No. 17-299

In The
Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

v.

CHARLES KLEINERT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CHARLES KLEINERT

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QUESTIONS PRESENTED

1. Whether a local prosecutor may pursue criminal charges under state law against a federal officer for conduct necessary and proper to carry out the officer's federal duties.

2. Whether the lower courts erred in applying the accepted test for a federal officer's Supremacy Clause immunity, at Petitioner's request.

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INTRODUCTION

Petitioner, acting through the Travis County District Attorney (the "District Attorney"),[1] argues this is a case about the federal government taking power from a sovereign state. The "state power" the District Attorney claims was wrongfully taken is the asserted right to prosecute a federal officer whose conduct, as determined finally and indisputably on the record below, was vested with federal authority under the officer's assignment to an FBI task force.

The District Attorney's argument frames the case's Supremacy Clause immunity issues entirely backwards. The federal government cannot take from a state sovereign power it never held. States have never had the authority under our federalist system to prosecute, much less imprison, federal officers for necessary and proper conduct involved in enforcing federal law. *See Tennessee v. Davis*, 100 U.S. 257, 263 (1879) ("No State government can exclude [the federal government] from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."); *see also Osborn v. Bank of U.S.*, 22 U.S. 738, 865 (1824) (Marshall, C.J.) ("An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that

[1] At the time of the indictment, Rosemary Lehmberg was the elected District Attorney of Travis County, Texas. The position is currently held by Margaret Moore.

he shall not be punished for obeying this order. His security is implied in the order itself.").

From the earliest days of our republic, it was understood that our federal government is "supreme within its sphere of action." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). But the federal government "can act only through its officers and agents, and they must act within the States." *Davis*, 100 U.S. at 263. To preserve the ability of the federal government to function, this Court has held those officers and agents, when taking necessary and proper actions to carry out their federal duties, are immune from prosecution under state law. *Cunningham v. Neagle*, 135 U.S. 1 (1890).

The Founders recognized our federal system could not function if federal officers, serving federal ends, could "be arrested and brought to trial in a State court, for an alleged offence against the law of the State." *Davis*, 100 U.S. at 263. Such a system would allow the several States "to paralyze the operations of the [federal] government." *Id.* In our nation's history, local prosecutors have from time to time attempted to frustrate federal law through local criminal prosecution, as in the days of Prohibition enforcement, or during federally mandated integration of public universities. However, the Constitution contains no such "element of weakness." *Id.*; *see also* FEDERALIST NO. 44 (James Madison) (the Supremacy Clause prevents "inversion of the fundamental principles" that would result if "authority of the whole society [were] every where subordinate to the authority of the parts").

The District Attorney's improper framing of the Supremacy Clause issues cannot mask the underlying reality that this case does not present this Court with any vehicle for the resolution of a genuine or meaningful conflict between circuits, or for that matter any opportunity to refine or amplify existing Supremacy Clause jurisprudence.

First, the question whether Supremacy Clause immunity protects state officers "assisting" the federal government is not presented by the petition. The district court found the officer in question here was acting as a federal officer when he engaged in the conduct for which the District Attorney attempted to prosecute him. The District Attorney did not challenge that district court finding at the court of appeals, and the district court's determination that the officer was acting as a federal officer is not subject to reevaluation through a petition to this Court. The attempted false distinction set out in the petition between "true federal officers" and the officer in question is thus not only wrong, but also of no moment.

Second, it is well settled that Supremacy Clause immunity only prohibits state and local prosecutions of federal officers for necessary and proper actions performed in furtherance of their federal duties. A local prosecutor has had, and will continue to have, the authority to prosecute a federal officer under state law if the officer's conduct was not serving a federal end.[2] The

[2] Federal officers may also be prosecuted under federal law, where the Supremacy Clause interposes no defense. *E.g.*, 18

plain language of the indictment sought by the District Attorney, as well as the factual record about the underlying conduct on which the district court based its Supremacy Clause immunity findings, foreclose any argument that the prosecution attempted by the District Attorney did not seek to prosecute the officer for his conduct in carrying out federal duties.

Third, the reed-grasping argument made in the petition about a need to resolve an argued conflict among circuits is built upon challenging the vitality of a legal test the District Attorney herself asked the district court to apply. The court of appeals properly held the District Attorney waived any argument as to the "necessary and proper" standard applied by the district court. Waiver principles would likewise prevent this Court from reaching the merits of the claim of a conflict between circuits on the standard. Even then, the conflict claimed by the District Attorney is illusory, given the universal endorsement of the relevant legal test by every court of appeals to have considered the question. Even if the issue could be reached by this Court, the District Attorney has no sound grounding for her request to the Court to undo more than a century of settled constitutional law and fundamentally rewrite Supremacy Clause jurisprudence.

Especially given these infirmities in the request for review by this Court, the District Attorney's invocation of the Tenth Amendment and the anti-commandeering

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U.S.C. § 242 (allowing federal prosecution of any person who willfully deprives another of their federal rights).

doctrine rings hollow. This is not a case about "federal control of state officers." *Printz v. United States*, 521 U.S. 898, 922 (1997). Supremacy Clause immunity addresses the reverse situation: attempts by states to control federal officers, by seeking to criminalize their necessary and proper conduct. This they cannot do. "[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." *Johnson v. Maryland*, 254 U.S. 51, 56-57 (1920) (Holmes, J.).

STATEMENT

Petitioner indicted Charles Kleinert on a state-law charge of "reckless" manslaughter, as a result of the unintentional shooting death of a suspect during an attempted arrest for multiple federal crimes. Pet. App. at 1a, 19a. The indictment charged that Kleinert "recklessly" caused the suspect's death by attempting to physically control, strike, and arrest him while the officer held a drawn firearm in his hand. *Id.* at 5a-6a.

On July 26, 2013, Kleinert was working full time on the federal Central Texas Violent Crimes Task Force, based out of the FBI's Austin office. *Id.* at 2a; *see also* R.2560. Kleinert carried out duties as a member of the task force and as a "Special Federal Officer /Special Deputy-US Marshal." R.2171. Kleinert's federal duties included making warrantless arrests for

federal crimes committed in his presence. Pet. App. at 16a; 21 U.S.C. § 878(a)(3).

The task force relationship between the local police agencies and the FBI was governed by an agreement called a Memorandum of Understanding ("MOU"). The MOU does not restrict the duties or obligations of federal officers imposed by federal law. Pet. App. at 16a. It "does not unequivocally limit the types of crimes that task force officers may investigate." *Id.* Rather, deputized federal agents have broad law enforcement responsibilities stemming from the Constitution and other federal law.[3] *Id.* at 17a.

Kleinert's pursuit and attempted arrest of the suspect fell within his oath to enforce federal law. Pet. App. at 17a. Kleinert's federal task force duties brought him to a bank to further investigate a robbery that had occurred earlier in the day. *Id.* at 18a. While Kleinert was inside the bank, a man approached the bank and engaged in a number of suspicious behaviors in Kleinert's sight, hearing, and/or presence: (1) attempting to enter

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[3] Federal law does not recognize the "primacy" of the MOU. Federal law merely allows cooperating agencies to enter into such agreements to govern "[t]he supervision of the duties" of employees assigned to federal agencies or task forces. 5 U.S.C. § 3374(c); 21 U.S.C. § 878(b) (assigned employees are not federal employees except for limited purposes set forth in § 3374(c)). The District Attorney and certain *amici* fail to distinguish between supervision and criminal prosecution. Nothing in the MOU can fairly be read as a waiver of the constitutional Supremacy Clause immunity rights of any federal officer on the task force. To the extent the District Attorney is suggesting such a waiver for the first time in this Court, she has waived that argument.

the locked bank, despite a posted sign indicating the bank was closed; (2) falsely identifying himself as a known bank customer to a bank manager, who went outside the bank to talk to the man; (3) attempting to withdraw money from the account of the customer he was falsely claiming to be; (4) later falsely identifying himself to Kleinert as the customer's brother, after Kleinert went outside the bank to investigate; (5) lying to Kleinert about having walked to the bank from a nearby car wreck; (6) obscuring his face with his cell phone; and (7) finally running from Kleinert. *Id.* at 19a. These actions gave Kleinert probable cause to arrest the man for "at least two federal felonies" committed in Kleinert's presence: "bank robbery and bank fraud." *Id.* at 19a-20a.

When the suspect fled, Kleinert gave chase. Pet. App. at 5a. Kleinert eventually caught up to the suspect, drew his service weapon, and commanded the suspect to "get down on the ground." *Id.* An expert witness retained by the District Attorney described these as "good police tactics." *Id.* at 27a. The suspect did not comply with Kleinert's lawful order; instead, he chose to flee again. *Id.* at 5a. Kleinert quickly caught up to the suspect and grabbed the suspect's left shoulder with his left hand, with Kleinert's right hand still holding his firearm.[4] *Id.* The suspect continued to attempt

[4] According to the district court's factual findings, Kleinert chose not to reholster his weapon for two reasons. First, he did not know if the suspect resisting arrest was armed. Pet. App. at 54a. Second, Kleinert was dressed in plain clothes, including an untucked shirt which hung down over his hip holster. *Id.* at 22a. To

to flee, and led Kleinert under a bridge, where the suspect tried to scramble up a rocky incline on all fours. *Id.* Kleinert again commanded the suspect to "get down," and – in an effort to force the suspect down to the ground – delivered two "hammer-fist strikes" to the suspect's lower back using the "meaty part" of the bottom of his right hand that held the firearm. *Id.* While Kleinert was attempting a third hammer-fist strike, the suspect reared back into Kleinert, causing both men to lose balance. *Id.* While the men were falling to the ground, Kleinert's service weapon discharged unintentionally, and the discharged bullet killed the suspect. *Id.* at 5a n.2 ("The State has never argued that Kleinert intentionally shot Jackson, and none of the State's witnesses identified any physical evidence to contradict Kleinert's account of an accidental shooting."); *see also id.* at 27a.[5]

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reholster his weapon, Kleinert would have had to stop and take his eyes off the suspect. *Id.* at 54a.

[5] For this reason, certain *amici*'s repeated reliance on intentional shooting cases, such as *Tennessee v. Garner*, 471 U.S. 1 (1985), is misplaced. *See* Br. of Tex. State Conf. of NAACP (hereinafter "NAACP Amicus Br."), at 12-13, 18-19.

REASONS FOR DENYING THE PETITION

I. This case is an inappropriate vehicle for reconsidering the application or scope of Supremacy Clause immunity.

A. The District Attorney waived her arguments on appeal.

1. In the district court, the parties agreed on the relevant test for whether an officer's conduct was "necessary and proper," and thus subject to Supremacy Clause immunity. In the words of the District Attorney before the district court: "An action is 'necessary and proper' only if the officer had a subjective belief that it was justified and that belief was objectively reasonable." App. at 35. Belying the District Attorney's current suggestion that she advocated a test that would evaluate not the reasonableness of the officer's *belief* but rather the reasonableness of the officer's *conduct*, the prosecutors expressly argued Kleinert's belief was not objectively reasonable. App. at 46-47 ("An objectively reasonable officer would know that this conduct was unreasonable.");[6] *see also* R.2085 (State's closing argument at the district court motion to dismiss hearing: "for an agent's actions to be judged necessary and proper, he must show that he had an honest and reasonable belief that what he did was necessary in the performance of his duty").

Following the parties' lead, the district court applied this two-part test. Pet. App. at 33a. It first analyzed

[6] The District Attorney's appendix omits these portions of the briefing, and they are included in the attached appendix.

whether Kleinert subjectively believed his actions were necessary and proper.[7] *Id.* at 51a-53a. It then analyzed the objective reasonableness of that belief. *Id.* at 54a-63a.

On appeal, the District Attorney urged the court of appeals to reject this two-part test in favor of a different proposed standard. The newly proposed standard would focus on whether the officer's conduct (not belief) was objectively reasonable. *See* Br. for Appellant, *Texas v. Kleinert*, 2016 WL 683973, at *29-30 ("The State urges this Court to hold that the defendant's actions had to have been objectively necessary and proper to fulfilling his federal duties."); Pet. at 26 (arguing Kleinert's "conduct was objectively unreasonable, and that his claim to immunity must therefore fail"). As was pointed out by Kleinert at the court of appeals, such a test would represent an open invitation for local prosecutors to circumvent Supremacy Clause immunity by engaging themselves, or hired experts, to second-guess the reasonableness of a federal officer's actions. *See* Br. of Appellee, *Texas v. Kleinert*, 2016 WL 1622162, at *58-60.

The court of appeals properly concluded that the District Attorney waived this argument by failing to

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[7] As has been established by prior jurisprudence, the word "necessary" is used in the same sense it appears in the Necessary and Proper Clause. Necessary means "convenient, or useful," employing "any means calculated to produce the end," not a "single means" or "absolute physical necessity." *McCulloch v. Maryland*, 17 U.S. 316, 413-14 (1819) (Marshall, C.J.).

urge this novel test in the district court. Pet. App. at 14a n.7. The court of appeals then analyzed the record under "the same standard the State relied on" in the district court. *Id.* Echoing the District Attorney's own language, the court of appeals held: "For conduct to be 'necessary and proper,' an officer must subjectively believe that his actions were appropriate to carry out his federal duties, and that belief must be objectively reasonable." *Id.* at 14a.

