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

REPLY BRIEF FOR PETITIONER

WALLACE B. JEFFERSON
AMY WARR
NICHOLAS BACARISSE

ALEXANDER DUBOSE JEFFERSON & TOWNSEND LLP
515 Congress Avenue
Suite 2350
Austin, Texas 78701

MARGARET MOORE
District Attorney
EMILY RUTH EDWARDS
MICHAEL SCOTT TALIAFERRO*
ROSA THEOFANIS
Assistant District Attorneys

TRAVIS COUNTY DISTRICT ATTORNEY'S OFFICE
P.O. Box 1748
Austin, Texas 78767
(512) 854-9400
**Counsel of Record*
Scott.Taliaferro@traviscountytx.gov

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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State-federal taskforces, which have proliferated more than at any other time in the nation's history, implicate the sovereignty of every state. These taskforces intrude upon, and can displace, a State's power over the police function. They affect the obligations of tens of thousands of law-enforcement officers. The Fifth Circuit did not confront these vital federalism issues, instead holding that Supremacy Clause immunity protected a State officer from State prosecution even though Texas never consented to waive this important aspect of its sovereignty. Pet. 19–22.

The Fifth Circuit also mistakenly measured the objective reasonableness of the State officer's actions not against the Fourth Amendment, but against his and other officers' subjective opinions. This decision complicates an already muddled jurisprudence, in which at least one circuit (following this Court's lead) applies a purely objective test, while others cling to a relic of pre-*Harlow* qualified immunity. Pet. 24–28. Qualified immunity is today judged on purely objective terms, but the lower court's Supremacy Clause-immunity standard would rely instead on officers' internal thought processes. The antiquated standard the Circuit invoked has, until now, been insulated from this Court's review.

Respondent Kleinert's evasive Response underestimates the significance of these issues. After twenty pages of briefing, Kleinert still cannot identify a clear statement providing that Texas must, as a condition of participating in the State-federal taskforce, surrender its sovereign power to hold its own officers to account for a criminal act. Neither does Kleinert explain why the standard for Supremacy

Clause immunity ought to vary from other official-immunity doctrines.

Kleinert spends most of his response urging that the State waived all of its arguments. Yet the issues are preserved. And notwithstanding Kleinert's one-sided recitation of the lower court proceedings, the questions here are vital to a new era of law enforcement. The Court should take this opportunity to answer them.

I. This case merits review.

A. The lower court's decision violates the Tenth Amendment.

1. Supremacy Clause immunity undermines the States' "pre-eminent[]" power "to make and enforce [their] own criminal laws." *Arizona* v. *Manypenny*, 451 U.S. 232, 243 (1981). Thus, this Court has long reserved immunity for cases of "an exceptional nature."[1] *Baker* v. *Grice*, 169 U.S. 284, 291 (1898).

Kleinert views Supremacy Clause immunity as an officer's personal prerogative. It is not personal at all. The doctrine was born of the federal government's need to perform its constitutional prerogatives. Thus, Supremacy Clause immunity's application must always balance a federal right against state sovereignty. See, *e.g.*, *Manypenny*, 451 U.S. at 242–243 (rejecting argument that removal deprived the state of its state-law right to appeal acquittal). The

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[1] Kleinert says the quoted language "is nowhere to be found in *Neagle*" and "comes from this Court's habeas jurisprudence." However, both *Neagle* and *Baker* (decided just eight years after *Neagle*) were Supremacy Clause immunity cases arising in the habeas context, and *Baker* relied on *Neagle* in making this pronouncement. *Baker* v. *Grice*, 169 U.S. 284, 291 (1898); *Cunningham* v. *Neagle*, 135 U.S. 1 (1890).

question here is whether federal authority, confined by a contract with a state's political subdivision, overrides the state's authority to prosecute its own officer for violating state law.

2. The "federal officer" here, a State employee, worked with the federal government only with the State's permission. Pet. 3–4.[2] The State remains, in the public mind, responsible for the officer's misconduct. Pet. 15, 17–18. Yet divesting the State of its prosecutorial powers, as the lower courts have done here, removes the State's power to redress *its own* officers' criminal acts, nullifying accountability mechanisms and rendering the State less representative. Pet. 17 (citing *United States* v. *Lopez*, 514 U.S. 549, 576–577 (1995) (Kennedy, J., concurring)); see also *F.T.C.* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

3. At the same time, any harm to federal interests is substantially diminished when a state prosecutes its own officer, seconded to the federal government, as opposed to a federal employee. The federal government is not constitutionally harmed when it loses assistance to which it was never entitled. Pet. 17.

