No. 18-5188

IN THE

The Supreme Court of the United States

OCTOBER TERM 2019

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

TEAM NUMBER 27
COUNSEL FOR RESPONDENTS

NOVEMBER 18, 2019

QUESTIONS PRESENTED

I. When deciding immunity under the Supremacy Clause for a federal agent facing state prosecution, can disputed issues of material fact be decided on a motion to dismiss or must they be viewed in the light most favorable to the State?

II. Are a federal officer's subjective intent and the reasonableness of their actions pursuant to federal authority relevant to determining whether the Supremacy Clause provides the officer with immunity from a state criminal prosecution?

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PARTIES TO THE PROCEEDING

Petitioner Hank Schrader is an agent of the Federal Bureau of Investigation, presently stationed in Wisconsin.

Respondent is the State of New Tejas.

DECISIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is not reported but is available at No. 18-5719 and reprinted at R. 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. 27.

STATEMENT OF JURISDICTION

The Thirteenth Circuit's judgment was entered on October 2, 2019. The petition was timely filed and granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondents bring this criminal action under New Tejas criminal statutes, which can be found at R. 45–46 and are reprinted in the Appendix. The relevant federal laws pursuant to which Petitioner Hank Schrader made the arrest in question can be found at R. 44–45 and are reprinted in the Appendix. Petitioner claims immunity under Article VI of the United State Constitution.

Article VI provides, in relevant part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

INTRODUCTION

Any standard this court articulates to decide when a federal officer deserves Supremacy Clause immunity must strike a delicate balance. On one hand, our dual sovereign system mandates that states "have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress." *McCulloch v. Maryland*, 17 U.S. 316, 322 (1819). On the other, courts must "exercise caution in invoking the Supremacy Clause" to rescue federal agents from state prosecution. *Whitehead v. Senkowski*, 943 F.2d 230, 234 (2d Cir. 1991). As this Court has explained, federal courts should only extend Supremacy Clause immunity to a federal officer when "the reasons for the interference of the Federal court . . . [are] extraordinary." *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 7 (1906). Petitioner here abused his federal authority to pursue his personal ends; finding that he is entitled to immunity will leave the State of New Tejas powerless to protect its citizens against violent, vindictive assaults so long as the perpetrators are officers who claim to be enforcing federal law.

This court should affirm the decision of the Thirteenth Circuit by recognizing that when deciding Supremacy Clause immunity cases, it must view disputed facts in the light most favorable to the State and must refuse to protect federal agents who act without authority, with malicious intent, or in an objectively unreasonable manner.

STATEMENT OF THE CASE

A. New Tejas legalizes marijuana.

The citizens of the state of New Tejas voted to legalize the possession and consumption of marijuana in 2016. R. at 30. While federal law continues to classify marijuana as a Schedule I drug, New Tejas permits small, appropriately-licensed stores to grow marijuana and sell it directly to the public. R. at 30.

B. A near collision in the car makes petitioner "furious."

Agent Hank Schrader is a 20-year veteran of the Federal Bureau of Investigation (the "FBI"). R. at 27. In November of 2016, Agent Schrader took his family on vacation to Madrigal, New Tejas. R. at 28. This trip was unrelated to any of his official duties. R. at 28. While driving his family to a museum in a rental car one morning, Agent Schrader was forced to stop suddenly when another driver, Mr. White, quickly braked to a halt in front of Agent Schrader's car. R. at 28–29. Some dispute exists over which driver was responsible for the near collision. R. at 29. Agent Schrader's response, on the other hand, is undisputed. He cursed and braked sharply, and when both vehicles stopped at the next red light, he exited his car. R. at 29. His wife described him as he stepped out as "furious" and his face "red." R. at 29. By his own admission, he had lost his temper. R. at 29. He stormed up to Mr. White's vehicle, and Mr. White also exited his vehicle as Agent Schrader approached him. R. at 29. Agent Schrader began yelling at Mr. White, though neither man recalls what was said verbatim. Mr. White recalls telling Agent Schrader to "back off" and that the agent was "crazy." R. at 29. Mr. White shoved Agent Schrader in the chest and Agent

Schrader drew back his arm; his wife thought he was about to punch Mr. White. R. at 29–30. At that moment, the light turned green, and both men returned to their vehicles. R. at 30. Agent Schrader cooled down and went on to the museum with his family. R. at 30.

C. Agent Schrader sees Mr. White later and arrests him.

After leaving the museum, Agent Schrader and his family walked around downtown Madrigal in search of a restaurant for lunch. R. at 30. While walking, he again encountered Mr. White. This time, he observed Mr. White walking out of a marijuana dispensary, which, pursuant to New Tejas law, had minimal, non-descript advertising—the sign on the front of the building merely read "Pinkman's Emporium." R. at 30–31. Upon leaving Pinkman's Emporium, Mr. White was about fifteen feet away from Agent Schrader, and he was carrying about two ounces of marijuana in a transparent plastic bag. R. at 31. Neither party disputes that Mr. White's purchase and possession of the marijuana fully complied with New Tejas law. R. at 31.

At this moment, Agent Schrader was on vacation, off duty, and had never been personally involved in a single drug trafficking investigation. R. at 28. However, when Agent Schrader saw the bag of marijuana, he shouted, "Stop! You're under arrest!" R. at 31. From fifteen feet away, Agent Schrader charged Mr. White, causing Mr. White to turn and run. R. at 30. The agent performed a "flying tackle" on Mr. White from behind, R. at 38, "landing heavily atop him and sending him crashing onto the concrete sidewalk." R. at 31. The tackle broke Mr. White's arm and chipped several of his teeth. R. at 31–32.

The encounter ended quickly. Mr. White cried out in pain and immediately stopped struggling. R. at 31. Local police arrived to find that Agent Schrader had arrested and handcuffed Mr. White. R. at 31. Later, Agent Schrader testified that he was unaware of the legalization of marijuana in New Tejas, but that he would have done the same thing regardless. R. at 31–32.

D. New Tejas charges Agent Schrader with aggravated assault.

The community reacted with outrage. R. at 32. An examination at the hospital revealed that Agent Schrader's tackle broke Mr. White's arm and chipped several of his teeth. R. at 31–32. The state's expert testified that such a tackle was improper and reckless under the circumstances. R. at 38, n.7. The Madrigal County district attorney, Mrs. Wexler, publicly stated that the federal government should not be interfering with the sovereign will of New Tejas, whose citizens voted to legalize marijuana. R. at 32–33. She called Agent Schrader's actions an "illegal and unjustified" arrest, which caused "unconscionable" injuries. R. at 32–33.

Agent Schrader was indicted for assault and aggravated assault, and neither party disputes that Mr. White's broken arm and chipped teeth amount to the "serious bodily injury" required for aggravated assault under New Tejas law. R. at 33.

E. Agent Schrader invokes the Supremacy Clause to immunize his conduct.

Agent Schrader removed the case to federal court under 28 U.S.C. § 1442, which requires that the officer plead a federal defense to the prosecution. R. at 33–34. Agent Schrader claimed immunity under the Supremacy Clause as a federal officer, enforcing federal law, facing state criminal prosecution. R. at 34. The state

did not challenge the removal. R. at 34. After the case reached the United States District Court for the District of Madrigal, Agent Schrader moved to dismiss the case under Federal Rule of Criminal Procedure 12(b) on grounds of immunity. R. at 34.

In deciding the motion to dismiss raising Supremacy Clause immunity, the District Court first decided disputed issues of material fact. R. at 36. Relying on this fact-finding, the court found that, as a matter of law, Agent Schrader's conduct was "necessary and proper" in the accomplishment of his federal duties.

The United States Court of Appeals for the Thirteenth Circuit reversed. R. at 1. They found that a motion to dismiss, on grounds of immunity under the Supremacy Clause, can only be granted if, "viewing the evidence in the light most favorable to the State, immunity is warranted." R. at 7. They also noted that the lower court misapplied the "necessary and proper" analysis. Applying the correct test and viewing the evidence in the light most favorable to the State, the appeals court found that Agent Schrader was not entitled to immunity. R. at 12–13. Agent Schrader appealed and this Court granted certiorari.

SUMMARY OF ARGUMENT

The U.S. Constitution immunizes federal officers from state prosecution in the execution of their responsibilities. U.S. CONST. art. VI, § 2, cl. 1; *see Cunningham v. Neagle*, 135 U.S. 1, 75 (1890). Complete immunization from the legal consequences of an otherwise unlawful act is a heavy protection to afford federal agents. The value of this protection must be weighed against the harm that stems from interference with state police power to enforce their criminal laws. Federal courts must operate under an "exceedingly delicate jurisdiction" that prioritizes extending such protection to a

federal officer only when there are "exceptional facts" justifying the interference. *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 7 (1906).

To ensure that the Court vitiates state prosecutorial power only under exceptional circumstances, disputed issues of material fact should not be resolved on a pretrial motion and must be construed in the light most favorable to the state.

