249–60 (explaining the time and costs associated with obtaining and storing digital discovery in criminal cases).

<sup>310</sup> See Wallace, *supra* note 6, at 1528 (arguing that the Waxman and Morrison reasonableness standard is inadequate because it “places immunity at the mercy of detailed factual investigations”).

<sup>311</sup> *Files*, 36 F. Supp. 3d. at 878; see also *Crawford-El v. Britton*, 951 F.2d 1314, 1317 (D.C. Cir. 1991) (“We have understood *Harlow* to allow inquiry into motive where a bad one could transform an official’s otherwise reasonable conduct into a constitutional tort.” (citations omitted)).

<sup>312</sup> See *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (“This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials

after the immunity question is resolved and the case proceeds to trial for the underlying criminal offense.<sup>313</sup>

Proving intent is often difficult, if not impossible, and could lead to federal officers escaping liability where they otherwise may not under an objective inquiry.<sup>314</sup> Take, for example, § 1983 cases against municipalities for negligent hiring of police officers.<sup>315</sup> Courts deciding these cases often require plaintiffs to prove deliberate intent, and as a result “have gradually narrowed the scope of liability for [] municipalit[ies].”<sup>316</sup> Wallace is also correct that 18 U.S.C. § 242 codified a willfulness standard for violations of federal law by federal officers and that there has been “no claimed evidence of a rise in violations of constitutional rights.”<sup>317</sup> But this argument neglects to consider violations of state law, which is a different matter. Besides, the Supreme Court already “drew a fine line between the role of subjective intent with respect to the affirmative defense of qualified immunity—where it is irrelevant—and the role of subjective intent with respect to the elements of a constitutional violation—where it remains a vital element of certain civil rights suits.”<sup>318</sup> The

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also place them beyond the reach of criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242 . . .”).

<sup>313</sup> Though beyond the scope of this Article, it is unclear whether the Supreme Court would adopt an approach that allows the Court to determine what order to decide the case. That is, whether there was a violation of state law or whether Supremacy Clause immunity applied. Given the difference in outcomes between qualified immunity and Supremacy Clause immunity (i.e., damages v. prison time) we suspect the Court would not adopt the standard in *Pearson v. Callahan* which allows courts to decide which order to resolve these questions. See *Pearson v. Callahan*, 555 U.S. 223, 236–37 (2009) (holding that the procedure required in *Saucier v. Katz* was no longer mandatory). If the Supreme Court did allow courts to choose the order perhaps a willfulness standard or a reasonable belief standard would be appropriate.

<sup>314</sup> Subjective intent is also easily bypassed. For example, in employment discrimination context, employees have the burden of proving by a preponderance of the evidence that the employer’s constitutionally impermissible reason was a motivating factor for an adverse decision. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). To escape liability, employers can point to essentially any other valid reason for making their decision. See *Harris v. Shelby Cnty. Bd. of Educ.*, 99 F.3d 1078, 1084 (11th Cir. 1996). Subjective intent also opens the door for disputed issues of material fact. See *id.* (concluding there were genuine issues of material fact as to the employer’s intent (citing *Pearson v. Macon-Bibb Cnty. Hosp. Auth.*, 952 F.2d 1274, 1280 (11th Cir. 1992))).

<sup>315</sup> Daylene A. Marsh, *Guilty or Not: Municipal Liability for Negligent Hiring of Police Officers*, 14 T. MARSHALL L. REV. 69 (1989).

<sup>316</sup> *Id.* at 82.

<sup>317</sup> Wallace, *supra* note 6, at 1529; see also 18 U.S.C. § 242 (“Whoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of a crime].”).

<sup>318</sup> Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective*

“[s]ocial costs that adequately justified the elimination of the subjective component of an affirmative defense do not necessarily justify serious limitations upon ‘the only realistic’ remedy for the violation of constitutional guarantees.”<sup>319</sup> “We are obviously not free to add a ‘malice’ requirement where the Supreme Court has not done so, nor would such an addition be warranted.”<sup>320</sup> If subjective intent is irrelevant in the qualified immunity context, it is equally irrelevant in the Supremacy Clause immunity context.