It is well known that this Court is "a court of review, not of first view." *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1170 (2017). Neither the district court nor the court of appeals considered or applied the novel test the District Attorney urges this Court to adopt. Basic waiver principles counsel against the Court's grant of review.

In addition to traditional waiver rules, the District Attorney's position is further foreclosed by the doctrine of invited error. "A party cannot complain on appeal of errors which he himself induced the district court to commit." *McCaig v. Wells Fargo Bank (Tex.), N.A.*, 788 F.3d 463, 476 (5th Cir. 2015) (internal quotation marks omitted). If it was error for the district court to apply the test it applied – which it was not – the District Attorney invited that error by asking the court to apply it.

2. Kleinert's constitutional defense is premised on his status as a federal officer. Federal-officer status is a prerequisite to removal under the aptly named federal-officer removal statute. 28 U.S.C. § 1442(a)(1). It is

also a prerequisite to asserting the defense of Supremacy Clause immunity, which only protects federal officers. *Neagle*, 135 U.S. at 62; Pet. App. at 15a.

The District Attorney challenged Kleinert's federal-officer status in the district court. However, on appeal, she abandoned any argument that Kleinert was not a federal officer. Pet. App. at 8a ("The State does not dispute that Kleinert is a federal officer, and our review of the record confirms his federal-officer status."). Because the District Attorney "chose[] to leave this holding undisturbed," she waived any argument about Kleinert not acting as a federal officer. *Id.* at 15a.

The District Attorney likewise abandoned her challenge to the federal court's jurisdiction under the federal-officer removal statute. *Id.* at 8a n.4. By doing so, the District Attorney conceded two significant facts. First, she conceded Kleinert was a federal officer, the initial requirement for removal. Pet. App. at 15a. Second, she conceded the actions for which Kleinert stood indicted were "done by him under color of federal authority and in enforcement of federal law." *Mesa v. California*, 489 U.S. 121, 132 (1989); Pet. App. at 17a-18a ("Importantly, the State concedes that federal law authorized Kleinert, as a special deputy for the FBI, to make warrantless arrests for any federal felony if he has probable cause.").

Kleinert's indisputable status as a federal officer enforcing federal law resolves the District Attorney's purported federalism concerns. There is no dispute the Supremacy Clause protects "true federal officers" like

Kleinert. To the extent that the District Attorney posits that the Constitution might apply differently to what the District Attorney dubs "hybrid State-federal officers,"[8] those questions are not presented by this case.

B. The courts of appeals uniformly apply the challenged prong of the immunity test.

1. There is no significant divergence among circuits on application of the two-pronged immunity test used by the lower courts at the urging of both parties. No federal court has rejected this test, or applied the alternative test the District Attorney advocated for on appeal.

With respect to the objective prong – the only prong at issue in this appeal – every court of appeals to have considered the question agrees on the standard: the officer's *belief* that his conduct was necessary and proper must be objectively reasonable. *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004); *Texas v. Kleinert*, 855 F.3d 305, 314 & n.7 (5th Cir. 2017); *Kentucky v. Long*, 837 F.2d 727, 745 (6th Cir. 1988); *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977); *Wyoming v.*

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[8] This conjured term has no meaning in the context of Supremacy Clause immunity. Federal-officer status is binary; a person is a federal officer, or he is not. If he is, he may invoke the Supremacy Clause regardless of any other status he may have. It is no more relevant to the Constitution that Kleinert was a local police department employee than it was that he was a father or a sports fan.

Livingston, 443 F.3d 1211, 1222 (10th Cir. 2006), *cert. denied sub nom. Wyoming v. Jimenez*, 549 U.S. 1019 (2006).[9]

Explaining this universally endorsed standard, the courts have expressly rejected the position urged by the District Attorney on appeal. A federal officer is not required to show "that his action was in fact necessary or in retrospect justifiable, only that he reasonably thought it to be." *Clifton*, 549 F.2d at 728. "[N]o federal officer has *ever* been denied immunity because a court later second-guessed the reasonableness of his conduct." *Idaho v. Horiuchi*, 253 F.3d 359, 399 (9th Cir. 2001) (*en banc*) (Hawkins, J., dissenting), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001).

The novel standard advocated by the District Attorney would threaten to sow turmoil and confusion in the application of Supremacy Clause immunity by upending more than a century of settled constitutional law. Under the District Attorney's view of the law, local prosecutors could vitiate Supremacy Clause immunity

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[9] The District Attorney and certain *amici* suggest Supremacy Clause immunity is limited to "exceptional" cases, but that language is nowhere to be found in *Neagle*. Instead, that language comes from this Court's habeas jurisprudence. *E.g.*, *Baker v. Grice*, 169 U.S. 284, 291 (1898). Of course, habeas cases present distinct concerns because habeas relief is, by definition, discretionary. *U.S. ex rel. Drury v. Lewis*, 200 U.S. 1, 8 (1906) (habeas statutes "do not imperatively require the circuit courts to wrest petitioners from the custody of state officers in advance of trial in the state courts"). A refusal to grant habeas relief pre-trial does not mean an officer is not ultimately entitled to immunity.

from prosecution in any case by hiring experts to opine the federal officer acted recklessly or unreasonably. That tactic did not work when local prosecutors attempted to prosecute a federal officer for actions taken in seeking to enforce a federal mandate to integrate the University of Mississippi. *See In re McShane's Petition*, 235 F. Supp. 262, 263-64, 269 (N.D. Miss. 1964) (granting Supremacy Clause immunity even though prosecutors presented experts who opined the federal officer acted recklessly).[10] It did not work when the District Attorney tried it in the district court. And it should not become the law in the future.

2. In its quest to find a circuit split worthy of this Court's attention, the District Attorney and certain *amici* also attempt to manufacture disagreement among the courts of appeals regarding the subjective prong of the standard.

First, even assuming that disagreement over the subjective prong were to exist, it would be irrelevant to

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[10] As the District Attorney did in the lower courts, certain *amici* advocate for a state-law "recklessness" exception to Supremacy Clause immunity. NAACP Br., at 3, 8, 14 & n.13. *Amici* do not identify any case holding that a federal officer may be prosecuted under state law for acting recklessly while attempting to arrest a suspect. To the contrary, the cases confirm Supremacy Clause immunity is available *despite* claims that the federal officer's conduct was improper under a state-law standard. *E.g.*, *In re McShane*, 235 F. Supp. at 263-64 (immunity for officer who acted recklessly); *Livingston*, 443 F.3d at 1226-28 (immunity for officers who acted in violation of state law). Any other rule would obliterate the doctrine, as every officer charged with a crime under state law may be said by a local prosecutor to have acted contrary to state law.

this appeal. The District Attorney did not and is not challenging the district court's factual finding that Kleinert honestly believed his actions were necessary and proper. The Fifth Circuit affirmed that finding under clear error review, because "none of the evidence suggest[ed] that Kleinert acted out of personal interest or bore any ill will toward Jackson." Pet. App. at 21a, 24a. The petition seeks review only of the objective component of the lower courts' analyses, not the subjective component.

Second, no genuine disagreement among circuits on the second prong exists. No court of appeals has refused to apply the subjective prong of the standard. The Tenth Circuit expressly reserved the question in *Livingston*. 443 F.3d at 1222. The Ninth Circuit did the same in *Horiuchi*, which was ultimately vacated as moot when the prosecutors dropped the case. 253 F.3d at 366 n.11. Under *Clifton*, the subjective prong remains the law of the land in the Ninth Circuit. 549 F.2d at 728.[11]

The District Attorney cites *Denson v. United States*, 574 F.3d 1318 (11th Cir. 2009), describing the case as

[11] Although their analysis of *Horiuchi* is incorrect, certain *amici* concede there is no circuit split. NAACP Amicus Br., at 14 ("If *Horiuchi* had not been vacated, *Kleinert* would present this Court with a circuit split. . . ."). *Horiuchi* would not present a circuit split because it applied the same two-prong test used by the Fifth Circuit. *See Horiuchi*, 253 F.3d at 366 ("For an agent's actions to be adjudged necessary and proper, he must show that he had an honest and reasonable *belief* that what he did was necessary in the performance of his duty." (emphasis added, internal quotation marks omitted)).

applying a "*Neagle*-based qualified-immunity test." That formulation conflates two distinct holdings. The *Denson* court applied the traditional qualified immunity test to *Bivens* claims brought against government officials, holding the plaintiffs failed to prove a violation of their constitutional rights. *Id.* at 1338, 1344. The court then held the Supremacy Clause barred state-law tort claims against the federal government itself (not federal officers), drawing on *Neagle*. *Id.* at 1348. The application of *Neagle* to tort claims against the government has no bearing on the issues raised in this case, and suggests no conflict with Supremacy Clause immunity as applied to federal officers in criminal cases.

Finally, the District Attorney mischaracterizes the Sixth Circuit's holding in *Long*. That court called Supremacy Clause immunity "analogous" to qualified immunity, but only "in that there comes a point early in the proceedings where the federal immunity defense should be decided in order to avoid requiring a federal officer to run the gauntlet of standing trial and having to wait until later to have the issue decided." *Long*, 837 F.2d at 752. This procedural similarity among immunity defenses has nothing to do with the subjective prong of the standard. The *Long* court endorsed that component in affirming a district court order which characterized the test as (in part) "a subjective one." *Id.* at 740.

II. Supremacy Clause immunity is rarely asserted and will never affect the vast majority of state and local law enforcement officers.

1. Local prosecutions of federal officers are exceedingly rare. From the rarity of such prosecutions, one can infer that local prosecutors have learned to apply the lessons of *Neagle* and its progeny and generally accept that they lack constitutional authority to police through prosecution the conduct of federal officers carrying out federal duties, even if local political or other factors might otherwise prompt them to do so. *See Livingston*, 443 F.3d at 1213 (referring to Supremacy Clause immunity as a "seldom-litigated corner" of constitutional law). Even high-profile cases have wisely been dropped by prosecutors once the protections of the federal forum were invoked. *See Horiuchi*, 266 F.3d at 979 (vacating opinions as moot after local prosecutors dropped charges). As a result, discussions of the doctrine in the reporters are few and far between, with modern jurisprudence being dominated by just a handful of opinions from the courts of appeals.

Even certain *amici* highlight the rarity of local prosecutions of law enforcement officers generally. *See* Br. of Amici Scholars in Support of Petition (hereinafter "Profs. Amicus Br."), at 8 (citing Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS U. L.J. 363, 366, 377 (2016), reporting 97 prosecutions in 2001 and 224 in 2011). Given that prosecutions of federal officers make up only a subset of those few cases, it is unsurprising that this issue does not arise frequently.

The vast majority of state and local law enforcement officers will never encounter a Supremacy Clause immunity issue. The District Attorney contends there are some 720,000 such officers on the streets today. Pet. at 10. Although she claims an "astounding" number of those individuals serve on federal task forces – thereby operating as federal officers – she estimates the number at roughly 18,000. *Id.* at 12. Certain *amici* put both numbers slightly higher – 21,382 out of 765,000. Profs. Amicus Br. at 7, 11. Even if the precise figures are double those estimates, nearly 95% of America's state and local officers fall outside the scope of the Supremacy Clause immunity doctrine.

2. The District Attorney's numbers also disprove her slippery slope argument. Cases explicitly applying Supremacy Clause immunity to federal officers have been on the books for more than 125 years. *See Neagle*, 135 U.S. at 62. State and local officers serving on federal task forces are routinely treated as federal officers by the courts. *See, e.g.*, *United States v. Martin*, 163 F.3d 1212, 1214 (10th Cir. 1998); *United States v. Torres*, 862 F.2d 1025, 1030 (3d Cir. 1988); *Colorado v. Nord*, 377 F. Supp. 2d 945, 949 (D. Colo. 2005); *Lee v. Village of Glen Ellyn*, No. 16-cv-7170, 2017 WL 2080422, at *3 & n.1 (N.D. Ill. May 15, 2017) (collecting additional cases). In spite of these protections, the District Attorney concedes task force participation has expanded, particularly in the last 16 years. If Supremacy Clause immunity were truly a deterrent to task force participation, those numbers would be trending in the opposite direction.

3. The District Attorney is wrong to suggest the Fifth Circuit's holding in any way infringes upon local governance of local officers. The Supremacy Clause does not affect the ability of state and local agencies to "hold [their] officers accountable."[12] Supremacy Clause immunity has no application to local efforts to prosecute local officers for claimed violations of state law, when those local officers are not acting as federal officers.

The application of the Supremacy Clause does arise when state and local law enforcement agencies choose to participate in federal task forces, with their officers deputized as federal officers. Through this process, states do not "relinquish" any aspect of their sovereignty. To the contrary, a federal officer serving a federal end is, and always has been, beyond the reach of state criminal laws. *Osborn*, 22 U.S. at 865. This Court has long recognized the "incontrovertible principle" that the federal government may, "through its official agents, execute on every foot of American soil the powers and functions that belong to it." *Ex parte Siebold*, 100 U.S. 371, 395 (1879). Local prosecutors can no more prosecute a task force officer for enforcing federal law than they could prosecute a deputy U.S.