This standard still permits a federal judge to promptly determine whether the state has sufficiently contested the officer's claim of immunity. Furthermore, it best comports with treatment of other affirmative defenses, such as self-defense or qualified immunity, at the motion to dismiss stage—few courts question the sensible and relatively settled approach of viewing disputed issues of fact in the light most favorable to the non-moving party. *See New York v. Tanella*, 374 F.3d 141, 148 (2d Cir. 2004); *see also Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n.16 (1952) ("This case is here to review the granting of a motion to dismiss the indictment. It should not be necessary to mention the familiar rule that, at this stage of the case, the allegations of the indictment must be taken as true.").

Disputes of material fact may only be resolved pretrial under a narrow set of circumstances, none of which are present here. In this case, to resolve the question of immunity, a court must necessarily resolve factual disputes which overlap significantly with the determination of guilt, implicating the intent and reasonableness behind Petitioner's actions. The State of New Tejas has met its burden by providing sufficient evidence to raise at least genuine issues of material fact on questions such as Petitioner's motivation in making the arrest and whether

he properly identified himself as a law enforcement officer. *Tanella*, 374 F.3d at 148. This should be sufficient to avoid dismissal at such an early stage of the prosecution, the Court having such limited evidence at its disposal.

The Court must strike a similar balance in selecting the proper standard for assessing immunity under the Supremacy Clause. A federal officer claiming immunity must act within the scope of his federal duty. Petitioner was not on duty at the time of Mr. White's arrest, and his actions were in fact *contrary to*, rather than in furtherance of, established federal drug enforcement policy at the time of the arrest. Thus, his actions bore no reasonable relation to his prescribed duties as a federal officer. Furthermore, immunity should not extend when circumstances give the court reason to doubt Petitioner's statement that he honestly believed his actions were "necessary and proper" to the fulfillment of his duties, lest an officer be permitted to maliciously enforce a law for personal gain. Given the prior altercation and the fact that Petitioner was off-duty and on vacation at the time, Petitioner had strong personal motives for arresting and injuring Mr. White. Finally, Petitioner's immunity claim should fail because his actions were not objectively reasonable, given the facts at the time as he understood them. Petitioner does not contest the reasonableness of his actions, and the facts support this. The enforcement decision was made by an off-duty officer to enforce an unfamiliar law. Petitioner executed a flying tackle to subdue a man for a very minor offense without properly identifying himself as an officer first. There was no emergency, Mr. White displayed no weapons, and nothing prevented

Petitioner from approaching Mr. White slowly and calmly. All of these factors militate against immunizing Petitioner's actions.

ARGUMENT

I. When Deciding a Motion to Dismiss a State Criminal Prosecution Based on Immunity Under the Supremacy Clause, Disputed Issues of Fact Should be Viewed in the Light Most Favorable to the State.

In deciding the motion to dismiss, the district court struggled to apply the correct standard of review to the facts because there is admittedly "practically no law, and very little guidance" on this direct question. *Idaho v. Horiuchi*, 253 F.3d 359, 375 (9th Cir.) (en banc), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001). This Court should navigate the question using the practical guidance of federal procedure and the foundational principles surrounding Supremacy Clause immunity. It is not contested that a federal officer is protected by the Supremacy Clause if he violates state law through the performance of their federal duties—as long as he was acting within the scope of their authority and did no more than what was necessary and proper. *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890). This is a burden-shifting framework, however, whereupon a state is properly entitled to challenge the threshold defense of immunity by showing that the facts offered in support of an officer's claim are materially disputed. *See New York v. Tanella*, 374 F.3d 141, 148 (2d Cir. 2004) (internal quotations omitted) (citing *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988)) ("However, we are mindful that once a threshold defense of immunity is raised, the State bears the burden of com[ing] forward with an evidentiary showing sufficient

at least to raise a genuine factual issue whether the federal officer . . . [did] no more than what was necessary and proper for him to do in the performance of his duties.").

Courts have grappled with the question of whether district court judges are permitted in a *pretrial motion* to resolve disputed issues of fact in order to decide whether immunity applies to the officer's circumstances. Every circuit except one chooses not to resolve disputed facts on such limited evidence. Instead, they view the facts in the light most favorable to the state because it conforms to the common practices of federal procedure regarding pretrial motions. *See Tanella*, 374 F.3d at 148 (viewing the facts in the light most favorable to the state in the Second Circuit); *Long*, 837 F.2d at 752 (holding the same in the Sixth Circuit); *Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006) (same). Given the scope of Rule 12(b) pretrial motions, the burden-shifting framework of raising and responding to a Supremacy Clause immunity defense, and the standard applied to other affirmative defenses, including qualified immunity, a district court judge should not be permitted to resolve material disputes of fact when it implicates the final determination of guilt.

Moreover, the policy of state and federal balancing is not furthered by allowing a single federal judge to dispose of credible indictments where the state has met its burden of disputing facts on which the question of immunity turns. This Court should preserve both the procedural safeguards for reviewing evidence in the light most favorable to the non-moving party, as well as the policy reasons implicated in state-federal balancing by affirming the decision of the Thirteenth Circuit. Because New

Tejas has met the evidentiary burden required to cast the facts supporting defense of immunity in material dispute, the state must be permitted to prove its case at trial.

A. ***Disputes Underlying Supremacy Clause Immunity Claims Are Mixed Questions of Law and Fact, Where the Determinations of Fact Implicate the Determination of Guilt.***

Immunity is distinct from other pretrial determinations in which judges are properly empowered to resolve underlying issues of fact. In the instances wrongly compared as "analogous" pretrial determinations, such as double jeopardy and attorney-client privilege, the judge decides issues "*collateral* to the defendant's guilt." *Horiuchi*, 253 F.3d at 379 (Fletcher, J., concurring) (emphasis added). Most pretrial determinations where a judge is properly permitted to resolve issues of fact are completely jurisdictional (e.g. statute of limitation) or procedural (e.g. failure of indictment to state an offense). FED. R. CRIM. P. 12(b). In contrast, the disputed issues of fact underlying Schrader's defense completely affect the determination of immunity, and therefore of guilt. Because the claim "overlaps significantly with the elements of the offense," R. at 6., this Court should treat the defense of immunity under the Supremacy Clause like defenses of qualified immunity or self-defense. *Horiuchi*, 253 F.3d at 379 (Fletcher, J., concurring) (noting that all three "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.").

i. *In All Other Contexts of Affirmative Defenses, Including Qualified Immunity, a District Court Judge May Not Resolve Material Issues of Fact on a Pretrial Motion.*

A defense of immunity is like all affirmative defenses in that it necessarily implicates mixed questions of law and fact. When a defense is one where, if proven, the defendant is legally blameless though guilty in fact, the inquiry is inherently context-specific and reliant on the inferences drawn from the facts. That is especially true in this case, because Schrader's subjective intent and the objective reasonability of his actions based on the circumstances as he saw them are at the heart of the analysis that determines whether he receives immunity for his otherwise unlawful actions. *See infra* Part II. In other words, "disputed issues of fact go directly to what the defendant did, and to whether the defendant honestly and reasonably believed that his or her actions were justified." *Horiuchi*, 253 F.3d at 379 (Fletcher, J., concurring).

For this reason, both the district court and the Thirteenth Circuit correctly stated that Supremacy Clause immunity functions under similar principles as the statutorily created protection of qualified immunity. Both types of immunity protect officials from "undue interference" and were thought to include an inquiry into the federal agent's subjective intent, *Wood v. Strickland*, 420 U.S. 308, 322 (1975), and the objective reasonableness of the officer's conduct, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), inferred through facts. No circuit has ever permitted a district court judge to rule on qualified immunity when there are disputed issues of material fact.

As one example, the Ninth Circuit in *Act Up!/Portland v. Bagley* found that questions of the officer's reasonableness, the facts within his knowledge and what conduct he did or failed to do were "genuine issue[s] of fact" that "prevent[ed] a determination of qualified immunity at summary judgment." 988 F.2d 868, 873 (9th Cir. 1993). Therefore, the case had to proceed to trial. *See also Hurlman v. Rice*, 927 F.2d 74, 78–79 (2d Cir. 1991); *Santiago v. Fenton*, 891 F.2d 373, 386–87 (1st Cir. 1989); *Brandenburg v. Cureton*, 882 F.2d 211, 215–16 (6th Cir. 1989); *Melear v. Spears*, 862 F.2d 1177, 1184 (5th Cir. 1989); *Turner v. Dammon*, 848 F.2d 440, 444 (4th Cir. 1988), *abrogated on other grounds by Johnson v. Jones*, 515 U.S. 304 (1995); *Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987); *Fludd v. United States Secret Service*, 771 F.2d 549, 554 (D.C. Cir. 1985); *McSurely v. McClellan*, 697 F.2d 309, 321 & n.20 (D.C. Cir. 1982).

In all of these cases, the presence of a factual dispute rightfully takes the inquiry out of a judge's hands and gives it to a jury to resolve after robust factfinding and adversarial testing of each side's claims at trial. With the exception of the Ninth Circuit, the jury not only resolves the disputes, but also answers the question of reasonableness.[1] Even without taking this extra step, this Court should view the analogous purpose and procedures of qualified and Supremacy Clause immunity and relegate disputed issues of fact to the jury.

