No. 15–51077

In the United States Court of Appeals
for the Fifth Circuit

STATE OF TEXAS,
Plaintiff–Appellant

v.

CHARLES KLEINERT,
Defendant–Appellee.

On Appeal from the United States District Court for the Western District of Texas, Austin Division, Case No. A14–CR–0388–LY

BRIEF OF AMICI CURIAE FOR THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS AND COMBINED LAW ENFORCEMENT ASSOCIATIONS OF TEXAS SUPPORTING THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION'S DISMISSAL OF THE INDICTMENT AGAINST DEFENDANT

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CERTIFICATE OF INTERESTED PERSONS

State of Texas,
Plaintiff–Appellant

v. **No. 15-51077**

Charles Kleinert,
Defendant–Appellee.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. The State of Texas, Plaintiff-Appellant;
2. Charles Kleinert, Defendant-Appellant;
3. Randy T. Leavitt, The Law Officer of Randy T. Leavitt, attorney for Charles Kleinert;
4. Eric J.R. Nichols, Beck Redden, LLP, attorney for Charles Kleinert;
5. William R. Peterson, Beck Redden, LLP, attorney for Charles Kleinert;
6. Scott Taliaferro, Assistant District Attorney, Travis County, Texas;
7. Rosa Theofanis, Assistant District Attorney, Travis County, Texas;
8. Rosemary Lehmberg, Elected District Attorney, Travis County, Texas;

9. Michael Rickman, Combined Law Enforcement Associations of Texas, Counsel for Amici Curiae;

10. Todd Harrison, President, Combined Law Enforcement Associations of Texas, Amici Curiae.

11. William J. Johnson, Executive Director and General Counsel for the National Association of Police Organizations, Amici Curiae.

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INTEREST OF AMICUI CURIAE

The National Association of Police Organizations, ("NAPO"), is a nonprofit coalition of police units and associations from across the United States. NAPO represents more than 100 police units and associations with over 241,000 sworn law enforcement officer members and more than 100,000 citizen members who share a dedication to fair and effective crime control and law enforcement. NAPO represents its members by influencing the course of national affairs concerning law enforcement related issues by addressing legislative, executive, and judicial actions that occur in the Nation's capital.[1]

NAPO works to protect healthcare, pensions, and other benefits provided to law enforcement officers by influencing federal policy and the actions of Congress and the Administration. Moreover, NAPO works to preserve federal funding of state law enforcement matters, including but not limited to, violent crime control, national AMBER alerts, child protection, mentally ill offenders treatment and crime reduction, and anti-terrorism efforts.

Similarly, the Combined Law Enforcement Associations of Texas, ("CLEAT"), is an association member of the National Association of Police Organizations, and is the largest police union in Texas. CLEAT represents over

[1] This brief has been filed with the consent of all parties involved. *See* FED. R. APP. PROC. 29 (A). would note that no part of this brief was authored by counsel of any party, an no person or entity other than the National Association of Police Organizations and the Combined Law Enforcement Associations of Texas made any monetary contribution to the preparation and submission of this brief.

20,100 state and local law enforcement personnel employed in the State of Texas and provides representation for a majority of the largest police associations in the State. CLEAT provides legal protection, lobbying, and legislative representation to its member-officers and affiliated police associations in order to ensure that Texas law enforcement officers work under conditions that permit the job to be done safely and effectively.

In light of the vital role played by law enforcement officers to protect the peace, safety, and security of American society, it is crucial that the rights and interests of law enforcement officers are protected. Law enforcement personnel often perform their duties to society by subjecting themselves to dangerous, unpredictable, stressful, and dynamic encounters, and it is therefore crucial that there is certainty and predictability in the legal standards of review for law enforcement action taken in furtherance of said duties.

In this case, the State is attempting to overturn the decision of the Federal District Court to further its attempt to prosecute Appellee, Charles Kleinert, a law enforcement officer, for manslaughter as a result of the death of Larry Jackson which occurred during Appellee's attempt to arrest Jackson pursuant to the Appellee's authority as a deputized federal law enforcement officer. Appellee was a special Deputy U.S. Marshal and deputized law enforcement officer and was fulfilling his duties as part of a federal task force on the day in question. As a

federal law enforcement officer Appellee correctly asserted, and the U.S. District Court agreed, that he is entitled to supremacy clause immunity and therefore should not be subject to a state-law standard or prosecution. In light of the number of law enforcement personnel represented by NAPO and CLEAT, and the need for consistent and fair standards for law enforcement personnel, both organizations have a direct and substantial interest this case.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

STATEMENT OF THE CASE

The Federal District correctly interpreted and applied the law to this case and granted supremacy clause immunity to Officer Kleinert for his conduct while enforcing the laws as a deputized federal taskforce agent, therefore operating under federal law and federal policies. In addition, NAPO and CLEAT members, although employed as state and local law enforcement officers, routinely agree to work for and with federal law enforcement officers on designated federal taskforces; these officers rely on the policies, procedures, and standards outlined in federal law to perform their duties in furtherance of the goals and assignments as part of the federal taskforces.

