No. 06-23

In the Supreme Court of the United States

STATE OF WYOMING, PETITIONER

v.

MICHAEL DAVID JIMENEZ
AND WESLEY O. LIVINGSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT MICHAEL DAVID JIMENEZ IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
BARBARA L. HERWIG
AUGUST E. FLENTJE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court's failure to hold an evidentiary hearing under 28 U.S.C. 1446(c)(5) before permitting removal of respondents' state criminal prosecution constituted harmless error.

2. Whether respondents were entitled to Supremacy Clause immunity from state criminal prosecution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-44) is reported at 443 F.3d 1211. The order of the district court (Pet. App. 45-74) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2006. The petition for a writ of certiorari was filed on July 5, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1994, acting pursuant to his authority under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, the Secretary of the Interior ordered the reintro-

duction of gray wolves in Wyoming and surrounding States. 59 Fed. Reg. 60,252-60,263 (1994). The Department of the Interior subsequently published regulations authorizing the Fish and Wildlife Service (FWS) to supervise the reintroduction. In order to control predation on livestock in the area, those regulations require FWS to monitor the reintroduced wolves. See 50 C.F.R. 17.84(i)(8). FWS does so primarily by fitting the wolves with radio collars, which allow FWS and local ranchers to track the wolves and, where necessary, to take appropriate action to protect livestock. Pet. App. 3-4, 34-35.

Respondent Michael David Jimenez was the leader of FWS's Wyoming Wolf Recovery Project; respondent Wesley O. Livingston, an experienced wolf handler, was a federal contractor working on the project. On February 13, 2004, FWS officials spotted a pack of gray wolves near Meeteetse, Wyoming, in an open area far outside their normal range. Although respondent Jimenez was unfamiliar with the area, two other participants in the operation told him that they believed that the wolves were located on federal land. Accompanied by a pilot, respondents pursued the pack by helicopter and, using net and dart guns, successfully immobilized five wolves. Although respondents did not know it at the time, information subsequently collected from the helicopter's global positioning system (GPS) indicated that, when respondents fired their guns, the wolves were located on private land. Pet. App. 5-7.

Working with the helicopter pilot, respondents collected the five wolves in a central location, where they examined them and fitted them with collars. Respondent Jimenez subsequently stated that there were no fences, signs, or cattle at the location. As respondents were processing the wolves, Randy Kruger, an employee

of the Larsen Ranch Company, drove up a neighboring road and stopped nearby. He asked Jimenez what respondents were doing; after Jimenez told him, he took several pictures of Jimenez with the wolves. Kruger did not indicate to Jimenez that respondents were on private land. After an apparently friendly conversation, Kruger went on his way. Pet. App. 7-8.

2. The gray-wolf reintroduction program was the object of strong local opposition. Upon learning of the capture operation, Wyoming state officials undertook an investigation to determine whether respondents had been on private land or on the public right-of-way adjoining the nearby road. After conducting a survey, the officials determined that respondents had been on private land owned by the Larsen Ranch Company. The Park County Prosecutor's Office subsequently filed misdemeanor trespass and littering charges against respondents in state court. Pet. App. 4, 8-9.

3. Respondents filed notices of removal in the United States District Court for the District of Wyoming pursuant to 28 U.S.C. 1442(a)(1), which authorizes the removal of a criminal prosecution commenced in state court against "any officer * * * of the United States * * * sued in an official or individual capacity for any act under color of such office." A separate provision specifies that, before permitting removal of a criminal prosecution, a federal court "shall order an evidentiary hearing to be held promptly and after such hearing shall make disposition of the prosecution as justice shall require." 28 U.S.C. 1446(c)(5). The district court ordered removal of both prosecutions without holding an evidentiary hearing.

Petitioner then moved to vacate the orders of removal, contending, *inter alia*, that the district court had

erred by permitting removal without holding an evidentiary hearing; respondents moved to dismiss the prosecution, contending that they were immune from suit under the Supremacy Clause of the Constitution. After holding a hearing on those motions, the district court denied petitioner's motions to vacate and granted respondents' motions to dismiss. Pet. App. 45-74.

