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 PETITIONER

Counsel for Petitioner

Team No. 33

QUESTIONS PRESENTED

I. May a district court resolve questions of fact pertinent to a Supremacy Clause immunity defense when a federal agent raises the defense on a Motion to Dismiss his state criminal prosecution?

II. What test applies when a federal official, claiming to have acted pursuant to federal authority, asserts immunity from state criminal prosecution under the Supremacy Clause and *In re Neagle*, 135 U.S. 1 (1890)?

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Petitioner Hank Schrader is a Special Agent with the Federal Bureau of Investigation.

Respondent, State of New Tejas, is a state properly situated within the United States of America.

JURISDICTIONAL STATEMENT

Petitioner was indicted for assault and aggravated assault in New Tejas state court. Pursuant to 28 U.S.C. § 1442, Petitioner removed his case to federal court. The district court entered judgment in favor of Petitioner on September 14, 2017. Respondent appealed to the Thirteen Circuit Court of Appeals. The judgment of the Court of Appeals was entered on October 2, 2018. Petitioners applied for writ of certiorari, which this Court granted on March 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

DECISIONS BELOW

The decision of the Thirteenth Circuit Court of Appeals was not reported, but is available at No. 18-5719 and at page 1a of the record. The unreported opinion of the United States District Court for the District of Madrigal's decision is available at No. 17-cr-5142 and at page 27a of the record.

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner raised his Motion to Dismiss under Article VI of the United States Constitution, claiming immunity from prosecution under the laws of the State of New Tejas. The relevant New Tejas state statutes are set forth in R. at 43–46a and reproduced in the Appendix below.

Article VI, Clause 2 of the United States Constitution provides:

> 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.

18 U.S.C. § 3052 provides:

> … 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.

INTRODUCTION

The Supremacy Clause of the United States Constitution provides that federal law is the supreme law of the land, notwithstanding laws of any of the fifty states. U.S. CONST. art. VI, cl. 2. For well over a century, this Court's precedent has established a simple rule of law: federal officers may not be prosecuted for faithfully fulfilling their federal obligations. *See In re Neagle*, 135 U.S. 1 (1890). The State of New Tejas has impermissibly violated this command and intruded on federal supremacy. By remanding Agent Schrader's case, the Thirteenth Circuit has substantially burdened Agent Schrader's entitlement not to stand trial. The complexities of Supremacy Clause immunity require district courts to sit as a factfinder interposed between state prosecutors and juries. Those facts, pertinent to immunity, shall be used to establish whether, pursuant to his duties, a federal officer acted in an objectively reasonable manner. Because the Thirteenth Circuit incorrectly remanded this case to trial, this Court should reverse the decision of the Thirteen Circuit Court of Appeals, and both formally establish as proper procedure the ability of district courts to resolve facts and identify objective reasonableness as the core of the Supremacy Clause standard.

STATEMENT OF THE CASE

A. Agent Schrader is a Special Agent of the FBI.

Agent Hank Schrader has dutifully served as an FBI Special Agent for nearly twenty years. R. at 27a–28a. During the course of his service, he has experience with investigations and enforcement in a wide variety of areas, including racketeering, wire fraud, and kidnapping. R. at 27a–28a. Agent Schrader has received multiple

commendations for his work, and is currently stationed in Wisconsin. R. at 28a. Agent Schrader has never personally worked on drug trafficking investigations. R. at 28a. However, pursuant to 18 U.S.C. § 3052, Agent Schrader is authorized to make arrests for violations of "any" federal law committed in his presence. 18 U.S.C. § 3052 (1948). Agent Schrader has not been formally disciplined for any conduct arising from his twenty years of service. R. at 28a.

B. **Agent Schrader takes a trip to New Tejas.**

In November 2016, Agent Schrader traveled to Madrigal, New Tejas, for a honeymoon with his wife and two stepchildren. R. at 28a. On the morning of November 8, the fifth day of the trip, Agent Schrader was driving his family to the New Tejas Natural History Museum when he claims that Mr. White was "speeding dangerously, pulled in front of his vehicle, and immediately braked" causing Agent Schrader to "narrowly avert a collision." R. at 28a–29a. The exact events of the traffic incident are disputed, but what happened after is not. R. at 28a–29a. At a stop light, Agent Schrader exited his car and yelled at White. R. at 29a. White got out of his vehicle and shoved Agent Schrader in the chest, telling him, "back off, you're crazy, but if you wanna fight, I ain't backing down." R. at 29a. Though both men cannot remember the extent of their conversation, there is no evidence that Agent Schrader did not responded with similar threats or violence. R. at 29a–30a.

Both men then re-entered their cars, and Agent Schrader's wife testified that he "visibly relaxed" and apologized to the family for losing his temper. R. at 30a. The

family then went to the museum, where they spent hours enjoying the exhibits. R. at 30a. There was no further mention of the earlier confrontation. R. at 30a.

C. Agent Schrader arrests Mr. White for violating federal law.

Later that day, Agent Schrader's family left the museum to have lunch. R. at 30a. As they walked down a "shady" boulevard, White emerged from a non-descript marijuana dispensary fifteen feet away and was carrying two ounces of marijuana in a clear plastic bag. R. at 30a–31a. Agent Schrader, without backup and presumably unarmed, immediately identified that White was in possession of marijuana in violation of federal law and shouted, "[s]top! You're under arrest!" R. at 31a. White fled as Agent Schrader ran toward him. R. at 31a.

Agent Schrader eventually caught up to White and tackled him to the ground. R. at 31a. Agent Schrader thereafter placed White in handcuffs. R. at 31a. When local police arrived at the scene, they found Agent Schrader explaining to White that he was under arrest for violating 21 U.S.C. § 844, the simple possession prohibition of the Controlled Substances Act. R. at 31a. Agent Schrader identified himself as an FBI agent enforcing federal law. R. at 31. Local police allowed him to leave the scene, satisfied by his claim of authority. R. at 31a. There is no evidence Agent Schrader referenced or considered the previous encounter with White around the time of the arrest, despite White's opportunity to testify before the district judge. *See* R. at 29a–32a.

In 2016, New Tejas made both possession and consumption of marijuana legal under state law. R. at 30a. Marijuana, however, remains a Schedule I drug and

possession is illegal under federal law. R. at 30a. Agent Schrader denies having knowledge of this ballot initiative. R. at 2a.

D. The Madrigal community strongly disapproves of White's arrest.

White is a prominent marijuana user and advocate in Madrigal. R. at 32a. White's arrest under federal law angered the Madrigal community, leading hundreds of protesters to gather and "angrily" complain about White's arrest and resulting injuries, which included a broken arm and chipped teeth. R. at 32a–33a. The Madrigal County District Attorney, Mrs. Wexler, was recently elected on a pro-marijuana platform and spoke forcefully at the protest in a speech that was captured on video. R. at 32a. Citing the recent state ballot initiative that purported to legalize possession contrary to federal law, Wexler said, "[t]he federal government has no business interfering with the sovereign will of the people of New Tejas, and I will use every power of this office to prevent federal marijuana laws from being enforced in this great State." R. at 32a. At District Attorney Wexler's direction, Agent Schrader was subsequently indicted for assault and aggravated assault under New Tejas law. R. at 33a.

Wexler specifically addressed White's arrest and announced her intent to charge Agent Schrader with aggravated assault so that he would "serve a lengthy prison sentence." R. at 33a. She concluded, "[l]et 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.

E. Agent Schrader files a motion to dismiss his criminal indictment.

Agent Schrader removed the case to federal district court under 28 U.S.C. § 1442, and subsequently moved to dismiss under Federal Rule of Criminal Procedure 12(b), claiming immunity from state prosecution under the Supremacy Clause of the Constitution. R. at 33a–34a. The District Court for the District of Madrigal held an evidentiary hearing on Agent Schrader's motion where the court received extensive briefing and heard both witness testimony and oral argument. R. at 3a. The District Court for the District of Madrigal, finding it was permitted to resolve disputed issues, subsequently made findings of fact and conclusions of law. R. at 37a–41a. Based on these findings, the district judge granted Agent Schrader's motion to dismiss, concluding Supremacy Clause immunity properly shields Agent Schrader from state prosecution. R. at 41a.

On appeal, a divided panel of the Thirteenth Circuit reversed the district court and remanded the case for trial. R. at 13a. The Circuit held the district court improperly resolved questions of fact and disregarded all findings by the district judge, articulating that the court should have construed facts in a light most favorable to the state. R. at 8a. Further, the Thirteenth Circuit inferred that Agent Schrader was motivated by a malice, rendering his conduct outside the scope of Supremacy Clause immunity. R. at 11a, 13a. Certiorari was granted on March 18, 2019 to address the certified questions above. R. at 1a.