[1] *Horiuchi*, 253 F.3d at 379 (Fletcher, J., concurring) (noting that the "Ninth Circuit appears to be unique in holding that the jury is only to resolve factual disputes" where every other circuit gives the jury "not only questions of disputed fact but also questions of reasonableness.").

An equally good comparator is a self-defense claim, where a finding that defendant's intent only to exercise force in anticipation of severe bodily harm or death will nullify legal consequences for an otherwise illegal act. *Horiuchi*, 253 F.3d at 379 (noting that both concern justifications for a defendant's action). Self-defense and immunity defenses are specifically apt comparators in the realm of affirmative defenses because courts analyze nearly identical factual issues in the context of what the defendant did or failed to reasonably do given perceived danger and split-second decisionmaking—except in immunity cases the defendant is always a federal officer.

For example in *Neagle*, this Court analyzed immunity by looking at whether the federal marshal was "correct in the belief that, without prompt action on his part, the assault of Terry upon the judge would have ended in the death of the latter." 135 U.S. at 76. Similarly, in *Tennessee v. Davis,* this Court looked at whether the federal agent's fatal act "was done in necessary self-defence, to save his own life; that at the time [of] the alleged act . . . he was . . . an officer of the United States." 100 U.S. 257, 258 (1879). In classic self-defense cases, such as *Beard v. United States*, this Court engages in essentially the same analysis, looking at whether the "[defendant] had, at moment he struck the deceased, reasonable grounds to believe, and in good faith believed, that he could not save his life or protect himself from great bodily harm except by doing what he did." 158 U.S. 550, 560 (1895).

Analogizing to other justification defenses such as qualified immunity and self-defense, this Court should affirm the well-founded principle that a defense that heavily revolves around claims of proper intent and reasonability, as well as

inferences from the credible narrative of the events surrounding the actions, cannot be decided by a judge on a motion to dismiss.

ii. Under the Plain Meaning of Rule 12, a Court May Resolve an Immunity Defense by Pretrial Motion Only if it Can Be Determined Without a Trial on the Merits.

A Rule 12(b) pretrial motion is an improper vehicle for deciding whether the Supremacy Clause precludes an indictment of a federal agent by a state if the underlying facts are in material dispute. *Long*, 837 F.2d at 752 (finding that "if the underlying facts are substantially in dispute, a Rule 12 pretrial motion is not the proper vehicle for deciding whether the Supremacy Clause precludes an indictment of a federal agent by a state."). A judge may only dismiss a case under Rule 12(b) where there is no need for a trial on the merits. R. at 7; FED. R. CRIM. P. 12(b). The Rule 12(b) comments list former jeopardy, former conviction, former acquittal, statute of limitations, immunity, lack of jurisdiction, and failure of indictment or information to state an offense as such examples of defenses or objections that may be raised pretrial. FED. R. CRIM. P. 12(b). As discussed in Section I(A)(i), only jurisdictional or procedural issues may be resolved by a judge on a pretrial motion. A defense of immunity is neither merely jurisdictional nor procedural and cannot be properly dismissed on a pretrial motion if there are disputed issues of material fact.

Though it is *possible* to raise immunity pretrial, immunity is a threshold defense that requires additional factfinding. That is, unlike pretrial defenses that are easily proven or disproven, immunity under the Supremacy Clause implicates the credibility, intent and reasonableness of the actions of the federal agent. It is

undoubtedly a complicated weighing of facts that is required to decide whether Schrader has met the burden of proving he receives immunity or whether the state has met the burden of proving that he acted with criminal intent. A judge should not be permitted to resolve this issue the way they would of a question as uncomplicated and collateral such as whether a statute of limitations has passed. Disputes of fact implicating criminal guilt must be resolved by a jury.

The procedural framework of raising an immunity defense under the Supremacy Clause also supports this argument. The federal agent first takes advantage of federal protections by removing to federal court. 28 U.S.C. § 1442. Then, the federal agent raises immunity under the Supremacy Clause as a threshold defense. That is, he raises the presumption that what he did cannot be criminally prosecuted by the state because he was performing within the scope of his federal authority and his actions were necessary and proper. What follows, however, is an opportunity for the State to rebut the presumption of immunity by presenting evidence to the contrary. It is an extremely light burden on the State as explained in Section I(A)(iii) below, due to extremely heavy protection afforded by immunity to federal officers who meet the burden of proving their claim.

iii. The District Court Did Not Appropriately Apply the Burden-Shifting Framework of Immunity Under the Supremacy Clause.

Factual disputes can be resolved pretrial only if, when viewing the facts in the light most favorable to the state, the presumption of immunity is "supported by so great a preponderance of evidence that a reasonable mind construing it can hardly come to any other conclusion." *Brown v. Cain*, 56 F. Supp. 56, 59 (E.D. Pa. 1944). In

the case law arising from Supremacy Clause immunity, there are only three circumstances under which this burden can be met by the Petitioner.

In the first and most obvious instance, the motion to dismiss may be granted where the state made no showing of evidence disputing facts asserted by the federal agent. *See Morgan v. California*, 743 F.2d 728 (9th Cir. 1984); *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982) (granting Supremacy Clause immunity pretrial because "the underlying facts are not in substantial dispute"); *Connecticut v. Marra*, 528 F. Supp. 381 (2d Cir. 1981) (granting Supremacy Clause immunity pretrial where the state presented no facts challenging the defendant's claim).

The Ninth Circuit in *Morgan* also addresses the second set of circumstances in which a judge resolving issues of fact is appropriate. In these cases, the state is not silent, but nevertheless fails to meet their burden by presenting facts that are mere allegations. Allowing dismissal of "mere allegations" alleviates the risk that a state may, as a means of overcoming the evidentiary burden, fabricate factual disputes. *Morgan*, 743 F.2d at 733 ("All that a local prosecutor would have to do to secure a state court jury trial would be to fabricate a factual allegation that, if true, would negate the officer's reliance on a federal privilege.").

Finally, a court may be permitted to resolve the issue of immunity pretrial if the factual disputes on the record, though legitimate, are found immaterial. For example in *Tanella*, the Second Circuit found it proper for the facts to be resolved pretrial because the dispute of whether the victim was reaching for a weapon or turning to run was immaterial—the federal agent's actions were necessary and

proper in either version of the facts. 374 F.3d at 616. This can be contrasted against this Court's finding in *United States ex rel. Drury v. Lewis*, where it held that the factual disputes were material and could not be resolved by a judge. 200 U.S. 1, 8 (1906). If at trial, the evidence led the jury to believe that the victim did in fact surrender before he was fatally shot, then the federal guards' actions did not warrant immunity. *Id.* Thus, substantial issues may only be disposed of on a motion to dismiss if their determination one way or the other are immaterial.

In other words, even when circuits have allowed a judge to decide immunity, they still apply the burden-shifting framework of Supremacy Clause immunity. Namely, that a pretrial motion may answer the question of immunity if: (1) there are no substantial factual disputes, (2) the state's factual claims are transparently fabricated allegations, or (3) in cases where the factual disputes will be immaterial to the outcome. Barring those three circumstances, the rule persists that "when material facts are 'involved in uncertainty and the subject of conflicting testimony,' they should be resolved by the verdict of a jury." *Birsch v. Tumbleson*, 31 F.2d 811, 813 (4th Cir. 1929) (remanding federal warden's petition to be immunized from homicide charges due to conflicting evidence as to who shot first).

The burden on the Petitioner is intended to be high, as immunity totally shields him from any recourse for their actions if it applies. The burden on the state has been consistently held to be low, only requiring a legitimate, material dispute of fact to challenge a threshold immunity defense. "Regardless of the conclusion which the judge himself might reach, if there is a substantial conflict of evidence as to basic or

controlling facts the Federal Court should refuse to exercise its discretion to release the relator and should remand him." *Brown*, 56 F. Supp. at 59.

iv. *Under the Correct Burden-Shifting Framework, Petitioner's Conduct Raises Material Issues of Triable Fact That Cannot Be Resolved by a Judge on a Pretrial Motion.*

Schrader's claim does not qualify for dismissal on a pretrial motion by a judge ruling on the facts. New Tejas has met its burden of showing evidence sufficient to raise genuine factual issues over whether Petitioner was acting within the scope of his authority and doing no more than what was "necessary and proper" in the performance of his duties. *See infra* Part II. Schrader's subjective intentions and the objective reasonability of his actions—essential to the determination of either immunity or criminal behavior—cannot be scrutinized without interpreting the disputed facts. The disputed facts in turn directly affect the inferences that may be drawn by a factfinder and applied to the question of immunity or guilt. Following the procedural guidance of Rule 12 and the burden-shifting framework of immunity as a threshold defense, a district court judge should not be able to resolve these factual issues on a pretrial motion to dismiss. *Drury*, 200 U.S. at 3 (holding that where attendant circumstances surrounding the act is "conflicting and leads to opposite conclusions of fact as one or other version of the affair . . . is accepted," the facts must go to a jury). Several disputed facts are critical to resolving whether Agent Schrader was entitled to Supremacy Clause immunity.

The district court erred in accepting Schrader's wholesale denial of having motives beyond law enforcement when he tackled and injured White at face value.