SUMMARY OF ARGUMENT

In this case, the States position, asserted through the Travis County District Attorney's Office, contradicts federal law and creates unfair, impracticable, and dueling standards for law enforcement personnel deputized as federal officers. State and local law enforcement officers chosen to be deputized as federal officers and to serve on federal taskforces are selected, trained, supervised by, and work alongside federal officers and should be held to the same federal standards and laws as their colleagues and supervisors. In the case before the Court, Appellee did no more than was necessary and proper to discharge his duties and effectuate an arrest based on the situation that confronted him.

Furthermore, the Federal District Court decision must be reviewed on an abuse of discretion standard because the true issue at hand is whether the Federal District Court correctly determined that the Appellee reasonably believed that his conduct was necessary and proper under the circumstances; in this case there is significant evidence to establish that the Appellee acted within his discretion and in furtherance of his duties as a federal taskforce agent. Therefore, this Court should uphold the Federal District Court's Dismissal of the Indictment based on the federal supremacy clause immunity.

ARGUMENT

I. THE DUAL-SOVEREIGN SYSTEM BETWEEN STATE AND FEDERAL LAW ENFORCEMENT PROMOTES IMPORTANT VALUES AND POLICY GOALS THAT SHOULD BE RESPECTED.

The dual-sovereign system between state and federal law enforcement protects state and local law enforcement officers who volunteer and are screened and selected to work side-by-side with federal law enforcement officers. The dual-sovereign system is designed to protect state and local officers who take on a cooperative role with federal taskforces and who participate in overall coordinated law enforcement efforts with their federal counterparts.

Due to their specialized knowledge and experience in their specific communities, state and local peace officers are often asked to affirmatively take on the additional duties and responsibilities working with federal officers on

taskforces and/or federal law enforcement assignments; these officers become deputized federal officers through federal agencies such as the Federal Bureau of Investigation (FBI), Drug Enforcement Agency (DEA), etcetera. Although the deputized officers continue to be employed by their local agency, the officers take their daily assignments and supervision from the federal taskforce to which they are assigned and work hand-in-hand with the federal officers on law enforcement operations.

As a deputized federal officer, local law enforcement personnel work with the federal officers to obtain arrest warrants, search warrants, and to make arrests without warrants pursuant to the federal taskforce requirements and procedures. Accordingly, the state and local officers selected for the federal taskforces and/or assignments should be subject to federal, not state, law for the actions they take as deputized federal officers. State and local officers performing federal taskforce duties should be subject to federal standards of liability, particularly regarding criminal charges based on claims of recklessness and/or negligence and not intentional conduct.

Consistent with the underlying policy of the supremacy clause, state and local officers who work on or with federal taskforces should not be subject to prosecution, by local prosecutors, for the manner in which they conduct their

federal duties. State-law standards for reckless/negligent conduct should not be imposed by local prosecutors onto federal officers carrying out their federal duties.

Due to the fact that local district attorneys are elected by the local population, they face political pressure to respond to incidents that occur in their home counties. Often this political pressure stems from inaccurate information regarding law enforcement incidents disseminated by local media outlets and political activists with limited knowledge of the actual facts and circumstances and without insight into the nature and danger of law enforcement encounters. The political pressure on local district attorneys can increase when the public learns that a law enforcement incident involves a federal officer employed by a state or local law enforcement agency. Federal immunity insulates the local prosecutors from the political pressure by removing the possibility of state prosecution for federal officers. This immunity incentivizes local actors to turn the matter over to federal officials to handle it as they see fit; these federal officials are more insulated from local politics and therefore will not allow politics to drive their decision-making. Moreover, the federal officials are more in tune to the standards and direction given to federal officers in regards to performing their official duties.

Federal supremacy clause immunity allows the local district attorney to avoid crossing swords with state and local law enforcement when a federal officer is

involved and therefore preserves the important relationship that exists between state prosecutors and state and local law enforcement officers.

II. DUE TO THE DYNAMIC NATURE OF POLICE WORK PARTICULARLY AS IT RELATES TO THE PARTICULAR LAW ENFORCEMENT AGENCIES AND JURISDICTIONS THERE ARE NO "WELL-ESTABLISHED MODERN POLICE STANDARDS" OR NATIONAL STANDARDS FOR ACTION TAKEN.