### 3. Clearly Established, if so by What Kind of Law?

The last question is whether courts should include qualified immunity’s “clearly established [by federal] law” prong.<sup>321</sup> One argument against its inclusion is that qualified immunity is a common-law doctrine derived from the Supreme Court’s view of the law when § 1983 was enacted.<sup>322</sup> Conversely, Supremacy Clause immunity is derived from the Supremacy Clause of the Constitution<sup>323</sup>—the only thing the two doctrines share is the word “immunity.” The Authors believe, as do Waxman and Wallace, that some sort of “fair warning” is required. As both scholars explain, the Supreme Court has established this requirement broadly and applied it to the criminal context under § 242.<sup>324</sup> In *United States v. Lanier*, the Court explained that:

The fact that one has a civil and the other a criminal role is of no significance; both serve the same objective, and in effect the

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*Intent That Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 893 (1998) (emphasis omitted). Segregating the subjective inquiry in the immunity question from the violation even occurs in cases where “malice” is part of the underlying violation, like in cases of malicious prosecution. *See, e.g.*, *Sykes v. Anderson*, 625 F.3d 294, 309–10 (6th Cir. 2010); *Gallo v. City of Phila.*, 161 F.3d 217, 222 n.6 (3d Cir. 1998); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 184 n.5 (4th Cir. 1996).

<sup>319</sup> *Crawford-El v. Britton*, 523 U.S. 574, 591 (1998).

<sup>320</sup> *Idaho v. Horiuchi*, 253 F.3d 359, 366 n.10 (9th Cir. 2001) (en banc).

<sup>321</sup> *Qualified Immunity*, ABA (Dec. 17, 2020), [https://www.americanbar.org/groups/public\\_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/](https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/) [<https://perma.cc/H56V-YDG4>].

<sup>322</sup> *See, e.g.*, *Owen v. City of 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.”).

<sup>323</sup> U.S. CONST. amend. VI.

<sup>324</sup> *See Waxman & Morrison, supra* note 6, at 2212 (“Although [the Supreme Court] rejected the defendant’s particular fair warning defense, the Court actually gave the requirement quite a broad scope.”); Wallace, *supra* note 6, at 1519 (“[W]e see that the *Lanier* Court acknowledged that government officials require notice that their actions could result in criminal prosecution, just as civil defendants require notice of potential civil liability.” (citing *United States v. Lanier*, 520 U.S. 259, 270–71 (1997))).



qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of criminal statutes.<sup>325</sup>

This disagreement resides with what constitutes “fair warning” or whether something was “clearly established.”<sup>326</sup> Waxman suggests that “a federal officer’s entitlement to immunity from state criminal prosecution does not depend on an assessment of his conduct under state law.”<sup>327</sup> As a general rule, under *Neagle*<sup>328</sup> and *Johnson v. Maryland*,<sup>329</sup> that is correct. But Waxman’s argument fails to consider an exception that the Supreme Court did not account for when promulgating the rule: federal officers authorized by, or acting under, the authority of state law.<sup>330</sup> Recent events in Portland, Oregon provide an example of this exception.<sup>331</sup> During the Black Lives Matter protests of summer 2020, the federal government used Customs and Border Protection officers to guard federal properties, including courthouses.<sup>332</sup> But it was unclear whether these officers were strictly enforcing federal law, or were enforcing state law.<sup>333</sup> Oregon—like many states—authorizes federal

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<sup>325</sup> *Lanier*, 520 U.S. at 270–71 (1997). Note that 18 U.S.C. § 242’s fair warning requirement and 42 U.S.C. § 1983’s “clearly established” tests are not identical because § 242 is limited to “willfulness” while § 1983 deals with “reasonableness.” They are, as a practical matter, nearly identical. See *Hope v. Pelzer*, 536 U.S. 730, 740 (2002) (“[T]he ‘fair warning’ requirement is identical under § 242 and . . . qualified immunity . . . [We have] ‘upheld convictions under . . . § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct . . . at issue violated constitutional rights.’”).

<sup>326</sup> *Id.*

<sup>327</sup> Waxman & Morrison, *supra* note 6, at 2234.

<sup>328</sup> *Neagle v. Cunningham*, 135 U.S. 1, 75 (stating that an officer “cannot be guilty of a crime under the law[s] of [a] State.”)