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[12] The District Attorney and certain *amici* point to Portland and San Francisco as examples of cities concerned with task force oversight issues. But those concerns focus on whether task force officers will follow state or federal guidelines for conducting surveillance. Whether local prosecutors could indict task force officers under state law was not part of the debate. *See* Michael Price, Brennan Center for Justice, National Security & Local Police 37-38 (2013).

marshal or court security officer for protecting a federal judge.

The District Attorney's example in her petition of revenue officers helps to demonstrate the backwards nature of her approach to the Supremacy Clause immunity issue. Revenue officers were among the first federal officers to receive protection from state-law prosecutions for performing their duties. *See Osborn*, 22 U.S. at 865 (listing "collectors of the revenue" as "examples in point" of federal officers who "are protected, while in the line of duty"). When this Court affirmed the constitutionality of the federal-officer removal statute, it did so in a case involving a revenue officer indicted under state law. *Davis*, 100 U.S. at 262-63. These individuals, who often found themselves "enforcing . . . locally unpopular national law[s]," were granted the right to present their immunity defenses to federal courts and avoid "hostile state forum[s]." *Livingston*, 443 F.3d at 1222 (citing *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)). Congress recognized the importance of this procedure as early as 1815. *Willingham*, 395 U.S. at 405. It was intended that these federal officers be held to account by the government they served, not by the states or localities in which they are required to operate.

4. The District Attorney would aim to upend more than a century of settled constitutional law protecting federal officers from local prosecutors who,

often driven by political concerns,[13] object to the manner or means by which those officers enforce federal law.[14] The Supremacy Clause protected from local prosecution special deputy marshal David Neagle, after he saved the life of Justice Stephen Field from a would-be assassin. *Neagle*, 135 U.S. at 53. California prosecutors would have imprisoned Neagle for murder. *Id.* at 3. It also protected from local prosecution marshal James McShane, who spearheaded enforcement of a court order requiring the admission of James Meredith to the University of Mississippi. *See In re McShane*, 235 F. Supp. at 263-64. Mississippi prosecutors would have seen McShane imprisoned for enforcing federal law. *Id.* at 264. When marshals in West Virginia summoned a

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[13] The District Attorney makes little effort to disguise the local political concerns underlying her attempted prosecution here. The District Attorney, a locally elected office holder, states she is not concerned with whether Kleinert is "ultimately convicted." Pet. at 22. The District Attorney states she seeks instead the chance to "complete [the] criminal process" against the officer, as demanded by local constituencies. *Id.* Of course, the Supremacy Clause countenances no such political motivation for prosecuting a federal officer – regardless of the time in history and its political winds.

[14] Idaho prosecutors took a similar tack in *Horiuchi*, calling the entire concept of Supremacy Clause immunity "un-American," an "archaic anomaly" with no place in our modern democracy. Plaintiff-Appellant's Opening Br., *Idaho v. Horiuchi* (No. 98-30149), 1998 WL 34089683, at *58. While the opposition of local prosecutors to Supremacy Clause immunity is understandable politically, it is indefensible legally. *See Free v. Bland*, 369 U.S. 663, 666 (1962) ("The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.").

posse comitatus to bring to justice a wanted man who had made it known he "would not be taken alive," it was the Supremacy Clause which protected two citizens in the posse from state murder charges. *West Virginia v. Laing*, 133 F. 887, 887-89 (4th Cir. 1904).

The District Attorney seeks to have the Court cast this history aside and rewrite the Constitution to permit state-law prosecutions of federal officers performing federal duties. That reformulation of core Supremacy Clause immunity jurisprudence could only cause those who currently serve the federal government – including task force officers – to think twice about doing so. *See* Br. of FBI Agents Ass'n in Support of Appellee, *Texas v. Kleinert*, 2016 WL 1702201, at *16 ("many officers would likely be reluctant or opposed to participate [in federal task forces] if their federally-authorized activities subjected them to state prosecution"); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2231 (2003) ("Even the most dedicated federal servant would be reluctant to do his job conscientiously if he knew it could mean prison time in the state penitentiary.").

III. The Fifth Circuit's decision is consistent with established precedent.

Review is also unwarranted because the court of appeals's approach to Supremacy Clause immunity

tracks the mainstream, consensus approach taken by all other courts to have confronted this issue.

1. Both the district court and the court of appeals applied the appropriate test at the urging of both parties. The court of appeals, in a manner consistent with established precedent, applied a four-element test to its review of the district court dismissal: (1) Kleinert was a federal officer; (2) he was authorized by federal law to perform his actions; (3) he subjectively believed his actions were necessary and proper; and (4) that belief was objectively reasonable. Pet. App. at 15a. The court of appeals also recognized, in a manner consistent with established law, that the district court's conclusions on these four elements are essentially unassailable on clear error review.[15]

First, the District Attorney conceded on appeal Kleinert's status as a federal officer. *Id.* at 15a. Second, "[e]ach of the State's arguments that Kleinert lacked federal authority to arrest Jackson [was] belied by the record." *Id.* at 20a. Third, "none of the evidence suggest[ed] that Kleinert acted out of personal interest" or with criminal intent, and "[n]othing in the record indicate[d]" the district court's evaluation of Kleinert's subjective belief was clearly erroneous. *Id.*

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[15] To the extent any factfinding was necessary to support the district court's decision, the parties executed a joint jury waiver, agreeing that the district court could "resolve any and all factual issues" related to the Supremacy Clause immunity defense. Pet. App. at 36a. The Fifth Circuit held the District Attorney waived any argument about the proper standard to apply to Rule 12 motions to dismiss by executing the jury waiver. *Id.* at 13a n.6.

at 21a, 24a. The District Attorney's own indictment, which charged "reckless" conduct, made a finding of actual criminal intent impossible. According to Texas's highest criminal court, "it is . . . impossible that a person 'intend' to commit a crime involving recklessness or criminal negligence." *Gibbons v. State*, 634 S.W.2d 700, 705 (Tex. Crim. App. 1982). Fourth, the District Attorney presented "little evidence" that Kleinert's conduct could not have been considered reasonable. Pet. App. at 26a. The District Attorney's own expert conceded Kleinert used "good police tactics" in drawing his weapon and approaching Jackson with the weapon drawn. *Id.* at 27a. The district court heard "substantial testimony in Kleinert's favor." *Id.* "All of this evidence support[ed] the district court's conclusion that Kleinert's *belief* in the propriety of his conduct was objectively reasonable." *Id.* at 27a-28a.

2. Even if the argument made in the petition had been fully preserved for appellate review, the argument that the lower courts erred by failing to assess the reasonableness of Kleinert's *conduct* under a Fourth Amendment excessive force standard is both incorrect and inconsistent with prevailing law.

Implicit in this suggestion of error is the District Attorney's position, asserted only on appeal, that the relevant question was not whether Kleinert's *belief* about his conduct being necessary and proper to carry out federal duties was objectively reasonable, but rather whether that *conduct* was objectively reasonable. No court has ever applied that standard in this

context, which is likely why the District Attorney did not urge it before the district court. *See Horiuchi*, 253 F.3d at 399 ("[N]o federal officer has *ever* been denied immunity because a court later second-guessed the reasonableness of his conduct.").[16]

To the contrary, the courts have properly focused on the officer's belief as to his conduct, dismissing charges even when the officer misjudges his authority under federal law. *Long*, 837 F.2d at 745 ("a mistake in judgment or a 'botched operation,' so to speak, will not of itself subject a federal agent to state court prosecution"). In *Clifton*, for example, the officer shot a fleeing suspect the officer mistakenly believed had shot a fellow agent. 549 F.2d at 729. Even though the officer was wrong, his belief was honest and reasonable, and he was therefore immune from prosecution on murder and manslaughter charges. *Id.*

3. The District Attorney further suggests, quite incorrectly, that the lower courts' decisions were not

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[16] Imagine an officer executing an arrest warrant mistakenly arrests the wrong suspect, whom the officer honestly and reasonably believes is the person described by the warrant. Such conduct might violate the Fourth Amendment, but it would not subject the officer to state-law prosecution for kidnapping. *In re Lewis*, 83 F. 159, 161-62 (D. Wash. 1897) (officers who exceeded scope of search warrant immune from prosecution on state-law robbery charges). While some Fourth Amendment case law may be relevant to help establish guideposts by which the officer could have formed an objectively reasonable belief regarding his conduct, the District Attorney could not overcome the Supremacy Clause immunity defense by showing a technical violation of the Fourth Amendment.

moored to any legal standard. Even a cursory review of the order and opinion below puts that notion to rest.

The district court cited *Graham v. Connor*, 490 U.S. 386 (1989), and its framework for evaluating the "reasonableness" of a particular use of force. Pet. App. at 59a. The District Attorney elsewhere argues that *Graham* and its progeny set out an appropriate standard to draw upon. Pet. at 27-28 (arguing Kleinert's conduct "should have been judged by" the *Graham* standard).

The district court also looked to other Fourth Amendment cases presenting similar situations of attempted arrest by an officer. In the first, the Sixth Circuit held it was not objectively unreasonable for an officer to go "hands on" with a suspect while holding a firearm, despite the risk that the firearm could accidentally discharge – which it did, killing the suspect. Pet. App. at 60a (discussing *Pleasant v. Zamieski*, 895 F.2d 272, 273 (6th Cir. 1990)). In the second, the Fifth Circuit held it was not objectively unreasonable for an officer to attempt to handcuff a resisting suspect while holding a firearm, even though the firearm accidentally discharged and killed the suspect. Pet. App. at 60a (citing *Watson v. Bryant*, 532 Fed. App'x 453, 458-59 (5th Cir. 2013) (unpublished)). Both courts granted qualified immunity to the officers.

The district court next referred to *Tanella*, a Supremacy Clause immunity case. Pet. App. at 60a. *Tanella* granted Supremacy Clause immunity to a federal officer who intentionally shot a suspect based on the

mistaken but reasonable belief that the suspect was reaching for a weapon. 374 F.3d at 152. The court also cited two additional Supremacy Clause immunity cases, highlighting the relevant inquiry as the reasonableness – not the ultimate correctness – of the officer's belief. Pet. App. at 61a (citing *Clifton*, 549 F.2d at 728; *United States v. Lipsett*, 156 F. 65, 71 (W.D. Mich. 1907)).

The district court deliberately and carefully considered and applied the relevant legal standards applied by various courts across the country in its thirty-page order. The court of appeals affirmed by analyzing the record in light of those same standards. Pet. App. at 24a-25a (analyzing the "objective reasonableness" of Kleinert's belief by looking to "the circumstances surrounding the conduct that the State charge[d] as criminally reckless"). The District Attorney's dissatisfaction with the outcome of that analysis is no substitute for a showing that the lower court decisions lie outside well-established jurisprudence.

4. Before the district court, the District Attorney presented evidence she believed established that Kleinert's belief in the necessity of his actions was objectively unreasonable. After the district court reached the opposite conclusion, the District Attorney now faults the lower courts for relying upon that evidence rather than conducting a Fourth Amendment analysis in an evidentiary vacuum. Pet. at 27.

The District Attorney built its case against Supremacy Clause immunity in large measure on a

theory that Kleinert violated local police department policies and therefore could not have believed his actions were reasonable. App. at 35-43 (leading the discussion of "necessary and proper" with this theory).[17] At the evidentiary hearing, the District Attorney presented no evidence from the police department itself, but instead used hired expert witnesses to argue Kleinert's actions failed to comply with these policies or were otherwise "unreasonable." This "expert"-driven evidentiary presentation formed the cornerstone of the District Attorney's case against Kleinert.

This strategy backfired on the District Attorney. First, the District Attorney's own experts were forced to concede on cross-examination that Kleinert used "good police tactics," and that " 'good, reasonable police officers' sometimes go 'hands-on' with suspects while still holding a firearm." Pet. App. at 27a. Second, it was Kleinert (not the District Attorney) who elicited testimony from local police trainers and federal agents. These witnesses described police training and policy in a manner that allowed the district court – if police department policies were the standard for "necessary and proper" conduct, which they are not – to find that Kleinert's conduct during the attempted arrest was

[17] As a matter of law, law enforcement policies do not set the standard for "necessary and proper" conduct under the Supremacy Clause. *Cf. Whren v. United States*, 517 U.S. 806, 815 (1996) (Fourth Amendment analysis does not depend upon "police enforcement practices," which "vary from place to place and from time to time").

consistent with both the policies and his training. Pet. App. at 25a-26a.