The duties and expectations for law enforcement personnel changes from agency to agency and jurisdiction to jurisdiction so no single, uniform, national police policy or standard on use of force or arrest procedure exists. Moreover, law enforcement action is often taken under high-intensity, rapidly unfolding, and dynamic situations so there is no such standard that dictates that an officer may never go "hands-on" with a suspect while holding a firearm in order to effectuate an arrest. More specifically, there is no standard that dictates that an officer can never pursue a suspect with a gun in his or her hand nor is there is a standard which dictates that an officer cannot draw his or her weapon to facilitate an arrest for a non-complaint suspect. In fact, it is common for an officer to draw his or her weapon to facilitate an arrest for a non-compliant suspect. Furthermore, rarely if ever do any police standards, policies or procedures specifically prohibit any particular action being taken to effectuate an arrest because it is impossible to predict each and every scenario that an officer may face while performing his/her duty to protect society and uphold the laws.

More specifically, Agent Dennis May, testified that he helped launch and coordinate the Central Texas Violent Crimes taskforce, the taskforce to which Appellee was assigned. ROA. 1975-86. Agent May testified that he was a firearms defensive tactics and tactical instructor for the FBI and is authorized to instruct state and federal police. ROA. 1978. Agent May testified that federal training allows for an officer in Appellee's circumstances, to use his judgment to apprehend a suspect. ROA. 1979-80. Agent May went on to state that an Agent was not disciplined for striking a suspect in the head with a gun to gain compliance. ROA 1984-85. Based on Agent May's testimony, it is clear that Appellee acted in an objectively reasonable manner and did what was necessary and proper under the circumstances but also acted in compliance with training and policy; a much higher standard.

Nevertheless, law enforcement polices, whether they be federal, state, local, or otherwise, should not be the standard for supremacy clause immunity. There are jurisdictions that promulgate policies that attempt to by represent "best practices" that exceed the standards for objectively reasonable conduct under the constitutional standards. State and local jurisdictions can ensure compliance with these elevated standards which are often "in excess of the federal constitutional minima" by using administrative tools "such as reprimands, salary adjustments, and promotions." *Tanberg v. Sholtis*, 401 F.3d 1151, 1164 (10th Cir. 2005). "If

courts treated these administrative standards as evidence of constitutional violations . . . this would create a disincentive to adopt progressive standards." *Id.*

III. A LACK OF ADHEANCE TO STATE, LOCAL, AND/OR FEDERAL LAW ENFORCEMENT POLICIES AND PROCEDURES IS NOT EVIDENCE OF A VIOLATION OF ANY LAW; STATE, FEDERAL, OR OTHERWISE.

Appellant and the NAACP assert that the Federal District Court erred in not considering policies and practices before dismissing the indictment, although evidence exists to show that Appellee was in compliance with such policies and practices. However, ample case law exists to support the proposition that evidence that an officer charged with violating a constitutional standard may have also violated a state or local police policy is irrelevant. For example, the Fifth Circuit reversed a district court's judgment holding a police officer liable under § 1983 where the trial judge recounted "six errors of police procedure" which "when taken together caused the death" of the suspect. *Young v. City of Killeen, Tex.*, 775 F.2d 1349, 1352 (5th Cir. 1985). The court explained that although the officer's violations of police procedures may be relevant to a negligence claim under state law, they have no bearing on whether the Constitution was violated. *Id.* at 1352–53.

The Court noted that "The Plaintiffs have charged that the force [Officer] Lowery employed was excessive, at least in part because Lowery may not have followed established police procedures . . . . The implication is that Lowery

thereby manufactured the circumstances that gave rise to the fatal shooting. We rejected a similar argument in *Young*. . . . [E]ven a negligent departure from established police procedure does not necessarily signal violation of constitutional protections." *Fraire v. City of Arlington*, 957 F.2d 1268, 1275–76 (5th Cir. 1992) (footnote omitted).

"In the exclusionary rule context, the Supreme Court has rejected the use of local police regulations as a standard for evaluating the constitutionality of police conduct . . . . That logic would seem to apply equally to a damages suit under § 1983. This Court has consistently held that the violation of police regulations is insufficient to ground a § 1983 action for excessive force." *Tanberg*, 401 F.3d at 1164 (citing *Whren v. United States*, 517 U.S. 806, 815 (1996)) *Ford v. Childers*, 855 F.2d 1271, 1275–76 (7th Cir. 1988) (affirming directed verdict granted in favor of officer on § 1983 claim despite expert testimony that officer's conduct violated local police policy and "generally accepted police practices"). *Medina v. Cram*, 252 F.3d 1124, 1133 (10th Cir. 2001) ("We have, of course, recognized that claims based on violations of state law and police procedure are not actionable under § 1983") *Jonas v. Bd. of Comm'rs of Luna Cnty.*, 699 F. Supp. 2d 1284, 1299 (D.N.M. 2010) ("The clearly established law also does not permit a plaintiff to establish a constitutional violation with evidence that the officers violated [standard operating procedures] and their training. The clearly established law

requires the exclusion of any evidence regarding the violation of SOPs and training, because such evidence is irrelevant to Fourth-Amendment inquiry.")

