No. 18-5188

IN THE

Supreme Court of the United States

HANK SCHRADER,
Petitioner,
v.
STATE OF NEW TEJAS,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR THE RESPONDENTS

NOVEMBER 18, 2019

TEAM NUMBER 31
COUNSEL FOR RESPONDENTS

QUESTIONS PRESENTED

I) When deciding a motion to dismiss a state criminal prosecution based on immunity under the Supremacy Clause, are disputed issues of fact decided by the district court or viewed in the light most favorable to the State?

II) What test governs whether the Supremacy Clause provides a federal officer with immunity from a state criminal prosecution?

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Petitioner Hank Schrader is an Agent for the Federal Bureau of Investigation who was vacationing with his family in the State of New Tejas.

Respondent State of New Tejas is the government for a state within the United States.

DECISIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is not reported but is available at No. 18-5719 and reprinted at R. 1a.[1] The District Court for the District of Madrigal's decision is not reported but is available at No. 17-cr-5142 and reprinted at R. 27a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 2, 2018. This Court granted certiorari on March 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] This brief cites the Appendix to Petition for Writ of Certiorari as the Record.

INTRODUCTION

The Constitution, federal laws made pursuant to it, and treaties made under its authority constitute the "supreme Law of the Land." U.S. CONST. art. VI, § 2. Powers not delegated to the United States are reserved to the States. U.S. CONST. amend. X. While these values might seem at odds with one another, their tug-of-war maintains a fundamental principle: as a nation of laws, "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882).

Lee's enduring statement—that in our Union, no man or woman is above the law—rings as true today as it did in 1882. To ensure consistency and respect the judge's neutral role when a federal official asserts Supremacy Clause immunity, district courts must (1) view disputed issues of fact in the light most favorable to the nonmovant and (2) apply a three-part immunity analysis composed of objective and subjective elements. New Tejas asks this Court to affirm the decision of the Thirteenth Circuit Court of Appeals.

STATEMENT OF CASE

A. Mr. Schrader First Met Mr. White After a Road Rage Incident While Vacationing in New Tejas

In November 2016, Mr. Schrader vacationed with his family in Madrigal, New Tejas. (R. at 28a.) On November 8, Mr. Schrader, an off-duty agent for the Federal

Bureau of Investigation, encountered Mr. White during a road rage incident.[2] Mr. Schrader later admitted that when he left his car to confront Mr. White, he "just lost [his] temper." (R. at 29a.)[3] After Mr. White exited his car, "Agent Schrader began yelling." (R. at 29a.) In the heat of the moment, Mr. White shoved Mr. Schrader. (R. at 29a.) Mr. Schrader drew back his arm as if to punch Mr. White before providence intervened and the light turned green. (R. at 30a.) Both men returned to their vehicles after the cars behind them began honking. (R. at 30a.)

B. Mr. White Later Purchased Marijuana, Which Is Legal Under New Tejas Law.

In 2016, the citizens of New Tejas—like citizens in states around the country—voted to make "possession and consumption of marijuana legal under state law." (R. at 30a.)[4] Following the road rage incident with Mr. Schrader, Mr. White legally purchased two ounces of marijuana from a local dispensary.[5] The legal drugs were clearly visible in a transparent plastic bag. (R. at 31a.)

C. After Seeing Mr. White With Marijuana, Mr. Schrader Used a Flying Tackle to Make an Off-Duty Arrest Against Mr. White.

Mr. Schrader and his family were looking for somewhere to eat lunch when he saw Mr. White step out of a building approximately fifteen feet in front of him. When

[2] Mr. Schrader claimed that Mr. White sped in front of him and suddenly braked, causing him to slam his own breaks to avoid collision. Mr. White denied driving in such a careless manner. (R. at 29a.)
[3] Mr. Schrader's FBI record shows similar on-duty altercations. For example, Mr. Schrader was once reprimanded for "reckless discharge of a firearm." In multiple other instances, Mr. Schrader has been accused of using excessive force. (R. at 28a.)
[4] Marijuana remains a Schedule I drug that is illegal to possess under federal law. (R. at 30a.)
[5] The dispensary, Pinkman's Emporium, complied with New Tejas law by having inconspicuous signage that did not explicitly denote the nature of its business. New Tejas Admin. Code § 51.014. (R at 31a.)

Mr. Schrader saw Mr. White holding the legally purchased marijuana, he "shouted, 'Stop! You're under arrest!' and began running towards him. (R. at 31a.).

Mr. White turned and ran away, which prompted the vacationing agent to give chase and employ a flying tackle that sent his suspect crashing onto the concrete sidewalk. (R. at 9a, 31a.) Mr. Shrader's takedown broke Mr. White's arm and chipped several of Mr. White's teeth.[6] Id. at 32a. Mr. White then "cried out in pain and ceased struggling." (R. at 31a.)

When local police arrived, Mr. Schrader informed Mr. White that he was under arrest for possession of marijuana in violation of Section 844 of Title 21 of the United States Code. (R. at 31a.) Despite being off-duty, Mr. Schrader "identified himself as an FBI agent enforcing federal law." (R. at 31a.) Mr. White was handcuffed despite his injuries, transported by ambulance to a local hospital, and not charged with any crime. (R. at 32a.) Mr. Schrader claimed that he would have attempted to arrest Mr. White even if the two had not been involved in their earlier confrontation because Mr. White was the first individual he encountered in open, public possession of marijuana. (R. at 38a.)

D. District Attorney Wexler Charged Mr. Schrader with aggravated assault.

The Madrigal community reacted with outrage. (R. at 32a.) The day after Mr. Schrader's flying tackle arrest of Mr. White, protestors gathered downtown to voice their frustration. (R. at 32a.) Madrigal County district attorney, Mrs. Wexler, echoed the community's sentiment and promised to use her power to prevent the application

[6] The district court credited New Tejas' expert testimony that the use of a flying tackle was "improper and reckless" under these circumstances. (R. at 38a.)

of federal marijuana laws in New Tejas. (R. at 32a.) According to Mrs. Wexler, federal agents within the state enforce these laws at their own risk and Mr. Schrader's specific conduct constituted aggravated assault. (R. at 33a.) She did not hide her motivations to make Mr. Schrader an example of what might happen when a federal official employed such force to enforce federal marijuana law. (R. at 33a.)[7] Mrs. Wexler followed through on her promise and charged Mr. Schrader with aggravated assault. (R. at 33a.)

E. Mr. Schrader Removed New Tejas' Prosecution to Federal Court.

Mr. Schrader asserted a justification defense based on arrest and search but removed the state prosecution to the District Court of Madrigal under 28 U.S.C. § 1442. (R. at 33a.) Section 1442 removal requires litigants plead a federal defense, so Mr. Schrader argued that the Supremacy Clause immunized him—a federal agent enforcing federal law—against state prosecution. (R. at 34a.) He moved for a 12(b) dismissal of New Tejas' indictment once in district court. (R. at 33a.)

District Court Judge McGill elected not to view factual disputes in the light most favorable to New Tejas (the nonmovant) for 12(b) purposes. (R. at 33a.) With this "point of procedure" out of the way, as Judge McGill phrased it, (R. at 33a), he decreed findings of fact and conclusions of law before analyzing immunity under the "necessary and proper" test outlined in *In re Neagle*, 135 U.S. 1, 75 (1890). (R. at 8a,

[7] "Let this serve as a warning to any other federal officers who seek to enforce marijuana laws in the State of New Tejas. You are not welcome here, and you attempt to enforce these laws at your own risk." (R. at 33a.)

37a.)[8] This test asks (1) objectively, whether Mr. Schrader's conduct was reasonable and (2) subjectively, whether Mr. Schrader believed himself to be acting in good faith. (R. at 35a.)

Despite acknowledging Mr. Schrader "acted foolishly in a manner ill-befitting a federal law enforcement officer," (R. at 37a), Judge McGill held—based on his own factual findings—that the Supremacy Clause forbade New Tejas from prosecuting Mr. Schrader for aggravated assault. (R. at 41a.)