The State cannot have surrendered its sovereign power *sub silentio*. Pet. 20; *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 577 (2012). The MOU said nothing about the State ceding its authority over Kleinert; that power was instead expressly reserved to the State. Pet. App. 95a–96a, 103a; see also 5 U.S.C. 3374(c) (providing that "supervision of the duties" of a State officer assigned to a federal agency

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[2] The FBI agent who led the taskforce testified that State officers were assigned to the taskforce by the local agency. R.1182. Accordingly, the Austin Police Department issued a letter assigning Kleinert to the taskforce. R.2166.

"may be governed by [an] agreement between the" two sovereigns).[3]

Indeed, the Founders assumed that if state revenue officers assisted the federal government, they would remain subject to state law. Pet. 18–19. This understanding is not undermined by this Court's recognition that *federal* revenue officers are immune. See Br. in Opp. 21 (citing cases). The Founders' assumption hinged not on the activity (collection of revenue), but on the identity of the officers' employer (the State). Pet. 18–19. That the officers assisted the federal government was of no moment. Thus, Kleinert's cases do not address the circumstances of this case.

4. Kleinert argues that "[n]othing in the MOU can fairly be read as a waiver of the constitutional Supremacy Clause." Br. in Opp. 6 n.3. In fact, the MOU stated that Kleinert remained subject to State law while serving on the taskforce. Pet. 4; Pet. App. 95a–96a, 103a.[4]

More important, the question is not whether the MOU waived Kleinert's immunity, but whether the State affirmatively surrendered its prosecutorial authority as a condition of participating in the State-

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[3] Kleinert mentions section 3374 only to attempt to draw a spurious distinction between "supervision" and "prosecution." Br. in Opp. 6 n.3. But holding officers to criminal account is an important supervisory power. Pet. 18. More important, section 3374 is a codification of cooperative-federalism principles that apply when, as here, the State's sovereignty cannot be taken without its consent.

[4] Kleinert suggests that Portland's and San Francisco's concerns about taskforce participation are inapposite because they focused only on whether state taskforce officers would follow state or federal law. Br. in Opp. 20 n.12. Kleinert's distinction is spurious. The promise to follow state law is nugatory if the state has no power to enforce it against individual officers.

federal taskforce. Pet. 20. Texas did not. A power not delegated to the federal government is reserved to the State.

5. Kleinert justifies a prohibition against the State's prosecuting its own employee because he was a "federal officer." Br. in Opp. 20. Kleinert's argument is a non-sequitur.

Kleinert is a "federal officer" only because the State assented to that designation; it simultaneously retained its right to discipline its own officers. Pet. 21–22; Pet. App. 95a–96a, 103a. Kleinert does not dispute that Texas's sovereignty is weakened if the State cannot prosecute its own officer. See Pet. 10, 17–18. The extent of the State's surrender is therefore controlled by the scope of its consent. Pet. 19–22.

Whether Kleinert is a "federal officer" determines the scope of his power under federal law. But it does not answer whether the State voluntarily surrendered its sovereignty. Were it otherwise, the anti-commandeering doctrine would cease to exist.

6. Kleinert asserts that "State and local officers serving on federal task forces are routinely treated as federal officers by the courts." Br. in Opp. 19. This assertion warrants a closer look.

Only one of the cases Kleinert cites concerns Supremacy Clause immunity. In *Colorado* v. *Nord*, 377 F. Supp. 2d 945, 949 (D. Colo. 2005), the court held that not only DEA agents, but also taskforce members, were immune from prosecution. It neither distinguished between the two groups nor discussed the federalism problems this petition presents. In any event, the *Nord* officers were prosecuted for enforcing a federal statute; standard preemption principles would have precluded the prosecution. See *id.* at 947.

Kleinert's remaining cases hold that taskforce members are "federal officers" for the purposes of

criminal statutes prosecuting threats or assault on federal law enforcement, *United States* v. *Martin*, 163 F.3d 1212 (10th Cir. 1998); *United States* v. *Torres*, 862 F.2d 1025 (3d Cir. 1988), or "federal tort liability statute[s]," *Lee* v. *Village of Glen Ellyn*, No. 16-cv-7170, 2017 WL 2080422, at *8 (N.D. Ill. May 15, 2017) (quotation marks omitted).

These cases are not relevant. Kleinert was a "federal officer" because the State agreed, on a limited basis, that he could be. Loaning an officer to a taskforce does not automatically divest the State of its prosecutorial prerogative. Unless Texas affirmatively relinquished its sovereignty in the MOU, it is empowered to prosecute Kleinert even as he served a dual role.