As to the failure to hold an evidentiary hearing, the district court reasoned that, "[w]here there is no disagreement as to the facts relevant to the Court's determination of the removal issue, no evidentiary hearing is required by Section 1446(c)(5)." Pet. App. 63. The court explained that "Section 1442(a)(1) requires no more than the assertion of a colorable defense," and determined that "[b]oth defendants have raised colorable federal defenses, specifically that they are immune from prosecution under the Supremacy Clause." *Id.* at 64. As to the substantive question of immunity, the district court concluded that respondent Jimenez was "performing acts [he was] authorized to perform by federal law"; that he "subjectively believed that his actions were authorized by federal law"; and that "this belief was also objectively reasonable." *Id.* at 73. The court also concluded that respondent Livingston "was acting under the instruction and supervision" of Jimenez and was therefore "likewise immune from prosecution." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-44.

a. The court of appeals first held that the district court correctly denied petitioner's motions to vacate the removal orders. Pet. App. 24-33. The court noted that the relevant removal statute, 28 U.S.C. 1442(a)(1), had been construed to permit removal only where a federal officer had alleged a colorable federal defense: *e.g.*, that the officer had immunity under the Supremacy Clause.

Pet. App. 28. The court reasoned that "[t]he district court's decision that no evidentiary hearing was required may seem to be commonsensical," because "[t]here is no need for a court to hold an evidentiary hearing in a matter when there are no material facts in dispute." *Id.* at 29. The court also observed, however, that "the text of § 1446(c)(5) is unequivocal." *Id.* at 30.

Ultimately, the court of appeals concluded that it "need not determine whether the district court's decision to forego an evidentiary hearing was legal error," on the ground that, under the circumstances, "any error was without a doubt harmless." Pet. App. 31. The court noted that "there were no material facts in dispute" because "[i]t is undisputed that [respondents] were federal officials, and likewise undisputed that they have a colorable federal defense," and "[t]hat is all that is required for removal under § 1442(a)(1)." *Id.* at 31-32 (footnote omitted). "In our view," the court reasoned, "to reverse and remand to the district court for an evidentiary hearing (on nothing), as [petitioner] requests, would be a colossal waste of time and resources." *Id.* at 32.

b. The court of appeals then held that the district court correctly granted respondents' motions to dismiss on the basis of Supremacy Clause immunity. Pet. App. 11-23, 33-44. After discussing at length the decisions of this Court (and of other courts of appeals) on Supremacy Clause immunity, the court stated that "a federal officer is not entitled to Supremacy Clause immunity unless, in the course of performing an act which he is authorized to do under federal law, the agent had an objectively

reasonable and well-founded basis to believe that his actions were necessary to fulfill his duties." *Id.* at 23.[*]

Applying that standard, the court of appeals first determined that respondents' actions were authorized by federal law. Pet. App. 34-37. The court noted that the applicable regulations "do not merely authorize, but impose an obligation on[,] [FWS] to monitor wolves." *Id.* at 35. While the regulations "[do] not contain an explicit grant of authority for [FWS] staff to trespass," the court reasoned, "Supremacy Clause immunity does not require that federal law explicitly authorize a violation of state law." *Id.* at 36.

The court of appeals next determined that respondents had an objectively reasonable and well-founded basis to believe that their actions were necessary to fulfill their duties. Pet. App. 37-44. The court noted that "[i]t is not clear to us that [respondents] would have lacked an objectively reasonable basis to believe their actions were necessary to the performance of their functions[] even if they had been aware they were on private land." *Id.* at 39. The court determined, however, that "the undisputed evidence in the record establishes that [respondents'] belief that they were on [public] land was objectively reasonable and well-founded." *Ibid.* The court explained that, "[g]iven the expansive range of gray wolves as well as their propensity to run in any direction after being darted, it would be an onerous burden on federal officers * * * to require them to determine the precise boundaries of land that *might* be encountered, on threat of criminal prosecution if they

[*] The court of appeals "le[ft] for another day the question whether that belief must be both subjectively and objectively reasonable," noting that "[petitioner] does not dispute that [respondents] subjectively believed they were on federal land." Pet. App. 23.

should be in error." *Id.* at 39-40. The court concluded that "[o]ur review of the evidence presented to the district court demonstrates that * * * [respondents] confined their acts to an objectively reasonable view of the scope of their authority." *Id.* at 43.