Perhaps most damningly to the case brought by the District Attorney, one former local officer testified that a prosecutor from that office sought his help in building the prosecution's case and asked him if he would testify that Kleinert's decision to employ a hammer-fist strike while holding a firearm was against policy. Pet. App. at 26a. The former officer told the prosecutor that he refused to do so "because it wasn't true," adding that anyone willing to say that "would have to perjure themselves." Pet. App. 26a.[18]

This testimony helped to drive home the point that the District Attorney, admittedly driven by local political forces, sought to prosecute a federal officer for acts she called "reckless," but that the district court found as a factual matter to be within the sphere of conduct necessary and proper to enforce federal law. That the lower courts here followed over a century of

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[18] The former officer's testimony went unrebutted. The District Attorney never identified any policy, much less any legal authority, establishing a prohibition on using hands-on tactics, including a hammer-fist strike, against a resisting suspect while holding a firearm. To the contrary, even Fourth Amendment standards applicable to an officer's civil responsibility suggest such hands-on conduct with resisting suspects is not improper. *See, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 196 (2004) (qualified immunity for officer who "struck [the suspect] on the head with the barrel and butt of her gun"); *Perry v. City of Chicago*, 733 F.3d 248, 250 (7th Cir. 2013) (same for officer who "struck [the suspect] with his gun and punched him"); *Watson*, 532 Fed. App'x at 458-59 (same for officer who "fail[ed] to reholster his weapon in the midst of handcuffing a potentially armed suspect").

established jurisprudence and held this prosecution is barred by Supremacy Clause immunity is hardly a remarkable event, and does not make this case an appropriate vehicle for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 16, 2017

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF TEXAS,	§	Case No. A14-CR-0388-LY
v.	§	
	§	**State's Opposition**
Charles Kleinert,	§	**to Motion to Dismiss**
	§	**Indictment**
Defendant.	§	

State's Opposition to Motion to Dismiss Indictment

The State of Texas, by and through the District Attorney for Travis County, respectfully requests that the Court deny the defendant's Motion to Dismiss the Indictment. In support of this request, the State would show the following:

Summary of Argument:

This case is not one of those "exceptional" cases that justify interference with the "regular course of justice in the state court" by the grant of immunity from State prosecution because the defendant's conduct does not meet the criteria for Supremacy Clause Immunity. The defendant could be held immune only if (1) his conduct was authorized by the laws of the United States and (2) his actions were no more than was "necessary and proper" to carry out his federal duty. The defendant has failed to satisfy the first prong of this test because, according to his sworn grand jury

testimony, he was a attempting to make an arrest for Evading Detention, a state misdemeanor offense, at the time he shot Jackson and thus he was not "in the discharge of his duty as an officer of the United States." Further, because he was acting outside of the parameters of the task force and did not have probable cause to arrest Jackson for any federal offense, not only did he lack the subjective belief he was acting under federal authority but he lacked objective authority to do so. Furthermore, because the defendant acted with criminal intent (criminal recklessness) he could not have been acting within the scope of the authority conferred by the laws of the United States. With regard to the second prong of the test, because his victim was unarmed, fleeing, and posed no threat of serious physical harm to anyone, the defendant's actions in bludgeoning and trying to control him with a hand that held a loaded firearm while attempting arrest were neither "necessary" nor "proper" in the performance of his duties. It was not the defendant's "duty" to arrest Jackson as a task force member, much less to recklessly employ the techniques he used in violation of the Fourth Amendment bar against excessive use of force. Because the defendant cannot show as a matter of law that he did no more than his duty under federal law, his motion to dismiss should be denied.

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      i. Immunity is improper because the defendant had no federal duty to arrest Jackson but instead acted pursuant to his duty as a Texas peace officer.

         1. The defendant's grand jury testimony shows he was trying to arrest Jackson for a State offense.

         2. As a Texas peace officer, the defendant had both legal authority and a legal duty to arrest Jackson for Evading Detention, a state misdemeanor committed in his presence.

         3. As a task force member, the defendant had neither legal authority nor a legal duty to arrest Jackson.

         4. The defendant's attempted arrest of Jackson was not "in the discharge of his duty as an officer of the United States."

ii. Immunity is improper because the laws of the United States did not authorize the defendant to commit manslaughter.

B. The defendant is not immune because his conduct was neither "necessary" nor "proper" to carry out his duty.

i. The defendant's conduct was not necessary or proper because it violated APD policies.

1. Failure to call for backup violated policy.

2. Failure to abandon the chase violated policy.

3. Commandeering a civilian vehicle violated policy.

4. Failure to re-holster his weapon before going "hands-on" violated policy.

5. Using a gun to bludgeon and control Jackson violated policy.

ii. The defendant's conduct was not necessary or proper because it violated the Constitution.

1. Killing Jackson was a Fourth Amendment seizure.

2. The defendant was not justified in the use of deadly force.

3. The defendant's handling of his firearm was objectively unreasonable.

4. Killing Jackson was an illegal seizure.

3. Conclusion

4. Prayer

1. Legal Standard and Procedure

A. Legal Standard for Rule 12 Motion

The defendant may raise his Supremacy Clause immunity defense by way of motion to dismiss. *City of Jackson v. Jackson*, 235 F. Supp. 2d 532, 534 (S.D. Miss. 2002); *Idaho v. Horiuchi*, 253 F.3d 359, 367 (9th Cir. 2001), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001); *Kentucky v. Long*, 837 F.2d 727, 730 (6th Cir. 1988); *see also Texas v. Carley*, 885 F. Supp. 940, 944 (W.D. Tex. 1994). "A motion to dismiss under Rule 12 should be granted only if the underlying facts supporting the defense are not in dispute." *People v. Nord*, 377 F. Supp. 2d 945, 948 (D. Colo. 2005). "[O]nce a threshold defense of immunity is raised, the State bears the burden of 'coming forward with an evidentiary showing sufficient at least to raise a *genuine* factual issue whether the federal officer was . . . doing no more than what was necessary and proper for him to do in the performance of his duties.'" *New York v. Tanella*, 374 F.3d 141, 148 (2d Cir. 2004), *quoting Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988) (emphasis in original).

The Court has asked the parties whether an evidentiary hearing is necessary for this motion. The Court has some evidence before it, presented at the

prior hearing on removal. The State presents some additional facts in support of this Opposition. However, in light of its evidentiary burden, the State would like the opportunity to present additional evidence to the Court in a hearing. If this Court finds *either* (1) the defendant is not immune as a matter of law *or* (2) that the State has raised a genuine issue of material fact bearing on his immunity, then the Motion to Dismiss Indictment under Rule 12 should be **denied**.

B. Procedure to Resolve Genuine Factual Issues Regarding Immunity

If this Court finds that the State has not defeated the immunity defense as a matter of law, but has met its burden of raising a genuine factual issue whether the defendant is immune, there is a lack of authority regarding who should be the fact-finder to resolve these factual issues.[1] The defendant proposes that this Court resolve any disputed facts. *See* Motion to Dismiss Indictment at 5-6. There is some guidance for this approach. The parties in *Arizona v. Files*, 36 F. Supp.

[1] The most in-depth discussion of this issue is found in the case *Idaho v. Horiuchi*, 253 F.3d 359 *vacated as moot*, 266 F.3d 979 (9th Cir. 2001) at IV. (attached here as Appendix, Tab 6) ("Because we find that there are material questions of fact in dispute which, if resolved against Horiuchi would strip him of Supremacy Clause immunity, we must reverse the district court's order dismissing the case. The question remains: What next? Presuming that Horiuchi wishes to press his immunity claim, a trier of fact will have to resolve these factual issues. Will this be the district judge, hearing the matter on a renewed motion to dismiss, or the jury during the course of the trial?" *Idaho v. Horiuchi*, 253 F.3d at 374.)

3d 873 (D. Ariz. 2014) agreed the "Court should follow the procedural framework endorsed by the plurality opinion in *Idaho v. Horiuchi*, 253 F.3d 359, 374-76 *vacated as moot*, 266 F.3d 979 (9th Cir. 2001)." *Arizona v. Files*, 36 F. Supp. 3d 873, 876 (D. Ariz. 2014). The State is likewise willing to have the Court decide these disputed factual issues pretrial so long as this Court endorses that approach and, like the parties in *Files*, the parties to this suit execute written waivers of any right to have a jury resolve the factual issues bearing on the defendant's claim of immunity under the Supremacy Clause.[2] *See Arizona v. Files*, 36 F. Supp. 3d at 876.

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[2] Under Texas law, waiver of the right of trial by jury can only be made with the consent and approval of the court and the attorney representing the state. TEX. CODE CRIM. PROC. art. 1.13; *see also In re State ex rel. Tharp*, 393 S.W.3d 751, 758-59 (Tex. Crim. App. 2012) (where the State refuses to join the defendant's waiver of jury trial, and the defendant pleads guilty, the trial court must submit all relevant issues, including punishment, to the jury). In a case removed under 28 U.S.C. § 1442(a)(1), the court should apply the state substantive law, but the federal rules of procedure. *People v. Nord*, 377 F. Supp. 2d 945, 947-948 (D. Colo. 2005), *citing Arizona v. Manypenny*, 451 U.S. 232, 241 (1981).

2. Argument

A. The defendant is not immune because his conduct was not authorized by the laws of the United States.

i. Immunity is improper because the defendant had no federal duty to arrest Jackson but instead acted pursuant to his duty as a Texas peace officer.

"The mere fact that one is an officer of the United States or of one of its courts does not exempt him from civil or criminal liability for what he does beyond the scope of his official duties and not in the discharge thereof." *Isaac v. Googe*, 284 F. 269, 270 (5th Cir. 1922). Moreover, "[for a federal official to be exempt from civil or criminal liability under state law for his act it is not enough that at the time and place of such act he was present for an official purpose. The act must be done in pursuance of his official duty." *Isaac v. Googe*, 284 F. at 270.

The defendant could be immune from State prosecution only if (1) his conduct was authorized by the laws of the United States and (2) his actions were no more than was "necessary and proper" to carry out his duty. *Morgan v. California*, 743 F.2d 728, 731 (9th Cir. 1984); *Cunningham v. Neagle*, 135 U.S. 1 (1890). The defendant is not immune; first, because at the time he attempted to arrest and killed Jackson, he was not acting under authority of federal law.

1. The defendant's grand jury testimony shows he was trying to arrest Jackson for a State offense.

For the purposes of the removal proceeding to this Court and in his motion to dismiss the indictment, the defendant claims that he was attempting to arrest Larry Jackson, Jr. for a federal offense at the time that he killed him. *See Texas v. Kleinert*, 2015 U.S. Dist. LEXIS 55180, *8 (W.D. Tex. Apr. 28, 2015), Affidavit in Support of Motion to Dismiss Indictment.

But this statement contradicts the defendant's own grand jury testimony, on March 27, 2014, that he was attempting to arrest Jackson for Evading Detention, a misdemeanor offense under Texas law.[3]

> Q: All right. At this point when you – do you believe whenever you drew your weapon on Mr. Jackson and when you put your hands on him, did you have, first of all, a right to detain him for suspicion of a crime?
>
> A: I had a right to detain him over at the bank.
>
> Q: Okay, and that's why you gave chase?
>
> A: Yes, sir.

---

[3] A person commits the offense of "Evading Detention" under Texas law "if he intentionally flees from a person he knows is a peace officer or federal special investigator attempting lawfully . . . detain him." TEX. PENAL CODE § 38.04. In the absence of aggravating factors not present here, the offense is a Class A misdemeanor. TEX. PENAL CODE § 38.04.

Q: Did you have probable cause to arrest him for anything?

A: I did. He – at a very minimum, he could have been arrested for evading a detention and –

Q: Go ahead.

A: Just through that evading and detention arrest, then anything else about what he was attempting to do at the bank would have come into play, you know, whether he's got a forged check on him or whatever else he has. If he's got Mr. Major's wallet on him or, you know, just whatever else he's got on his person that was going to allow him to do what he was attempting to do at the bank, then – you know, before that, I couldn't have done anything like that. I can't say, you know, put your hands on the wall, I'm going to frisk you and take out your wallet and do all this stuff, I can't do that and I didn't do that and – but at this point, ***once he's under arrest for, at a minimum, evading a detention, then all that stuff comes into play and you just go at it from there.***

Q: All right. So if you had drawn your weapon on Mr. Jackson and he saw you and he stopped and he put his hands up and he just submitted to you –

A: Yes, sir.

Q: – what would you have done, what was your plan?

A: My plan would have been – I had my handcuffs on me. I would have approached him, I would have had him place his hands behind his back. I would have put my knee into his back to try to keep him down on the ground. I would have had to move one arm up at a time – I would have put my weapon up. I would have got my handcuffs out. Handcuff one arm, handcuff the other arm. I probably – since the bank was so far away, I would have called for somebody else to come and meet us down there.

Q: Okay. And would he have been under arrest at this point?

A: Yes, sir.

Q: For what

A: Again, the minimum, for evading a detention.

Q: And that was for running from you from the bank when you had a right to detain him?

A: Yes, sir.

KGJT 102-105(emphasis added).[4]

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[4] Throughout this Opposition, citations to "S" or "D" refer, respectively, to State's and Defendant's exhibits admitted at the hearing on the issue of removal to federal court held on April 9, 2015. Citations to "FRT" ("Federal Removal Transcript") are to the reporter's transcript of that hearing. Citations to "KGJT" ("Kleinert Grand Jury Testimony") are to the transcript of the defendant's testimony before the grand jury on March 25 and March 27, 2014, attached here as Appendix Tab 1.

The defendant's grand jury testimony shows that, at the time, the defendant planned to arrest Jackson for an offense for which he had confidence in his right to arrest – Evading Detention (*See* TEX. PENAL CODE § 38.04) – and then, once he made a legal arrest for Evading, he could search Jackson incident to that arrest and decide at that point what additional charges if any, were appropriate. In later testimony before the grand jury, when the defendant was asked to identify what offense he was investigating that day, he listed "fraud," "a class A misdemeanor" (TEX. PENAL CODE Chapter 32), "forgery" (TEX. PENAL CODE § 32.21), "presenting himself with a government record." (TEX. PENAL CODE § 37.10 "Tampering with Governmental Record"[5]) and, of course, "evading a detention" (TEX. PENAL CODE § 38.04). *See* KGJT at 159-161.