B. This Court should revisit its Supremacy Clause immunity standard.

Kleinert contends that lower courts apply a consistent standard in Supremacy Clause immunity cases. Yet confusion, not consistency, prevails. And even if the lower courts were consistent, the standard Kleinert touts is the vestige of a long-abandoned rule

1. Though Kleinert refers to the immunity standard applied by the court of appeals as representing "more than a century of settled constitutional law," Br. in Opp. 14, the standard is merely adolescent, and this Court has never approved it.

The lower court's rule, invented by the Ninth Circuit's *Clifton* decision, can be traced to this Court's pre-*Harlow* official-immunity precedent. Pet. 24–25; see also *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Clifton* v. *Cox*, 549 F.2d 722, 728 (9th Cir. 1977). That pre-*Harlow* standard, abandoned in every other context, persists in Supremacy Clause-immunity cases only because (1) the lower courts have lost sight of the rule's origins and (2) this Court has

not had an opportunity to set the record straight. See Pet. 23.

Kleinert cannot explain why Supremacy Clause immunity should be treated differently from other official-immunity doctrines. This Court, to the contrary, has suggested that a single standard is preferable.

2. Kleinert states that courts have "universally endorsed" the Fifth Circuit's standard that an officer's reasonable belief renders the officer immune, regardless of whether his conduct comports objectively with the Constitution. Br. in Opp. 14. In truth, the courts of appeals have recognized the disconnect between the commonly applied *Clifton* standard and qualified-immunity principles.

For example, the Tenth Circuit has rightly refused to adopt *Clifton*'s subjective-belief prong. *Wyoming* v. *Livingston*, 443 F.3d 1211, 1221–1222 (10th Cir. 2006). Its refusal is explained by the conflict between *Clifton* and *Harlow*. *Ibid.* While it has not yet abandoned *Clifton*, the Ninth Circuit has expressed similar reservations. See Pet. 25 (discussing *Idaho* v. *Horiuchi*, 253 F.3d 359 (9th Cir. 2001) (en banc), vacated as moot en banc, 266 F.3d 979.

Kleinert dismisses *Denson* v. *United States*, 574 F.3d 1318 (11th Cir. 2009), as inapplicable here. Br. in Opp. 17. But, in applying *Neagle*'s immunity standard to an FTCA case, *Denson* did not adopt *Clifton*'s subjective test. 574 F.3d at 1347. Instead, it looked at whether the officer acted within his constitutional authority. *Ibid.* (holding that an officer's "actions fail to qualify as 'necessary and proper' if committed in violation of the negative injunctions of the Constitution"); accord Pet. 27–28.

Even under the pre-*Harlow* immunity standard, an officer could not reasonably believe he could violate clearly established law without consequence. Pet. 26.

Rather than inquire into the objective constitutionality of Kleinert's actions, the lower courts focused on Kleinert's beliefs, as well as other officers' opinions about his actions. See Pet. 7–8; see also Pet. App. 25a (holding that Kleinert "acted consistently with his training and with what other officers would have done"). Thus, the lower courts' analysis was flawed even under *Clifton*.

This Court should grant certiorari to protect States' sovereign authority, to preserve State-federal law-enforcement priorities, and to harmonize Supremacy-Clause jurisprudence with this Court's immunity and federalism precedent.

II. This case is an appropriate vehicle.

Kleinert argues that the State forfeited review by not raising its arguments below. Br. in Opp. 9; see *United States* v. *Olano*, 507 U.S. 725, 733 (1993). The arguments were, in fact, preserved, and the court of appeals resolved them erroneously.

Once a "claim is properly presented, a party can make any argument in support of that claim." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). It is "not limited to the precise arguments [it] made below." *Ibid.*

In *Yee*, 503 U.S. at 534–535, this Court considered the petitioner's regulatory-taking argument, even though it may not have been carefully raised below, because the petitioner had unquestionably raised a takings *claim*. *Id.* at 535. Similarly, in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995), this Court held that the petitioner's argument that Amtrak "is part of the Government" was "not a new claim," but was instead "a new argument to support what has been his

consistent claim: that Amtrak" violated his First-Amendment rights.

The State has consistently claimed that Kleinert may not invoke Supremacy Clause immunity. And the arguments the State makes in support of that claim were made in the lower courts.

A. The State argued below that Kleinert's federal authority was limited by the State-federal contract.

Kleinert acknowledges that the State preserved its federalism argument in the district court but asserts waiver in the court of appeals. Br. in Opp. 12.