The rationale behind this rule is readily apparent. Any state prosecution for alleged "reckless/negligent" conduct would be based not just on local police standards, but the interpretation of those standards by a local prosecutor and/or the local prosecutor's hired experts. Prosecution of an officer should not be based on policies and procedures that are created an intended solely as a guideline for law enforcement action as such action is often occurring in unpredictable and unique circumstances. Rarely do bright-line rules exist for police use of force. Moreover, policies and procedures are subject to differing interpretations and elevate the standard above that required by the law and constitution.

IV. IT IS IMPROPER TO REQUEST THAT THIS COURT REVERSE THE GRANT OF SUPREMACY CLAUSE IMMUNITY BECAUSE THE LAW IS CLEAR AND WAS PROPERLY APPLIED TO THE FACTS.

Appellee's conduct was reasonable and proper under the circumstances as Appellee had a duty as a deputized marshal and federal taskforce officer to investigate, detain, and apprehend a criminal who is engaging in misconduct directly in front of him. ROA. 1988. Appellant asserts that Appellee placed the suspect in great and unjustifiable risk by taking out his firearm to apprehend the suspect, however, this action by Appellee was consistent with training and

practice. ROA. 1987. In this case Appellee was correctly granted supremacy clause immunity for his actions.

The argument that deference should not be given to law enforcement officers in use of force cases because they may use immunity as a "blue-print" for evading accountability is not supported by evidence or fact. In fact, in 2015, 128 law enforcement officers were killed in the line of duty, yet deadly force by Officers account for only a small fraction of the interactions with citizens. Furthermore, the NAACP correctly asserts that many of these police encounters are surreptitiously recorded and videos are produced long after officers provide statements as to their conduct and rationale in the high intensity and dynamic situations and therefore any statement from law enforcement must fit the facts, as it does in this case. Moreover, immunity and/or an affirmative defense for police use of force have existed for decades and to post-hoc strip officers of the immunity based on an unsupported assertion that they will use it improperly is unlawful and unnecessary.

The Supremacy clause immunity granted in this case is well established law and should not be changed because of the unlikely possibility that someone may improperly use it as a "blue-print" for evading accountability. Law Enforcement officers nationwide have a difficult task that they have sworn to fulfill in order to protect and serve and this type of supremacy clause immunity is granted in order to allow officers to fulfill their duties.

V. AS LAW ENFORCEMENT USE OF FORCE ACTION IS OFTEN TAKEN WITH LITTLE TIME FOR PLANNING OR REVIEW THERE IS FREQUENTLY HINDSIGHT BIAS THAT EXISTS.

The Supreme Court has long recognized, through cases such as *Graham v. Connor*, 490 U.S. 386 (1989), the temptation for prosecutors, judges, and juries to become Monday morning quarterbacks while reviewing an officer's actions from the safety of an office or courtroom. The Court has routinely held that an officer's actions should not be considered with the benefit of 20/20 hindsight. Moreover, the Court has recognized that the objectively reasonable test is met if "officers of reasonable competence could disagree" on the legality of the defendant's actions. *Malley v. Briggs*, 475 U.S. 355 (1986).

Law enforcement is a dangerous and difficult profession that often requires split-second decisions to be made in rapidly evolving situations. Furthermore, law enforcement officers are expected to subject themselves to unpredictable and potentially life-threatening scenarios that may end in use of force encounters.

> "Other than random attacks, all [use-of-force] cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing then no force would have been used. In this sense the police always cause the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits society praises the officer for causing." *Plakas vs. Drinski,* 19 F.3d 1143, (7th Cir. 1994), cert. denied.

In all but the most extreme of circumstances, deference should be given to officers' on-the-spot judgment calls, made in the most stressful of situations, without time for careful reflection or cost-benefit analysis.

CONCLUSION

For the forgoing reasons, this Court should affirm the Federal District Court's Dismissal of the Indictment in this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2016, a true and correct copy of the foregoing Brief of Amici Curiae for the National Association of Police Organizations and Combined Law Enforcement Associations of Texas Supporting the United States District Court for the Western District of Texas Austin Division Dismissal of the Indictment Against Defendant was forwarded via regular mail and electronic mail to the individuals listed below and addressed as follows:

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements.

1. This brief complies with type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains a total of 4011 words.
2. This brief complies with the type-face requirements of FED. R. APP. P. 32 (a)(5) and the typestyle requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in Microsoft Word 2010 using 14-point Times New Roman font with 12-point Times New Roman footnotes.

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April 27, 2016