Nowhere to be found in his grand jury testimony is the defendant's current claim that he had observed a completed federal felony offense prior to Jackson running and had probable cause to arrest for a federal offense and intended to arrest him for a federal offense against the bank. *Contrast* KGJT at 159-161 and Affidavit for Motion to Dismiss at 4.

The State submits that the grand jury testimony of the defendant provides a more credible account of his state of mind at the time of the incident than the affidavits he has prepared both in support of his removal petition and, now, in support of his motion to

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[5] Under Tex. Penal Code § 37.01, a driver's license can be a government record. TEX. PENAL CODE § 37.01.

dismiss indictment. First, the grand jury testimony occurred nearer in time to the event. Second, the grand jury testimony was made under questioning, from a variety of speakers. Third, the grand jury testimony was given before the defendant was under indictment. Fourth, the language that the defendant uses in his grand jury testimony is more detailed, specific and authentic in its tone. For example, the defendant's statement: "I believed that the suspect had engaged in conduct that was classified as felony conduct under federal criminal law," has a tone consistent with its nature as a statement prepared for litigation. *See* Affidavit in Support of Motion to Dismiss at 4.

Thus, judging by what the State submits is the most credible version of his own subjective view of the evidence at the time, when the defendant pursued Jackson and attempted to arrest him for Evading Detention, he believed that he had probable cause to arrest Jackson for that offense and only that offense.

2. As a Texas peace officer, the defendant had both legal authority and a legal duty to arrest Jackson for Evading Detention, a state misdemeanor committed in his presence.

As a commissioned peace officer in the state of Texas, the defendant had a duty "to preserve the peace," a duty that included making warrantless arrests for any offense against state law committed in his presence or within his view. TEX. CODE CRIM. PROC. art.

2.13; TEX. CODE CRIM. PROC. art. 14.01. *See also Mansfield v. C.F. Bent Tree Apartment, L.P.*, 37 S.W.3d 145, 151 (Tex. App. – Austin 2001, no pet.). "Peace officers are not relieved of this obligation because they are off-duty. If an off-duty officer observes and responds to a crime, he becomes an on-duty officer." *City of Balch Springs v. Austin*, 315 S.W.3d 219, 225 (Tex. App. – Dallas 2010), *citing Hafdahl v. State*, 805 S.W.2d 396, 401 (Tex. Crim. App. 1990), overruled on other grounds by *Madden v. State*, 799 S.W.2d 683, 686 n.3 (Tex. Crim. App. 1990); *City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W.2d 374, 377 (Tex. App. – Dallas 1994, no writ). The defendant's assignment to the task force did not relieve him of his peace-keeping duties. The defendant's status as an APD officer was not subordinate to his status as a task force member. In fact, he would not have been on the task force but for the fact that he was already a commissioned peace officer with APD. D-1.

At the time he initially detained Jackson, the defendant knew (1) that the man who tried to open the door of the bank had identified himself as William Majors and said he wanted to make a withdrawal and (2) that two bank employees knew a bank customer named William Majors and said that this man was not the customer they knew as William Majors. KGJT at 57-59. The bank employees had asked the defendant to talk to Jackson. FRT at 90. Jackson's use of the name William Majors along with the bank teller's representations concerning a customer by that name amounted to "specific and articulable facts" amounting to

"reasonable suspicion" to detain Jackson and question him further. *Terry v. Ohio*, 392 U.S. 1 (1968). Additionally, the defendant's badge identified him as being with the Austin Police Department, he showed his badge to Jackson, and he orally identified himself to Jackson as a detective with the Austin Police Department. KGJT at 60-61.[6]

Because Jackson intentionally fled from the defendant, a peace officer who was attempting lawfully to detain him, the offense of Evading Detention was committed in his presence and the defendant had both the right and the duty to arrest Jackson, under state law, when he pursued him. TEX. PENAL CODE § 38.04; TEX. CODE CRIM. PROC. art. 14.01; TEX. CODE CRIM. PROC. art. 2.13.

Because the defendant was attempting to arrest Larry Jackson, Jr. for Evading Detention – a misdemeanor offense against the laws of the State of Texas committed in his presence – when he attempted to arrest Jackson, he was acting as a peace officer in the State of Texas.

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[6] If the defendant had any federal insignia, he did not employ them in the course of investigating Jackson.

3. As a task force member, the defendant had neither legal authority nor a legal duty to arrest Jackson.

By contrast, no equivalent duty or authority to investigate or to arrest Larry Jackson existed for the defendant as a member of the federal task force.

As an initial matter, the Texas Code of Criminal Procedure expressly provides that certain federal investigators, including FBI agents and deputy U.S. Marshals, "shall not be deemed peace officers, but shall have the powers of arrest, search, and seizure under the laws of this state as to *felony offenses only."* TEX. CODE CRIM. PROC. art. 2.122(a)(1), (9) (emphasis added). In other words, such federal investigators do not have the power to arrest a suspect for offenses that are misdemeanors under Texas law. *See Guerra v. State*, 432 S.W.3d 905, 911 (Tex. Crim. App. 2014); *Mosley v. State*, 983 S.W.2d 249, 257 (Tex. Crim. App. 1998) (op. on reh'g). Given this, the defendant could not have arrested Jackson for the misdemeanor Texas offense of Evading Detention under his federal authority.

The task force's "daily responsibilities" were delineated by their mission statement as stated in Memorandum of Understanding between the FBI and APD ("MOU") thus: "to identify and target for prosecution organized crime groups and/or individuals responsible for Violent Incident Crimes, to include; Aggravated Robbery, both personal and commercial; Carjackings; Kidnappings; and Extortions." D-1; FRT at 58. It was not normal practice in the task force to investigate

matters not contemplated by the MOU. FRT at 59. The ordinary practice of task force members was to investigate the violent crimes listed in the MOU after they had already been committed and to try to solve those crimes and seek arrest warrants. FRT at 59, 63. This did not include investigating nonviolent attempted thefts or frauds. FRT at 59.

The MOU also makes it clear that task force work included "case assignments" in areas of concern. D-1 at 2-3. Additionally, according to the MOU, there was to be "no unilateral action taken on the part of the FBI or participating agencies relating to [Central Texas Violent Crimes Task Force] investigations or areas of concern." D-1 at 3. ("Investigative Exclusivity") During the years-long duration of the task force, there had not been a single warrantless arrest for a nonviolent federal offense made unilaterally by a deputized local law enforcement officer. FRT at 35-36.

As a deputized local law enforcement officer serving on the task force, as opposed to an FBI agent, the defendant lacked the authority he now claims to make warrantless arrests for federal offenses. The defendant has claimed powers of arrest co-extensive with that of an FBI agent. *Texas v. Kleinert*, 2015 U.S. Dist. LEXIS 55180, *8 (W.D. Tex. Apr. 28, 2015). Under Federal law, "agents of the Federal Bureau of Investigation of the Department of Justice may . . . make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be

arrested has committed or is committing such felony." 18 USCS § 3052. The defendant's special deputation from the FBI does state that he is authorized with the identical powers of arrest.[7] D-4. But the asserted authority to deputize with such powers of arrest ultimately derives from Section 878, Title 21, United States Code, a provision that empowers the Attorney General to deputize local law enforcement officers for *controlled substances enforcement*.[8] Because the

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[7] That document states "Pursuant to the authority granted to the Attorney General by Public Law 99-570, Section 1869, and delegated to me by Section 0.85, Title 28, Code of Federal Regulations, you are hereby authorized to exercise the powers of enforcement personnel set forth in Section 878, Title 21, United States Code, [. . .]." D-4. At the removal hearing, former Special Agent in charge of the task force, Phillip Gadd also testified that the defendant's authority to make arrests without warrant for any offense against the United States committed in his presence derived from Section 878, Title 21, United States Code. FRT at 54-55. Special Agent Dennis May testified to his believe that the FBI can immediately deputize people under Title 21 authority by the "assistant special agent in charge deputizing that person and filling out the appropriate paperwork." FRT at 19.

[8] Public Law 99-570 is the "Anti-Drug Abuse Act of 1986" and Section 1869 is entitled "AUTHORITY OF ATTORNEY GENERAL TO DEPUTIZE STATE AND LOCAL LAW ENFORCEMENT OFFICERS FOR CONTROLLED SUBSTANCES ENFORCEMENT." 99 P.L. 570, 100 Stat. 3207. Furthermore, Section 878, Title 21, United States Code, "Powers of Enforcement Personnel," appears within a chapter on "*Drug Abuse Prevention and Control.*" 21 USCS § 878. (emphasis added). Section 0.85, Title 28, Code of Federal Regulations is a section of the Code of Federal Regulations that lays out the general functions of the Director of the Federal Bureau of Investigation, but although that provisions states that the FBI director may "provide training for State and local law enforcement personnel," there is no provision stating that the FBI director or his agents have the ability to

defendant is not an agent of the FBI and was not designated by the Attorney General as a local law enforcement officer deputized for controlled substances enforcement, he did not have authority under Title 21 to make arrests for offenses against the United States co-extensive with that of an FBI agent or a "local law enforcement officer designated by the Attorney General." 21 USCS § 878.

Secondly, assuming *arguendo*, that the defendant did have the power to make warrantless arrests under Title 21, he did not witness an "offense against the United States committed in [his] presence," nor did he have probable cause to believe Jackson had committed a "felony, cognizable under the laws of the United States," and thus he objectively lacked federal authority to arrest Jackson based on the facts of the case.[9]

The defendant asserts that at the time he tried to arrest Jackson, he had probable cause to arrest Jackson for two federal felonies: bank fraud and bank robbery. *See* Motion to Dismiss at p. 12-13, fn. 9, *citing* 18 U.S.C. §§ 2113, 1344. But the facts known to him at the time did not amount to probable cause to arrest for either offense.

At the point that he was detained, Jackson had identified himself as William Majors and stated his

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grant local law enforcement officers arrest authority under the laws of the United States. 28 CFR 0.85.

[9] Thus, contrary to the defendant's assertion, the State does dispute that "Mr. Jackson committed a federal crime in Mr. Kleinert's presence." *See* Motion to Dismiss Indictment at 5.

desire to make a withdrawal. Having this information, along with the bank employees' representations concerning a different bank customer of that name, the defendant "walked" Jackson over to a planter and started to confront him but did not handcuff him. KGJT 63, 173. Subsequently, the defendant asked Jackson if he had identification with him. KGJT 62. He replied that he did not and started to walk away. KGJT 62. Jackson then stated that he was the "brother of William Majors and that he had a wreck and that he had come down to the bank to get some money for the tow truck and for the rental." KGJT 173. Because he "had no idea" whether the man was actually William Majors' brother, the defendant suggested they "call up William" and get the issue "straightened out." KGJT 173.

At the point that he ran, Jackson had not presented any identification, legitimate or false, had not attempted to withdraw a specific amount of funds, had not indicated the form in which he wanted to make a withdrawal, and had not shown any violence or aggression. Because the name William Majors is not uncommon, it was possible that Jackson shared the name with another customer or was Majors' brother.[10] His purchase of glue and possession of false identity cards was unknown to the defendant and did not form part of the basis of the probable cause determination.

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[10] Sheila Bostick testified that Benchmark Bank has branches in Dallas and Plano and that she simply assumed that Jackson was using the name of the William Majors that was a customer at her bank. FRT at 119-120.

As stated above, the State agrees that, at the time that the defendant detained Jackson outside the bank, the bank employees' representations that Jackson had used someone else's name justified his detention. *Terry v. Ohio*, 392 U.S. 1 (1968). However, during the defendant's inconclusive investigation, during which he at least appeared to entertain the possibility that Jackson was Will Majors' brother, Jackson took off running and the defendant gave chase. KGJT 64-67. KGJT 173. Based on the facts known up to the point when Jackson ran, both Jackson's identity and intent were insufficiently developed for the defendant to have witnessed an "offense against the United States committed in [his] presence," nor did he have probable cause to believe Jackson had committed a "felony, cognizable under the laws of the United States" and thus the arrest of Jackson was not authorized by the laws of the United States. 18 USCS § 3052. *See Loughrin v. United States*, 134 S.Ct. 2384 (2014).

"[U]nprovoked flight, without more, can not elevate reasonable suspicion to detain and investigate into the probable cause required for an arrest." *United States v. Navedo*, 694 F.3d 463, 474 (3d Cir. 2012). Although the defendant may have had some authority "derived from the general scope of [an] officer's duties," that authority did not include the right to arrest without probable cause. U.S. CONSTITUTION, AMEND. IV.; *Morris v. Noe*, 672 F.3d 1185, 1192 (10th Cir. 2012); *Contrast Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982).