The court of appeals rejected petitioner's contention that respondents should have known they were operating on private land on the grounds that (1) the GPS data showed that, when respondents fired their guns, the wolves were located on private land, and (2) structures and signs in the vicinity should have alerted respondents to the fact that they were on private land. Pet. App. 41-43. As to the GPS data, the court reasoned that, "at most, the GPS coordinates could have enabled [respondents], after the fact, to determine where they had been when they encountered the wolves." *Id.* at 41. As to the structures and signs, the court reasoned that "the structures were not in the immediate vicinity of [respondents] while they were tending to the wolves" and that "[the signs] did not provide [respondents] reason to know they were trespassing, because the signs implicitly authorize entry." *Id.* at 42-43.

The court of appeals concluded that "[g]ranting immunity in this case serves the purposes for which Supremacy Clause immunity was developed." Pet. App. 44. The court noted that "[t]he record evidence supports the suspicion that the prosecution of [respondents] was not a bona fide effort to punish a violation of Wyoming trespass law, * * * but rather an attempt to hinder a locally unpopular federal program." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of

another court of appeals. Petitioner identifies no issue that merits this Court's review. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioner first contends (Pet. 6-16) that the court of appeals erred by holding that the district court's failure to hold an evidentiary hearing under 28 U.S.C. 1446(c)(5) before permitting removal constituted harmless error. Petitioner, however, fails to identify any case in which a court has awarded relief in similar circumstances for the failure to hold an evidentiary hearing under Section 1446(c)(5).

Moreover, the court of appeals correctly held that, even assuming that the district court erred in not conducting an evidentiary hearing, any such error was harmless in the circumstances of this case. Section 1446(c)(5) provides that, before ordering removal of a criminal prosecution, a district court "shall order an evidentiary hearing to be held promptly." As a preliminary matter, it is questionable whether Section 1446(c)(5) requires the district court to conduct an evidentiary hearing even where (as here) there is no genuine issue of material fact as to which an "evidentiary hearing" would be meaningful. See Pet. App. 29 (noting that "[t]here is no need for a court to hold an evidentiary hearing in a matter when there are no material facts in dispute"). Even assuming that it does, however, Section 1446(c)(5) does not specify a remedy for the failure to hold an evidentiary hearing, and such a failure is therefore subject to harmless-error analysis. Cf. Fed. R. Crim. P. 52(a).

Any error in this case was in fact harmless. In order to obtain removal under the federal officer removal statute, 28 U.S.C. 1442(a)(1), a federal officer need only allege a colorable federal defense. See, *e.g.*, *Mesa* v. *Cali-*

fornia, 489 U.S. 121, 125-134 (1989); *Willingham* v. *Morgan*, 395 U.S. 402, 409 (1969); *Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247, 252, 254 (1868). Where a district court fails to hold an evidentiary hearing in an action for which removal is sought under Section 1442(a)(1), but subsequently holds that the federal officer has a *valid* federal defense (and thus dismisses the action), it would be futile to remand for such a hearing, because the court's subsequent holding that the federal officer had a valid federal defense necessarily forecloses the conclusion that the federal officer lacked even a *colorable* federal defense (and thus lacked a basis for removal in the first place). See Pet. App. 32 (noting that "to reverse and remand to the district court for an evidentiary hearing * * * would be a colossal waste of time and resources"); cf. *United States* v. *Mechanik*, 475 U.S. 66, 70-71 (1986) (holding that an error at the grand jury stage was harmless on ground that "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt"). In such circumstances, there is no basis for disturbing the district court's subsequent decision to dismiss the prosecutions.