SUMMARY OF ARGUMENT

The federal sovereign reigns supreme over all persons and things within the borders of the United States, without which, the "public authority might be insulted

and its proceedings interrupted without impunity." *The Federalist No. 43,* (James Madison) (C. Rossiter ed., 1961). The virtue of this supremacy grants federal officials a Constitutional entitlement not to stand trial at the behest of state governments. Procedurally, where a district court is asked to dismiss a criminal indictment against a federal official, the district court need not empanel a jury. Though the federal courts have scarcely addressed this point of procedure, Agent Schrader's Constitutional entitlement and the Federal Rules of Criminal Procedure grant district courts authority to resolve issues of fact.

In assessing the language of Rule 12 and the overarching goals of criminal prosecution, this Court has bound itself by *stare decisis* to allow district courts to engage in fact-finding where facts surrounding the *commission of a crime* are not intertwined with facts relevant to the *validity of the defense. United States v. Covington*, 395 U.S. 57, 60 (1969). Factual determinations of immunity do not determine the guilt or innocence of federal officials. Thus, the time to extend *Covington* to Supremacy Clause immunity is now.

Federal officials are entitled to immunity from criminal trial in the same way government officials are protected in cases of civil liability. This Court has time and again recognized the threat that civil liability will lead to deterrence of official conduct. Because a federal official may not be indemnified by the government, erroneously allowing prosecution to proceed in every case where issues are in dispute—as will always be the case—impermissibly and unconscionably results in rampant overdeterrence of federal officials exercising necessary discretion to enforce

federal law. District courts, well versed in the intricacies of federal immunity, must resolve issues of fact pre-trial to preserve a federal official's Constitutional right not to stand trial—a right that cannot otherwise be vindicated once denied.

In cases like the one at bar, this Court should apply the Supremacy Clause Immunity standard from *In re Neagle* and grant immunity from state prosecution for federal officials whose acts were (1) pursuant to federal authority, and (2) objectively reasonable under the circumstances, giving due deference to the exigencies of law enforcement. Because Agent Schrader, an FBI Special Agent, was exercising his authority to make an arrest for violations of the Controlled Substances Act, and because his actions were objectively reasonable under the circumstances, the district court properly granted his motion to dismiss pursuant to Supremacy Clause immunity.

The history of Supremacy Clause immunity, which dates back well over a century, indicates that the doctrine is particularly applicable to cases where state prosecutors are motivated by a desire to challenge locally unpopular federal laws and officials. Agent Schrader's prosecution was motivated by District Attorney Wexler's expressed intent to subvert federal law, making this a case in which dismissal of the prosecution under Supremacy Clause immunity is particularly urgent.

As determined by *In re Neagle*. federal officials acting under color of federal authority and duty broadly construed, overcome the initial burden to establishing immunity. Agent Schrader arrested White sufficiently pursuant to his authority and duty to enforce federal law. Agent Schrader has express statutory authority to

execute arrests for violations of the Controlled Substances Act committed in his presence, and his tactical arrest of Mr. White falls within the broad construction of the authority prong established by Supreme Court and federal circuit court precedent. A broad and forgiving construction of this element is crucial to effective federal action, as it guards against undue chilling of discretionary actions and allows for uniform oversight by federal authorities, rather than the fifty states.

Finally, considering Supremacy Clause precedent, this Court's doctrine in analogous circumstances of probable cause and official immunity, and policy rationales underlying the Supremacy Clause, the "necessary and proper standard" must be applied as a rule of "objective reasonableness." Precedent from a wide range of contexts indicates that the touchstone of judicial inquiry into law enforcement action is objective reasonableness based on the circumstances. A significant degree of deference to law enforcement is critical, especially when the alternative would allow states to infringe on federal law enforcement. Agent Schrader needed to quickly execute a solo arrest of a potentially violent, fleeing lawbreaker, making his actions objectively reasonable despite the injuries White incurred. Moreover, even if a subjective reasonableness test is applied, upon consideration of the facts found by the district court, the Thirteenth Circuit's factual inference regarding Agent Schrader's motive was insufficient to overturn the district court's grant of immunity. The Thirteenth Circuit should be reversed.

ARGUMENT

I. The Nature of Federal Supremacy Mandates That District Courts Resolve Disputed Issues of Fact Presented on a Federal Officer's Motion to Dismiss His Criminal Indictment. To Do Otherwise Would Render Supremacy Clause Immunity a Practical Nullity.

The Madrigal District Court properly resolved questions of fact related to Agent Schrader's motion to dismiss based on the Supremacy Clause. In cases of check usurpations by the states through judicial fact finding. *The Federalist No. 28* (Alexander Hamilton) (C. Rossiter ed., 1961). Fundamental to the federal sovereign is its inherent power to prevent states from impeding upon the ability of federal officials to exercise their duty to carry out federal law. *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819). Article VI of the Constitution amply provides that it is the United States Government and not the States that retains control over federal agents acting in accordance with their official duties. Accordingly, Supremacy Clause immunity renders state and federal courts inapt to enforce state criminal laws against an official who acts under color of federal law. *See Arion v. Sato*, No. 13-00464, 2014 WL 495423, *3 (D. Haw. Feb. 6, 2014). The consequence of declaring supremacy ensures immunity is a central attribute of the Constitution's structure.

Upon ratification of the Constitution, the States gave up portions of their judicial power to answer legal questions within their borders. *See Tennessee v. Davis*, 100 U.S. 257, 266 (1880). That power was thereby vested in the federal courts to determine questions arising under the laws of the United States. *Id.* Consequently, though the Tenth Amendment generally grants states plenary power to address criminal law, the state sovereign's power is inferior when the law falls within a

constitutionally enumerated power of the federal government. U.S. CONST. amend. X. The federal government's power is exceptionally acute where immunity from state criminal prosecution is before the court. *See Davis*, 100 U.S. at 263.

This necessary hierarchy of federal and state power as established by the Constitution reflects the Framers' intention to treat federal law as supreme. Where federal agents plainly and erroneously act outside the scope of their authority, the states may bring criminal charges. *Idaho v. Horiuchi*, 253 F.3d 359, 361–62 (9th Cir. 1991). However, the Constitution grants those same agents, acting to vigorously perform their duties, immunity and removes the shackles of state prosecution. Supremacy Clause immunity, which stems from the very concept that a law cannot be both the execution of a federal duty and a violation of state criminal law, is an absolute bar from suit. *Arizona v. Files*, 36 F. Supp. 3d 873, 877 (D. Ariz. 2014). Once established, both federal and state courts are stripped of jurisdiction over the officer. *Ohio v. Thomas*, 173 U.S. 276, 283 (1899).

Erroneous denial of immunity under the Supremacy Clause unfairly, and unconstitutionally, denies federal officials the right to be free from prosecution under state law. *Id*. Prosecution under circumstances such as those before this Court, disrupts the federal system by sanctioning the "inversion of the fundamental principles" of our democracy, making the federal government "subordinate to the authority of the parts." *The Federalist No. 44* (James Madison) (C. Rossiter ed., 1961).

The very principles of federal sovereignty hereafter guide this Court to authorize judicial fact finding related to a federal official's defense of Supremacy

Clause immunity. This point of procedure, ill-defined and scarcely discussed by the federal courts, constitutionally sits with the district court instead of a jury of one's peers. Rule 12 of the Federal Rules of Criminal Procedure authorizes the district courts to resolve questions of fact where doing so does not require the court to determine an individual's guilt or innocence. Fed. R. Crim. P. 12(b). The constitutional design commands Supremacy Clause immunity be considered in a manner consistent with other forms of immunity, particularly where denying courts the power to resolve issues of fact would render the Supremacy Clause a nullity. The District Court for the District of Madrigal thus properly resolved issues of fact and dismiss Agent Schrader's case on the basis of the Supremacy Clause, thereby precluding New Tejas from unconstitutionally prosecuting Agent Schrader.

A. Rule 12 Of The Federal Rules Of Criminal Procedure Specifically Contemplates That District Courts Will Resolve Issues Of Fact Related To Supremacy Clause Immunity.

Historically, federal judges are educated through testimony and expert witnesses at trial. Today, however, modern courts routinely answer questions of fact in areas they are not necessarily versed. Allison Orr Larsen, *Judicial Fact-Finding in an Age of Rapid Change: Creative Reforms from* Abroad, 130 HARV. L. REV. F. 316, 316–17 (2017). Notably, judicial fact-finding occurs most frequently in pretrial proceedings. Though this Court has declined to address judicial fact-finding as it relates to the Supremacy Clause, a matter within a federal court's purview, immunity is only meaningful if district courts can sit as the ultimate factfinder on motions to dismiss. Both Respondent and the Thirteenth Circuit failed to demonstrate

otherwise, incorrectly discounting the applicability of other instances of judicial fact-finding under Rule 12(b) both here and as a general point of procedure.

1. Consistent With Rule 12, Resolution Of Disputed Facts Related To A Defense Of Supremacy Clause Immunity Does Not Resolve The General Issue To Be Presented Before A Jury.