Furthermore, the defendant told the grand jury that he did not think that he had probable cause to search Jackson without arresting him for Evading Detention. Stating that "through that evading and detention arrest," that he might have found a forged check or stolen wallet, (evidently under a search "incident to arrest" theory), the defendant testified that, "before that [. . .] I can't say, you know, put your hands on the wall, I'm going to frisk you and take out your wallet and do all this stuff, I can't do that and I didn't do that [. . .]." KGJT 103. In other words, before Jackson fled, the defendant didn't think he had probable cause to search him (or, by inference, to arrest him for federal bank fraud or bank robbery and search him incident to arrest for those offenses). Judging by the most credible version of his own subjective view of the evidence at the time, his grand jury testimony, the defendant did not believe that he had probable cause to arrest Jackson for a federal offense at the time he pursued him and attempted to arrest him. In sum, the defendant lacked both objective and subjective authority to arrest Jackson for a federal offense.

Not only did the defendant lack authority to arrest Jackson for a federal offense, but the defendant's *duties* as a task force member did not include initiating independent investigations of nonviolent theft or fraud offenses or responding to citizen complaints. As outlined, *supra*, task force duties were delineated by the MOU. Task force officers were to investigate organized crime groups and crimes of violence including aggravated robbery, carjackings, kidnapping and extortion.

Agents were assigned cases and were not authorized to act unilaterally. Responding to citizen complaints unrelated to "areas of concern" was outside the general scope of the defendant's duties as a task force member. There was certainly nothing in the MOU that directed the defendant to perform as he did.

Furthermore, the defendant's actions were outside the practice norms of the task force. From the fact that the FBI does not furnish uniforms to task force officers, does not issue radios or hand cuffs to task force members, and does not require task force members to wear or carry radios, it is evident that the FBI does not intend task force officers to function as peace keeping officers as part of their duties as federal task force officers. *See* FRT at 61. In this case, the investigation of Jackson began because two women working at the bank urged the defendant to talk to Jackson, not because his supervisors, FBI Special Agents Dennis May or Phil Gadd, told him to investigate. In fact, Special Agent Gadd testified he was totally unaware of the defendant's investigation of Jackson and did not direct him in his investigation of Jackson. FRT at 60. Also, a warrantless arrest made for a nonviolent federal offense by a deputized local law enforcement officer without the knowledge of a supervising agent had never been made in the history of the task force. FRT at 35-36. Nothing in his prior work experience or direction from his supervisors would have led the defendant to believe he had a duty to arrest Jackson as a task force member.

Events following the shooting also bely the notion that the defendant had a task force duty to investigate Jackson. The MOU states that "responsibility for conduct not under the direction of the SAC or SSA of each CTV/CTF member, both personally and professionally, shall remain with the respective agency head, and each agency shall be responsible for the actions of their respective employees." FRT at 60. In this case, the FBI did not investigate Jackson's shooting at all.[11] FRT at 64. The utter lack of supervisory review from the FBI following Jackson's shooting suggests that the agency did not believe that the defendant had a federal duty to investigate or arrest Jackson.

Because the federal authorities conducted no investigation and instead washed their hands of any responsibility for the defendant's conduct, he will almost certainly avoid any prosecution by federal authorities. If the instant motion to dismiss is granted, he will likewise stifle this prosecution by the State of Texas. If a local law enforcement officer deputized into a task force can *recklessly* shoot an unarmed citizen with no federal oversight and with complete immunity from prosecution in State court, then he is accountable to neither of the sovereigns whose laws he is sworn to uphold. Such an outcome would result in a breathtaking

[11] This failure to investigate is in contrast to the fact that the FBI investigated a subsequent shooting involving task force members, but in that incident, three full-time FBI agents were also present and they were serving a federal arrest warrant. FRT at 184.

lack of government accountability and dictates against a finding that he was performing a federal duty.

Because the defendant was at the bank performing task force duties at the time he encountered Jackson and because of the overlapping nature of federal and state criminal statutes governing certain theft and fraud offenses, the defendant has a theoretical framework that allows him to *say* now that his pursuit of Jackson was related to his task force work and that he intended to arrest Jackson for a federal crime.[12] But his task force status and presence at the scene in that capacity are not sufficient to "exempt him from civil or criminal liability for what he does beyond the scope of his official duties and not in the discharge thereof." *Isaac v. Googe*, 284 F. at 270. Furthermore, the MOU acknowledges, there are a number of overlapping areas between state and federal laws in the areas of the task force's concern. D-1. ("Dispute Resolution.") ("In cases of overlapping jurisdiction, the participating agencies agree to work in concert to achieve the [Task Force]'s objectives.") For instance, robbery, though it may take place at a bank, can also be prosecuted as a state

[12] In the civil context, the Fifth Circuit follows the rule that parties cannot thwart the purposes of summary judgment by creating "sham" issues of fact "by submitting an affidavit which directly contradicts, without explanation," previous testimony. *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. Tex. 1984) *citing Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir.1980); *Van T. Junkins & Associates, Inc. v. U.S. Industries, Inc.*, 736 F.2d 656, 657 (11th Cir.1984); *Vanlandingham v. Ford Motor Co.*, 99 F.R.D. 1, 3 (N.D.Ga.1983). *See also*, *Bank of Illinois v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1168 (7th Cir. Ill. 1996)

crime.[13] *See* Appendix, Tab 5 Arrest Affidavits and Judgments of Conviction for state offenses of robbery in Williamson County, Texas for robberies committed at Wells Fargo and Chase Bank.

Because the investigation of Jackson was taken on by his own initiative, without the awareness or approval of his task force supervisors, and far outside of the usual work of the task force, the defendant could not have reasonably believed his conduct was *necessary* to perform his duties as a member of the task force. *See Arizona v. Files*, 36 F. Supp. 3d 873, 884 (D. Ariz. 2014) (Defendant did not honestly or reasonably believe his conduct was necessary to perform his duties and could not "cloak himself with immunity under the Supremacy Clause.")

In sum, as a task force member, the defendant had neither legal authority nor a legal duty to arrest Jackson for a federal offense.

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[13] Even the federal offense of bank robbery committed when one, "enters or attempts to enter any bank, . . . with intent to commit in such bank, . . . any felony affecting such bank, . . . and in violation of any statute of the United States, or any larceny" is not wholly dissimilar to the state offense of attempted burglary which a person commits when, without the effective consent of the owner, the person "enters a . . . a building . . . not then open to the public, with intent to commit a felony, theft, or an assault." *Compare* 18 U.S.C. § 2113(a) with Texas Penal Code § 30.02.

4. The defendant's attempted arrest of Jackson was not "in the discharge of his duty as an officer of the United States."

To avail himself of an immunity defense, the defendant has attempted to overlay a veneer of federal authority onto his actions, but this Court should find that, when he detained and pursued Jackson, the defendant was acting as a Texas peace officer as a matter of law. The defendant explained himself to the grand jury thus: "These employees of this bank have asked me to go out and conduct an investigation on one of their customers and if I don't give chase, if I just – if he just runs off and I say, well-, he ran off. Then they're going to be upset." KGJT 6768.

Indeed, although the parties dispute what offense Jackson committed in the presence of the defendant, the underlying facts supporting probable cause to believe Jackson had committed an offense are undisputed. Jackson said he was William Majors and asked to make a withdrawal. The women at the bank asked the defendant to go and talk to Jackson and he did so, identifying himself as a detective with the Austin Police Department.[14] During the course of their brief discussion, Jackson took off running. The defendant gave chase and attempted to make an arrest. The State respectfully asks this Court to find, on the basis of these undisputed facts, that the defendant had probable

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[14] He also identified himself as "Austin Police" to Regina Bethune. S2 1.

cause to arrest Jackson for the misdemeanor state offense of Evading Detention and that he lacked probable cause to arrest Jackson for any federal offense.

Furthermore, only as a state police officer did he have peace-keeping authority to make arrests for misdemeanors. "If an off-duty officer observes a crime, as a matter of law he becomes an on-duty officer." *Cherqui v. Westheimer St. Festival Corp.*, 116 S.W.3d 337, 344 (Tex. App. – Houston [14th Dist.] 2003, no pet.). The defendant's response to a citizen's complaint and his attempt to arrest Jackson for a Texas Penal Code misdemeanor committed in his presence were legally authorized only as the actions of a state peace officer. The State respectfully asks this Court to find, as a matter of law, that when the defendant attempted to arrest Jackson, he was not "in the discharge of his duty as an officer of the United States."

Further, because the defendant's pursuit and arrest of Jackson were not in pursuance of any federal duty, he should not be immune from State prosecution. *Morgan v. California*, 743 F.2d 728, 734 (9th Cir. 1984(where evidence raised dispute over whether federal drug enforcement agents acted in pursuit of official duties, court denied relief, reasoning, "In the absence of a showing that the state prosecution was intended to frustrate the enforcement of federal law, that factual resolution should have been left to the state court"); *See also New Jersey v. Bazin*, 912 F. Supp. 106, 116 (D.N.J. 1995); *State v. Adams*, 213 N.C. 243, 247 (1938) ("There is no evidence that the defendant in destroying the bridge in question was acting under

authority of the United States or in pursuance of his duties as farm agent.")

ii. Immunity is improper because the laws of the United States did not authorize the defendant to commit manslaughter.

Where officers act "wantonly, with a criminal intent, then they were not acting within the scope of the authority conferred by the laws of the United States." *In re Fair*, 100 F. 149, 155 (C.C.D. Neb. 1900). "While homicide that is excusable or justifiable may be committed by an officer in the proper discharge of his duty, murder or other criminal killing may not." *Colorado v. Symes*, 286 U.S. 510, 518 (1932).

Because the defendant acted with the culpable mental state of recklessness when he shot Jackson, he did not act "within the scope of the authority conferred by the laws of the United States." The indictment charges the defendant with manslaughter, or "recklessly causing the death of Larry Jackson." Indictment of Charles Kleinert for Manslaughter, Appendix, Tab 2; *see also* TEX. PENAL CODE § 19.04 ("A person commits an offense if he recklessly causes the death of an individual.") Although recklessness is a lesser culpable mental state under Texas law, it is still criminal intent. TEX. PENAL CODE § 6.03 ("A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and

unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."). Federal criminal law also makes reckless conduct a crime under certain circumstances. *See, e.g.*, 18 U.S.C. § 1864(a)(3) (reckless use of hazardous and injurious device on Federal land or an Indian reservation). Thus, the defendant is alleged to have acted with a culpable mental state.

The defendant claims that a federal officer cannot be subjected to trial on state criminal charges on allegations that he was reckless or negligent. *See* Motion to Dismiss at 21 ("A state cannot prosecute a federal officer for employing means that the state considers reckless under its laws.") However, the defendant does acknowledge, "A federal agent may lose his *Neagle* protection if he acts [. . .] with actual criminal intent." Motion to Dismiss at 17, *citing Maryland v. DeShields*, 829 F.2d 1121 (4th Cir. 1987). Indeed, "*Drury* squarely holds that a state may prosecute federal agents if they have acted unlawfully in carrying out their duties." *Idaho v. Horiuchi*, 253 F.3d at 366, *citing United States ex rel. Drury v. Lewis*, 200 U.S. at 8.

The analytical framework for addressing claims of immunity is not altered by the fact that an officer is charged with an offense predicated upon recklessness or criminal negligence. *See e.g.*, *Mesa v. California*, 489 U.S. 121 (1989) (defendant charged with manslaughter denied removal); *Idaho v. Horiuchi*, 253 F.3d 359

vacated as moot, 266 F.3d 979 (9th Cir. 2001) (reversing district court's dismissal of involuntary-manslaughter complaint alleging, *inter alia*, that Horiuchi "did unlawfully, but without malice, kill Vicki J. Weaver, a human being, in the operation of a firearm in a reckless, careless or negligent manner"); *State v. Ivory*, 906 F.2d 999, 1002 (4th Cir. 1990) ("Every state has an interest in protecting its citizens from drivers who are reckless or intoxicated; that interest does not vanish whenever the driver happens to be a federal employee in a government car or a military truck."); *North Carolina v. Cisneros*, 947 F.2d 1135, 1138 (4th Cir. 1991) (no removal for Marine charged with unintentional death by vehicle); *Lilly v. State of West Virginia*, 29 F.2d 61 (4th Cir. 1928) (federal prohibition agent charged with involuntary manslaughter); *Puerto Rico v. Fitzpatrick*, 140 F. Supp. 398 (1956) ((denying soldier's motion to dismiss charging instrument, court reasoned, "I fail to see how the performance of the duties assigned to defendant . . . can justify his abandoning the right lane of the road . . . to invade the left lane . . . collide with another truck coming in this direction, nor how such action could have been the only means he had to perform his official duties, so as to bring this case under the holding in *In re Neagle*."). In sum, Federal officers are not *per se* immune from prosecution where they are alleged to have acted recklessly, not intentionally, because they are still alleged to have acted with a culpable mental state.

The defendant suggests that the State is bound to prove that he had some personal motive in committing manslaughter, above proof that he acted with "criminal intent." *See* Motion to Dismiss Indictment at 5 ("The State does not allege, much less have evidence to suggest, that Mr. Kleinert's alleged conduct was motivated by anything other than an effort to arrest Mr. Jackson.") Certainly in cases where a federal officer acts out of personal interest or "malice" or is attempting to accomplish personal goals instead of federal duties, it is easier to discern that the officer is not performing a duty under federal law. However, "[m]otive is not an essential element of a criminal offense. Therefore, motive need not be proved in order to establish the commission of the offense." *Rodriguez v. State*, 486 S.W.2d 355, 358 (Tex. Crim. App. 1972). Here, it is possible that the defendant acted not only with recklessness, but out of anger at Jackson for disobeying his commands, out of unwillingness to come back to the bank empty-handed or a desire to apprehend Jackson at all costs. Regardless, so long as he acted recklessly, his motive is not something the state has to prove in order to establish his "criminal intent." A finding of "malice" or personal interest is not necessary to show that he was not "acting within the scope of the authority conferred by the laws of the United States." *In re Fair*, 100 F. at 155.