When determining whether an officer should receive Supremacy Clause immunity, the court must look at the officer's subjective intent and reasonableness, which includes looking at the circumstances surrounding the officer's conduct to see if he had a bad motive. See *infra* Section II(B)(i). The prior verbal and nearly physical altercation between Schrader and White colors the determination of Schrader's intentions. R. at 29. Schrader contends that he was only concerned with enforcing federal law but admits to "losing his temper" and being "furious" at White. *Id.*

The district court also wrongfully stated that Schrader being off-duty and on vacation was "irrelevant." R. at 39. The court failed to consider that Schrader's professional responsibilities had never included federal drug law enforcement and that his actions did not further federal drug policy at the time. An out-of-uniform, off-duty officer, who was untrained and under no federal directive, suddenly choosing to enforce federal marijuana laws should be evaluated for truthfulness given the countervailing facts. R. at 28.

By the point of the arrest, Schrader had already spent several days in New Tejas. R. at 28. There is no evidence to suggest that he was interested in performing his federal agent duties while on vacation with his wife and two young children. R. at 28. The reaction to White was unique, sudden and inconsistent with his actions and demeanor the rest of the trip. Whether Schrader intended to injure White with his flying tackle or if, given the facts, he was rightfully using force to detain someone, is a determination that turns on how much weight each piece of evidence is given, what

is inferred from the combination of evidence or sequence of events and what additional evidence may be found through discovery at trial.

Determining whether the Supremacy Clause protects a federal officer's conduct also depends on whether the officer's conduct is objectively reasonable. *See infra* Section II(B)(ii)(2). This includes a determination of whether Schrader properly identified himself as a federal agent, thereby giving White an appropriate reason to surrender to arrest. It is unclear from the given facts whether White knew he was being detained by a federal agent. R. at 30–31. Schrader never identified himself as a federal agent before executing the flying tackle, and as far as White was concerned, he was participating in a legal activity. Immunity can thus turn on whether shouting "You're under arrest!" without a badge or further identification counts as sufficient warning if a person believes they are being pursued by someone with whom they previously had an aggravated encounter.

All of the above are determinations that go directly to the question of immunity, and the state has met its burden of raising at least a genuine factual issue as to whether the Petitioner was doing no more than what was necessary and proper to do in the performance of his federal duties. There is no question that Schrader's flying tackle, which "posed obvious and foreseeable risks" and landed White in the hospital with serious injuries, are unlawful if not necessary and proper to enforce the federal government's interests. R. at 32, 38. Whether the facts set forth by the state or those claimed by Schrader are found to be true and credible will inform the inferences drawn as to the scope of his authority, as well as his intent and objective reasonability

in executing the tackle. These determinations are exactly the test under which immunity is granted or denied. *See infra* Section II(B). This Court should find that the district court overstepped in resolving factual disputes and affirm the Thirteenth Circuit's decision to view the facts in the light most favorable to the state.

B. The State-Federal Balancing Principles of Supremacy Clause Immunity Are Best Protected by Allowing Juries to Resolve Disputed Issues of Material Fact.

i. *A Federal Officer Is Sufficiently Protected by Supremacy Clause Immunity as a Defense to Liability.*

The dissent of the Thirteenth Circuit was convinced that avoiding trial was fundamental to the protection of Supremacy Clause immunity. R. at 17–19. However, the seminal cases of Supremacy Clause immunity, *Drury* and *Neagle*, never squarely confronted the issue of whether, when a federal officer's actions are called into question by the State, the question is jurisdictional or determined on the merits. James Wallace, *Supremacy Clause Immunity: Deriving a Willfulness Standard from Sovereign Immunity*, 41 AM. CRIM. L. REV. 1499, 1505–06 (2004). In other words, it was unclear whether immunity under the Supremacy Clause was an affirmative defense (i.e. a claim for innocence in fact) or a preemption of state criminal prosecution (a jurisdictional challenge). *Id.* Courts have historically been perplexed, leading to confusion in procedure and misapplication of the law. The district court would have immunity apply as a federal preemption (jurisdictional) defense, one that "cuts short a prosecution before a defense is ever raised." *Id.*

This ignores, however, that all cases since have treated the question as a defense. It is clear that Schrader, like all federal officers, is not merely asserting that

the state court has no jurisdiction over him. He instead pleads a set of facts that, if true, vitiate the illegality of his otherwise unlawful conduct. To hold otherwise would be inapposite, and in fact harmful to federal officers, because once a jurisdictional defense is denied pretrial, it may not be raised again during trial. For example, if a judge rules that a statute of limitation has not expired, a defendant sent to trial may not succeed on that defense.

The dissent in the court below was therefore incorrect in arguing to extend immunity under the Supremacy Clause beyond post-trial liability. R. at 18. They state that "even if Rule 12 were removed from the federal rules, the Constitutional [sic] would still require district court judges to rule on and decide any disputed issues of fact related to the assertion of immunity." R. at 19. Their view arises from the belief that federal agents must be afforded the protection of "interposing a federal judge between the state prosecutor and the jury." R. at 19.

However, this level of blind protection offered to federal agents is unfaithful to the common law tradition surrounding Supremacy Clause immunity cases. As argued in Section I(A)(ii) *supra*, Rule 12(b) is an improper vehicle for the case before the Court because there are material disputes of triable fact. As this Court found in *Drury*, it is an "exceedingly delicate jurisdiction" given to the federal courts to—by the decision of a single judge—take an indicted person out of the hands of the state prosecution and permanently discharge them from facing any potential finding of liability. 200 U.S. at 7. The standard this Court set in *Drury* would only be met if

Schrader "presented what this court regarded as such exceptional facts as to justify the interference of the Federal tribunal." *Id.*

Additionally, both the federal removal statute and the state statute assert that Schrader's justification is a "defense." 28 U.S.C. § 1442; Penal Code of New Tejas § 50.01. Supremacy Clause immunity is therefore not a jurisdictional protection which may "cut short" any chance of trial. As a threshold defense, it is only subject to a decision on a pretrial motion if it meets the burden of no other reasonable conclusion being drawn from the facts than immunity. The Thirteenth Circuit correctly follows the overwhelming majority of circuits in finding that "Schrader identified no rule or statute that would permit him to evade a jury trial. He moved to dismiss this indictment under [Rule 12] . . . Rule 12 does not permit a district court to adjudicate fact issues that overlap with the issues to be decided at trial." R. at 8.

ii. *To the Extent that Supremacy Clause Immunity Applies to Avoiding Trial, a Prompt Ruling, Viewing the Facts in Light Most Favorable to the State, Is Sufficient Protection.*

If this Court is persuaded that Supremacy Clause immunity in fact should apply to avoiding trial, a judge must still view the facts in light most favorable to the state when making that decision. Given the nebulous history surrounding the doctrine, this Court should be steadfast in maintaining the foundational principles of balancing state and federal interests. The purpose of Supremacy Clause immunity is to prevent state prosecution from impeding federal agents in the performance of their duties. These principles must of course be balanced with the state's interest in exercising its police power to protect its citizens.

Both the Sixth Circuit and the Second Circuit follow this deference to state police power except under exceptional circumstances: when there is no evidence of disputed facts put forward by the State or if the factual disputes are immaterial. *See supra* Sections I(A)(ii)–(iii). Supremacy Clause immunity only requires that intervention by a federal judge occur at an early enough stage to offer sufficient protection from undue suffering caused by anticipation of trial. *See, e.g.*, *Tanella*, 374 F.3d at 147 (citing *Long*, 837 F.2d at 752) (holding that a federal immunity defense ought to be decided "early in the proceedings" so as "to avoid requiring a federal officer to run the gauntlet of standing trial and having to wait until later to have the [immunity] issue decided," while still construing the facts in light most favorable to the state).

The principles of *Neagle* are adequately upheld as long as the decision is made promptly on the threshold question of immunity. Federal operations are still protected from the chilling effect of state prosecution by deciding threshold immunity early in the proceedings. *Long*, 837 F.2d at 752. (holding that the court must "make a prompt ruling" when Supremacy immunity is raised, but still viewing facts for the state); *see also Tanella*, 374 F.3d at 147 (citing *Davis*, 100 U.S. at 262–63) (recognizing "the need to prevent states from 'paralyz[ing]' operations of the federal government," but still viewing the facts on the indictment as true). In deciding the issue pretrial, this Court must ensure that the exceptional circumstances that warrant vitiating state prosecutorial powers are present. This test is baked into the burden-shifting framework by requiring the facts be viewed in the light most favorable to the state

on a motion to dismiss. This balances federal interests, by allowing immunity to be decided promptly, as well as state interest, by viewing the facts in the light most favorable to the state, thus ensuring that states who have met the burden of raising a genuine factual issue can prove their case at trial.