The District Court below appropriately made findings of fact on the record consistent with the requirements of Rule 12, which specifically envisions district courts making "preliminary findings of fact" to resolve the ultimate legal question presented by a motion. *United States v. Jones*, 452 F.2d 661, 664 (6th Cir. 1976). Where disputed issues of fact exist, the district court, versed in the "subtleties of federal immunity law," shall hold a pretrial hearing and make a determination on those facts. *Horiuchi*, 253 F.3d at 376; *see also California v. Dotson*, CV No. 12cr0917 AJB, 2012 WL 1904467, *2 (S.D. Cal. May 25, 2012). Rule 12 guides this Court to grant district courts the authority to resolve factual disputes related to Supremacy Clause immunity because such resolution will not lead to "trial of the general issue." Fed. R. Crim. P. 12(b).

Succinctly, Rule 12(b) governs two categories of motions. The first category does not involve the general issue to be adduced at trial while the second often requires resolution of the ultimate issue.[1] *United States v. Pope*, 613 F.3d 1255, 1259 (10th Cir. 2010). Notably, the first category includes evidence suppression, trial conduct and preparation, and nearly all motions to dismiss. *Id.* In the latter group,

[1] The second category of issues motions presented by Rule 12 typically requires factual determinations appropriately suited for a jury. Factual determinations relevant to the defenses of self-defense, insanity, and entrapment will also be relevant in assessing the guilt or innocence of the defendant. *United States v. Smith*, 866 F.3d. 1092, 1096 n.5 (9th Cir. 1989).

which includes immunity defenses, issues can be decided without determining facts surrounding the crime, and thereby do not involve the general issue. In all pretrial motions, if the court is faced with disputes of fact, Rule 12(b)(2) anticipates the district court will conduct pretrial hearings and resolve questions of fact. *United States v. Nunez-Rios*, 622 F.2d 1093 (2d Cir. 1980). Once the district court states its findings on the record, the court has followed the calling of Rule 12. *Id.*

At these hearings, district courts retain authority to resolve issues of fact that do not raise the "general issue." *Pope*, 613 F.3d at 1259 (quoting *United States v. Yakou*, 428 F.3d 241, 246 (D.C. Cir. 2005)). The general issue is not implicated unless resolving facts pertinent to the 12(b) motion will be necessary to establishing the defendant's guilt or innocence of the alleged crime. *Id.* This Court properly indicated that a case is "capable of determination" pre-trial only where "trial of the facts surrounding the *commission of the alleged offense* would be of no assistance in determining *the validity of the defense*." *United States v. Covington*, 395 U.S. 57, 60 (1969) (emphasis added). In *Covington*, appellee was prosecuted for the possession of marijuana in violation of federal law. *Id.* at 58. Before trial, the appellee raised his privilege against self-incrimination, and the district court dismissed his criminal indictment. *Id.* This Court reasoned Rule 12(b) specifically grants the district court discretion to hold factual hearings to resolve issues "peculiar to the motion." *Id.* at 60. This Court ultimately held the question surrounding both Fifth Amendment privilege generally and waiver of the privilege did not specifically involve consideration of the ultimate crime. *Id.*

Suppression hearings are most commonly presented on Rule 12(b) motions, and often require the district judge to engage in "extensive fact-finding." Shira A. Scheindlin, *Judicial Fact-Finding and the Trial Court Judge*, 69 U. MIAMI L. REV. 367, 368 (2015). Disputed facts decided by the court legally establish the facts and constitute the basis for that fact's application to the general rule of law. Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact Finding–Their Justified Divergence in Some Particular Cases*, 18 L. & PHIL. 497, 503 (1999).

Evidence relating to motions to suppress are narrowly within a range of issues that, though "collateral to guilt or innocence," may be raised before trial and that allow the court to resolve issues of fact. *United States v. Barletta*, 500 F. Supp. 739, 742 (D. Mass. 1980). Chiefly, the presentation of facts surrounding motions to suppress, particularly those in dispute, differs from evidence that will be presented at trial. *Id.* In these hearings, courts are often asked to resolve factual disputes relevant to the legality of a search or seizure, or the constitutionally of police conduct to procure a confession. *Id.* Though evidence relevant to the motion to dismiss "arguably overlaps at least in part with some of the proof to be introduced at trial," the motion was capable of determination by the district court without invading the province of the jury. *United States v. Barletta*, 644 F.2d 50, 59 (1st Cir. 1981). Simply, factual findings in suppression motions are required to render a legal conclusion and do not shed light on whether the defendant violated the federal or state law at issue. *Id.*

Resolution of facts related to a grant of Supremacy Clause immunity does not bear weight on the general issue to be resolved at trial. Instead, any facts resolved by a district court will not be relevant to a question of guilt or innocence, because immunity is a question of law. In *Drury*, for example, two officers were denied Supremacy Clause immunity because of conflicting testimony. *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 8 (1906). The case, however, is first distinguishable as a matter of principle because Rule 12 was not yet adopted. Even further, *Drury* remains distinct because the federal officials conceded the very issue pertinent to the ultimate conclusion; they admitted the suspects had surrendered, thereby making their conduct unlawful and not in pursuit of their federal duties. The officers were denied immunity because the district court's resolution of facts determined the officers were guilty. *Id.*

Further, and relevant to the proceedings below, in *New York v. Tanella*, the district court appropriately indicated that the State impermissibly blurred the distinction set forth in *Covington*. 281 F. Supp. 2d 606, 612 (E.D.N.Y. 2003). The state intertwined the facts surrounding the *commission* of the alleged offense and those surrounding the *validity of the defense*. *Id.* Though this is a narrow distinction, factual determinations surrounding Supremacy Clause immunity will not intertwine with the actual commission of a crime or the relative guilt or innocence of a federal official. As in *Tanella*, the Thirteenth Circuit below improperly distorted these Rule 12 requirements. *See id.;* R. at 6a.

The evidence taken during Agent Schrader's evidentiary hearing and any factual disputes were appropriately resolved by the district court. First, Agent Schrader's immunity defense does not overlap with the elements of the offense at issue, despite the holding below. R. at 6a. The facts established in *Pope*, bear directly on this point. 613 F.3d at 1259. There, Pope's motion to dismiss was directly collateral to his guilt. Pope, charged with possession of a firearm after his conviction for misdemeanor domestic violence, moved to dismiss based on the Second Amendment. *Id.* at 1255. Whether Mr. Pope had committed the crime—that is how he procured a firearm, for what purposes, and whether he threated another without provocation—were outside the record and would directly determine the validity of his as-applied challenge under the Second Amendment. *Id.* at 1262. Pope's defense improperly implicated trial of the general issue, and his motion to dismiss was appropriately denied. *Id.* Where the district court is asked to resolve an issue that involves only the facts presented by the parties, however, the general issue is not implicated. *Id.*

Here, the charged *offenses* are assault and aggravated assault to which Agent Schrader claimed his *defense* of Supremacy Clause immunity. R. at 2a. The Thirteenth Circuit incorrectly compared the defense to be used at trial—justification—to Agent Schrader's overarching claim of immunity. R. at 6a. The court was perhaps correct that the facts relevant to justification as a defense would be significantly intertwined with the resolution of Agent Schrader's immunity defense. *See* U.S. CONST. art. VI, cl. 2; New Tejas Penal Code § 50.02. However, the court was

required under *Covington* to assess findings of fact related to the assault charges and those required to grant immunity. 395 U.S. at 60. Assault merely requires a factual determination that an individual "knowingly" caused bodily injury and aggravated assault is ascertained by substantive proof that a person both committed assault *and* caused harm. New Tejas Penal Code §§ 22.01–02. Under the Supremacy Clause, the court need only ask whether an officer acted pursuant to his duties and in a reasonable manner. *Neagle*, 135 U.S. at 58. The district court, in granting Agent Schrader's motion, did not resolve facts pertinent to assessing Agent Schrader's guilt on the assault charges. R. at 38a. Rather, the district court determined Agent Schrader's credibility, whether Agent Schrader identified himself properly, and the implications of proceeding with prosecution. R. at 38. Resolution of Supremacy Clause immunity thus does not lead to factual determinations of the general issue, making the district court is the proper venue to resolve issues of fact.

B. District Courts Properly Sit As A Factfinder On Disputed Issues Of Fact Relevant To Immunity.

District courts routinely and competently ascertain facts on motions to dismiss and motions for summary judgment to determine whether there is enough information to send a case to trial. *Files*, 36 F. Supp. 3d at 877. By way of procedure, the Sixth Amendment's guarantee to a jury trial does not extend to disputes of fact material to a federal official's Supremacy Clause defense. *Id.*; *see e.g., In re Neagle*, 135 U.S. at 75. Because the Supremacy Clause serves not as a mere justification or excuse, but as a "shield against liability," juries need not be empaneled to render verdicts on disputed issues. *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004);

see also Horiuchi, 253 F.3d at 376. Therefore, the district court properly sits as factfinder when resolving factual disputes in Supremacy Clause immunity cases.