Furthermore, while an officer cannot be called to account in a criminal prosecution for "the mode or manner in which he performed the duty," immunity is also not "intended to place beyond the reach of a state's criminal law federal officials who employ means which

they cannot honestly consider reasonable in discharging their duties." *Petition of McShane*, 235 F. Supp. 262, 273-274 (N.D. Miss. 1964). There is also a difference between "a mistake" and "recklessness," for which the officer should not be immune. "Consequently, when the evidence discloses . . . that federal officials acted without reasonable cause or that their conduct was unreasonably dangerous 'in the exercise of sound discretion' . . . release on habeas corpus should be denied." *Petition of McShane*, 235 F. Supp. 262, 273 (N.D. Miss. 1964) *quoting Castle v. Lewis*, 254 F. 917 (8th Cir. 1918).[15]

In this case, Regina Bethune, the civilian whose car the defendant commandeered during his pursuit observed the defendant to be "out of control" and "highly agitated." S2 1. Then, not long thereafter, by the defendant's own admission, he intentionally hit Jackson two times in the back with his right hand while he was holding a loaded gun in that hand. KGJT at 118, 152. The medical examination performed after Jackson was shot shows that he suffered a "contact-type gunshot wound of the posterior neck" with "muzzle imprint and gunpowder soot deposition" and that his spinal cord was severed. *See* Appendix Tab 3, Medical Examiner Report, Larry Eugene Jackson, Jr, pages

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[15] "Indeed, even if there is material conflict of evidence such that if the state's version is accepted 'it could not reasonably be claimed that (the act charged to be criminal was committed) in the performance of the duty imposed by the Federal law,' habeas corpus should be denied." *Id. at* 273 (N.D. Miss. 1964), *citing United States ex rel. Drury v. Lewis; Birsch v. Tumbleson*, 31 F.2d 811 (4th Cir. 1929).

2, 7 and 8 of 8. "The projectile direction is back to front, slightly right to the left, and without significant up/down deviation." Medical Examiner Report, page 3 of 8. In other words, Jackson was shot in the back of the neck, with a gun pressed to his skin and the bullet trajectory was approximately horizontal through the neck. Thus, the defendant's admitted conduct alone is not sufficient to explain the injuries that led to Jackson's death.[16]

The defendant further testified that after he struck Jackson twice with the gun, he attempted a third strike, but he did not specify a target for the third strike in his testimony. KGJT at 131. The evidence that Jackson was killed by a contact wound at the back of the neck supports an inference that the defendant may have additionally used his gun to hit Jackson on the head or neck or that he may have pressed the muzzle of his gun to Jackson's neck in an attempt to control him. Furthermore, although the defendant states in his affidavit that he maintained his "index finger on the slide" of his weapon, the gun undoubtedly fired, and, when pressed, before the grand jury, he admitted that "the only conclusion" is that his finger did enter the trigger. KGJT at 140.

These facts and the allegations in the indictment support a finding that the defendant acted recklessly. Because the defendant acted with criminal intent he was not acting within the scope of the authority

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[16] The extent of the force used by the defendant is thus also a disputed fact under the evidence.

conferred by the laws of the United States and thus should not be immune from prosecution. *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 8 (1906) ("But there was a conflict of evidence as to whether Crowley had or had not surrendered, and it is conceded that if he had, it could not reasonably be claimed that the fatal shot was fired in the performance of a duty imposed by the Federal law, and the state court had jurisdiction."); *See also Birsch v. Tumbleson*, 31 F.2d 811 (4th Cir. 1929) (court denied issuance of a writ of *habeas corpus* to a federal game warden charged in state court with homicide after killing two poachers because evidence was conflicting as to who fired first); *Castle v. Lewis*, 254 F. 917, 926 (8 Cir. 1918) (release on *habeas corpus* denied when federal officials' conduct in firing into a fleeing automobile was unreasonably dangerous "in the exercise of sound discretion").

B. The defendant is not immune because his conduct was neither "necessary" nor "proper" to carry out his duty.

"[T]o be immune from state prosecution under the Supremacy Clause, 'a federal officer must do no more than is necessary and proper in the performance of his duties.'" *City of Jackson v. Jackson*, 235 F. Supp. 2d 532, 534 (S.D. Miss. 2002) (internal citations omitted). An action is "necessary and proper" only if the officer had a subjective belief that it was justified and that belief was objectively reasonable. *City of Jackson v. Jackson*, 235 F. Supp. 2d 532, 535 (S.D. Miss. 2002). The defendant's conduct surrounding his pursuit,

apprehension and attempted arrest of Larry Jackson, Jr. went far beyond what was "necessary and proper in the performance of his duties."

i. The defendant's conduct was not necessary or proper because it violated APD policies.

First, the impropriety of the defendant's conduct is demonstrated by his violation of agency policies. "An unreasonable desire to apprehend a fleeing subject at all costs has no place in professional law enforcement." S-12, APD Policy on Vehicle Pursuits, at 84.

1. Failure to call for backup violated policy.

"It is recognized that foot pursuits potentially place department personnel and the public at significant risk." S-11, APD Policy on Foot Pursuits, at 96. For this reason, officers initiating a foot pursuit should broadcast "as soon as it becomes practicable and available," their identification, their location and direction of travel, the reason for the foot pursuit, the number of subjects and their descriptions and whether the subject is known or believed to be armed. S-11 at 97-98. Prior to Jackson's apprehension, the men ran through a parking lot past a nearby store. KGJT 68-69. The defendant began to fall behind as the chase continued close to a nearby hospital. KGJT 70. As the defendant continued to pursue and to lose ground to the younger Jackson, he commented to a man he passed, "I'm

getting too old for this." KGJT 71-72. Tired, red-faced, and out-of-breath, the defendant slowed to a walk but could still see the man ahead. KGJT 73, 85. At no point during this time did he call for backup. While the initial decision to chase Jackson was within the defendant's discretion, his failure to call for back up and communicate the details of the pursuit was a violation of policy. S-11.

2. Failure to abandon the chase violated policy.

APD policy also holds that the decision to continue a foot pursuit should be "continuously re-evaluated in light of the circumstances presented at the time." S-11 at 96. In this case, a number of factors weighed in favor of discontinuing a foot pursuit, including that the defendant was acting alone, that he might not be able to control the younger, fitter Jackson if a confrontation occurred, that his fatigue might make him incapable of controlling Jackson if he caught him, that he had no communication with any other law enforcement officer, that he was nearing an isolated area, that he was not equipped with the basic equipment of a patrol officer, including a radio, that he had lost track of Jackson's location, and that there appeared to be no immediate threat to the department or the public if Jackson was not immediately apprehended. *See* S-11 at 96-97. Given all of these factors, his foot pursuit had become too risky to be justified under the circumstances, and the defendant should have found an alternative to foot pursuit when he did not quickly catch Jackson.

3. Commandeering a civilian vehicle violated policy.

Prior to apprehending Jackson under the bridge, the defendant also commandeered the car of Regina Bethune. KGJT 78. Bethune, a hospital employee, was in the process of leaving the parking lot of the hospital when she saw a man "yelling and waving his arms." S2 1. She planned to continue driving but the man "lunged" at the passenger-side door and pounded on door, yelling "Stop, Austin Police." S2 1. The man seemed "out of control" and "highly agitated" but he got into Bethune's vehicle and ordered Bethune to "go." S2 1. Although the defendant was "too upset" to "effectively communicate" with Bethune, she understood that she was to follow someone and they actually located the man, walking near a creek. S2 2. Bethune asked "Is he dangerous?" whereupon her passenger yelled "No!" S2 2. As Bethune's car approached a bridge over the creek, the defendant yelled "Stop" and jumped out of her car. S2 2. Throughout the interaction, Bethune remained uncertain if the defendant was actually a police officer. S2 3.

The decision to commandeer Regina Bethune's vehicle in the pursuit of Jackson was a dangerous violation of policy. "Vehicle pursuits expose innocent citizens, law enforcement officers, and fleeing violators to the risk of serious injury or death." S-12 at 84. "Officers' conduct during the course of a pursuit must be objectively reasonable; that is, what a reasonable officer would do under the same circumstances." S-12

at 84. Police cars that do not have emergency equipment are prohibited from initiating or joining in a pursuit except for emergencies involving "serious crimes or life-threatening situations." S-12 at 88. In this instance, given the relatively low threat Jackson presented to public safety, the inherent risks in involving a civilian in a police function, the lack of backup, and the nature of the offense Jackson was suspected of committing, commandeering a civilian vehicle being driven by a civilian and not equipped with any kind of warning equipment was a departure from objectively reasonable conduct.

4. Failure to re-holster his weapon before going "hands-on" violated policy.

After exiting the car, the defendant attempted to intercept Jackson as he came out from under the bridge. KGJT 88. Believing he was in earshot, the defendant drew his weapon and yelled "get down on the ground now." KGJT 89. The defendant was advancing toward Jackson, but Jackson took off running again towards the bridge. KGJT 92. The defendant gave chase but did not re-holster his gun. KGJT 94-96. The defendant grabbed Jackson by the shirt, held on to the shirt as he continued to follow Jackson, struck him twice on the back with his gun in his hand and attempted a third strike. KGJT 95, 96, 117-118, 129, 132. Ultimately, Jackson died by gunshot, fired at point-blank range at the neck and severing the spinal cord.

KGJT at 117-122; Medical Examiner Report, Larry Eugene Jackson, Jr., Appendix, Tab 3.

The defendant's handling of his gun in this episode violated policy. According to departmental policy, "Firearms shall not be displayed or pointed in a threatening or intimidating fashion unless it is objectively reasonable to believe there is a substantial risk that the situation may escalate to the point where deadly force would be permitted. Firearms shall be secured or re-holstered as soon as reasonably practicable when it is determined that deadly force is no longer necessary." S-15, APD Policy on Firearms at 50. At an absolute minimum, the defendant should have re-holstered his weapon before he went "hands on" in an attempt to arrest Jackson. The defendant's failure to re-holster was a violation repeated at least once. The defendant claims that to "stop, take his eyes off of the suspect, and holster his weapon" would have "creat[ed] an untenable risk to both himself and the general public and increase[ed] Mr. Jackson's chances of escape." Motion to Dismiss at 22. But given that Jackson had shown no aggression, did not appear to be armed, and deadly force was not indicated, it was the defendant's failure to holster his weapon that created an "untenable" risk.

5. Using a gun to bludgeon and control Jackson violated policy.

According to the MOU, members of the task force were to follow the rules of their own agency on firearms

discharge and the use of deadly force.[17] D-1 at p. 6. The APD policy indicates that guns are not to be used as an impact weapon. *See* S-14, APD Policy on Control Devices and Techniques at 57, listing control devices, which do not include firearms. Furthermore, an impact weapon should not be used intentionally on the "head, neck, spine and groin" unless "the officer has an objectively reasonable belief the subject may cause serious bodily injury or death to the officer or others." S-14, APD Policy on Control Devices and Techniques at 58. Finally, under APD policy, an officer is justified in using deadly force against another only when the circumstances involve imminent or potential risk of serious bodily injury or death. S-13, APD Policy on Response to Resistance, at 47-48.

As detailed above, the defendant admits he intentionally hit Jackson two times in the back with his right hand while he was holding a loaded gun in that hand. KGJT at 152. Based on the medical evidence showing Jackson was killed by a contact wound at the back of the neck, the defendant may have additionally used his gun to hit Jackson on the head or neck with

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[17] The APD use of force policy was revised after an investigation started in 2007 by the Civil Rights Division of the U.S. Department of Justice into the department during which it provided recommendations including recommendations that the APD should revise its use of force policies and adopt an appropriate use of force continuum and that APD should make clear what impact weapons were permitted. *See* December 23, 2008 letter from Shanetta Cutler, USDOJ to Austin City Manager and Austin Police Chief. Appendix, Tab 4.

his "third strike" or he may have pressed the muzzle of his gun to Jackson's neck in an attempt to control him.

Under the APD policy, an officer's actions in using force must be "objectively reasonable" in light of the seriousness of the suspected offense or reason for contact with the individual, the imminence of threat to the officer or others and other exigencies. S-13 at 46-47. Jackson had never shown any aggression[18] and the defendant had told Bethune he was not dangerous. It was not objectively reasonable for the defendant to target Jackson's head and neck with an impact weapon in order to apprehend him nor was it objectively reasonable for him to strike Jackson with a loaded gun on the back.