The dissent below argued this overburdens the federal agent to prove his case before trial, thereby nullifying the protective effects. R. at 19. This is not the case. Federal agents regularly prevail under this test if they meet the exceptional circumstances to which Supremacy Clause immunity without trial was meant to apply. *See, e.g.*, *Livingston*, 443 F.3d at 1226 (finding immunity applied even "assum[ing] the truth of the allegations in the indictment"); *Tanella*, 374 F.3d at 151 (finding immunity applied to the federal agent's actions, even after viewing facts in light most favorable to the state); *Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977) (same). Furthermore, Schrader retains the ability to make his fair case for immunity to a federal jury, in a trial overseen by a federal judge. His right to appeal in the federal system is likewise unimpeded. That strikes a more appropriate balance between state and federal power than allowing federal officers who have violated state laws off the hook without trying the facts—there, the State has no recourse. *Drury*, 200 U.S. at 7 (finding that rescuing a properly indicted federal agent and discharging them as a final prevention of state law is an exceptional interference by the federal government, and so should be sparingly granted to exceptional cases).

The Supremacy Clause protects those officers who *cannot* be guilty of a crime by virtue of their federal pursuits. *Neagle*, 135 U.S. at 75. But in order to be the

exceptional case, a federal officer must offer facts that make the inference of conviction unreasonable. That is, Petitioner must present facts so indisputable that a judge may decide he clearly meets the burden of showing his acts did not exceed scope of his authority nor what was necessary and proper in furtherance of his federal duties. If this were the case, Petitioner must be timely removed from anticipating and preparing for trial, and protected from suffering the personal and professional costs being indicted. However, if there are material issues of disputed fact, Schrader's claim does not meet the exceptional circumstances under which federal courts liberate indicted federal agents from facing trial. Because Schrader removed to federal court, he will receive all the benefits of pursuing his defense in the federal system. But because the state has met its burden of raising genuine issues of material fact, Schrader should now only benefit from an expedient decision of immunity as a threshold matter, where the decision by a federal judge on the motion to dismiss applies the facts in light most favorable to the state.

II. The Thirteenth Circuit Correctly Held That Supremacy Clause Immunity Extends Only to Authorized Conduct by a Federal Officer That is Objectively and Subjectively Necessary and Proper.

No court has taken the position that federal agents have blanket immunity from state prosecution. "Supremacy Clause immunity is not absolute and so presupposes that federal agents can be prosecuted for violating state law." *Horiuchi*, 253 F.3d at 376. Courts are sensitive to the strain it puts on our system when federal courts are able to shield federal officers from facing justice in state courts. As this Court explained:

> It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented.

Drury, 200 U.S. at 7; *see also Whitehead v. Senkowski*, 943 F.2d 230, 234 (2d Cir. 1991). Given this discomfort, federal courts should ensure that this power is "sparingly exercised." *Morgan*, 743 F.2d at 731.

This Court in *Neagle* articulated the general standard that every court determining Supremacy Clause immunity has carried forward:

> [I]f the prisoner 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 marshal 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. This lays out two questions a court must answer. *See Long*, 837 F.2d at 744 ("It is by now well settled that under *In re Neagle*, a two-part test determines whether or not a state court has jurisdiction to prosecute a federal agent for conduct facially violative of a state's criminal code."). The first is whether the conduct falls within the scope or bounds of what the officer is "authorized to do by the law." *Neagle*, 135 U.S. at 75. The second is whether the conduct is "necessary and proper" to the officer's performance of his duty. *Id.*; s*ee also Long*, 837 F.2d at 744. This prong requires determining the officer's subjective intent in enforcing the law and whether the officer acted objectively reasonably in his enforcement. *Whitehead*, 943 F.2d at 234.

Whether this Court applies the "authority" prong, or the objective or subjective prongs of the "necessary and proper" test to Schrader's case, the result is the same. Officer Schrader's conduct breached the scope of his authority, his actions were motivated by personal malice, and his conduct violated the bounds of objective reasonableness. It is antithetical to *Neagle*'s foundational principles to extend Supremacy Clause protection to Petitioner's claim.

A. Supremacy Clause Immunity Requires an Officer's Conduct to Fall Within the Scope of His Federal Authority.

Before evaluating whether an officer's actions were "necessary and proper" to his authority, a court must determine the scope of that authority and whether the agent acted within it. A federal court will only extend Supremacy Clause immunity upon finding "some element of power and *authority asserted under the government of the United States*." *Neagle*, 135 U.S. at 54 (emphasis added). This Court has noted that "authority" encompasses more than what an officer is explicitly authorized to do. *Id.* at 68. While a broad reading of "authority" in this context is appropriate given the federalism values at stake, the Court should also recognize its limitations. Federal law must recognize some "outer perimeter of [the officer's] line of duty." *Denson v. United States*, 574 F.3d 1318, 1347 (11th Cir. 2009) (internal quotations omitted) (quoting *Barr v. Matteo*, 360 U.S. 564, 575 (1959)). However, this Court in *Neagle*, and courts subsequent, have seen fit to limit the boundaries of an officer's "scope of authority" in several important ways. *Clifton*, 549 F.2d at 728. Exercise of federal power that does not advance federal interests cannot be said to be done within the scope of an officer's federal authority. Additionally, an officer breaches the outer limit

of his authority's scope when his conduct lacks a "reasonable relation" to his prescribed duties. Here, Petitioner's actions bear no reasonable relation to his prescribed duties, and his decision to tackle Mr. White not only does not further but in fact detracts from federal interests.

i. An Officer Acts Outside the Scope of His Authority When His Actions Do Not Bear a Reasonable Relation to His Duties and Responsibilities.

Supremacy Clause immunity extends only to conduct which an officer carries out in the course of his official duties or while acting in an official capacity. *See Neagle*, 135 U.S. at 75. This accords with the fundamental purpose of Supremacy Clause immunity: to "reduce the inhibiting effect that . . . prosecution can have on the effective exercise of official duties." *Livingston*, 443 F.3d at 1221. This makes clear that immunity is tied to the pursuit of an officer's duties. If the officer's exercise of power does not "bear some reasonable relation to and connection with the duties and responsibilities of the official," *Clifton*, 549 F.2d at 726 (quoting *Scherer v. Morrow*, 401 F.2d 204, 205 (7th Cir. 1968)), the Supremacy Clause does not immunize against prosecution for the harm committed under the exercise.

If a federal officer is not on duty at the time he claims to be exercising federal power, a court should not find that he is acting within the scope of his authority. Few courts have had an opportunity to consider whether an out-of-state, out-of-uniform, off-duty officer enforcing an unfamiliar law is acting within the scope of his authority. In the vast majority of Supremacy Clause immunity cases, the officer is working on a case, following orders or otherwise on-the-job when the challenged conduct arises.

Significantly, in the only circuit court opinion in which federal officers claiming immunity were not on-the-job, the Ninth Circuit court found that Supremacy Clause immunity was inappropriate. *Morgan*, 743 F.2d at 733–34. There, two DEA agents claimed that while they were on their way to meet with a confidential informant, they got into a traffic accident with a man who threatened them with a gun, leading them to follow him to a jewelry store to search him for weapons. *Id.* at 730.

The court noted that it would have been appropriate for the officers to follow the man if they had been on duty and he had threatened them. However, substantial evidence showed that, at the time, the agents were drunk and on their way to another bar. *Id.* at 729–30. The court's analysis did not depend solely on whether the agents' actions were necessary and proper. Given the facts that the agents were not on duty and the traffic collision was minor, the officers' decision to follow the man and use force could not be "within the scope of the agents' federal authority." *Id.* at 733–34; *see also Bracken v. Okura*, 869 F.3d 771, 775 (9th Cir. 2017) (holding that an off-duty police officer acting as a private security guard at a hotel event should not receive qualified immunity for his unconstitutional actions because the officer was "not serving a public, governmental function").

Very few Supremacy Clause immunity cases consider the question of whether the officer's actions fall within his authority. Instead, they hinge on whether the officer's actions were "necessary and proper." This is because in all other cases in which a circuit court has found Supremacy Clause immunity appropriate, the officers were following direct orders or were at least on duty at the time they committed the

questionable act.[2] Therefore, these cases almost never had to answer the primary question of whether the officer was enforcing federal law as part of his duties at the particular time and place, since it was nearly always evident that they were.

ii. An Officer Does Not Act Within the Scope of His Authority When His Actions Do Not Advance Any Federal Interest.

A federal officer does not act within his federal authority when his actions do not promote any federal interest. The purpose of allowing Supremacy Clause immunity is to disallow states from preventing the *federal government* from "enforc[ing] its laws and execut[ing] its functions in all places." *Neagle*, 135 U.S. at 1. In other words, immunity allows the government to protect its interests, and the officer is merely an agent of that exclusive interest. To the extent that a federal officer's interest diverges from those of the government, the officer pursuing that personal interest is not protected by the Supremacy Clause, as that protection belongs solely to the federal government. Where a federal officer's action does not promote the interest underlying federal law, his authority stops, and so too should any protection afforded under the Supremacy Clause.

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[2] *See, e.g.*, *Tanella*, 374 F.3d at 147 (DEA agent acted within his authority during the questioned conduct because he was on assignment watching a drug dealer meet with an informant); *New Mexico v. Dwyer*, 105 F.3d 670, *3 (10th Cir. 1997) (unpublished) (Forest Service agents acted within their authority committing criminal trespass because they were on duty at the time); *Maryland v. DeShields*, 829 F.2d 1121, *4 (4th Cir. 1987) (unpublished) (soldier acted with authority because he was on duty and was obeying a direct order from a superior officer during the questioned conduct); *Clifton*, 549 F.2d at 728 (DEA agent who was charged with second-degree murder for a fatal shooting that occurred while the officer was conducting a drug raid was acting within his authority).