1. The Ninth Circuit Properly Outlined The Role Of The District Courts To Decide Questions Of Fact In Cases Of Supremacy Clause Immunity.

The shortage of Supremacy Clause jurisprudence at all levels of the federal judiciary sheds little light on the appropriate procedure to be followed when deciding motions to dismiss. However, the Ninth Circuit's determination in *Idaho v. Horiuchi*, is the appropriate standard for this Court to adopt. 253 F.3d at 374. The Ninth Circuit recognized that conflicting evidence will often be presented prior to trial. *Id.* District courts are the appropriate entity to resolve facts where Supremacy Clause immunity is at issue just as they appropriately resolve questions of fact in bench trials and motions to suppress. *Id.* at 374. Accordingly, to remain faithful to the protective nature of the Supremacy Clause, factual issues related to immunity must be resolved by the district court judge. *Id.* at 376.

Horiuchi has an exquisite history, though not particularly relevant to this proceeding. *Id.* In *Horiuchi*, an officer of the Federal Bureau of Investigation removed his state prosecution to federal court and motioned to dismiss, claiming he was immune from prosecution under the Supremacy Clause. *Id.* His motion was initially granted and affirmed on the appeal as the Ninth Circuit aptly recognized the interests served in granting officials immunity for the discharge of their official duties. *Id.* Though the decision was reversed in an en banc rehearing, the court's reasoning turned on the district courts *failure* to resolve disputed issues of fact. *Id.* at 373. The Ninth Circuit further acknowledged the hyperbole of sending disputed

issues of fact to a jury in other instances, chiefly those involving habeas petitions in which the court could not actually submit legal questions to a jury. *Id.* at 375. Allowing district courts to resolve questions of fact prevents states from both hamstringing federal officials by forcing them to stand trial and leaving the federal government powerless against state prosecutions.

The Fourth Circuit's decision in *West Virginia v. Laing* is particularly on point and one of the few cases directly speaking to this issue. 133 F. 887, 891 (4th Cir. 1904). The circuit reasoned that there was no legal support for West Virginia's contention that a jury should serve as the ultimate trier of fact. *Id.* Rather, it was clear that Congress intended for federal district court judges, competent and well versed in the intricacies of federal law, to hear evidence and, without juries, proceed to answer federal questions. *Id.* To hold otherwise, the court reasoned, would wrongfully allow federal officers to be punished for the exercise of their lawful duties. *Id.* The sovereign grants the federal government the power to "execute its own laws, in its own way, and in its own tribunals," which stand appropriately equipped to resolve factual questions. *Id.*

Horiuchi and *Laing* thus demonstrate the importance of allowing district courts to resolve disputed issues of fact. As a preliminary matter, nearly all criminal prosecutions will have some material disputes. Accordingly, it is inapposite to the Supremacy Clause to allow immunity to turn on the non-existence of material disputes of fact. *Morgan v. California*, 743 F.2d 728, 733 (9th Cir. 1984). It is unlikely that a criminal defendant will agree with each piece of evidence presented against

him. This Court would place an undue restraint on federal officials if, each time they are indicted, they cannot assert immunity as a defense merely because there is a dispute of fact that could be effectively resolved by the district court.

Perhaps more importantly, however, the very nature in which the state may raise issues of fact places this Court in a precarious position to ignore the potential ramifications of denying a federal official's motion to dismiss. *Id.* However, in the context of a criminal prosecution, states also allege facts by way of criminal indictment. Courts should not willfully and with a blind eye allow the state to both allege facts and subsequently view those facts in the light most favorable to the state. To accept the Respondent's contention and affirm the Thirteenth Circuit would be to grant the state an unyielding license to reject immunity in all criminal cases against federal officials, thereby contravening the Supremacy Clause. *See id.* (stating states would have a perverse incentive to "fabricate a factual allegation" to negate an officer's immunity defense). The incentive at stake in determining an entitlement to Supremacy Clause immunity—the existence of triable facts—is an issue trial judges confront daily. *United States v. Johnson*, 515 U.S. 304, 316 (1995).

2. Drawing On The Principles Behind Qualified And Sovereign Immunity, It Is Necessary For District Courts To Sit As The Ultimate Finder Of Fact.

Unlike qualified immunity, Supremacy Clause immunity is "constitutionally grounded." *Butz v. Economou*, 438 U.S. 478, 497 (1978); *see also* U.S. CONST. art. VI. Though qualified and Supremacy Clause immunity are derived from independent sources of federal law and serve different functions, the doctrines share fundamental similarities. *Wyoming v. Livingston*, 443 F.3d 1211, 1221 (10th Cit. 2006). Both

doctrines stand to provide an absolute immunity from prosecution, thereby preventing individuals or states from forcing federal officials to stand trial. *Id.* This Court has routinely recognized the prudential concerns underlying the necessity of qualified immunity and, considering the constitutional requirements and the fundamental principles of federalism, district courts have a duty to render prompt rulings on immunity to avoid excessive interference with official action. *Livingston*, 443 F.3d at 1221–22 (citing *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988)).

a. *Qualified And Supremacy Clause Immunity Do Not Permit Courts To Consider Facts In A Light Most Favorable To The Burdened Party.*

First, as a matter of procedure, in the context of civil liability, courts seek to incentivize the protection of individual claimants from constitutional violations while placing a heavy burden placed on the government officials. *Id.* Qualified immunity cases assuredly demonstrate that factual disputes alone are insufficient to bring a civil case to trial. *Horiuchi*, 253 F.3d at 376. Ordinarily, government officials sued pursuant to § 1983 or *Bivens* will move for summary judgment. Rule 56 of the Federal Rules of Civil Procedure require district courts to take the facts in the light most favorable to the non-moving party—the civil plaintiff alleging a violation of his constitutional rights. Fed. R. Civ. P. 56(a). On motions for summary judgment based on qualified immunity, this Court has left a doctrinal void regarding who bears the burden of disproving the applicability of governmental immunity.[2] Notwithstanding

[2] The Circuits have independently adopted various standards to fill that void. A handful of Circuits have, however, determined that the burden of both pleading and proving entitlement to immunity falls on the defendant. Only two circuits seemingly place the burden of disproving qualified immunity on the plaintiff. Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2071–72 (2018).

this doctrinal space, a majority of circuits place the burden of proving qualified immunity in whole or in part on the defendant. In such cases, the district court considers facts in a manner favorable to the non-moving and *unburdened* plaintiff. *See* Reinert, *Qualified Immunity at Trial*, *supra* at 2071–72.

In contrast, in the context of Supremacy Clause immunity, a defendant need only raise the defense, at which point the burden shifts to the state to disprove the validity of defendant's immunity. *Tanella*, 281 F. Supp. at 612. Accordingly, where the Supremacy Clause is invoked, the non-moving party is the very state burdened with demonstrating—by more than mere allegations—that the defendant's immunity defense is unwarranted. The state's burden is effectively meaningless if the state claiming facts also has those facts considered in a favorable light. It is unconscionable to sanction a procedural practice rendering all allegations of fact sufficient to deny a defendant's motion to dismiss. *See Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988).

The State's proposed procedure would result in grants of immunity only in those cases where both parties agree to each independent fact, ensuring the defense is rarely, if ever, invoked. District courts are adequately suited to resolve disputed issues of fact and must do so where holding otherwise renders Supremacy Clause immunity a nullity by lifting the burden placed on the state and considering all facts in the state's favor. Adopting the Thirteenth Circuit's interpretation grants the state a license to act as judge, jury, and executioner—to charge a federal official under state

law, to undercut that official's immunity by bringing forth "disputed" issues of fact, and to unconstitutionally force that official to stand trial.

b. *Once Supremacy Clause Immunity Is Denied, An Officer's Entitlement Not To Stand Trial Cannot Be Vindicated.*

Assuming immunity is improperly denied in either qualified or Supremacy Clause immunity, the remedies presented to government officials are vastly different. Qualified immunity is intended to be resolved prior to trial because, as this Court noted, it grants an "entitlement not to stand trial." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). If immunity is improperly denied, that entitlement is "effectively lost" and can no longer be maintained *Id.* Maintaining this right has since turned on the ability for government officials to immediately appeal a denial of immunity. *Johnson*, 515 U.S. at 312.

The Court is correct that an "entitlement not to stand trial" is lost if immunity is denied. *Mitchell*, 472 U.S. at 525. Qualified immunity, however, provides not just this protection from suit but also provides officials with a *defense* that may be raised at trial. *Sharp v. Johnson*, 669 F.3d 144, 158 (3d Cir. 2012) ("a party may raise qualified immunity as a defense at trial"); *Ray v. Foltz*, 370 F.3d 1079, 1082 (11th Cir. 2004). As a direct consequence, even if the Government official has exhausted and lost his pretrial appeals, his right to immunity may still be vindicated at trial. *Id.* At trial, a jury will hear and resolve factual disputes, leaving the legal question of immunity to the court. *See Willingham v. Crooke*, 412 F.3d 553, 560 (4th Cir. 2005) (holding after a jury resolves factual questions the district court may "reserve for itself the legal question" of qualified immunity on the facts).

An official's entitlement to be free from liability at each stage of litigation—pretrial, during trial, and posttrial—is a fundamental attribute of qualified immunity that federal officials do not receive when forced into criminal prosecutions. Supremacy Clause immunity may only be invoked in a pretrial motion. *Livingston*, 443 F.3d at 1119. The entitlement presented to federal officials being criminally prosecuted is this immunity from suit that is "effectively lost" once it is denied. *Mitchell*, 473 U.S. at 512. Once improperly denied, a federal officer shall stand trial without the defense, and must rely on state law defenses to escape conviction.. *Livingston*, 443 F.3d at 1119. Here, for instance, Agent Schrader would only be allowed to assert justification as a defense under the laws of New Tejas. Once a federal official is convicted, his only recourse is a post-conviction habeas petition. *Id.* Even presuming a favorable result at trial, improperly denying immunity presents reputational harms and the disruption of a federal officer's official duties. As a structural matter, the Supremacy Clause requires a careful consideration of facts by the district court. An official's "entitlement not to stand trial" is only supported if the court can reasonably resolve facts and, to hold otherwise, vitiates the defense merely because a state can allege facts. *Mitchell*, 473 U.S. at 512.

c. *Prudential Concerns Underlying Supremacy Clause Immunity Bear More Weight In The Criminal Context.*

Lastly, this Court has routinely recognized the importance of granting immunity to government officials acting within the scope of their employment. *See Johnson*, 515 U.S. at 311. First, there is a particular sense of injustice associated with punishing government officials who act in good faith, notwithstanding any

discretionary acts taken. Second, and perhaps most relevant to criminal prosecutions, is the danger associated with threatening federal officers with prosecution if they are not well versed in the intricacies of state law. *Butz*, 438 U.S. at 498; *see also* Donald L. Doernberg, *Taking Supremacy Seriously: The Contrariety of Official Immunities*, 80 FORDHAM L. REV. 443, 466 (2011). Those prudential concerns associated with civil proceedings and qualified immunity are more prevalent in the criminal context and may be rationally relied on in this Court's holding, as precedent has previously allowed. *Johnson*, 515 U.S. at 311.

In this regard, the key distinction between qualified and Supremacy Clause immunity is the very nature of the proceeding. Qualified immunity occurs where government officials are being tried for civil violations. *Mitchell*, 472 U.S. at 517. The primary purpose in these proceedings is not to punish government officials for violating the law. *Id.* Rather, qualified immunity primarily applies where there a claimant alleging a violation of his constitutional rights. *Id.* Thus, civil proceedings exist solely to compensate individuals victimized by unconstitutional conduct. Government officials, however, almost never bear the financial burden associated with compensation. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 (1998). There is no vicarious or respondeat superior liability associated with constitutional violations of government officials, but governments often indemnify their officers regardless.[3] Joanna C. Schwartz, *Police*

[3] As a preliminary matter, municipalities may be liable if the locality has an established unconstitutional policy or custom. *Monell v. Dep't of Social Services*, 436 U.S. 658, (1978).
In a recent empirical study of eighty-one jurisdictions across the country over a six-year period, Schwartz identified the prevalence of indemnification in cases involving official misconduct. Schwartz,

Indemnification, 89 N.Y.U. L. REV. 885, 887 (2014). This Court has articulated that qualified immunity is specifically "designed to protect against overdeterrence," but, in practice, an officer who fails to bear the weight of his actions will not be deterred. *Id.* Society demands victims be compensated for the harm they suffer. Indemnification renders it reasonable to submit questions of fact to a jury because sending a case to trial is not likely to lead to significant overdeterrence in cases of qualified immunity.

The very fear of overdeterrence underlying qualified immunity is more heavily felt in the criminal context where Supremacy Clause immunity is invoked. As this Court has feared, officials who are threatened with personal liability will be "induced to act with an excess of caution" or to "skew their decisions in ways that result in less than full fidelity" to the public good. *Forrester v. White*, 484 U.S. 219, 223 (1988). The threat of criminal prosecutions and imprisonment consequently stifles federal law enforcement agents more so than the threat of civil liability will restrain police action. Criminal prosecution, by extension, results in more extreme constraints consistent with this Courts stated fears. *See White*, 484 U.S. at 223; *Butz*, 438 U.S. at 497. Supremacy Clause immunity must shield officers from undue interference associated with criminal prosecution by balancing the state's legal authority to

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Police Indemnification, *supra*, at 905. The study concluded that even where statues or policies in a jurisdiction prohibit indemnification, officers are "virtually always indemnified" for civil rights and non-civil rights violations and are often provided counsel free of charge. *Id.* at 908. 915. Though federal officials "almost never" financially contribute to judgments, they were responsible to contribute in less than .5% of all cases. *Id.* at 912. Of course, indemnification is not necessarily consistent across the country—there are jurisdictions that will refuse to indemnify unless the individual officer is dismissed from the case. *Id.* at 916. Where punitive damages are awarded, officers are similarly indemnified by the government. In twenty § 1983 cases resulting in a award of punitive damages, but one officer was required to pay punitive damages in an amount totaling $300. *Id.* at 918.

prosecute and the need to protect officials acting pursuant to their official duties. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). This balance is appropriately struck only if the district court can resolve questions of fact and to adopt the Respondent's suggestion that all issues shall be put to a jury will place an undue restraint on federal officials. State prosecutors would hereafter be granted widespread latitude to allege any disputes, automatically triggering a jury trial and rendering the defense moot. Officers, fearing criminal prosecution, would subsequently be less inclined to act in the pursuit of their duties.

Importantly, criminal prosecutions impose severe sanctions that the government cannot bear for the federal officials. The government cannot stand trial, nor can the government serve a federal official's sentence if convicted. The goal of a criminal prosecution is not compensation of victims and is directly related to the punishment of a federal official. *See Horiuchi*, 253 F.3d at 376. While an important goal, the societal justice of criminal prosecutions pales in comparison to the ends achieved in civil proceedings. The government can, however, implicate the principles essential to both qualified immunity and the Supremacy Cause. To remain faithful to these principles requires this Court to interpose federal judges between the prosecutor and the jury to protect federal officials from standing trial unless the district court reasonably concludes the facts require it to deny immunity. *Id.*

It is the province of district courts to stand between prosecutors such as Ms. Wexler who specifically "proclaimed" she was prosecuting Agent Schrader to prevent enforcement of federal law and to "serve as a warning" that federal officials can

enforce the law at their "own risk." R. at 15a, 32–33a. Civil procedures adopted in the qualified immunity framework do not sufficiently protect federal officers and will only allow the states to usurp power from the federal government. Granting the district court the ability to resolve facts will not undermine the possibility of conviction; rather, it allows federal officials to avoid unnecessarily undergoing the process of state criminal procedure. *Long*, 837 F.2d at 752.

District courts are the appropriate fact finders in instances of Supremacy Clause immunity just as they appropriately resolve questions of fact in other 12(b) motions. *Id.* By allowing the district court, as here, to resolve factual disputes, this Court will safeguard the very immunity the Framers intended. Placing a judge between the state prosecutor and an unsuspecting jury will dispel any "vindictive criminal charges" against federal officers, thereby protecting federal officers acting pursuant to their duties. *Horiuchi*, 253 F.4d at 376.

II. The Court Should Adopt a Supremacy Clause Immunity Test that Protects Federal Law Enforcement Officers Like Agent Schrader From State Prosecution When Actions Arise From Federal Authority and Are Objectively Reasonable

FBI Agent Hank Schrader is being prosecuted for enforcing the federal Controlled Substances Act by a state prosecutor who candidly admitted that she would bring the prosecution "to prevent federal marijuana laws from being enforced in this great State." See R. at 32a–33a. Such an attempt by a state to undermine the execution of the sovereign will of the nation is plainly unconstitutional. *See* U.S. CONST. art. VI, cl. 2; *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). Well over a century ago, this Court crafted the doctrine of Supremacy Clause immunity as a

remedy for such intrusions by states into federal law enforcement. *In re Neagle*, 135 U.S. 1, 75 (1890). The doctrine shields federal officers from state prosecution for federal actions that are "necessary and proper" to the execution of their federal duties. *Id.* This case presents an opportunity for the Court to articulate a precise test for this immunity. Precedent, constitutional principles, and policy rationales dictate a test that confers immunity when a federal officer's actions (1) arise from federal authority, and (2) are objectively reasonable under the circumstances.

Because the prosecution of FBI Special Agent Schrader arises from his apprehension of Mr. White for violating federal law, and because the manner of apprehension was necessary and proper under the circumstances, he is entitled to Supremacy Clause immunity. Given the anti-federal statements of the District Attorney, this is a case of "peculiar urgency," and the District Court was correct to grant Agent Schrader's motion to dismiss. The Thirteenth Circuit's decision to the contrary should be reversed.

A. The State Prosecutor's Intent to Subjugate Federal Law Explicitly Motivated Agent Schrader's Prosecution, Implicating the Core Rationale Behind Supremacy Clause Immunity

Since the earliest days of our republic, this Court has recognized that ensuring the supremacy of federal law requires protecting federal agents from intrusion by the states. *See Osborn v. Bank of U.S.*, 22 U.S. 738, 865-66 (1824). Here, District Attorney Wexler unequivocally asserted that the prosecution of Agent Schrader was motivated by a desire for New Tejas marijuana laws to supersede the longstanding federal prohibition, R. at 32a–33a, an unconstitutional approach that federal courts

must stop through Supremacy Clause immunity. A review of the case law illustrates that the application of Supremacy Clause immunity at the motion to dismiss stage is essential to the case at bar.

1. Supremacy Clause Immunity Is Particularly Important When State Prosecutions Are Motivated by Opposition to the Enforcement of Federal Law

The doctrine of Supremacy Clause immunity was first articulated in the remarkable case of *In re Neagle*. 135 U.S. at 75. The case arose from a long standing feud between a disgruntled couple and the federal courts, which culminated in a suspected assassination attempt against Supreme Court Justice Stephen Field on a train car in Fresno, California. *Id.* at 43–47, 52–54. David Neagle, a Deputy U.S. Marshal assigned to protect Justice Field, shot and killed one of the would be assassins, David Terry, who repeatedly punched the Justice in the head and appeared to reach into his pocket for a weapon. *Id.* at 52–54. After the local sheriff arrested Neagle for murder, he filed a writ of habeas corpus, which the Supreme Court held was properly granted. *Id.* at 4, 76. The Court explained that it is an "incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it." *Id.* at 60. The Court then set forth the basic standard for Supremacy Clause immunity, stating:

> [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 . . . .

Id. at 75. This core principle of protecting federal law enforcement from undue interference by states has been consistently invoked when, in moments of federal-state controversy, state prosecutors have sought to punish federal officers.

Subsequent Supreme Court jurisprudence illustrates the focus of the Supremacy Clause immunity doctrine on preventing incursions on federal power by the states. In *Ohio v. Thomas*, this Court protected the administrator of a federally sponsored disabled veterans home when he was arrested by Ohio officials for refusing to post a display that he was serving the butter substitute oleomargarine, in contravention of a state law. 173 U.S. 276, 281–84 (1899). A few years later, the Court in *United States ex rel. Drury v. Lewis* explained that federal courts should be restrained in granting Supremacy Clause immunity, and should focus their interventions on cases where there is a "peculiar urgency" to halt the state prosecution. 200 U.S. 1, 6 (1906). There, the Court determined that a state prosecution of a military officer who ordered a subordinate to shoot and kill a suspected copper thief should be allowed to proceed, where witness testimony indicated that the order to shoot the thief was given after he had surrendered to law enforcement. *Id.* at 2–3, 8. Finally, in *Johnson v. Maryland*, the Court prevented Maryland from punishing a Postal Department driver for failing to have a license to drive in the state, rejecting the notion that states can impose standards of conduct on federal employees. 254 U.S. 51, 57 (1920). Taken together, these cases illustrate the

Court's use of Supremacy Clause immunity primarily as a tool to prevent states from imposing their laws and political choices on federal officers acting pursuant to federal law. The attempt here by District Attorney Wexler to undermine federal drug laws squarely implicates this concern.

While *Johnson*, decided nearly a century ago, was the last time this Court took up a Supremacy Clause immunity case, the doctrine's repeated application in the lower federal courts illustrates its particular import to situations where state prosecutors target federal officials whose actions are deeply unpopular in the state. *See id.* In 1962, when resistance to a federally mandated attempt to integrate the University of Mississippi led to violent riots and two deaths, local prosecutors criminally charged the Chief of the U.S. Marshals for ordering the use of tear gas. *In re McShane*, 235 F. Supp. 262, 264 (N.D. Miss. 1964). In this politically charged context, the federal district court applied the *Neagle* standard and determined that Chief McShane should be shielded from state prosecution for his discretionary actions taken to enforce a federal order. *Id.* at 272, 275.

Additionally, in *Wyoming v. Livingston*, state prosecutors brought a trespass action against U.S. Fish and Wildlife Services employees who were working to reintroduce gray wolves into Wyoming, an initiative that was vehemently opposed by local residents. 443 F.3d 1211, 1213–14 (10th Cir. 2006). In affirming dismissal under Supremacy Clause immunity, the court explained, "[t]he record evidence supports the suspicion that the prosecution

of Mr. Jimenez and Mr. Livingston was not a bona fide effort to punish a violation of Wyoming trespass law . . . but rather an attempt to hinder a locally unpopular federal program." *Id.* at 1231.

These cases illustrate the doctrine's particular importance to cases in which state prosecutions appear motivated by local opposition to federal law and federal law enforcement. This is just such a case, and the "peculiar urgency" of these circumstances calls for application of Supremacy Clause immunity.

2. Supremacy Clause Immunity Is Essential Because Agent Schrader's Prosecution Is Motivated by Local Hostility to Federal Law

In a speech to a large crowd of angry protesters, Madrigal County District Attorney Wexler unequivocally proclaimed her motivation for prosecuting Agent Schrader: "I will use every power of this office to prevent federal marijuana laws from being enforced in this great State." R. at 32a. This approach attempts to subjugate federal law to the whims of New Tejas voters, a blatant violation of the Supremacy Clause. *See* U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land."); *McCulloch*, 17 U.S. at 405 ("The nation, on those subjects on which it can act, must necessarily bind its component parts.").

The long history of Supremacy Clause immunity suggests that it is particularly important in a case in which a state blatantly attempts to impose the political will of its constituents on federal officials. *See Thomas,* 173 U.S. at 28–83; *Livingston*, 443 F.3d at 1231; *In re McShane*, 235 F. Supp. at 275.

District Attorney Wexler's attempt to undermine enforcement of the Controlled Substances Act embodies a case of "peculiar urgency," identified in *Drury*, where a district judge's discretion to dismiss a prosecution under Supremacy Clause immunity is imperative. *See* 200 U.S. 1, 6 (1906). Federal courts play a crucial role in protecting federal law and federal officers from infringements by states, and as such this Court should consider the formulation of a test and the district court's decision to dismiss this case with that fundamental principle in mind.

B. Agent Schrader Acted Pursuant to His Broad Authority and Duty to Enforce Federal Law

As an FBI Special Agent, Agent Schrader acted pursuant to his broad federal authority to make arrests when he arrested White for violating the Controlled Substances Act. Because his prosecution is premised on an official action taken pursuant to his federal authority, Agent Schrader's action satisfies the first element of the Supremacy Clause immunity standard established in *In re Neagle*. *See* 135 U.S. at 75 (affording protection from prosecution for an "act which he was authorized to do by the law of the United States, which it was his duty to do"). This portion of the standard is an essential element to any Supremacy Clause immunity test.

1. Agent Schrader Was Authorized by 18 U.S.C. § 3052 to Arrest White for Violating the Controlled Substances Act

The standard from *Neagle* requires a federal officer to engage in "act which he was authorized to do by the law of the United States, which it was his duty to do" in order to qualify for Supremacy Clause immunity. *Id.* Agent

Schrader was prosecuted for just such an act: exercising his broad federal authority to arrest an individual who was violating the Controlled Substances Act in his presence. R. at 31a.

Congress granted broad authority to FBI Special Agents to enforce the full panoply of federal laws, an authority that is not contingent on whether the agent is technically "on duty." 18 U.S.C. § 3052. The authorizing statute, 18 U.S.C. § 3052, provides that "agents of the Federal Bureau of Investigation . . . [may] make arrests without warrant *for any offense against the United States committed in their presence* . . . ." *Id.* (emphasis added). Although New Tejas had recently attempted to legalize marijuana possession, White was violating federal law when he noticeably possessed two ounces of marijuana, and thus Agent Schrader acted within the scope of his federal law enforcement authority when he arrested White. *See* 21 U.S.C. §§ 802, 812, 844.

Despite the wishes of New Tejas voters, the Controlled Substances Act prohibits the possession of marijuana, which is a Schedule I substance under the Act. *Id.* §§ 802, 812, 844. Therefore, possession of marijuana, absent an explicit research exemption, can be criminally penalized by federal law enforcement. *Id.* § 844. The arrest of White was justified under federal law.

2. The Arrest of White Satisfies the Federal Authority Element of Supremacy Clause Immunity

This Court's standard in *Neagle* requires the relevant action to be taken pursuant to federal authority in order to qualify for Supremacy Clause immunity, and liberally construes the notion of "authority." The *Neagle* Court,

in affirming the grant of habeas corpus to a U.S. Marshal who shot Justice Field's assailant, held that Supremacy Clause immunity does not require a precise authorization for the action in question. 135 U.S. at 59. Rather, authority is sufficient if it is "derived from the general scope of his duties under the laws of the United States." *Id.* White's arrest, the subject of this inquiry, was within the general scope of Agent Schrader's duties as an FBI Special Agent. *See* 18 U.S.C. § 3052.

A decision by the Ninth Circuit illustrates the importance of a broad conception of authority in this context. In *Clifton v. Cox*, the Ninth Circuit allowed a federal narcotics officer who shot and killed a fleeing suspect to claim Supremacy Clause immunity, despite the fact that the shooting exceeded the express authority of his supervisors. 549 F.2d 722, 726–28, 730 (9th Cir. 1977). The court emphasized the importance of allowing leeway for law enforcement to make split second decisions, even if those decisions turn out to be wrong. *Id.* at 727. It explained, "errors of judgment in what one conceives to be his legal duty will not, alone, serve to create criminal responsibility of a federal officer." *Id.* The court further explained, "even though his acts may have exceeded his express authority, this did not necessarily strip petitioner of his lawful power to act under the scope of authority given to him under the laws of the United States." *Id.* at 728. These decisions reflect a common sense principle: given the numerous discretionary and high stakes decisions inherent in field level law enforcement, federal authority and duty for the purposes of Supremacy

Clause immunity should be broadly construed so as not to unduly chill the actions of officers.

Here, Agent Schrader was exercising his broad authority to make arrests for violations of federal law under 18 U.S.C. § 3052. R. at 39a. In fact, the record indicates that he was explicit in his invocation of federal authority: Agent Schrader announced to White that White was "under arrest," informed White of the particular statutory basis for the arrest, and identified himself as an FBI agent. R. at 31a. Local law enforcement called to the scene did not hinder Agent Schrader after the incident, apparently satisfied with his invocation of federal authority. R. at 31a.

Of course, Agent Schrader was on vacation at the time of the incident in question. R. at 28a. However, this fact does not invalidate his authority to make arrests under the plain text of § 3052, which confers authority based on the individual's title. 18 U.S.C. § 3052. Law enforcement officers, particularly FBI agents, make up a unique class of public servants, who can never truly step away from their law enforcement identity, as Congress recognized when it authorized off duty law enforcement officers to carry concealed firearms. *See* Law Enforcement Officers Safety Act of 2004, § 2(a), 18 U.S.C. 926B (2012). Indeed, the Department of Justice maintains authority and oversight over Agent Schrader when he is "off duty," and can police law enforcement misconduct through 18 U.S.C. § 242. U.S. Dep't of Justice, Criminal Section, Law Enforcement Misconduct (2019), https://www.justice.gov/crt/law-

enforcement-misconduct ("The Department's authority extends to all law enforcement conduct, regardless of whether an officer is on or off duty, so long as he/she is acting, or claiming to act, in his/her official capacity.")

Ultimately, Agent Schrader's arrest of White for violating the Controlled Substances Act satisfied the requirement under Supremacy Clause immunity that the act at issue be an "act which he was authorized to do by the law of the United States, which it was his duty to do." *In re Neagle*, 135 U.S. at 75. Agent Schrader was acting pursuant to his broad authority to make arrests for violations of the Controlled Substances Act. *See* 18 U.S.C. § 3052; 21 U.S.C. § 844. The federal authority requirement should be liberally construed, given the exigencies and split second, discretionary decisions involved in enforcing the law. *See In re Neagle*, 135 U.S. at 59; *Clifton v. Cox*, 549 F.2d at 727–28, 730. A broad construction of federal authority is particularly apt in a situation such as Agent Schrader's where his actions are subject to the oversight and control of the U.S. Department of Justice. Indeed, the rationale underlying the Supremacy Clause immunity doctrine reflects the importance of respecting the decision of Congress to subject federal enforcement authorities to a uniform system of federal standards rather than the varying standards and oversight of fifty different states. *See* Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2234 (2003). Therefore, Agent Schrader was acting

pursuant to his federal authority, and the only remaining question under this Court's doctrine is whether his actions were "necessary and proper."

C. Under the Circumstances, Agent Schrader's Tactical Arrest of White Was Objectively Necessary and Proper to Effectuate the Arrest

Agent Schrader's decision to tackle White to arrest him for violations of the Controlled Substances Act was necessary and proper under the standard from *Neagle*, given that Agent Schrader was without backup, White was fleeing, and White had previously assaulted Agent Schrader. *See* R. at 31a. These circumstances are sufficient to satisfy the standard first announced in *Neagle*: Supremacy Clause immunity is available for federal actions where the officer "did no more than what was necessary and proper for him to do." 135 U.S. at 75. While this Court has yet to define the precise contours of the "necessary and proper" inquiry, it should adopt a rule of objective reasonableness, following the lead of its doctrine in the probable cause and official immunity cases. *See Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *Harlow v. Fitzgerald*, 457 U.S. 800, 816–17 (1982). Given the breadth of Agent Schrader's authority, his actions in a moment of urgency were objectively reasonable. However, even under a subjective standard, Agent Schrader's actions surrounding the arrest were reasonable, and he should be eligible for Supremacy Clause immunity at the motion to dismiss stage.[4]

[4] The State alternatively suggests that the Court should deny immunity if the state violation is "grossly disproportionate" to the federal law being enforced. R. at 4a. This approach is blatantly unconstitutional, as it would allow judges to interpret whether a state law is more important to enforce that a conflicting federal law, despite the Constitution's command that federal law is supreme. *See* U.S. CONST. art. VI, cl. 2. Moreover, the Court in *Neagle* held that the Supremacy Clause immunity analysis depends on the federal—and not the state—law in question. 135

1. The "Necessary and Proper" Requirement for Supremacy Clause Immunity Should Be Interpreted to Require Objective Reasonableness

The appropriate test for whether a federal official's actions were necessary and proper is the familiar inquiry into objective reasonableness. While this Court has never fully elaborated on the boundaries of the "necessary and proper" requirement from *Neagle*, most federal circuits have appropriately considered this element of the test to require a finding of objective reasonableness. *See, e.g.*, *Livingston*, 443 F.3d at 1222; *Clifton*, 549 F.2d at 728. An objective standard would mirror this Court's approach to highly analogous contexts, such as officer probable cause and official immunity determinations, and would appropriately respect the exigencies of law enforcement without permitting gross abuses of power. *See Devenpeck*, 543 U.S. at 153; *Graham v. Connor*, 490 U.S. 386 (1989); *Harlow*, 457 U.S. at 816–17.

The Court in *Neagle* established the requirement that an officer's actions be "necessary and proper," without fully elaborating on the contours of the inquiry. *See* 135 U.S. at 75. Of course, the phrase "necessary and proper" is familiar to the Supremacy Clause context: the seminal Supremacy Clause decision in *McCulloch v. Maryland* relied on a liberal interpretation of the phrase in the Constitution, determining that it conferred on Congress a power to choose among a variety of "suitable" options in exercising its authority. *See* 17 U.S at 324–25. Such a construction would suggest a standard that is deferential to the decisions of law

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U.S. at 56-57 ("[E]ven the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States.").

enforcement within a range of reasonableness. Ultimately, the *Neagle* Court rested its conferral of immunity in large part on the determination that the U.S. Marshal had a "well-founded belief" that he needed to shoot Justice Field's assailant "under the circumstances." 135 U.S. at 76. This circumstantial focus suggests a degree of deference to the decision of *Neagle* and other law enforcement officers in high-stakes situations.

Moreover, in this Court's only opinion directly denying Supremacy Clause immunity, the Court in *Drury* focused on the fact that there was conflicting evidence, much of which suggested that officer Drury commanded a subordinate to shoot a copper thief after he surrendered. *Drury*, 200 U.S. at 6–8. This evidence, if true, would undoubtedly be objectively unreasonable, suggesting that *Drury* fits within an objective reasonableness conception of the necessary and proper requirement. *See id.* at 8.

Most federal circuit courts, applying the necessary and proper prong, have considered the objective reasonableness of the federal agent's actions. The Ninth Circuit in *Clifton v. Cox* affirmed a grant of immunity for a narcotics officer who shot a fleeing suspect, focusing in part on the "objective finding that his conduct may be said to be reasonable under the existing circumstances." 549 F.2d at 728. The court ultimately respected the district court's determination that the circumstances, including a chaotic scene in which the officer thought his colleague had been shot, justified the officer's decision to shoot the suspect, even though the suspect turned out to be unarmed. *Id.* at 724, 729. In *Wyoming v. Livingston*, the Tenth Circuit

focused on the objective reasonableness of a U.S. Fish and Wildlife Service officer's belief that he was on public land, affirming the grant of immunity even though he and his colleague did not know exactly where a helicopter chase of a wolf had taken them. 443 F.3d at 1229. Both of these objective reasonableness standards indicate a degree of deference to law enforcement activities, focusing on circumstances on the ground and giving leeway for mistakes in judgment. *Id.*; *Clifton*, 549 F.2d at 728.

This Court favors objective inquiries over subjective inquiries into law enforcement motivations in the analogous context of probable cause determinations. *See Devenpeck*, 543 U.S. at 153 ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause."). The Court explained that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton v. California*, 496 U.S. 128, 138 (1990). The inquiry here is highly analogous to a probable cause inquiry, which courts are well equipped to handle. Federal courts regularly assess whether law enforcement officers were justified in their determination of probable cause to conduct a search or make an arrest, with courts taking into account the circumstances solely from an objective perspective. *See Whren v. United States*, 517 U.S. 806, 812–13 (1996). Here too, the district court would be engaging in in a very similar inquiry: whether the circumstances objectively justified Agent Schrader's decision to arrest and effectuate the arrest in the manner that he did. *See Devenpeck*, 543 U.S. at 151; R. at 37a-38a. Such an approach would be readily applicable by trial judges, and

would avoid fraught inquiries into subjective intent that risk undermining "evenhanded law enforcement." *See Horton*, 496 U.S. at 138.

This Court has also favored objective inquiries in another highly analogous context—official immunity. In *Harlow v. Fitzgerald*, when assessing the immunity of White House staff members for actions taken pursuant to their employment duties, the Court reversed prior precedents and declined to consider the subjective motivations of the defendants. 457 U.S. at 816–17. The Court explained that, "substantial costs attend the litigation of the subjective good faith of government officials," including disruption of official duties, inhibition of discretionary acts, and deterrence of able individuals from public service. *Id.* Based upon this rationale, the Court in *Harlow* applied qualified immunity to shield the officials, explaining "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." *Id.* at 818.

In *Graham v. Connor*, this Court applied an objective reasonableness test to an excessive force suit against a police officer under 42 U.S.C. § 1983, explaining, "*all* claims that law enforcement officers have used excessive force . . . in the course of an arrest . . . should be analyzed under the Fourth Amendment and its [objective] 'reasonableness' standard." 490 U.S. at 395. Though *Graham* arose in the civil context, it rests on the same factual predicate at issue here—an assertion of excessive force by a law enforcement officer. *See id.* at 388; R. at 2a. Accordingly, the opinion's

fundamental premise of restrained judicial inquiry when considering penalties for the split-second decisions of law enforcement applies with equal force. *See id.* at 396–97 ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.")

This Court has long favored objective inquiries when making post hoc evaluations of law enforcement conduct, and such an approach should be extended to the Supremacy Clause immunity context. As with probable cause and official immunity, the effective execution of federal law requires a degree of trust and deference to the legally authorized, objectively reasonable actions of federal officials like Agent Schrader. *See id.* Moreover, an objective, restrained judicial inquiry is even more urgent in the Supremacy Clause immunity context, where courts must determine not only whether conduct should be reprimanded, but whether the case warrants a state prosecutor regulating the conduct of a federal officer enforcing federal law. *See* Waxman & Morrison, *supra*, at 2201. Because these issues and principles are best determined objectively, the Court should look to objective reasonableness when applying *Neagle*'s necessary and proper standard. R. at 37a–40a.

2. Even Under a Subjective Inquiry, Agent Schrader's Motion to Dismiss Should be Granted

Even under a subjective inquiry, the Thirteenth Circuit incorrectly determined that Agent Schrader's actions were not subjectively necessary and proper. R. at 10a–

11a. This decision relied on the mere assertion and inference that Agent Schrader acted merely to "satisfy a personal problem," a decision that conflicts with the factual findings of the district court. *See* R. at 11a, 30a–32a, 37a–39a. As discussed above, a subjective inquiry should not be applied to the Supremacy Clause immunity analysis, but even if it is, the mere conclusory statements and inferences relied on by the Thirteenth Circuit are insufficient to overturn the findings of the district court. *See New York v. Tanella*, 374 F.3d 141, 149–50 (2d Cir. 2004).

Even when federal circuit courts have applied a subjective standard in applying Supremacy Clause immunity, and even when facts are construed against the moving party, a district court is still empowered to determine whether contested factual issues are "genuinely" disputed. *See id.* For example, in *New York v. Tanella*, a district court granted the motion to dismiss of a DEA agent who shot and killed a suspect during a hand-to-hand struggle. *Id.* at 142–46. Despite conflicting eyewitness testimony, some of which indicated that the agent told the suspect, "I'm gonna shoot you," the Second Circuit determined that this evidence did not require overturning the district court, as the evidence did not compel a different factual determination about the agent's motive. *Id.* at 149–50.

Here, the factual record indicates that Schrader "visibly relaxed" after his confrontation with White hours before the arrest, and that he was able to enjoy his day at the Natural History Museum without mentioning the confrontation again. R. at 30a. Moreover, at no point during the arrest did Agent Schrader mention the previous incident; rather, Agent Schrader identified himself as an FBI agent and

explained to White that he was being arrested pursuant to 21 U.S.C. § 844. R. at 31a. The district judge credited the testimony of Agent Schrader, finding that his motivation to arrest White was based solely on federal law enforcement. R. at 37a–38a. There is no evidence in the record contradicting the district court's conclusion that Agent Schrader had a proper motive. *See* R. at 37a–38a. Instead, the Thirteenth Circuit relied on its own circumstantial inference that the previous interaction must have been motivated Agent Schrader to arrest White. R. at 11a. However, when reviewing the factual conclusions of the district court, an appellate court should not read into the record its own perceptions, but should rely on the district court's findings of fact unless they are clearly erroneous. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996) (recognizing that while reasonable suspicion and probable cause should be reviewed de novo, "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges"); *Clifton*, 549 F.2d at 729. The Thirteenth Circuit did not have a sufficient basis to overturn the motion to dismiss.

The Thirteenth Circuit's decision below illustrates a fundamental flaw in a subjective motivation inquiry. Acting only upon an arguable inference that contravened the district court's findings of fact, the Thirteenth Circuit risked sending a federal officer to a costly, distracting, and unjustified trial under state law. Such a decision threatens to undermine the vital protection Supremacy Clause immunity provides for federal law enforcement officers who enforce the law in the face of local resistance, allowing assertions of bad motive to force a case to trial. Even if the Court

finds the category of subjective inquiry justified, it should reject this erosion the role of trial judges in upholding the vitality of the Supremacy Clause by politically motivated state prosecutors. Thus, because Agent Schrader was acting pursuant to his federal authority and did so reasonably under either an objective or a subjective standard, this Court should reverse the Thirteenth Circuit and hold that his motion to dismiss on Supremacy Clause immunity grounds should be granted.

CONCLUSION

Agent Schrader has a fundamental entitlement not to stand trial in New Tejas because he reasonably acted pursuant to his duties. The District Court, in balancing the state's interest in enforcing criminal law against the injustices of prosecuting federal officers for the exercise of their duties, and consistent with the command of Rule 12, properly resolved issues of fact raised by Agent Schrader's motion to dismiss. Because the Supremacy Clause requires courts to broadly construe a federal agent's duties and the reasonableness of the officer's actions, the Thirteenth Circuit improperly denied Agent Schrader immunity. To affirm the Thirteenth Circuit is to unconstitutionally grant states a license to render Supremacy Clause immunity a practical nullity by raising issues of fact and considering the subjective motivations of an officer. This Court should reverse the decision of the Thirteenth Circuit Court of Appeals, affirm the District Court's grant of Agent Schrader's Motions to Dismiss, and remand this case for further proceedings.

Respectfully submitted,
/s/ Team No. 33
Team No. 33
Counsel for Petitioner
November 18, 2019

CERTIFICATE OF SERVICE

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

/s/ Team No. 33
Team No. 33
Counsel for Petitioner
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 of Petitioner, Agent Hank Schrader, contains 13,343 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Service and Certificate of Compliance.

/s/ Team No. 33
Team No. 33
Counsel for Petitioner
November 18, 2019

APPENDIX

21 U.S.C. § 802 provides, in pertinent part:

> **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 provides, in pertinent part:

> **(b) Placement on schedules; findings required** …
>
> (1) Schedule I.—
>
> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
>
> (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision. . . .
>
> **(c) Initial schedules of controlled substances**
>
> Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances,1 by whatever official name, common or usual name, chemical name, or brand name designated:
>
> Schedule I
>
> . . .
>
> **(10)** Marihuana . . .

21 U.S.C. § 844 provides, in pertinent part:

> **Penalties for Simple Possession**
> **(a) Unlawful acts; penalties**
>
> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order . . . . Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter

or subchapter II, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years. . . .

Section 22.01 of the Penal Code of New Tejas provides:

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.

Section 22.02 of the Penal Code of New Tejas provides:

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.

Section 50.01 of the Penal Code of New Tejas provides:

Justification as a Defense.

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

Section 50.02 of the Penal Code of New Tejas provides:

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.