Petitioner asserts (Pet. 14) that (1) the district court should have held an evidentiary hearing because "[i]ssues were clearly in dispute on immunity" and (2) the failure to hold an evidentiary hearing tainted the district court's subsequent decision to dismiss the prosecutions because petitioner could have developed facts at the evidentiary hearing that would have "substantiate[d] or alleviate[d] ultimate issues on immunity." Petitioner, however, fails to identify a disputed issue of material fact relevant to the question of *removal*. That is unsur-

prising, because petitioner does not assert (nor could it plausibly do so) that respondents lacked even a *colorable* defense of Supremacy Clause immunity. See Pet. App. 31-32 (noting that "[i]t is undisputed that [respondents] were federal officials, and likewise undisputed that they have a colorable federal defense") (footnote omitted). Moreover, petitioner concedes (Pet. 21) that, although the district court did not conduct an evidentiary hearing before granting removal, it did permit petitioner to present factual evidence in response to respondents' subsequent motion to dismiss on grounds of Supremacy Clause immunity. Indeed, petitioner evidently took advantage of that opportunity. See, *e.g.*, Pet. App. 71 (citing affidavit and declaration of Wyoming state official). Because the court of appeals correctly held that the failure to conduct an evidentiary hearing was harmless, and because petitioner identifies no conflicting authority, further review on that issue is unwarranted.

2. Petitioner contends (Pet. 16-28) that the court of appeals erred by upholding the district court's dismissal of the prosecutions on the ground that respondents were entitled to Supremacy Clause immunity. Petitioner does not suggest, however, that the court of appeals applied an erroneous legal standard in determining whether respondents had Supremacy Clause immunity—much less a standard that conflicts with that adopted by this Court or any other court. To the contrary, petitioner concedes (Pet. 17) that the applicable legal standard is "well established."

Petitioner does not dispute that respondents satisfied the first prong of the governing legal standard: namely, whether respondents were "performing [acts] which [they were] authorized to do under federal law." Pet. App. 23. Instead, petitioner merely argues (Pet. 21-

28) that the court of appeals misapplied the second prong of that standard: namely, whether respondents "had an objectively reasonable and well-founded basis to believe that [their] actions were necessary to fulfill [their] duties." Pet. App. 23. The court of appeals' resolution of that fact-bound issue was correct, and, in any event, the fact-bound application of a "well established" legal standard does not warrant further review.

As the court of appeals determined (Pet. App. 39), respondents reasonably believed that they were not on private land—and, *a fortiori*, had an objectively reasonable basis for believing that their actions were necessary to the performance of their duties. Cf. *ibid.* (suggesting that respondents may have had an objectively reasonable basis for that belief even if they had known that they were on private land). Petitioner correctly notes (Pet. 21) that respondents were in fact on private land while conducting their operations, but errs by contending (Pet. 22-23) that respondents should have *known* that they were operating on private land based on (1) the GPS data and (2) structures and signs in the vicinity. As the court of appeals noted (Pet. App. 42), the GPS data at most could have enabled respondents to determine after the fact where the wolves were located, because (as respondent seemingly concedes, Pet. 22) it would have been difficult, if not impossible, for respondents to pinpoint their location on maps while they were conducting their helicopter operations. And as the court of appeals also noted (Pet. App. 42-43), there is no indication that the structures were in the *immediate* vicinity of respondents while they were conducting their operations, and the signs at most would have led respondents to believe that any entry onto private land was authorized (even assuming that respondents saw them at all).

More generally, petitioner offers no response to respondents' evidence (1) that two other participants in the operation told respondent Jimenez that they believed that the wolves were located on federal land, and (2) that the employee of Larsen Ranch Company whom respondents encountered failed to indicate in any way that respondents were trespassing. See Pet. App. 40. Nor does petitioner identify any genuine issue of material fact that would have precluded the district court from ruling on respondents' Supremacy Clause defense at the motion-to-dismiss stage. Cf. *Kentucky* v. *Long*, 837 F.3d 727, 752 (6th Cir. 1988) (noting that, "when a threshold defense of federal immunity is raised to meet a state criminal prosecution, the state cannot overcome that defense merely by way of allegations," but "must come forward with an evidentiary showing sufficient at least to raise a *genuine* factual issue").

Because the court of appeals correctly concluded, based on undisputed material facts, that petitioner had an objectively reasonable and well-founded belief that they were not on private land, it correctly upheld the dismissal of the prosecutions. And because petitioner cites no conflict of authority on the governing standard for Supremacy Clause immunity, it identifies no issue that merits further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
BARBARA L. HERWIG
AUGUST E. FLENTJE
Attorneys

OCTOBER 2006