This rationale is fully articulated in the qualified immunity context. *See, e.g.*, *Denson*, 574 F.3d at 1347–48. It applies with equal force in the Supremacy Clause immunity context. *See Livingston*, 443 F.3d at 1221 ("Although qualified immunity and Supremacy Clause immunity have different sources and functions, there is a functional similarity between these two doctrines."); Seth Waxman & Trevor Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2239–40 (2003) (noting that it is appropriate to equate the scope of qualified immunity and Supremacy Clause immunity given that both are based on underlying principles of fair warning and preemption). Critical to determining the scope of an officer's authority in either context is "whether the officer's acts have some nexus with furthering federal policy." *Denson*, 574 F.3d at 1348. The Court must consider whether the action falls within the "outer perimeter" of the officer's duties. *Clifton*, 549 F.2d at 727 (citing *Barr*, 360 U.S. at 726). Recognizing this requirement in the Supremacy Clause context is faithful to the purpose of immunity laid out in *Neagle* and *Drury*. If the act has some tie to a federal purpose, criminalizing the act would frustrate a federal interest and therefore should not be allowed. *See Denson*, 574 F.3d at 1348. However, if the act lacks a nexus to a federal purpose, "state law may apply with full force, as no valid federal interest arises in protecting the ultra vires actions of a federal officer from liability." *Id.*

Explicitly recognizing this limitation to immunity would not chill federal enforcement action. An officer's "[e]rror[] of judgment in what a federal officer conceives to be his legal duty will not alone serve to create criminal responsibility of

a federal officer." *Morgan*, 743 F.2d at 731 (citing *Clifton*, 549 F.2d at 727). A presumption exists in the officer's favor, preventing courts from second-guessing good faith decisions by federal officers as to what lies within the scope of their federal authority.

iii. Petitioner Fails to Meet the Standard for Immunity Because His Actions Do Not Fall Within the Scope of His Federal Authority.

Petitioner here was not acting within the scope of his federal authority when he chased Mr. White down the street and tackled him for possessing two ounces of marijuana. First, Petitioner was not on duty at the time he arrested Mr. White, and his job responsibilities did not include enforcing federal drug laws. Second, Petitioner's decision to arrest Mr. White furthered no federal purpose——to the contrary, it ran counter to a stated federal law enforcement priority. These reasons alone serve to deprive Petitioner of Supremacy Clause immunity because his conduct does not fall within the "outer perimeter" of his federal duties. *Denson*, 574 F.3d at 1347.

Schrader was not on duty at the time he arrested Mr. White. R. at 28. Petitioner's circumstances run parallel to those of the officers in *Morgan*. As with Petitioner, the officers in *Morgan* claimed to be enforcing federal law when they followed the person, whom they had quarreled with over a traffic collision, into to a jewelry store to search him for a gun. *Morgan*, 743 F.2d at 729–30. Enforcing federal firearms laws is a valid federal purpose that both officers were legally able to pursue, just as Petitioner could lawfully enforce federal drug laws. However, neither Petitioner nor the DEA agents in *Morgan* were acting within the scope of their

authority when they invoked these laws. Petitioner was on vacation with his family at the time. R. at 28. The *Morgan* defendants were on their way to a bar. *Morgan*, 743 F.2d at 729–30. Petitioner's decision to enforce a drug law arose hours after his earlier personal conflict with Mr. White. R. at 30. The *Morgan* defendants invoked federal firearms laws because they had an earlier personal conflict with the person whose car they had backed into. *Morgan*, 743 F.2d at 729–30.

Furthermore, Petitioner's actions lie outside the scope of his authority because they advance no federal interest. FBI agents have general authority to enforce criminal laws of the United States by making arrests. *See* 18 U.S.C. § 3052 (FBI agents are authorized to "make arrests . . . for any felony cognizable under the laws of the United States"). However, determining authority is not merely a question of lawfulness under a statute. It is an inquiry as to whether the acts "have some nexus with furthering federal policy." *Denson*, 574 F.3d at 1348. Petitioner's actions fail to promote a federal interest, and in fact stand in direct conflict with Department of Justice marijuana enforcement policy, which informs all law enforcement officers that the Department "has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use." Memorandum from Deputy Attorney Gen. James M. Cole for U.S. Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013). Mr. White's two ounces fall under this guideline. Recognizing the state-federal tension that the instant case exemplifies, Department policy also noted that the "enactment of state laws that endeavor to authorize marijuana . . . possession by establishing a

regulatory scheme for these purposes affects [the] traditional joint federal-state approach to narcotics enforcement." When Petitioner spied Mr. White, decided to arrest him for violating federal drug laws, and tackled him, the officer was not acting within the "outer perimeter" of his authority. *Clifton*, 549 F.2d at 727. The federal government has an interest in ensuring that its agents can enforce federal drug laws unimpeded, but when actions fall outside the scope of those laws, as here, they have no "nexus with furthering federal policy." *Denson*, 574 F.3d at 1348.

B. Immunity Under the Supremacy Clause Requires That an Officer's Actions Be No More Than "Necessary and Proper" to Execute His Duty.

It is wrong to assume that "the exercise of authority in and of itself places a federal officer beyond the reach of a state's criminal process." *Clifton*, 549 F.2d at 728. This Court in *Neagle* required a second criterion before Supremacy Clause immunity would extend to a federal officer. Namely, immunity extends if, "in doing [the contested action], he did no more than what was necessary and proper for him to do." *Neagle*, 135 U.S. at 74; *see, e.g.*, *Tanella*, 374 F.3d at 147. This element is the "significant" part of the test laid out in *Neagle*, as it requires that the court examine an officer's specific conduct and circumstances. *Clifton*, 549 F.2d at 728. The proper test should include both objective and subjective elements. This is the approach taken by nearly every circuit court to have considered the issue. *See, e.g.*, *Texas v. Kleinert*, 855 F.3d 305, 314 (5th Cir. 2017); *Dwyer*, 105 F.3d at *3; *Whitehead*, 943 F.2d at 234; *Long*, 837 F.2d at 745; *DeShields*, 829 F.2d at *6; *Clifton*, 549 F.2d at 728.

i. An Officer Must Subjectively Believe That the Officer's Action is "Necessary and Proper."

The first part of the "necessary and proper" analysis is subjective. It requires an officer to have "subjectively believe[d] that his action is justified." *Tanella*, 374 F.3d at 147 (citing *Whitehead*, 943 F.2d at 234). An officer who does not believe that his actions are necessary to enforce federal law does not advance the interests of federal law enforcement and therefore not immunized under the Supremacy Clause. Protecting an officer wielding federal law to pursue his own ends would not further the underlying principle of Supremacy Clause immunity. Given overwhelming evidence that Petitioner's decision to arrest and the overzealous conduct during the arrest were motivated by personal malice and not by any desire to do his duty, the court below correctly found that Petitioner fails the subjective prong of the analysis.

1. The court should properly consider the subjective intent of the federal officer enforcing federal law.

A federal officer who uses a federal statute to pursue his own personal ends does not fall under the protection of the Supremacy Clause. Were this Court to allow an officer's malicious enforcement of federal law without any recourse by the states to protect their citizens, the "delicate jurisdiction" federal courts exercise would be upended. *Drury*, 200 U.S. at 7. Therefore, "[a]ny evidence of 'personal interest, malice, [or] actual criminal intent' will negate subjective reasonableness." *Kleinert*, 855 F.3d. at 317 (quoting *Baucom*, 677 F.2d at 1350).

The two courts that have suggested that Supremacy Clause immunity should not depend on the officer's subjective belief are misguided in their rationale. They

proposed to promote "the goal of promptly determining whether qualified immunity was appropriate on a motion for summary judgment." *Livingston*, 443 F.3d at 1222. However, considering subjective intent does not delay a court's determination of immunity, as the court must consider the factual circumstances anyway. While making a reasonableness determination, the court should not turn a blind eye to evidence of malicious intent driving an officer's enforcement decision. Additionally, the only two courts to suggest this have done so in dicta—never has a court found this rationale important enough to determine the outcome of the case. *See id.* at 1222; *Horiuchi*, 253 F.3d at 366 n.11.

In deciding whether an officer believed his conduct was necessary and proper, the court "focus[es] here on the circumstances surrounding the conduct" that the officer offers as justification for his actions. *Kleinert*, 855 F.3d at 319. If an examination of the circumstances gives a court reason to doubt the officer's statement that he honestly believed his actions to be "necessary and proper," immunity from prosecution should not extend. In *Kleinert*, the officer had probable cause to believe someone had committed a federal crime, and proceeded to chase him and strike him, all while wielding a loaded firearm. *Id.* at 317. The court found immunity proper because the officer had an "honest belief" that his actions were "reasonable and necessary to the exercise of his authority." *Id.* (internal quotations omitted) (citing *Livingston*, 443 F.3d at 1221). Similarly, in *Tanella*, the propriety of the officer's decision to shoot a fleeing suspect whom the officer was grappling with depended on whether the officer "honestly believed his life to be in danger" because the person he

shot was reaching for a gun at the time the officer shot him. *Tanella*, 374 F.3d at 148. The court gave the officer's statement that he feared for his life the presumption of truth. *Id.* at 150. However, it then considered whether the state had "raise[d] a genuine issue of fact about [the officer's] state of mind." *Id.* (citing *Long*, 837 F.2d at 744). Because the officer's conduct gave the court no reason to doubt his given reasons for his actions, immunity applied. *Tanella*, 374 F.3d at 150.