A three-judge panel of the Thirteenth Circuit reversed Judge McGill's decision. (R. at 41a.) Judge Fring explained that while the district court applied the correct *Neagle* test, it erred by not viewing disputed issues of fact in the light most favorable to New Tejas. (R. at 5a.) This mistake crippled the rest of Judge McGill's analysis, and Judge Fring reanalyzed how in the light most favorable to the nonmovant, Mr. Schrader's arrest of Mr. White was not necessary and not subjectively or objectively proper. (R. 9a–11a.) The Thirteenth Circuit also held that *Neagle's* objective prong is based on whether a federal officer used reasonable means in accomplishing his duties and not whether his actions violated clearly established law. (R. at 12a.)[9]

Judge Hamlin's dissent focused on the protective purposes of Supremacy Clause immunity and subordinate relationship between state and federal authority. (R. at 15a, 18a.) According to him, viewing disputed issues of fact in the light most

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[8] Although many courts follow *Neagle* verbatim and refer to its test as "necessary and proper," this language should not be conflated with the Necessary and Proper Clause of Article I, Section 8, Clause 18. *See, e.g.*, *Wyoming v. Livingston*, 443 F.3d 1211, 1220–21 (2006) (explaining difference).

[9] Judge Skyler concurred with Judge Fring and wrote separately to highlight the Tenth Circuit's balancing test for analyzing Supremacy Clause immunity. Id. at 14a. After comparing the federal need (marijuana prohibition) against the gravity of the state offense (aggravated assault), Judge Skyler concluded that the latter far outweighed the "trivial" former. *Id.*

favorable to nonmovants would arm state prosecutors with pretext to negate federal immunity privileges. (R. at 16a.) Judge Hamlin also took issue with what he categorized as state law "second-guessing" the means by which federal officers accomplished their duties. (R. at 16a.) The dissent argued that Mr. Schrader's conduct was objectively necessary and subjectively irrelevant, even in the light most favorable to New Tejas. (R. at 20a, 21a.)

This Court granted certiorari on March 18, 2019. (R. at 1a.)

SUMMARY OF ARGUMENT

Rule for Resolving Disputed Issues of Fact

Flashpoints in American federalism have erupted against the backdrop of Supremacy Clause immunity, but stripped of its headier details, this case centers around a district court judge's appropriate role when state and federal interests clash. The best way to ensure consistency and preserve a judge's impartiality is by following 12(b)'s requirements when a federal official seeks to dismiss a state's criminal prosecution. This method does not break new ground because it leaves issues collateral to a defendant's guilt or innocence where they belong; in the province of the jury.

Procedural Test for Supremacy Clause Immunity

This Court should interpret the language of "necessary and proper" under Supremacy Clause Immunity to include three grounds: (1) Whether the act of an officer was "necessary" to accomplish a federal duty; (2) that duty was objectively "proper"; and (3) that same duty was also subjectively "proper." This test strikes the

balance between state criminal enforcement— against individuals that exploit one's status of a federal officer— and to prevent vendettas against federal action within a state's borders.

ARGUMENT

I. VIEWING DISPUTED ISSUES OF FACT IN THE LIGHT MOST FAVORABLE TO NEW TEJAS (RATHER THAN LETTING THE DISTRICT COURT RESOLVE THOSE DISPUTES) CORRECTLY BALANCES FEDERAL AND STATE INTERESTS IMPLICATED IN SUPREMACY CLAUSE IMMUNITY.

A. Rule 12(b)'s Supports Viewing Disputed Issues of Fact in the Light Most Favorable to the Nonmovant.

Rule 12(b)'s plain language and usage offer a consistent standard of viewing disputed issues of fact in the light most favorable to the nonmovant.[10] It permits a party to "raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b). Immunity is just one of a group of defenses including "former jeopardy, former conviction, former acquittal, statute of limitations, lack of jurisdiction, [and] failure of indictment or information to state an offense." *Com. of Ky. v. Long*, 837 F.2d 727, 750 (6th Cir. 1988) (quoting Notes of the Advisory Committee to Fed. R. Crim. P. 12).

Courts obviously have to engage in some factfinding when they address these defenses, but the facts they find touch upon preliminary as opposed to collateral matters. In Supremacy Clause immunity cases, for example, a district court judge

[10] New Tejas is mindful of the varying import judges give purely textualist arguments. While Rule 12(b) may alone seem too simplistic to answer the first question presented, this Court cannot consider 12(b)'s "trial on the merits" prohibition separate from the implications of letting a district court judge resolve disputed issues of fact that can make or break a case.

decides preliminary facts about whether a removal-seeking federal official has satisfied § 1442's threshold requirements. Factually, is he an officer of the United States? Has the state indicted him for something he did either under color of his office or on account of any authority Congress gave him to apprehend criminals? Has he asserted a federal defense? The judge can resolve these threshold questions and even evaluate the official's affirmative defense when there are no material disputes.

Disputed issues of fact, on the other hand, are intertwined with a defendant's guilt or innocence in Supremacy Clause immunity cases. *See, e.g.*, *Horiuchi*, 253 F.3d at 379 (Fletcher, J. concurring) (finding no difference between a defense based on Supremacy Clause immunity and one based on self-defense because "[b]oth…concern justifications for a defendant's action; and both are based on assertions of an honest and reasonable belief held by the defendant which, if believed by the factfinder, require a verdict of not guilty"). Raising a defense is not the same as having that entire defense adjudicated before trial, and when *Neagle's* "necessary and proper" components overlap with the elements of a state crime, a district court judge is actually deciding the merits of the case when she resolves disputed issues of fact.

B. Letting Judges Resolve Disputed Issues of Fact Defeats the Purpose of Removal.

When a federal official's motivation for enforcing the law is legitimately in dispute and a district court judge unilaterally decides what that motivation was, § 1442's purpose is lost. Congress implicitly recognized that states can bring criminal charges against federal officials when it passed the removal provision. It could have legislated accordingly if it intended for all immunity cases to proceed as bench trials

or tried granting federal officials absolute immunity (in which case there would be no cases to remove).[11]

Per § 1442, however, the solution in Supremacy Clause immunity cases is not to forego trials but to have those trials play out before a jury in federal rather than state courts. There, state prosecutors and federal juries exist in equipoise. District court judges add and detract nothing from either side. Defendant federal officials face less risk of prejudice; the government that employs them faces less risk of state interference.

A state's interest in enforcing its criminal law has more bite when disputed issues of fact specifically relate to *Neagle's* "necessary and proper" test. Doubts about a federal official's need or motivation to enforce federal criminal law undermine the purpose of Supremacy Clause immunity because, "[w]hile state prosecutions of federal officers are less common, they provide an avenue of redress…[w]hen federal officers violate the Constitution, either through malice or excessive zeal…." *Horiuchi*, 253 F.3d at 361–62.

If the official enforces federal law as pretext to harass a state's citizen, he has acted in a manner unrelated to the federal government's actual goals yet cloaked himself in the removal provision's protective garb.[12] And "while it is necessary for

[11] 28 U.S.C. § 2402, for example, provides for bench trials in § 1346 tort actions against the United States, and 22 U.S.C. § 254 outlines diplomatic immunity under the Vienna Convention.

[12] *See, e.g.*, *Arizona v. Files*, 36 F.Supp.3d 873, 884 (D. Ariz. 2014) (denying immunity after concluding that federal Wildlife Services employee sought to satisfy a personal problem rather than do his job when he trapped neighbor's dog). *Files* noted how the defendant "had never before used his position to catch a dog in the neighborhood, much less a dog on his own property." *Id.* Similarly, Mr. Schrader "was never personally involved in any drug trafficking investigations" during his FBI tenure. R. at 28a. Both cases thus involve a federal official claiming immunity based on a duty he never exercised.

federal officials to be able to enforce federal laws without undue interference from the states, on the other hand the Supremacy Clause was not intended to be a shield for 'anything goes' conduct by federal law enforcement officers." *Long*, 837 F.2d at 750.

Supremacy Clause immunity is not absolute until a court grants it. *See Horiuchi*, 253 F.3d at 376–77. Until then, its limits maintain a balance between federal and state interests that the constitution has already tilted toward the federal end. To this end, *Long* summarized:

> Under principles announced long ago in *McCulloch v. Maryland*, the national government cannot be made to tolerate undue interference from the states in the enforcement of federal law. But neither should any state be made to tolerate unwarranted interference with its duty to protect the health and welfare of its citizens. 837 F.2d at 749.