<sup>329</sup> 245 U.S. 51, 56–57 (1920) (“[E]ven the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States.”).

<sup>330</sup> See *Ohio v. Thomas*, 173 U.S. 276, 283 (1899) (“[W]hen discharging [their] duties under *Federal* authority pursuant to and by virtue of valid *Federal* laws, [federal officers] are not subject to arrest or other liability under the laws of the State in which their duties are performed.” (emphasis added)).

<sup>331</sup> See Trevor Bach, *How Racist Policies Fostered Portland’s White Majority*, U.S. NEWS (Sept. 9, 2020, 11:16 AM), <https://www.usnews.com/news/cities/articles/2020-09-09/why-portland-the-center-of-the-black-lives-matter-protests-is-so-white> (noting that “anonymous federal officers were detaining protestors off the streets”).

<sup>332</sup> See Steve Vladeck, *What the Heck Are Federal Law Enforcement Officers Doing in Portland?*, LAWFARE (July 17, 2020, 4:17 PM), <https://www.lawfareblog.com/what-heck-are-federal-law-enforcement-officers-doing-portland> [<https://perma.cc/6YD6-EAMD>].

<sup>333</sup> See *id.* (noting that it was “hardly obvious” which federal law the Customs and Border

officers to enforce state law.<sup>334</sup> Embedded in Oregon’s law granting this authorization is a limitation that “federal officer[s] may use physical force as is justifiable and authorized under” other various Oregon statutes.<sup>335</sup> Further, Oregon “requires *state* certification that federal officers have received proper training before effectuating arrests under state law *before* such arrests can happen” and it was unclear that this process was followed.<sup>336</sup> Oregon, and other states, should not be precluded from prosecuting federal officers for violating state laws under these conditions because functionally these officers are acting more like state officers. Thus, state law should be considered under these circumstances.

Outside of this exception, relying on qualified immunity’s “clearly established by federal law” prong leaves much to be desired. As Wallace critiques, “‘notice’ in this sense, a warning that an individual may violate a law, ultimately depends on the interpretation of reasonableness by the court.”<sup>337</sup> Assuming the courts did utilize qualified immunity’s current approach to the “clearly established” test, it becomes clear that this critique is exaggerated for two reasons. First, most courts uphold immunity the majority of the time. A recent study sampling district courts in Texas, Florida, Ohio, California, and Pennsylvania found that qualified immunity was denied only 31.6% of the time when raised via motion.<sup>338</sup> In fact, the Supreme Court has “continually reinforced a narrow definition of ‘clearly established,’ requiring lower courts to accept as precedent only cases that have detailed circumstances very similar to the case they are weighing.”<sup>339</sup> And a court can “always manufacture a factual distinction” between the case before it and prior cases.<sup>340</sup> Consequently, between 2017 and 2018, 57% of all excessive force cases were decided in favor of officers because there was no clearly established federal law.<sup>341</sup> Second, under

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Patrol agents were enforcing); *see also* Sergio Olmos, Mike Baker & Zolan Kanno-Youngs, *Federal Officers Deployed in Portland Didn’t Have Proper Training*, *D.H.S. Memo Said*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/18/us/portland-protests.html> (noting that “[p]rotestors, along with videos posted on social media, have described scenes of federal officers seizing people and pulling them into unmarked vans”).

<sup>334</sup> OR. REV. STAT. § 133.245 (2019) (stating that a federal officer may arrest any person “[f]or any crime committed in the federal officer’s presence if the federal officer has probable cause to believe the person committed the crime”).

<sup>335</sup> *Id.* §§ 133.245(3) (noting limitations in the following statutes: “ORS 161.235 (Use of physical force in making an arrest or in preventing an escape), 161.239 (Use of deadly physical force in making an arrest or in preventing an escape) and 161.245 (“Reasonable belief” described).”).

<sup>336</sup> Vladeck, *supra* note 332.

<sup>337</sup> Wallace, *supra* note 6, at 1519 (citing *United States v. Lanier*, 520 U.S. 259, 270–71 (1997)).

<sup>338</sup> Schwartz, *supra* note 16, at 36–37.

<sup>339</sup> Chung et al., *supra* note 211.

<sup>340</sup> *McGarry v. Bd. of Cnty. Comm’rs*, 294 F. Supp. 3d 1170, 1201 n.16 (D.N.M. 2018).

<sup>341</sup> *See* Chung et al., *supra* note 211 (illustrating a shift in favor of police in qualified immunity cases decided on the “clearly established” prong).

*Pearson v. Callahan*,<sup>342</sup> the Supreme Court created a catch-22 because lower courts are free to proceed to the clearly established prong “without first assessing whether a defendant violated the constitutional or statutory rights of the plaintiff.”<sup>343</sup> The Court’s overruling of the mandatory sequencing—of first deciding whether a constitutional violation had occurred under *Saucier v. Katz*<sup>344</sup>—has led to some rights never becoming clearly established.<sup>345</sup> At bottom, Wallace’s fear that federal officers would somehow have less notice appears to be exaggerated.

Adopting a modified version of the clearly established test for Supremacy Clause immunity not only would not have the real-life effect of decreasing notice to federal officers, it also would give courts an opportunity to cure the maladies associated with qualified immunity. Rather than only relying on circuit courts to define clearly established violations, circuit courts should employ a number of tactics to better define for what violations federal officers would be criminally liable.

First, *all* circuit courts should guide whether a violation is clearly established. This is so because federal officers often work in a variety of jurisdictions, spanning multiple states.<sup>346</sup> This places all federal officers on the same footing and provides the same notice, at least from the circuit courts, as to what qualifies as clearly established. Also, such a standard provides consistency for federal agents who routinely move around the country.

Second, federal officers should be held accountable if they violate federal directives, policy, or guidance memorandums that would affect the rights of third parties. Federal officers are already on notice that they can be punished for actions that do not “promote the efficiency of the service.”<sup>347</sup> Arguably, attempting to exercise authority

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<sup>342</sup> See generally 555 U.S. 223 (2009).

<sup>343</sup> Schwartz, *supra* note 16, at 65.

<sup>344</sup> See generally 533 U.S. 194 (2001).

<sup>345</sup> See Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 40–41 (2015) (describing the variation with which the Fifth Sixth, and Ninth Circuits exercise discretion under *Pearson* to decide whether a constitutional violation has occurred); Colin Rolfs, *Qualified Immunity After Pearson v. Callahan*, 59 UCLAL. REV. 468, 491–93 (2011) (finding that after *Pearson* district courts often answered both steps of the qualified immunity test, but circuit courts more often moved to the clearly established step). *Cf.* Ted Sampsell-Jones & Jenna Yauch, *Measuring Pearson in the Circuits*, 80 FORDHAM L. REV. 623, 629 (2011) (finding that circuit courts followed the *Saucier* two-step process “most of the time”).

<sup>346</sup> For example, the FBI has fifty-six field offices, but not in every state. The Salt Lake City, Utah, field office covers Utah, Idaho, and Montana, which would place it in both the Ninth and Tenth Circuit’s jurisdiction. Likewise, the Kansas City, Missouri field office covers both Missouri and Kansas—placing those officers under both the Tenth and Eighth Circuit’s jurisdiction. See *Field Offices*, FED BUREAU INV., <https://www.fbi.gov/contact-us/field-offices> (last visited Mar. 28, 2022) (scroll down to “filter by” and select a given state to see what states are covered by each field office).

<sup>347</sup> 5 U.S.C. § 7513(a) (2012); 5 C.F.R. § 735.203 (2006) (“An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the government.”).

contrary to agency practices, procedures, or guidance violates this tenant. Our proposal simply heightens the severity of punishment from terminations and suspension to criminal liability when courts and juries find it proper to do so. And, as discussed above, this allows agencies to better control federal officers from going rogue, thereby ensuring cohesiveness and efficiency.<sup>348</sup> Besides, the Department of Justice has even gone so far to emphasize that “[h]igher level employees and those entrusted with sensitive responsibilities, including attorneys and law enforcement officers, are subject to closer scrutiny and greater potential discipline[.]”<sup>349</sup> Agencies are already liable for not following their own regulations,<sup>350</sup> and agencies must act through their federal officers.<sup>351</sup> Thus, it makes sense to subject federal officers to the same standard. This is especially true when one considers that citizens caught in enforcement proceedings can be held accountable to non-binding agency guidance documents.<sup>352</sup> Our proposal puts everyone on a level playing field then.

Lastly, under Supremacy Clause immunity, courts should still defer to the sequencing under *Saucier v. Katz*<sup>353</sup> unless: (1) the same constitutional question is before a higher court; or (2) where a constitutional determination would require interpretation of an ambiguous law. Further, in cases where there is limited factual information, the authors would encourage courts to allow parties to engage in limited discovery in order to guard against potential bad precedent.<sup>354</sup> This gives courts the flexibility to avoid the psychological pressure of cognitive dissonance that often arises when a judge finds that there is a violation but that it was not clearly established.<sup>355</sup> Together, this would aid the courts in developing precedent to give

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<sup>348</sup> See *supra* Section III.B.1.

<sup>349</sup> Memorandum from Lee J. Lofthus, Assistant Att’y Gen. for Admin., to all DOJ Employees, Off-Duty Conduct (Jan. 29, 2016), <https://www.justice.gov/file/1047651/download> [<https://perma.cc/W2RB-4JNW>].

<sup>350</sup> See *Sameena Inc. v. United States Air Force*, 147 F.3d 1148 (9th Cir. 1998) (“The Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it promulgates.” (citations omitted)). Note that this requirement is less rigid when the policy does not affect or is not intended to protect the interests of a party before an agency. See *id.* (citing *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959); Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629, 630 (1974)).

<sup>351</sup> See *Tennessee v. Davis*, 100 U.S. 257, 263 (1879) (noting that the federal government “can act only through its officers and agents”).

<sup>352</sup> See Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. REGUL. 165, 166, 174 (2019) (concluding based on empirical data that “regulated parties often face overwhelming practical pressure to follow what a guidance document ‘suggests’” with the possibility of criminal punishment being one of the greatest pressures).

<sup>353</sup> 533 U.S. 194, 200 (2001).

<sup>354</sup> See Nielson & Walker, *supra* note 345, at 37 (describing these as arguments against mandatory sequencing under *Saucier*).

<sup>355</sup> See *id.* at 48 (describing the cognitive dissonance issue (citing Nancy Leong, *The Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 704–05 (2010))).

federal officers fair warning while avoiding the pitfalls that normally come with the mandatory sequencing under *Saucier*. Effectively, this makes *Saucier* the default position, with the discretion to follow *Pearson* in certain circumstances.

#### CONCLUSION

Supremacy Clause immunity leaves courts at a crossroads. On one hand, “[a]n agent acting . . . in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.”<sup>356</sup> And it goes “without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause.”<sup>357</sup> On the other hand, exposing federal officers who violate state law to “the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.”<sup>358</sup> As Judge Learned Hand put it, the correct path “must be found in a balance between the evils inevitable in either alternative.”<sup>359</sup> That is what our proposal aims to accomplish. While it does not solve every foreseeable problem, it does provide a framework for courts to address some of the procedural and substantive hurdles in way that balances competing constitutional concerns among stakeholders. In absence of legislation, the courts must fashion a workable test to deal with what will likely be an increasing issue.

So, where does all of this leave Agent Schrader? First, on the procedural issue, there would not be a disputed issue of material fact. With the elimination of the subjective inquiry, the district court judge would be free to decide the Rule 12(b) motion because there are no disputed material issues of fact that overlap between the underlying state criminal charge and Supremacy Clause immunity. Second, under the authority prong Agent Schrader’s decision to arrest Mr. White would have been authorized. But, under the necessary and proper prong, Agent Schrader’s Supremacy Clause immunity defense would likely fail under either of our definitions of “necessary” because: he was on vacation, outside of his jurisdiction, enforcing a law he typically was not responsible for, and acted against department policy at the time.<sup>360</sup> Moreover, his decision to tackle Mr. White would likely be improper because it was both objectively unreasonable and likely would have violated clearly established law. In sum, the State of New Tejas was well within its right to prosecute Agent Schrader under its state criminal statutes.

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<sup>356</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971).

<sup>357</sup> *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> Recall that, under Judge Gardner’s version, “necessary” is defined as acting within the bounds of agency guidance, policy, and regulations. Only Justin’s version requires the first three elements. *See supra* Section III.B.1.