A clear case of subjectively improper action is when the officer's action is driven by bad intent. Essential to determining whether the officer's actions were necessary and proper is "whether the official employs means which he cannot honestly consider reasonable in discharging his duties or otherwise acts out of malice or with some criminal intent." *Clifton*, 549 F.2d at 728; *see also Long*, 837 F.2d at 745. As long as a court can say that "[t]here is no suggestion that [the officer] acted out of any personal interest, malice, actual criminal intent, or for any other reason than to do his duty as he saw it" and that "[h]is good faith cannot be seriously questioned," this prong will be met. *Baucom*, 677 F.2d at 1350 (citing *In re McShane's Petition*, 235 F. Supp. 262, 274 (N.D. Miss. 1964)). This limitation is not just for malice. Where an officer acts out of "excessive zeal," he likewise loses the protection of the Supremacy Clause. *Horiuchi*, 253 F.3d at 362.

In making this determination, a court does not take the officer's stated reason at face value; instead, it looks at the surrounding circumstances to probe other motivations he may have had in acting. To ensure that the actions of federal officers are not second-guessed, there is a presumption that the officer is telling the truth.

See Tanella, 374 F.3d at 150. However, if strong evidence surfaces of an officer's malicious intent, the court should not ignore it. In *Morgan*, the court did not accept the officers' assertion that the reason they followed the driver of a car they had hit with their car and brandished a gun at him was because he had threatened them. *Morgan*, 743 F.2d at 733. Instead, the court looked at the other evidence on the record—primarily that the officers were drunk at the time and had caused a car crash—and concluded that they did not have an honest belief that their actions were necessary to carry out their federal duties. *Id.* at 731.

This accords with the more general principle that a government official can commit an act that she is legally authorized to do, yet, at the same time, that act is improper because it has a bad motive. If a DEA agent were dealing drugs and conducted raids on other drug dealers to promote his own business interests, few would say that his conduct should be shielded by the Supremacy Clause. *See* Waxman & Morrison, *supra*, at 2254. The agent's conduct in cracking down on drug dealers, even killing them, would pass the Supremacy Clause immunity test: the agent would be acting objectively reasonably by enforcing laws within his federal authority. The only way to prevent an officer like this from cloaking his actions in the Supremacy Clause is by allowing the court to investigate his intent.

In cases in which lower courts have found that an officer's conduct met the subjective prong, there is no hint that the officer was motivated by personal bias. *See, e.g.*, *Kleinert*, 855 F.3d at 305 ("[N]one of the evidence suggests that [the officer] acted out of personal interest or bore any ill will toward [the man he shot]."); *Baucom*,

677 F.2d at 1350 ("There is no suggestion that [the officer] acted because of any personal interest, malice, actual criminal intent, or for any other reason than to do his duty as he saw it."). In cases in which lower courts have found an officer's conduct failed the subjective test, it is because there was evidence of malice or personal reasons motivating the officer's actions. In *Horiuchi*, the Ninth Circuit noted that federal officers driven "either through malice or excessive zeal" are not protected by the Supremacy Clause and then described in depth how the officer's conduct there was overzealous. *Horiuchi*, 253 F.3d at 362, 369–74. Similarly in *Morgan*, the circuit court rejected the district court's finding that the agents acted "in good faith pursuant to their federal duties," where there was ample evidence that the officers got into a car accident with someone and then followed the person to a jewelry store and brandished their weapons while threatening him. *Morgan*, 743 F.2d at 732.

2. The Thirteenth Circuit correctly found that Petitioner's conduct towards Mr. White was not subjectively proper.

Petitioner's decision to arrest Mr. White fails subjective "necessary and proper" scrutiny. To believe Officer Schrader's claim that his decision to arrest Mr. White was not motivated at all by his ill-will towards Mr. White would require ignoring the many reasons he had *to not* arrest Mr. White and the one main reason he had *to* arrest Mr. White.

First, Petitioner had little reason to arrest Mr. White. At the time, he was not on duty; instead, he was on vacation with his new wife and her two children. R. at 28. At the time he charged Mr. White, Petitioner was standing in front of them. R. at 30. Petitioner did not work in the New Tejas FBI office. R. at 28. He had no experience

with enforcing federal drug laws, and therefore was not familiar with the federal policies and practices that guided federal drug law enforcement. R. at 28. All of these factors make it less likely that Petitioner would choose to enforce a federal drug law. Circumstances also show that Petitioner had a strong personal reason to arrest Mr. White. Earlier in the day, Petitioner had almost been in a car collision with Mr. White. Right after the near-collision, Petitioner left his car and furiously confronted Mr. White. R. at 29. Petitioner admitted that he "lost [his] temper." R. at 29. Petitioner shouted at Mr. White, and Petitioner's wife feared that Petitioner was about to punch Mr. White before the confrontation finally ended. R. at 29–30. The evidence on record makes it likely that this decision was not based on the officer's subjective belief that it was necessary and proper. Instead, it was likely motivated by "malice or [] some criminal intent." *Clifton*, 549 F.2d at 728.

ii. An Officer's Belief That His Actions Were "Necessary and Proper" Must Be Objectively Reasonable.

Every circuit has followed the Supreme Court in *Neagle* in finding that the scope of the necessary and proper test includes some element of objective analysis. Those decisions recognize the proposition—especially applicable here—that the purpose of Supremacy Clause immunity is to prevent states from disabling the federal government from enforcing federal laws. This directive is not advanced by allowing federal agents to act in objectively unreasonable ways. The second inquiry of the "necessary and proper" test therefore asks whether the officer's subjective belief that his actions were justified was objectively reasonable, looking at the facts and circumstances surrounding the decision as the officer himself knew them at the time.

1. The court must consider the objective reasonableness of the federal officer enforcing federal law.

In its analysis in *Neagle*, this Court noted that the federal marshal was "correct in the belief that, without prompt action on his part, the assault of Terry upon the judge would have ended in the death of the latter." *Neagle*, 135 U.S. at 76. It went on to note that "such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim." *Id.* By evaluating the marshal's belief as "correct" and "well-founded," the *Neagle* Court promulgated objective analysis. *Id.*; *see Standard*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining an "objective standard" as one that "is based on conduct and perceptions external to a particular person" and that "does not require a determination of what the defendant was thinking"). This is a legal, not a factual conclusion. *Tanella*, 374 F.3d at 151 (extending Supremacy Clause immunity because the officer's decision was "objectively reasonable *as a matter of law*.") (emphasis added); *Dwyer*, 105 F.3d at *3 (stating that the question of whether the officer's belief was objectively reasonable is a legal inquiry). A majority of circuit courts that have considered this question recognize this approach by including such an objective element in their necessary and proper analyses.[3]

When looking at the circumstances surrounding the decision, the court "view[s] all of the circumstances as they appeared to [the officer]." *Tanella*, 374 F.3d at 147.

[3] *See Tanella*, 374 F.3d at 147 (citing *Whitehead*, 943 F.2d at 234) (to meet the "necessary and proper" standard, an officer's belief that his actions were justified must be "objectively reasonable"); *see, e.g.*, *Long*, 837 F.2d at 745; *Horiuchi*, 253 F.3d at 366; *Dwyer*, 105 F.3d at *3; *Baucom*, 677 F.2d at 1351.

In *Tanella*, the court had to evaluate the reasonableness of a DEA agent's decision to shoot a suspect he had been physically grappling with. As the *Tanella* court stated, the issue was not whether the shot suspect was actually turning to run from the officer, but rather whether the officer's belief that the suspect was about to grab his gun "was reasonable *from [the officer's] viewpoint*." *Id.* at 151 (emphasis in original) (citing *Long*, 837 F.2d at 745). Furthermore, there is no requirement that an officer's actions actually be correct. The officer "need not 'show that his action was in fact necessary or in retrospect justifiable, only that he reasonably thought it to be.'" *Tanella*, 374 F.3d at 147 (quoting *Clifton*, 549 F.2d at 728). In *Tanella*, the court specifically noted that it was not deciding that the officer "correctly evaluated the circumstances." *Tanella*, 374 F.3d at 152.

Thus, courts are required to evaluate the decision from the officer's point of view and extend immunity even to an officer who mistakenly but reasonably believes his actions are necessary. This strikes a proper balance to prevent the chill on officer decision-making while also respecting states' police powers to punish crimes committed in their jurisdictions. *See Drury*, 200 U.S. at 7. Affording Supremacy Clause immunity is only justified to the extent that immunity is needed to protect a federal interest. The federal government cannot have an interest in its officers' objectively unreasonable conduct, as conduct that is not reasonable does not advance federal interests.