New Tejas recognizes that Supremacy Clause immunity properly shields federal officials from state prosecutions in a large percentage of cases. Their ability to remove to federal court under § 1442—and even to have some cases dismissed—makes sense. When state and federal clashes implicate the Supremacy Clause, there are more often than not no disputed facts. A federal official acts within a state, the state disagrees with the action, and both sides end up in court. Immunity prevents a state from using its police power as pretext to impede a federal official advancing federal policy that the state just does not like, and district court judges avoid trials when trials are avoidable.

C. Federal Officials Raise a Presumption of Immunity Upon Removing to Federal Court, Which States Can Rebut with Evidence of Disputed Issues of Fact.

The Thirteenth Circuit's majority opinion gives proper respect to the competing state and federal interests in Supremacy Clause immunity cases. As Judge Fring explained, "[Mr.] Schrader's motion could be determined without trial on the merits only if, viewing the evidence in the light most favorable to the State, immunity is warranted." R. at 10a. The balance is simple: immunity attaches when uncontroverted facts support *Neagle's* "necessary and proper" analysis, and "the federal government is thus protected from state prosecutors seeking to interfere with its operations." *Id.* Immunity is inapplicable when "disputed questions of material fact exist, [and] the officer must face trial before a jury of his peers, who can resolve these factual disputes during a trial of the merits of the case.[13]

New Tejas urges this Court to also incorporate the Sixth Circuit's holding in *Long*, which outlined the following:

> [W]hen 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*. Rather, the state at that point must come forward with an evidentiary showing sufficient at least to raise a genuine factual issue whether the federal officer was acting pursuant to the laws of the United States and was doing no more than what was necessary and proper for him to do in the performance of his duties. 837 F.2d at 752 (emphasis added).

This caveat adds an extra layer to protect federal interests, and New Tejas welcomes it with open arms. If a state could simply allege damning issues of fact (which, if fabricated, are by their very "disputed"), Supremacy Clause immunity would be all bark and no bite. The district court would be compelled to view the disputed fact in

[13] Disputed questions of material fact might still resolve after a district court judge declines to dismiss an indictment but before the case goes to trial. When this happens in the federal official's favor, he has still avoided trial without making the district court step into the role of material factfinder.

the nonmovant's favor, and even if a federal official defendant disproves the fabrication at trial, his victory is pyrrhic because the very trial defeats immunity's purpose.[14] After all, "[h]aving to live through the anxiety of a criminal trial destroys most of the benefits of immunity, and so courts often dispose of factual questions underlying immunity defenses prior to allowing the jury to deliberate on criminal liability." *Horiuchi*, 253 F.3d at 375.

Long's rebuttable presumption anticipated this problem. Once a state indicts a federal official and the official invokes Supremacy Clause immunity, there should be a presumption towards dismissal. A state can only rebut this presumption with affirmative evidence that puts the official's immunity claim in question, just as New Tejas has done here. Mr. Schrader's prior encounter with Mr. White—during which the two men nearly came to blows—combined with the drastic measures he took to "arrest" the New Tejan, are more than mere allegations. In isolation, they paint a picture of an individual with a penchant for aggressiveness,[15] and together, they suggest a particular motive for revenge in light of the federal government's relaxed marijuana policy. Ultimately, it should be a jury who has the final say.

D. Federal Judges Must Remain Neutral When Adjudicating Supremacy Clause Immunity Cases.

Allowing a District Court judge to resolve disputed issues of fact also compromises her neutral role. The Thirteenth Circuit preserved this neutrality by

[14] A state may not even care about winning or losing in this scenario. It would have already gotten its way by taking a federal official—and by extension the federal government—to task.

[15] Mr. Schrader has survived four complaints of excessive force during his time with the bureau, none of which his supervisors sustained. He was once reprimanded for reckless discharge of a firearm. R. at 28a.

viewing disputed issues of fact in the light most favorable to the nonmovant, New Tejas, but District Court Judge McGill sold the issue short by framing it as a mere "point of procedure." R. at 36a. How a court answers the disputed facts question colors its entire immunity analysis, and the Supremacy Clause undoubtedly provides federal officials with a shield against state criminal prosecutions in many contexts. But this immunity is a *shield*, not a sword, and a federal official must overcome evidence in the light most favorable to the state when he asks a court to dismiss his case.

Here, the disputed issues of fact critically include (1) Mr. Schrader's motivations for arresting Mr. White and (2) Ms. Wexler's motivations for indicting Mr. Schrader. From a neutral standpoint, the record supports ill- and well-intentioned motivations for both issues.[16] If Mr. Shrader flying-tackled Mr. White because he had an axe to grind with the New Tejas citizen—and not because he felt compelled to enforce federal marijuana laws—immunity cannot attach. If Ms. Wexler indicted Mr. Schrader because she had an axe to grind with the federal government, immunity is the only way to prevent state interference with the federal sphere of operation.

When a district court judge takes it upon herself to decide these issues, however, she might *advance* a federal interest rather than simply protect it. Her factfinding occurs at the expense of a state applying its criminal code to disputed,

[16] The record supports these competing motivations to an extent. Evidence of Mr. Schrader's vindictiveness toward Mr. White undermines his immunity claim far more than evidence of Ms. Wexler's reasons for prosecuting might undermine the state's interest in protecting its citizens from assault.

material facts meant for a jury. And if she makes determinations like Judge McGill's, the appearance of siding with a federal official upsets federalism's balance in the Supremacy Clause context. The only way for a district court judge to remain neutral is to decide from a light most favorable to the nonmovant's point of view whether disputed issues of fact require trial or dismissal, just as judges do in other 12(b) contexts.[17]

As a thought experiment, imagine if Judge McGill's "point of procedure" resulted in discrediting all of Mr. Shrader's testimony, finding that Mr. Schrader acted with malice toward Mr. White, and concluding that Mr. Schrader's actions were unnecessary and in no way related to his obligations as a (vacationing) federal official. Supremacy Clause immunity would not attach, but how could there now be a trial? Judge McGill would have unilaterally resolved the case's critical issues, so every motion in limine, objection, and jury instruction would be imbued with previous findings against Mr. Schrader that are collateral to his guilt. If this was the case, the district court judge would have the ability to advance a *state* interest rather than simply protect it. The trial would be one in name only after Judge McGill already tipped his hand about not believing Mr. Schrader.

[17] Judge Fletcher's concurring opinion in *Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir.), vacated as moot, 266 F.3d 979 (9th Cir. 2001), pointed out how within the Ninth Circuit's civil damages immunity context, the jury decides disputed facts but the judge determines reasonableness based on those facts. *Id.* at 378. New Tejas believes that this formulation also appropriately balances state and federal interests in Supremacy Clause immunity cases while preserving a federal judge's neutral role.

Horiuchi provides a concrete example of the danger that might occur when federal judges resolve disputed issues of fact. At the tail end of his majority opinion, Judge Kozinski tellingly wrote the following:

> Assuming the facts alleged by the state, this is not a case where a law enforcement agent fired his weapon under a mistaken belief that his fellow agents or members of the public were in immediate danger. Rather, a group of FBI agents formulated rules of engagement that permitted their colleagues to *hide in the bushes and gun down men who posed no immediate threat.* 253 F.3d at 377 (emphasis added).

The Ninth Circuit made this strong admonition before a trial ever happened. It could have stopped after the first sentence had it simply viewed disputed issues of fact in the light most favorable to the nonmovant. After resolving the case's key disputes, however, the majority could not help but tip its hand toward which side should win.

Ironically, *Horiuchi* held in the state's favor when it decided disputed issues of fact. But New Tejas is troubled by *Horiuchi's* standard, not its case-specific result in a state's favor. Judicial neutrality takes priority given Supremacy Clause immunity's history of deep-seated state and federal disagreements, and viewing disputed issues of fact in the light most favorable to the nonmovant respects this impartiality by staying true to Rule 12(b). *Horiuchi's* standard invites the very inconsistency that the rule aims to prevent.

Here, Judge McGill hedged his findings when he stipulated, "I will resolve any disputed issues of fact that may be material to immunity, including the credibility of witnesses. If I am mistaken, I am confident that my colleagues on the appellate bench will correct me." R. at 37a. Supremacy Clause immunity cases cannot rest upon a district court judge deciding material issues at a preliminary level and leaving it up

to appellate judges to say he was right or wrong. Even Judge McGill's "findings of fact" were inconsistent; he determined that Mr. Schrader "did not intend to injure Mr. White or to commit a crime" but also that the "flying tackle of Mr. White onto concrete posed obvious and foreseeable risks." *Id.* at 38a.

At this preliminary stage, Judge McGill was not in a position to decide why Mr. Schrader acted as he did. Rather than rely on the appellate court to correct him (which it did), he should have followed both the letter of Rule 12(b) and history of Supremacy Clause immunity by resolving disputed issues of fact in the light most favorable to the nonmovant. Again, Congress could have required bench trials within this context if it wanted to. Simply removing to federal court should not allow a defendant or a state to avoid proving its disputed case before a jury.

E. Supremacy Clause Immunity's History Supports Viewing Disputed Issues of Fact in the Light Most Favorable to the Nonmovant.

District courts must view disputed issues of fact in the light most favorable to New Tejas because when courts have decided to don a federal official with immunity's protective cloak, the state had not affirmatively called into question that official's motives or the necessity of his conduct. Examining Supremacy Clause immunity's past emphasizes why the present case is one of contrast and why district court judges exceed their authority when they decide disputed issues of fact at their leisure.

i. Properly Immunized Cases Did Not Involve Disputed Issues of Fact.

In 1879, this Court planted Supremacy Clause immunity's seeds when it affirmed Congress' power to "provide for removal to federal court, before trial, of a

state criminal action prosecuted against a defendant who claimed federal authority to act as he did." *Long*, 837 F.2d at 742 (6th Cir. 1988) (citing *Tennessee v. Davis*, 100 U.S. 257 (1879)). *Davis* involved a federal revenue collector indicted by Tennessee for murder after an attempt to seize illicit distilleries ended in a shootout. *Long*, 837 F.2d at 742, n.6. The revenue collector said that he fired in self-defense after armed men inside the distillery shot at him. *Davis*, 100 U.S. at 260.

A decade later, this Court addressed the doctrine head on and held that when a federal official does no more than "necessary and proper" in performing an action authorized by the law of the United States, "he cannot be guilty of a crime under [state] law." *Neagle*, 135 U.S. at 75. *Neagle* involved an assassination attempt against roving United States Supreme Court Justice Stephen Field, who served on a panel of judges responsible for deciding the legitimacy of a marriage between former California Supreme Court Chief Justice, David Terry, and Sarah Hill.[18]

After the couple assaulted members of the judicial panel and made repeated threats against Justice Field's life, the attorney general assigned deputy marshal Neagle as the justice's bodyguard. *Id.* at 47. Then, either by happenstance or design, Ms. Hill,[19] Mr. Terry, Mr. Neagle, and Justice Field shared a San Francisco-bound train from Los Angeles. While Ms. Hill returned to her room to retrieve a firearm, Mr. Terry snuck up behind Justice Field and struck him twice on the head. When the

[18] Chief Justice Terry was also Justice Field's former colleague on the California bench, making the potential assassination all the more sensational. *Horiuchi*, 253 F.3d at 382.
[19] "Ms. Hill" was not "Mrs. Terry" because Justice Field's panel declared their union illegitimate. *Id.*

assailant appeared to reach for a knife in his coat, Marshal Neagle shot and killed him following a warning.[20] *Id.* at 52–53.

California charged the deputy marshal with murder, but this Court "forcefully rejected the state's attempt to prosecute Neagle and clearly established the immunity of federal officers under the Supremacy Clause from state prosecution." *Horiuchi*, 253 F.3d at 382 (Hawkins, J., dissenting) (citing *Neagle*, 135 U.S. at 75).

Another decade went by before this Court revisited Supremacy Clause immunity in a slightly less Hollywood context than the assassination of a sitting Supreme Court justice. In *Ohio v. Thomas*, 173 U.S. 276 (1899), the Court rejected Ohio's attempt to prosecute a federal soldiers' home director for violating a state statute regulating the use of oleomargarine. When federal officials "[discharged their] duties under federal authority pursuant to…*valid* federal laws, [they] are not subject to arrest or other liability under the laws of the state in which their duties are performed." *Id.* at 283 (emphasis added).

Thomas adds an important wrinkle to Supremacy Clause immunity because all the defendant director had to do to comply with Ohio law was advertise his use of oleomargarine. *See Long*, 837 F.2d at 742–43. This Court dismissed this ease of compliance argument and unequivocally explained that if a federal official acts by virtue of a valid federal order, no state interference—even as facially minimal as having to put up a sign—is allowed. *Thomas*, 173 U.S. at 283.

[20] Although California's former Chief Justice was ultimately found unarmed, Marshal Neagle's instincts were grounded in past experience. After the panel's adverse decision against the couple, Mr. Terry brandished a bowie knife in court before Marshal Neagle and other officers subdued him. *Neagle*, 135 U.S. at 45.

The oleomargarine regulation in *Thomas* impeded a federal official's actual course of conduct while he advanced a federal directive. This Court's sound opinion recognized the threat posed by a state like Ohio disguising obstacles as regulations, impeding the federal government's sphere of operation, and chipping away at federal power. *Thomas* did not involve a state asserting its interests after an official acted without impediment to fulfil his claimed federal function. *Accord Long*, 837 F.2d at 743 (noting "distinction between general local rules of conduct, and local laws specifically affecting the manner in which one's federal duties are carried out") (citing *Johnson v. Maryland*, 254 U.S. 51 (1920)).

The very next year, the Circuit Court for the District of Nebraska granted habeas relief on Supremacy Clause immunity grounds in *In re Fair*, 100 F. 149 (C.C.D.Neb.1900). *Fair* involved soldiers who shot and killed a deserter. *Horiuchi*, 253 F.3d at 386. The federal court dismissed Nebraska's criminal indictment after finding that "[t]he evidence revealed no malice, and, accordingly, if the soldiers 'acted without any criminal intent, but in an honest belief that they were only discharging the duties of a soldier,' they could not be guilty of a crime against the state." *Id.* at 382 (quoting *Fair*, 100 F. at 155).

Fair outlined the appropriate scope of Supremacy Clause immunity. The state has less of an interest in policing federal officials within its borders when it lacks evidence that the official acted for malicious reasons unrelated to his federal duty. And the district court judge protects the federal official's interest in avoiding trial

when she dismisses prosecutions that present no disputed issues of fact about the official's intent or about the necessity if his actions.

Just four years later, the Fourth Circuit used *Fair's* rational when it grappled with Supremacy Clause immunity in *West Virginia v. Laing*, 133 F. 887 (4th Cir.1904). There, "federal marshals enlisted local citizens as a posse comitatus to help serve a federal arrest warrant." *Horiuchi*, 253 F.3d at 385–86 (outlining facts). The subject of the warrant ran toward the officers with his pistol before retreating to a large tree. *Id.* Two deputized citizens shot and killed him, but the Fourth Circuit accepted Supremacy Clause immunity because "there was no feeling of animosity on [the citizens'] part towards [the outlaw], and no motive existed because of which either of them would have been induced to do him harm." *Fair*, 133 F. at 890.

Like *Fair*, *Laing's* analysis applied to undisputed facts. As the court explained, "[the citizens] knew [the outlaw] was 'a dangerous and desperate character,' and they reasonably believed that, when he turned to the shelter of the tree, he was intending to open fire on them." *Id.* at 890–91. The Fourth Circuit correctly rejected the state's claim that the case ought to go to a jury because "Congress certainly intended, in cases of this character,[21] that the judges of the United States should hear the evidence, and without a jury proceed in a summary way to pass upon the federal question involved." *Id.* at 891.

More recently, the Northern District of Mississippi examined Supremacy Clause immunity after the state prosecuted James McShane for breach of peace and

[21] New Tejas interprets "cases of this character" to mean Supremacy Clause immunity claims that do not present disputed issues of fact about a federal official's possible malice.

unlawful and felonious use of force. *In re McShane*, 235 F.Supp. 262 (N.D.Miss.1964). McShane's responsibilities as chief of the United States marshals involved enforcing a black student, James Meredith's, right to integrated education. *Id.* at 269. He ordered his marshals to deploy tear gas against a crowd protesting Mr. Meredith's admission, after which a riot broke out. *Id.*

While the parties disagreed about whether Marshal McShane's conduct was reasonable, the defendant showed "*without dispute* that he had no motive other than to discharge his duty under the circumstances as they appeared to him and that he had an honest and reasonable belief that what he did was necessary in the performance of his duty." *Id.* at 274 (emphasis added). Like *Fair* and *Laing*, then, Marshal McShane was entitled to immunity "even though his belief was mistaken or his judgment poor." *Id.* Mississippi offered no evidence that the marshal was motivated by reasons other than following his order to safely escort Mr. Meredith into school, so Supremacy Clause immunity prevailed.[22]

Davis (murder at a distillery), *Neagle* (murder to prevent an assassination), *Thomas* (disobeying an oleomargarine regulation), *Fair* (murder of a deserter), *Laing* (murder at the hands of a posse comitatus), and *McShane* (riot cause after deploying tear gas), all involved federal officials who, while perhaps not models of prudence, all

[22] In *Ex parte Jenkins*, 2 Wall.Jr. 521 (E.D.Pa.1853), the district court granted habeas relief to a United States Marshal arrested for carrying out the fugitive slave law. *Jenkins* not only highlights Supremacy Clause immunity's penchant for attracting highly charged state prosecutions; it also stands in sobering contrast to *McShane*—a civil rights case—and explains how federal officials are protected when they honestly pursue their federal duties. They cannot be punished for what a particular duty entails. *See also Osborn v. Bank of U.S.*, 22 U.S. 738, 865 (1824) (Marshall, C.J.) ([The official's] security is implied in the order itself."

acted with nothing but their federal obligation in mind. *See also Long*, 837 F.2d at 745 (distinguishing "error of judgment from an act done wantonly and with criminal intent") (citing *Clifton v. Cox*, 549 F.2d 722 (9th Cir.1977)). None of these cases suggested animus toward a particular individual or state or an official acting contrary to his federal directive. And each instance allowed district court judges to resolve issues at face value without having to credit one version of events over another.

This district court's gatekeeping role in factually undisputed cases protects both the federal official and his employer from vindictive state interference. Of course, these six cases are just some examples of how Supremacy Clause immunity operates when a state ups the ante and takes its disagreement with the federal government into the criminal forum. The bottom line is clear: cases properly foreclosed from prosecution on immunity grounds do not involve disputed issues of fact. But district court judges must give the state more leverage when a federal official attempts to avoid prosecution despite legitimate concerns about the intent underlying his exercise of federal authority. This leverage is not insurmountable; it just requires viewing disputed issues of fact in the light most favorable to the nonmovant.

ii. Properly Denied Immunity Cases Did Involve Disputes Issues of Fact.

The handful of exceptions to this doctrine of admittedly sweeping scope support viewing disputed issues of fact in the light most favorable to New Tejas. In 1906, this Court affirmed habeas denial to army officials facing homicide charges in Pennsylvania. *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906). The officials claimed that while trying to prevent thefts on their military base, they fired at one of

three or four suspects to prevent his escape. *Horiuchi*, 253 F.3d at 388 (outlining facts). Witnesses disputed this account and claimed that the suspect surrendered and pleaded with the officials before being executed. *Id.*

The lower court noted a "serious conflict of evidence involving an important issue of fact." *Id.* (quoting lower court). Because the officials may have acted with "deliberate criminal intent," and habeas relief was "an exceedingly delicate jurisdiction," the trial court did not err when it ruled against them. *Id.*

Although this Court did not come right out and say it, *Drury* recognized the problem Supremacy Clause immunity cases pose when disputed issues of fact question an official's motivation for carrying out his federal duty. New Tejas is not suggesting that every case with a questionable motivation should be denied habeas relief or removal, but instead that courts should follow *Drury* and not unilaterally decide what those motivations are. By denying habeas relief, the district court did not resolve the case in either the federal officials or state's favor. Nor did it pass judgment on which side of the disputed story it believed. After their journey up the appellate ladder, the army officials would still enjoy their rights to a jury trial.[23]

The Eighth Circuit also affirmed habeas denial to federal officials who shot and killed a man suspected of illegally transporting whiskey into Indian country. *Castle v. Lewis*, 254 F. 917 (8th Cir.1918). The officials claimed that they shot to immobilize a fleeing car of bootleggers, *id.* at 919, but disputed facts questioned whether one of

[23] Denied habeas relief, the army officials admittedly faced the additional burden of being tried in state court with its increased potential for prejudice. New Tejas does not believe Mr. Schrader should be denied a federal forum for his defense, just that the district court judge should not be the arbiter of disputed facts.

the suspects broke a whiskey bottle over the side of the car; whether officials told the car to stop; and whether the officials gave a command to kill the suspects. *Id.* at 923.

Castle acknowledged these disputes and noted "a substantial conflict as to what was said and done by the officers [] that invokes the consideration of a jury." *Id.* at 926. The officers also knew all but one occupant of the car as "settled residents and citizens of [the local town]." *Id.* This knowledge, combined with the fact that the suspects were returning home, "[rendered] it difficult to conclude that a person of ordinary prudence and intelligence, knowing the facts and circumstances which these officers knew…could have honestly believed [] that he could not have…[arrested] the occupants…in [the local town]."[24] *Id.*

The court also doubted whether "it was necessary, in the exercise of sound discretion, in order to make their arrest, to fire into the automobile and take the dangerous chances of injuring or killing some of its occupants." *Id.* With each Supremacy Clause immunity case, district court judges use their discretion to examine, "in the light of the clearness and certainty with which the material facts are established, whether they are admitted or proved beyond doubt, or are involved in uncertainty and the subject of conflicting testimony *which naturally invokes the verdict of the jury*." *Id.* at 920 (emphasis added).

[24] Like the *Castle* officials, whose familiarity with the suspects informed the Eighth Circuit's analysis of how reasonable their decision to shoot was, 254 F. at 926, Mr. Schrader "knew" Mr. White from their contentious encounter earlier in the day. The district court can use this knowledge (in the light most favorable to New Tejas) to combat Mr. Schrader's claim that he was simply enforcing a federal drug law without concern for who he was enforcing it against.

The Fourth Circuit relied on both *Drury* and *Castle* when it affirmed habeas denial to federal game wardens indicted for killing two hunters. *Birsch v. Tumbleson*, 31 F.2d 811 (4th Cir.1929). The wardens claimed that the hunters initially surrendered before raising their weapons, shooting, and prompting return fire. *Id.* at 812. Like *Drury*, however, witnesses indicated that the wardens shot the surrendering hunters in cold blood. *Id.*

In *Drury*, *Castle*, and *Birsch*, the reviewing courts upheld their respective lower courts' habeas denials. *Morgan v. California*, 743 F.2d 728 (9th Cir.1984), however, reversed a lower court's ruling that two DEA agents were entitled to Supremacy Clause immunity. The agents got into an altercation with someone following a car accident, and both parties disputed whether the federal officials were headed to meet an informant (for business) or their colleagues (for drinks). *Id.* at 729–730.

The Ninth Circuit emphasized "a substantial conflict in the evidence with respect to whether the officers were engaged in official business at the time of the incident." *Id.* at 734. It dismissed their immunity claim because the disputed issues of fact cast doubt on whether the agents were even acting in their federal capacity to begin with (as opposed to whether they had improper motivations for acting in a federal capacity).[25]

[25] Mr. Schrader's official status in New Tejas is even less attenuated than the DEA agents in *Morgan*. There, the Ninth Circuit reversed the agents' grant of immunity in part because they could have been on their way to meet colleagues for drinks. *Morgan*, 743 F.2d at 733. Here, Mr. Schrader was out of state (and uniform) while vacationing with his family. Other than perhaps claiming he is always on duty as an FBI agent, it is hard to argue that Mr. Schrader was acting in his federal capacity while searching for a place to each lunch with his wife and stepchildren. Surely he was not acting in his federal capacity when he nearly came to blows with Mr. White in the middle of the road.

iii. Judges Have Not Decided Disputed Issues of Fact About the Defendant in Supremacy Clause Immunity Cases.