The situation also did not justify deadly force. There is no evidence of any exigency or that Jackson was armed or posed an imminent or potential risk of serious bodily injury or death to the defendant or to anyone else.[19] The defendant himself acknowledged

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[18] The defendant's affidavit in support of his motion to dismiss the indictment differs from the testimony before the grand jury in that he states that after the second strike, but before the third strike that Jackson rose from the embankment and "turned his body with force into mine . . . cause[ing] me to spin and lose balance." *See* Affidavit in Support of Motion to Dismiss Indictment, p 7 at 12. But, at the time he testified before the grand jury, the defendant described "I was trying to hit him one more time as he was trying to pass me," and that "I'm attempting to swing one more time, and as I'm going like this is when he continues and I just, like, fall." KGJT at 131.

[19] The fact that the defendant did not attempt to pat down Jackson when he detained him at the bank in spite of having legal

that the situation did not justify the use of deadly force on his part:

> Q: Okay. Did – now you said Mr. Jackson, you weren't aware whether or not he had a weapon. Did he ever – now we know he ran from you and we know that he was still trying to, apparently, get away from you under the bridge. Did he ever take any aggressive acts or postures toward you?
>
> A: No, sir.
>
> Q: Okay. So would you classify anything he did as presenting a deadly force situation towards you?
>
> A: No, sir.
>
> Q: All right. Is there anything else that you think we should know that I haven't asked about how this happened under the bridge?
>
> A: Not that I can think of, sir. You mentioned, you know, making it a deadly force situation and at no time did I intend for this to be a deadly force situation [crying].

KGJT at 127-128.

Because the defendant's conduct violated multiple law enforcement policies surrounding both pursuit and use of force, it could not have been "necessary and proper in the performance of his duties."

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authority to do so suggests he didn't think Jackson was armed or dangerous. *Terry v. Ohio*, 392 U.S. 1 (1968).

ii. The defendant's conduct was not necessary or proper because it violated the Constitution.

The defendant's conduct was also not "necessary and proper in the performance of his duties" because he seized Jackson illegally under the Fourth Amendment. *See Idaho v. Horiuchi*, 253 F.3d 359 *vacated as moot*, 266 F.3d 979 (9th Cir. 2001).

1. Killing Jackson was a Fourth Amendment seizure.

The use of deadly force to apprehend a suspect is a seizure under the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Law enforcement agents may use deadly force only if they reasonably believe that killing a suspect is necessary to prevent him from causing immediate physical harm to the agents or others or to keep him from escaping to an area where he is likely to cause physical harm in the future. *Tennessee v. Garner*, 471 U.S. at 11-12. The unintentional or accidental use of deadly force in the course of an intentional seizure may violate the Fourth Amendment if the officer's actions that resulted in the injury were objectively unreasonable. *Brower v. County of Inyo*, 489 U.S. 593, 598-599 (1989). "[U]nintentional conduct triggering Fourth Amendment liability may occur when a police officer accidentally causes more severe harm than intended to an individual, such as when a suspect is injured 'by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg."

Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 796 (1st Cir. 1990), *quoting Brower*, 109 S. Ct. at 1382.

2. The defendant was not justified in the use of deadly force.

Whether a seizure is reasonable under the Fourth Amendment depends on the "facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). In this case, the defendant was attempting to arrest a fleeing suspect for a nonviolent misdemeanor offense (Evading Detention). The defendant told Regina Bethune that Jackson was not dangerous. The bank employees never saw Jackson display any aggression. There was no evidence that Jackson was armed. Even assuming, *arguendo*, that the defendant had additional probable cause to arrest Jackson for a felony offense, the defendant did not have probable cause to believe that Jackson "pose[d] a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. at 11. The defendant, as he acknowledges, was not justified in using deadly force.

3. The defendant's handling of his firearm was objectively unreasonable.

The fatal shot occurred while the defendant was "striking and attempting to strike Larry Jackson with his hand while holding a loaded firearm in that hand, seizing and attempting to physically control Larry Jackson while holding a loaded firearm, and attempting to seize and physically control Larry Jackson without maintaining a distance between himself and Larry Jackson that was sufficient to enable the defendant to holster his firearm." Indictment of Charles Kleinert for Manslaughter, Appendix, Tab 2. "Where the danger or threat posed by the subject – and as reasonably perceived by the police officer – is virtually non-existent, and the conduct of the officer in the handling of a firearm creates a very high risk of death or serious injury, an objectively reasonable officer would know that his conduct was unreasonable." *Stamps v. Town of Framingham*, 2014 U.S. Dist. LEXIS 177455, Civil No. 12-11908-FDS, at *25 (D. Mass. Dec. 26, 2014) (unpublished).

Here the threat posed by Jackson was nearly nonexistent. He was unarmed, he had fled throughout his entire encounter with the defendant, and the evidence showed that the defendant did not see him as a threat. Hitting someone with a loaded gun creates an extremely high risk of death or serious injury. Holding a loaded gun against the back of the neck of an unarmed suspect creates an extremely high risk of death or serious injury. An objectively reasonable officer would

know that this conduct was unreasonable. *See Baltimore v. City of Albany*, 183 Fed. Appx. 891, 898 (11th Cir. 2006) (holding officer who approached suspect from the rear during confrontation over suspected open container violation and struck him on the back of the head with his flashlight not entitled to qualified immunity, reasoning that "[in]the cases that have specifically addressed the issue, there appears to be agreement that striking a suspect in the head with a heavy flashlight or other blunt instrument at least poses a 'substantial risk of serious bodily injury,' if not death. We adopt this conclusion and find that such action constitutes deadly force under our definition of that term."). *See also Henderson y City of Fairfield*, 2013 U.S. Dist. LEXIS 19506, *17-18, 2013 WL 550158, Case No.: 2:12-CV-1070-VEH (N.D. Ala. Feb. 13, 2013) (pistol whipping the back of suspect's head was unreasonable use of force when he was suspected of a minor offense, was not armed, and was not acting in a threatening manner); *Ellis v. Ficano*, 1995 U.S. App. LEXIS 38840 at *25-26, No. 94-1039 (6th Cir. Dec. 27, 1995) (Defendant DEA agent not entitled to directed verdict on civil rights claim for striking four year old on the shoulder with the barrel of a rifle); *Morris v. United States*, 2014 U.S. Dist. LEXIS 177649, *33, fn. 9, CIVIL NO. 12-2926(NLH) (JS), (D.N.J. Dec. 29, 2014) (although there was no evidence to support the claim that officer struck suspect with the butt of a rifle, such a use of force "would be unreasonable and excessive in most situations").

The cases that the defendant cites to demonstrate that he employed an objectively reasonable use of force all consider the reasonableness of performing some other action while holding a gun. None, therefore, are on point with a critical fact present in this case: that the defendant *intentionally* struck Jackson more than once with a hand holding a loaded gun. *See* Motion to Dismiss at 23-26 *citing Pleasant v. Zarnieski*, 895 F.2d 272, 277, fn. 4 (6th Cir. 1990) ("It appears from the record, however, that Officer Zarnieski did not bludgeon or attempt to bludgeon Jeffrey Pleasant with his gun."); *Tallman v. Elizabethtown Police Dept.*, 167 F. App'x 459, 465 (6th Cir. 2006) (unpublished) (officer reached into car to detain suspect while pointing firearm at suspect with other hand, but did not intentionally strike suspect with hand holding loaded weapon); *Estate of Bleck v. City of Alamosa*, 540 Fed. Appx. 866, 867 (10th Cir. 2013) (suspect shot in the hip as officer pushed him onto a bed while holding gun in the other hand); *Speight v. Griggs*, 13 F. Supp. 3d 1298, 1322 (N.D. Ga. 2013)15 (officer "push-kicked" suspect to the ground while holding his gun but did not intentionally hit suspect with gun hand); *see also McCoy v. City of Monticello*, 342 F.3d 842, 848 (8th Cir. 2003) (officer slipped on ice while gun drawn but did not strike suspect with gun in hand); *Leber v. Smith*, 773 F.2d 101, 105 (6th Cir. 1985) (same); *Watson v. Bryant*, 532 F. App'x 453 (5th Cir. 2013) (unpublished) (officer failed to reholster his weapon while handcuffing suspect but did not strike suspect with gun intentionally); *Baskin v. City of Houston*, No. CIV.A.1:07CV58, 2008 WL 4615491 (N.D. Miss. Oct. 16, 2008), *Baskin v. City of*

Houston, 378 F. App'x 417, 418 (5th Cir. 2010) (unpublished) (an officer holding a pistol tried to grab a suspect and shot him, but no evidence that he intentionally struck him with hand holding gun).

Furthermore, unlike cases in which courts have found killings by officers to be justified, the defendant is not claiming a legal justification such as self-defense. Instead, he contends that his shooting of the victim was an "accident." D-47 at 5. *Contrast New York v. Tanella*, 374 F.3d 141, 152 (2d Cir. N.Y. 2004) (court accepted Tanella's self-defense justification); *Clifton v. Cox*, 549 F.2d 722, 729 (9th Cir. 1977) (Clifton claimed fleeing man posed a danger to the lives of the pursuing officers).

Not only are the cases the defendant cites in support of his claim factually distinguishable, but those cases involving accidental shootings are conceptually distinguishable, because there is a stark difference between an accidental death and one that results from recklessness. For instance, while the former cannot properly result in any criminal conviction under Texas law, the latter falls squarely within the definition of manslaughter. *See* TEX. PENAL CODE § 19.04(a). The reason for this distinction is that the concept of "an accident" relates to the *actus reas* of a criminal offense, not the *mens rea* of the actor. This point was made clear by the Court of Criminal Appeals in *Williams v. State*, 630 S.W.2d 644 (Tex. Crim. App. 1982). There, the court explained that an accident is not a "voluntary act" within the meaning of the Texas Penal Code: "[T]he correct meaning of the former term 'accident' was that

the actor did not voluntarily engage in conduct." *Williams v. State*, 630 S.W.2d 640, 644 (Tex. Crim. App. 1982) (op. on reh'g). Later, the court reiterated the same point, saying " 'conduct [is not] rendered involuntary merely because an accused does not intend the result of his conduct.' Therefore, the issue of the voluntariness of one's conduct, or bodily movements, is separate from the issue of one's mental state." *Rogers v. State*, 105 S.W.3d 630, 638 (Tex. Crim. App. 2003) *quoting Adanandus v. State*, 866 S.W.2d 210, 230 (Tex. Crim. App. 1993).

Unlike an accident, recklessness is defined by the Penal Code to be a culpable mental state. *See* TEX. PENAL CODE § 6.03(c). While accidentally causing the death of another person – an involuntary act – might not result in the violation of the victim's Fourth Amendment rights, there should be little question that an actor's conduct may be objectively unreasonable if he "voluntarily" engages in conduct that "recklessly causes the death of an individual." *Brower v. County of Inyo*, 489 U.S. 593, 598-599 (1989); TEX. PENAL CODE §§ 6.01(a), 19.04(a). Because the defendant intentionally struck an unarmed man while holding a loaded gun, his actions were unreasonably dangerous, not an "accident."

4. Killing Jackson was an illegal seizure.

The circumstances surrounding Jackson's seizure did not justify the use of deadly force. Even if Jackson

was killed by the discharge of a gun when he was meant only to be bludgeoned, the defendant's unreasonable conduct was an unconstitutional seizure and thus his conduct was not "necessary and proper in the performance of his duties," and he should not be held immune from prosecution. *Brower v. County of Inyo*, 489 U.S. at 598-99.

3. Conclusion

"It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented." *Baker v. Grice*, 169 U.S. 284, 291 (1898). Recognizing this, Supremacy Clause immunity has been reserved for the purpose of preventing "states from nullifying federal laws by attempting to impede enforcement of those laws." *Morgan v. California*, 743 F.2d 728, 731 (9th Cir. 1984), *citing Cunningham v. Neagle*, 135 U.S. 1 (1890).

The State in this case is trying to regulate the conduct of one of its own officers. The interests of the state and the federal governments in the enforcement of laws against theft, fraud and robbery are aligned, as demonstrated by the very existence of the joint task force. Furthermore, the defendant's actions, from the

time he initiated a chase without asking for help through his reckless shooting of the unarmed Jackson, were neither authorized by the laws of the United States nor "necessary and proper" to carry out his duty.

Because the state prosecution of the defendant does not "retard, impede, burden, or in any manner control" the execution of federal law (*McCulloch v. Md.*, 17 U.S. 316, 436 (1819)), this case is not one of those "exceptional" cases that justify interference with the "regular course of justice in the state court." *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 7 (1906), *quoting Baker v. Grice*, 169 U.S. 284, 291 (1898).

4. Prayer

The State respectfully requests that this Court deny the defendant's Motion to Dismiss Indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this State's Opposition to Motion to Dismiss was served on the following persons July 10, 2015, by electronic mail.

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Appendix

The following exhibits and their respective attachments are attached and fully incorporated herein:

1. Grand Jury Testimony of Charles Kleinert, March 25 and March 27, 2014
2. Indictment of Charles Kleinert for Manslaughter
3. Medical Examiner Report, Larry Eugene Jackson, Jr.
4. December 23, 2008 letter from USDOJ to Austin City Manager and Austin Police Chief

5. Arrest Affidavits and Judgments of Conviction for state offenses of robbery in Williamson County, Texas for robberies committed at Wells Fargo and Chase Banks

6. *Idaho v. Horiuchi*, 253 F.3d 359, 367 (9th Cir. 2001), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001).