The court of appeals held that the State did not challenge Kleinert's federal-officer status.[5] Pet. App. 15a. This is beside the point. Kleinert was both a federal and a State officer, and his State-officer status was a necessary predicate for his federal authority. The question is whether the federal commission divested the State of its power to hold its officer accountable for official misconduct.

The State has always proposed "that the scope of Kleinert's immunity, if any" was controlled by the contract between the State and federal governments. Pet. 21 n.3. For example, in the court of appeals, the State sought to reverse the district court for not holding that Kleinert's "federal duties were circumscribed by the MOU." Pet. C.A. Br., 2016 WL 683973, *32. The court of appeals rejected this argument on its merits. Pet. App. 16a–17a.

The MOU's importance in limiting the scope of Kleinert's immunity, if any, has been the State's early

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[5] It did so in the context of evaluating its jurisdiction under the federal-officer-removal statute. Pet. App. 8a n.4. Kleinert attempts to conflate this finding with the merits of the immunity defense, but these are separate inquiries.

and consistent focus. This Court should reject Kleinert's attempt to evade review.

B. The State argued below that Kleinert's conduct must be judged by Fourth Amendment standards.

The State argued to the Fifth Circuit that Kleinert is not immune because his actions violated the Fourth Amendment and were objectively unreasonable. Pet. C.A. Br. *40–47. The court of appeals refused to consider this argument, concluding that the State "neglected to urge the district court to adopt this qualified immunity-like standard." Pet. App. 14a n.7.

Kleinert relies heavily on this conclusion, pointing to a statement in the State's district-court brief that "[a]n action is 'necessary' only if the officer had a subjective belief that it was justified and the belief was objectively reasonable." Resp. App. 35a, cited by Br. in Opp. 9.

This single sentence was incorrect insofar as it focused on Kleinert's beliefs, but the substantive focus of the State's district-court arguments was always that Kleinert's actions must be measured against the Fourth Amendment's objective-reasonableness standard:

- "The defendant's handing of his firearm was objectively unreasonable."
- Kleinert's actions were "a departure from objectively reasonable conduct."
- "It was not objectively reasonable for [Kleinert] 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."

Resp. App. 4a, 39a, 42a, 46a; see also *id.* at 50a.[6]

The State related these arguments to the ultimate question of whether Kleinert had acted in an objectively reasonable manner: "[a]n objectively reasonable officer would know that [his] conduct was unreasonable." Resp. App. 46a–47a; accord Pet. 26 ("An officer cannot reasonably believe that he is entitled to take actions that violate clearly established law." (citing *Wood* v. *Strickland*, 420 U.S. 308, 321 (1975))).[7]

The State's argument regarding the immunity standard refines the core legal position it has advanced throughout this case: that Kleinert is not entitled to Supremacy Clause immunity because his actions violated the Fourth Amendment.

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The State's first issue is vital to restoring the proper boundaries of Our Federalism. Its second has perplexed the lower courts for a century. Both questions have evaded this Court's review and should be answered in this modern era of state-federal

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[6] At the district-court hearing, the State argued "that the standard also encompasses an objective reasonableness standard." R.1785; see also R.1950–1956, 2086–2089. Understanding that this was at issue, Kleinert argued to the contrary. R.2090, 2096. Looking for guidance in the face of ambiguous circuit-court precedent, the district court stated that it could "analogize this situation" to "qualified immunity." R.1362.

[7] Even if the State's trial-court briefing were ambiguous ambiguity does not justify a forfeiture finding. *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) (rejecting waiver argument despite the fact that "[p]ortions of [the petitioners'] complaint and briefing c[ould] be read either to argue a regulatory taking or to support their physical taking argument").

taskforces. Nothing stands in the way of the Court's answering both.

CONCLUSION

The petition should be granted.

Respectfully submitted,

MARGARET MOORE
District Attorney
EMILY RUTH EDWARDS
ROSA THEOFANIS
MICHAEL SCOTT
TALIAFERRO*
Assistant District
Attorneys

TRAVIS COUNTY DISTRICT
ATTORNEY'S OFFICE
P.O. Box 1748
Austin, Texas 78767
(512) 854-9400
**Counsel of Record*
Scott. Taliaferro@
traviscountytx.gov

WALLACE B. JEFFERSON
AMY WARR
NICHOLAS BACARISSE

ALEXANDER DUBOSE
JEFFERSON & TOWNSEND
LLP
515 Congress Avenue
Suite 2350
Austin, Texas 78701-3562

Counsel for Petitioner

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