Judge Hawkins summarized *Drury*, *Castle*, *Birsch*, and *Morgan* as follows:

> These four cases are instructive. *Each involved a substantial conflict in the evidence.* In three cases, there was evidence suggesting that the federal officers acted with deliberate malice. In the fourth, there was evidence suggesting that the federal officers were not on official duty at the time of the incident. *Horiuchi*, 253 F.3d at 389 (emphasis added).

While these handful of exceptions to Supremacy Clause immunity touched habeas relief, their reasoning explains why juries rather than district court judges must resolve disputed issues of facts within this "exceedingly delicate jurisdiction." *Id.* at 388. The lower court in *Drury* outlined each disputed issue of fact before concluding:

> [I]n the present case there is a serious conflict of evidence involving an important issue of fact, namely, whether Crowley turned around, and virtually had surrendered. It is very clear that on a habeas corpus hearing such as this it is not competent for the court to determine upon conflicting evidence whether the person under indictment in the state court is guilty or innocent of the offense of which he is accused. *United States ex rel. Drury v. Lewis*, 129 F. 823, 827 (C.C.W.D.Pa.1904) (internal citations omitted).

If a district court judge resolves disputed issues of fact, she determines whether the person under indictment is guilty or innocent. If she views disputed issues of fact in the light most favorable to the nonmovant, however, she maintains a procedural neutrality that still might compel dismissal on Supremacy Clause immunity grounds.

Morgan's warning that courts should grant habeas writs when "it is apparent to the district judge that the state criminal prosecution was so intended [to frustrate enforcement of federal law]…even if the judge has to resolve factual disputes to arrive at that conclusion," 743 F.2d at 733, does not address situations where both the

prosecution and defense impugn each other's motives. It also relates to factual disputes about the prosecutor's motivation for indicting, not about the official's motivation for allegedly doing his job.[26]

New Tejas is not asking this Court to decide whether Mr. Schrader assaulted Mr. White. It is not asking this Court to determine Mr. Schrader's state of mind, or Ms. Wexler's reason for prosecuting him. This Court does not have to deviate from precedent or turn Supremacy Clause immunity on its head to hold that these questions are within the province of the jury.[27] A party must overcome its opponent's best possible evidence if it wants to bypass a criminal jury, and if it cannot, it proceeds to trial cloaked with the presumption of innocence and standard of proof beyond a reasonable doubt.[28]

II. THE TEST GOVERNING SUPREMACY CLAUSE IMMUNITY SHOULD ASK WHETHER THE FEDERAL OFFICER ACTED IN A "NECESSARY AND PROPER" MANNER.

Once established, a Supremacy Clause immunity defense provides absolute defense to a federal actor who would otherwise be subject to state criminal sanctions.

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[26] The long-feared risk of a state using its police power to frustrate federal law enforcement seems slight in light of the just *four* cases where Supremacy Clause immunity failed to shield a federal official from his potential jury. More often than not, the doctrine will come to a federal official's rescue when he is asked to answer for his conduct. But it is not a talisman of innocence when legitimate questions exist about that official's mens rea.

[27] Nor is this case about the wisdom of federal marijuana law or about the constitutionality of marijuana legalization in New Tejas and other likeminded states. New Tejas concedes that had Mr. Schrader travelled to its state in his official capacity, followed specific orders to enforce 21 U.S.C. § 844, encountered Mr. White for the first time outside Pinkman's Emporium, and effectuated an arrest, it would likely have no basis to charge him with a crime. *See, e.g.*, *Livingston*, 443 F.3d at 1227–28 ("The question is not whether federal law expressly authorizes violation of state law, but whether the federal official's conduct was reasonably necessary for the performance of his duties").

[28] A federal jury very well might find Mr. Schrader not guilty of second-degree assault. If the evidence—viewed in the light most favorable to New Tejas—prevents Supremacy Clause immunity, Mr. Schrader can still claim a "justification" defense under the same rationale as his immunity claim.

Neagle, 135 U.S. at 75. Supremacy Clause immunity recognizes that because the federal government is supreme in operation, and its agents may not be continuously be held accountable to state charges. *Tennessee v. Davis*, 100 U.S. (10 Otto) 257, 263. See also *Maryland v. Soper*, 270 U.S. 9, 33 (1926) (holding that a federal officer seeking to remove a state prosecution to federal court "must by direct averment exclude the possibility that [the criminal charge] was based on acts or conduct of his not justified by his federal duty").

At the same time, this defense must be *proven* rather than merely asserted because there is no blanket protection to federal employees who willfully violate state or federal criminal statutes. *See Mesa v. California*, 489 U.S. 121 (1989) (denying removal under the federal officer removal statute when a postal worker alleged no colorable federal defense to the state charges of reckless driving).

Supremacy Clause immunity's power does not equate to carte blanche freedom from consequences. *Johnson v. Maryland*, 254 U.S. 51, 56 (1920) ("Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment."); *See also New York v. Tanella*, 374 F.3d 141, 146 (2d Cir. 2004) (explaining Supremacy Clause immunity cases requires "walk[ing] the fine line created between the goal of protecting federal officials acting in the scope of their duties and the obligation to avoid granting a license to federal officials to flout state laws with impunity") (internal citations omitted).

The procedural test that governs Supremacy Clause Immunity should reflect American federalism's designed conflict between the Supremacy Clause and the

Tenth Amendment. The Federalist No. 28 at 181 (Clinton Rossiter ed., 1961) ("[T]he general government will at all times stand ready to check the usurpations of the state governments, and [the states] will have the same disposition towards the general government…If rights are invaded by either, they can make use of the other as an instrument of redress.").

A. In Criminal Prosecutions, A Federal Agent May Assert A Supremacy Clause Immunity Defense If His Actions Were "Necessary and Proper" to Fulfill a Federal Duty.

To determine whether the Supremacy Clause Immunity attaches to an officer, this Court held:

> [If a federal officer] is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as [officer] of the United States, and if in doing that act he did no more than what was *necessary and proper* for him to do, he cannot be guilty of a crime under the law of the State. *Neagle*, 135 U.S. at 75.

As one court notes, "[t]he *Neagle* test, however, is not always easily applied." *Whitehead v. Senkowski*, 943 F.2d 230, 234 (2nd Cir. 1991). This Court's use of the phrase "necessary and proper" in *Neagle* was not completely defined but instead illustrated through application to the case's facts. Hence, the "necessary and proper" analysis lends itself to several interpretations. *See, e.g.*, Seth P. Waxman & Trevor W. Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause, 112 Yale L.J. 2195 (2003).

A Circuit Court split has developed concerning *Neagle's* "necessary and proper" treatment. *See Long*, 837 F.2d 727 (holding "necessary and proper" contains both a subjective and an objective element); *New York v. Tanella*, 374 F.3d 141, 147 ("[t]wo

conditions must be satisfied: (holding a federal agent's actions must be objectively reasonable and he subjectively believe that his action is justified). *But see Horiuchi*, 253 F.3d at 359 n.11 (expressing concern in light of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), but left "the issue for consideration where it matters") (vacated as moot, 266 F.3d 979 (9th Cir. 2001); *Livingston*, 443 F.3d 1211 ("We are also concerned with the incorporation of a subjective element into the reasonableness of a federal officer's actions.").

New Tejas agrees with the Thirteenth and majority of circuits that incorporate a three-part analysis from *Neagle*. For Supremacy Clause Immunity, a federal agent must show whether: (1) the act of an officer was "necessary" to accomplish a federal duty; (2) that federal duty was "proper"; and (3) that same federal duty was also subjectively "proper."

Courts interpret these first and second prongs as "objective" standards and the third prong as a "subjective" standard. *See Long*, 837 F.2d at 745 (explaining how on the subjective side, the agent must have an honest belief that his action was justified, and on the objective side, his belief must be reasonable). The first two prongs are "objective" because they do not take into account the federal agent's subjective intent. and are instead concerned whether the federal agent was acting pursuant to a federal law or policy establishing the duty. *Livingston*, 443 F.3d at 1226 (looking to whether the agent was acting under regulations promulgated under the Endangered Species Act). This prong looks to whether the officer acted reasonably in fulfilling the federal

duty. *Id.* at 1229 (finding an objectively reasonable and well-founded basis that the agents' actions were necessary to carry out their duties.).

When this Court applies *Neagle's* test, it should ask whether a federal agent did "no more than what was necessary and proper" in fulfilling a federal duty. The "necessary and proper" language considers three independent grounds: (1) whether the federal official acted pursuant to a "necessary" federal duty; (2) whether he performed that federal duty in a reasonable manner; and (3) whether his motivations to perform his federal duty were free from malice or malevolent intent.

i. Mr. Schrader's Actions Were Not Necessary to Accomplish a Federal Duty.

In the Supremacy Clause immunity context, the question rests on whether, considering the laws, regulations, and policies supplying the officer with his authority, the federal agent has authority to commit his act. *Neagle* invoked a federal statute for prisoners held 'in custody for an act done or omitted in pursuance of a law of the United States.'" *Neagle*, 135 U.S. at 40-41 (quoting REV. STAT. § 753). Although the court acknowledged that "there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case," it held there was still "a law" creating duty for the purposes of the statute. *Id.* The Court held:

> In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of [the invoked statute]. *Id.*

Neagle stands for the proposition that it is not whether a federal statute authorizes the federal official to act, but whether his use of force under the circumstances was reasonably understood to be within "the general scope" of the his duties. *Id.*

New Tejas does not dispute that immunity may protect a federal officer who acts at the direct orders of a superior. This principle is consistent with *Neagle's* reasoning because the federal agent there was "acting under the orders of Marshal Franks, and in pursuance of instructions from the Attorney General of the United States." *Neagle*, 135 U.S. at 4 (1890).

This case presents the opposite scenario at issue in *Neagle*. Agent Schrader was acting under no orders and in fact *against* instruction from the Attorney General of the United States, so penalizing his criminal conduct would not offend a federal interest. Agent Schrader's conduct crossed Supremacy Clause immunity's protective line and intruded into a traditional area of state sovereignty. See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (recognizing "criminal law enforcement' as an area "where States historically have been sovereign.").

a. Department of Justice Policy Prohibits FBI Agents from Enforcing Federal Marijuana Laws in States Like New Tejas.

Neagle was premised on the view that no legislation or policy expressly governed the conduct at issue. *Neagle*, 135 U.S. at 63, 68 (1890). With no guidance in that case, the Court evaluated how much discretionary leeway should be afforded in order to discharge a federal duty effectively. *Id.* This analysis mirrors a similar

analysis to qualified immunity in *Bivens* actions. The question in that context is whether the officer had sufficient notice his conduct was outside the scope of his federal authority, and the analysis looks to whether his authority was "clearly established at the time an action occurred." *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Here, Agent Schrader decided not to follow explicit federal guidance applying "to all federal enforcement activity." In 2013, the United States Department of Justice, through then-Deputy Attorney General James Cole, issued a guiding memorandum regarding federal enforcement of the Controlled Substances Act in marijuana cases.

This explicit guidance, known as the "Cole Memorandum," was promulgated by the Attorney General speaking directly to the issue of marijuana enforcement. *Cole Memorandum*, Appendix A. It declared that "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity." *Id.* That arrangement is meant to enable federal prosecutors to focus on "enforcement priorities that are particularly important to the federal government[,]" including prevention of violence, organized crime, interstate distribution, distribution to minors and use on federal property. *Id.*

In particular, the Cole Memorandum's instruction indicated that prosecutors and *law enforcement* should focus only on specific criterion for enforcement in state-legal cannabis operations. As part of the memorandum's detailed criteria, small

possession did not fall within any of the enforcement and were instead left to state authorities. The memorandum stated:

> [T]he federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the [limited criteria].

Unlike *Neagle*, federal agents today receive handbooks outlining their legal authority. Legal Handbook for FBI Special Agents, Federal Berea of Investigation, at 2, 5 (2003). The Federal Bureau of Investigation Agent Policy instructs that enforcement actions "should be authorized by the USA." *Id.* When instruction from the Attorney General is not "in any manner contrary to FBI rules or regulations," it is valid under the FBI and should be understood as within an agent's duty to obey.

While this Court has previously held opinion letters are not binding law and offer no affirmative defense to the accused in criminal proceedings, this does not change the letter's purpose in establishing a duty upon federal agents. *See Christensen v. Harris County*, 529 U.S. 576 (2000) (demonstrating a bright line between formal agency documents (such as legislative rules on the record) and less formal ones (such as opinion letters)); *See also United States v. Keller*, No. 12-cr-200883, 2014 U.S. Dist. LEXIS 151423 (KHV/JPO) (D. Kan.) [Doc. No. 1233 at 7] (concluding the Cole Memo does not exempt any individuals from marijuana prosecution.). With explicit guidance from a superior officer, the enforcement of the

Controlled Substances Act within New Tejas had nothing to do with Mr. Schrader's related responsibilities. If anything, Mr. Schrader acted *contrary* to the Attorney General's guidance.

B. Mr. Schrader's Conduct Was Not Objectively Proper.

This Court should look to whether the duty was performed in a reasonable manner and not base its analysis solely on whether an officer violated "clearly established law." After all, an agent might employ means that could be considered unreasonable even in light of clearly established duties. See, e.g., *Mesa* 489 U.S. 121 (finding a United States Postal worker unable to escape liability for his reckless driving while fulfilling the duty of delivering mail).

New Tejas agrees with the Thirteenth Circuit that federal officers should be protected from state prosecution when they employ objectively reasonable means in accomplishing their federal duties. *See also Clifton*, 549 F.2d at 728 (asking "whether the official employs means which he cannot honestly consider reasonable in discharging his duties.").

Courts analyze objective reasonableness from the point of view of a reasonable federal officer on the scene. *In re McShane*, 235 F. Supp. at 273 (holding that in Supremacy Clause cases, the standard for officer's actions "must take into account the circumstances existing at the time... as they appeared to him"). In cases involving force, this Court's reasonableness analyses take into account that officers may be forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. *See, e.g.*, *Graham v. Connor*, 490 U.S. 396–97 (1989).

The marshal in *Neagle* killed Mr. Terry when he reasonably thought the assailant was reaching for a knife, but later learned that the assailant was in fact unarmed. 135 U.S. at 45–47. The marshal was nonetheless discharged from state custody because the Court believed his act to be objectively reasonable considering his duty to protect a member of the Supreme Court. *Id.* 76. The marshal's mistake did not prevent the Supreme Court from concluding that his conduct was necessary and proper to performance his duty as federal officer. *Id.* Thus, analyzing a federal officer's assertion of Supremacy Clause immunity requires a review of the objective reasonableness of his conduct.

It was not objectively reasonable for Mr. Schrader to use a flying tackle that crashed Mr. White into the concrete. He used excessive force when he employed his takedown, and his actions inflicted severe injuries to Mr. White. This act of excessive force was not "necessary and proper" to execute his federal duties.

An officer may reasonably use excessive force where he "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). In doing so, Courts balance the nature and quality of the intrusion against the countervailing governmental interests and ask whether, under the circumstances, "including the severity of the crime at issue, the suspect poses an immediate threat to the safety of the officers or others." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

This inquiry is objective and does not consider the officer's possible good or bad motivations. Id. The objective reasonableness is "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id.

Here, the force used to enforce federal marijuana law was objectively unreasonable and not necessary and proper. Mr. Schrader used a flying tackle that the District Court found posed obvious and foreseeable risks. He tackled Mr. White from behind, landed heavily atop him, and sent him crashing onto the concrete sidewalk—all of which made the "suspect" crying out in pain.

With the Attorney General's guidance stressing the lack of importance in enforcing the Controlled Substances Act, Mr. Schrader's excessive force is disproportionate to the crime he claims to be preventing. On the use of force alone, Mr. Schrader acted outside the proper means of his federal authority.

It was also not objectively reasonable for Mr. Schrader to arrest Mr. White while off-duty and on vacation. This Court has not addressed the availability of Supremacy Clause immunity to off-duty federal agents acting in a civilian capacity. Nonetheless, this Court has looked "both to history and purposes that underlie government immunity in order to find the answer." *Richardson v. McKnight*, 521 U.S. 399, 404 (1997) (citing Wyatt v. Cole, 504 U.S. 158, 164 (1992)).

First, this Court asks whether history reveals a "firmly rooted" tradition of Supremacy immunity for off-duty agents. *Id.* at 404. Next, it look to common law as it existed when Supremacy Clause Immunity was first established. *See*, *e.g.*, *Filarsky v. Delia*, 566 U.S. 377, 384 (2012). The analysis considers whether granting immunity

would serve the purposes underlying the immunity. *Richardson*, 521 U.S. at 407–08 (explaining purposes underlying immunity such as the government's ability to perform its traditional function, preserving the ability to serve public good, and protecting the public from unwarranted timidity on the part of public officials).

Applying the framework set forth in *Richardson*, Supremacy Clause immunity should not be available to Mr. Schrader. First, there is not a firmly rooted tradition for an off-duty federal agent to make an arrest in civilian clothes, on vacation, with no notice to their federal agent status. This action simply does not take place under the color of law. *See, e.g.*, *Hunte v. Darby Borough*, 897 F.Supp. 839 (E.D.Pa.1995) (off-duty, out-of-uniform, officer responding to "disturbance" not acting under color of law even though he had previously identified himself as police officer to victim and told victim that he should be contacted if neighborhood problems arose); *See also Hudson v. Maxey*, 856 F.Supp. 1223 (E.D.Mich.1994) (off-duty officer responding to criminal activity (a break-in and assault) not acting under color of law when shooting assailant).

Mr. Schrader did not disclose his FBI status or authority to arrest until the local authorities arrived at the scene. His conduct should not be viewed as objectively reasonable behavior on behalf of a federal agent.

C. This Court Must Also Look to Mr. Schrader's Subjective Intent.

This Court should apply the Thirteenth Circuit's analysis and looking to Mr. Schrader's subjective intent. Many circuit courts agree that subjective intent should be considered in a Supremacy Clause Immunity defense. *See, e.g.*, *Clifton*, 549 F.2d at 728 ("In determining where a State's police function leaves off and the effectuation

of federal law begins, the subjective intent of the individual officer may provide the determining factor. The mere privilege of federal employment should not confer a blanket immunity especially if the agent "act[ed] out of malice or with some criminal intent.")

The decision to include subjective intent in a Supremacy Clause immunity analysis finds its roots in *Neagle*, 135 U.S. at 48–51 (using correspondence between the Attorney General of the United States, the District Attorney, and the marshal of the Northern District of California to look to the mental state of the marshal). There, the agent's subjective belief was that due to Mr. Terry's repeated threats against Justice Field, the justice would be in great danger required protection. *Id.* The subjective intent of the marshal in defending Justice Field from an attacker was not just considered—it was a main basis to consider when analyzing immunity.

This Court has addressed the difficulties imposed by adding a subjective element to officers in the course of their duties. *See, e.g.*, *Whren v. United States*, 517 U.S. 806, 814 (1996) (holding that a defendant could not use an arresting officer's possible malicious intent as a defense so long as reasonable grounds existed for the arrest). In *Whren*, the Court held an officer's subjective intent was irrelevant to whether an arrest was lawful since a reasonable officer could have stopped the defendant's car from a desire to enforce traffic laws. *Id.* at 808. Unlike *Whren*, however (which involved pretextual searches), this case involved an arresting officer is also the prosecuted defendant. New Tejas does not wish to conflate probable-cause Fourth Amendment analyses with the current case. An officer's malicious intent

should be considered when the officer is a defendant to a proceeding, no different than most criminal law cases.

i. Supremacy Clause Immunity is Similar to Qualified Immunity.

Further support to include subjective intent in the analysis exists in qualified immunity cases. Qualified immunity, like immunity under the Supremacy Clause, follows a subjective standard of analysis in criminal cases as this Court has previously stated:

> [T]he immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating ... constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with [protecting] daily lives than by the presence of actual malice. *Wood v. Strickland*, 420 U.S. 308, at 321 (1975).

Several years later, the Court redefined the view of federal immunity in *civil* actions, not *criminal* actions:

> The previously recognized "subjective" aspect of qualified or "good faith" has proved incompatible with the principle that insubstantial claims should not proceed to trial. Henceforth, government officials performing discretionary functions generally are shielded from liability for *civil damages* insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 801 (1982).

One concern is that no Supremacy Clause case considers the impact of *Harlow*, which rejected the subjective prong for the qualified immunity defense. Such reasoning might apply equally to Supremacy Clause immunity. *See Horiuchi*, 253 F.3d 359 n.11. However, *Harlow* involved immunity in civil cases, not criminal. *See Harlow*, 457 U.S. at 816 (explaining insubstantial civil claims should not proceed to

trial) (citing Rule 56 of the Federal Rules of Civil Procedure). *Strickland* was abrogated to not include civil cases, not overruled, making the pre-*Harlow* immunity defense still applicable in criminal actions for qualified immunity.

In determining where a State's police function leaves off and the unimpeded enforcement of federal law begins, the subjective intent of the individual officer may be the determining factor. This line of reasoning is consistent with *Neagle's* considerations and finds supported within various Circuits, as well as the qualified immunity context. The mere privilege of federal employment does not confer a blanket immunity especially if the agent "act[ed] out of malice or with some criminal intent." *Clifton*, 549 F.2d at 728. Such cases should look to the subjective intent of an officer may use his federal status as a vendetta against an unsuspecting citizen.

In the alternative, the appropriate test for Supremacy Clause immunity under this prong could require balancing the federal need against the gravity of the state offense. *Livingston*, 445 F.3d at 1222 n.5 ("We also leave for another day whether federal officers are entitled to Supremacy Clause immunity where their state law violation was disproportionate to the federal policy they were carrying out—where, for example, they commit a grievous state offense for the purpose of enforcing a trivial federal policy").

There is a difference between cases in which state law will actually impede a federal institution and cases in which a federal officer faces state prosecution for conduct understood to be beyond his authority. In *McCulloch*, for example, it was clear that the state tax would interfere with the functioning of the federal Bank. But

in a case where a federal officer exceeds his authority and then successfully invokes immunity from state prosecution on the ground that his error was reasonable, state law should come into power.

This test runs parallel to instances involving conflict preemption. Under conflict preemption, state law is displaced to the extent it "stands as an obstacle to the accomplishment and execution of full purposes and objectives of Congress'" *Geier v. Am. Honda Motor Co.*, 529 U.S. 861,873. (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). This case involved a minor regulatory drug offense. The Department of Justice underscored the minute importance of enforcing federal marijuana laws when it left "such lower-level or localized activity to state and local authorities." *Cole Memorandum*.

This Court may affirm the Thirteenth Circuit for any reason supported by the record, and New Tejas also asks this court to consider a plain language interpretation of the United States Constitution, which does not even support the concept of "Supremacy Clause immunity." *See, e.g.*, *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (affirming the decision not based on the petition for writ of certiorari which limited to specific questions).

Nowhere in Article VI is there any support for, much less a hint, the idea that federal agents who are charged with state crimes may become entitled to a "Supremacy Clause Immunity" defense to state charges. *Neagle* cites no support from the Constitution, legal authority, or public policy. We ask this court to consider how

this claimed immunity can coexist with a State's power to police within its own borders.

CONCLUSION

The federal agent in this case crossed the border into New Tejas and crossed the line of his federal duties. The assertion of Supremacy Clause immunity as blanket claim with no light in favor of the state would allow United States to be king and Agent Schrader a member of its royal guard. The assertion of Immunity must therefore be balanced; such balanced is achieved by recognizing disputed issues are viewed in the light most favorable to the State, ensure district court judge's appropriate role, and the test for Supremacy Clause Immunity requiring a multi-pronged analysis.

Appendix A – Cole Memorandum

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General
D.C. 20530

Washington,

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;

- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.[29]

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that

[29] These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

provide for regulation of marijuana activity must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for

assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases - and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

CC: Mythili Raman
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CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33.1, the undersigned hereby certifies that the Brief of Respondent contains 13,605 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Service, Certificate of Compliance, and the attached Appendix.

/s/ Team #63
Team #63
Counsel for Respondents
November 18, 2019