Refusing to allow Petitioner to avoid prosecution for his abuse of federal authority does not open the floodgates. Supremacy Clause immunity remains a broad

protection for those enforcing federal law. A decision against Petitioner does nothing to limit the federal government from freely sending its officers across the states to enforce federal law. The only reason Petitioner arrested his victim for violating federal law was to use his federal power as his own personal cudgel, acting under the guise of federal law enforcement. There is no federal interest here advanced by Officer Schrader's actions, and no federal interest stymied by his arrest and prosecution.

2. There are multiple factors a court could consider in evaluating objective reasonableness.

When deciding whether an officer acted reasonably, a court breaks down the circumstances and decisions surrounding the officer's conduct to decide whether there was sufficient support for each. In *Horiuchi*, the court explicitly listed out the six decisions composing the federal officer's action there. *Horiuchi*, 253 F.3d at 368–374. Working with a detailed factual record describing the information available to the officer and each step he took, the court found the officer's decisions unreasonable. *Id.*

A court should evaluate reasonableness considering an FBI agent's special knowledge and training. One way to determine this is to examine how other officers would have acted under similar circumstances. *Kleinert*, 855 F.3d at 319. Likewise, a court can consider whether an officer was trained to react to circumstances in a certain way and whether the officer's conduct at question conformed to that training. For example, in *Kleinert*, the district court heard testimony from fellow officers of the officer claiming immunity on how officers were trained to act under similar circumstances. *Id.*

A court should also consider the officer's opportunity for reflection. A decision, notably poor with the benefit of hindsight, is treated more favorably if it is made with little time for deliberation than if the officer has ample time to consider his actions. *See id.* at 320 (internal quotation marks omitted) ("Kleinert necessarily reacted on a split-second basis and accidentally fired his gun."); *Tanella*, 374 F.3d at 151) (noting that the officer's "close-quarter situation was hardly conducive to detached deliberation").

Where a federal officer is following orders, his actions are more likely objectively reasonable. In *DeShields*, the court found that the question of whether an Army sergeant was intoxicated at the time his car hit another car and killed its driver was irrelevant in determining Supremacy Clause immunity because the sergeant had been ordered by his commanding officer to drive his car, and the commanding officer knew that the sergeant might have been drinking. *DeShields*, 829 F.2d at *7. In finding that the officer's conduct satisfied the "necessary and proper" analysis, the court noted that the sergeant was "carrying out a legal order from a superior." *Id.* at *7; *see also McShane*, 235 F. Supp. at 270 (finding that an officer's decision to fire tear gas into a crowd was proper because he did so carrying out "specific instructions of the Attorney General of the United States"). This follows the limiting principle of immunity, as the fact that an officer is merely following an order given by a superior makes it more likely that his conduct furthers a federal interest.

In evaluating the level of force used during an arrest, the court should also consider whether the agent identified himself as a federal officer and whether his

target put up any resistance to arrest. In *Castle*, the court considered a case in which federal officers fired multiple rounds into an occupied car they suspected was being used to smuggle liquor into the United States, killing one of the occupants. *Castle v. Lewis*, 254 F. 917, 925–26 (8th Cir. 1918). In upholding the district court's finding that the officers had not acted reasonably in the level of force they used, the court relied on several factors. First, it noted that the occupants of the car were unarmed. *Id.* Additionally, the occupants did not resist arrest. *Id.* It also noted that the officers had not clearly identified themselves as law enforcement, and that the car's occupants "did not know that the officers wanted them to stop or wanted to arrest them until after the shooting." *Id.*

3. The Thirteenth Circuit correctly found that Petitioner's conduct towards Mr. White was not objectively reasonable.

Viewing "all of the circumstances as they appeared" to Petitioner, his two decisions were not objectively reasonable. *Tanella*, 374 F.3d at 147. First, the decision by an off-duty, on-vacation, ununiformed FBI agent to enforce a law he had no experience with cannot be said to have been reasonable under the circumstances. Second, given the lack of exigency, the fact that the perceived violation was relatively minor, and that Petitioner did not identify himself as a federal agent, his decision to tackle Mr. White was not objectively reasonable either. Finally, Petitioner does not dispute the fact that his conduct was objectively unreasonable. R. at 12–13.

Petitioner's decision to arrest Mr. White in the first place fails objective reasonableness muster. It is clear that Petitioner was not "carrying out a legal order

from a superior" at the time he decided to arrest Mr. White—far from it. *See DeShields*, 829 F.2d at *7. Petitioner's reason for being in New Tejas was "unrelated to any of [his] official duties." R. at 28. He was there with his family on vacation. R. at 28. Petitioner had no personal experience enforcing federal drug laws. R. at 28. The situation might have been different had Petitioner seen evidence of racketeering, money laundering or kidnapping—areas of federal law with which Petitioner had experience.

Petitioner's decision to enforce federal drug laws ran counter to Department of Justice policy to not "devote resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use." Cole Memorandum, *supra*. Mr. White's possession of two ounces of marijuana places him solidly within the lowest possible sentencing guidelines range. *See* R. at 31; U.S. Sentencing Guidelines Manual § 2D2.1 (U.S. Sentencing Comm'n 2007). Although there is no testimony on the record as to how other officers would have acted under similar circumstances, the facts as they stand are sufficient to find that no reasonable FBI agent in Petitioner's situation would have chosen to try to arrest Mr. White. *See Kleinert*, 855 F.3d at 319. The potential offense was so minor, and Petitioner's enforcing the law against Mr. White furthered no federal interest because it ran counter to DOJ policy.

Likewise, Petitioner's decision to chase after Mr. White and tackle him to the ground, leaving Mr. White with a broken arm and chipped teeth, cannot be said to be reasonable. R. at 32. Again, Petitioner's decision here must be analyzed from the

perspective of a reasonable FBI agent in Petitioner's shoes with access to the information Petitioner had available to him at the time. *Long*, 837 F.2d at 745. When Petitioner saw Mr. White at around noon, there was no exigency compelling Petitioner to act. *See Clifton*, 549 F.3d at 728–29 (officer's use of force was reasonable, where he shot and killed an armed man fleeing a chaotic arrest scene); *see also Tanella*, 374 F.3d at 319 (officer's use of force was reasonable, where he shot and killed a drug dealer following a high-speed car chase and hand-to-hand struggle). Nor is there any evidence that Mr. White was armed or that Petitioner believed Mr. White to be armed. R. at 31. Seeing Mr. White fifteen feet away, Petitioner chose to run and shout at him rather than closing the few feet between them to ask Mr. White what he had in his hand. R. at 31. Finally, Petitioner did not clearly identify himself as a federal agent. R. at 31.

The evidence available to the court and the reasonable inferences therefrom correctly led the Thirteenth Circuit Court of Appeals to find that Petitioner's actions were objectively unreasonable. Therefore, Petitioner is not entitled as a matter of law to Supremacy Clause immunity.

CONCLUSION

When considering a motion to dismiss predicated on a claim of immunity under the Supremacy Clause, this Court should construe disputed issues of fact in the light most favorable to the state. Immunity should not extend to a federal officer who, like Agent Schrader, exceeded the scope of his federal authority, had malicious intent and acted in an objectively unreasonable manner. This Court should affirm the decision of the Thirteenth Circuit and remand for further proceedings.

Respectfully submitted
/s/ *Team #27*
Team #27
Counsel for Respondents
November 18, 2019

CERTIFICATE OF SERVICE

By our signature, we certify that a true and correct copy of Respondents' brief on the merits was forwarded to Petitioner, Hank Schrader, through the counsel of record by certified U.S. mail, return receipt requested, on this, the 18th day of November, 2019.

/s/ *Team #27*
Team #27
Counsel for Respondents
November 18, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33.1, the undersigned hereby certifies that the Brief for Respondents, the State of New Tejas, contains 13,968 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 #27*
Team #27
Counsel for Respondents
November 18, 2019

APPENDIX A – FEDERAL STATUTES

28 U.S.C. § 1442 - Federal officers or agencies sued or prosecuted.

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

18 U.S.C. § 3052 - Powers of Federal Bureau of Investigation.

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

21 U.S.C. § 844 - Penalties for simple possession.

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . . .

21 U.S.C. § 802 – Definitions.

As used in this subchapter: . . . (6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.

21 U.S.C. § 812 – Schedules of controlled substances.

Schedule I . . . (c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation: . . . (10) Marihuana.

APPENDIX B – NEW TEJAS STATUTES

22.01 - Assault

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another;

(2) intentionally or knowingly threatens another with imminent bodily injury; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

(b) An offense under this section is a Class A misdemeanor.

22.02 - Aggravated Assault

(a) A person commits an offense if the person commits assault as defined in Sec. 22.01 and the person causes serious bodily injury to another.

(b) An offense under this section is a felony of the second degree.

50.01 - Justification as a Defense.

It is a defense to prosecution that the conduct in question is justified under this chapter.

50.02 - Arrest and Search

(a) A peace officer is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest or search, or to prevent or assist in preventing escape after arrest, if:

(1) the actor reasonably believes the arrest or search is lawful; and

(2) before using force, the actor manifests his purpose to arrest or search and identifies himself as a peace officer, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested.