

No. 18-5188

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM 2019

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**HANK SCHRADER**  
Petitioner,

v.

**NEW TEJAS,**  
Respondent.

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*ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE UNITED STATES*

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**BRIEF FOR RESPONDENT**

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NOVEMBER 18, 2019

TEAM NUMBER 55  
COUNSEL FOR RESPONDENT

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## QUESTIONS PRESENTED

- I. When deciding a motion to dismiss a state criminal prosecution based on immunity under the Supremacy Clause, are disputed issues of fact decided by the district court or viewed in the light most favorable to the State?
- II. What test governs whether the Supremacy Clause provides a federal officer with immunity from a state criminal prosecution?

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## **PARTIES TO THE PROCEEDING**

Petitioner Hank Schrader is an officer for the Federal Bureau of Investigations of the United States Federal Government.

Respondent New Tejas is a State in the United States of America.

## **DECISIONS BELOW**

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

## STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 2, 2018. The petition was timely filed and granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner removed this case to federal court 28 USC § 1442 because he believed he was entitled to immunity under the Supremacy Clause. Petitioner was charged with aggravated assault under the criminal statutes of New Tejas which have been reproduced in an appendix.

28 U.S.C. 1442 provides in pertinent part:

(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.

The Supremacy Clause provides in pertinent 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

The framers of the Constitution intended the federal and state governments each to check the abuses of the other. *See The Federalist No. 28*, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). This system of dual-sovereignty functions due to a careful balance between the states and the federal government established by the Supremacy Clause and the Tenth Amendment. *See: U.S. Const. art. VI, § 2; U.S. Const. amend. X*. However, there are situations where the interests of the states and the federal government conflict. In the case before this Court, the state of New Tejas brought charges against a federal agent, Hank Schrader, for a violent attack against one of New Tejas' citizens. Schrader seeks to avail himself of the protection of federal immunity for his unreasonable conduct. His decision to tackle to Mr. White for possession of a small amount of marijuana, which was legal in New Tejas, did not advance a federal interest, as evidenced by the fact that federal government never filed charges against Mr. White. At stake, is the delicate balance of state and federal powers and the sanctity of the state's plenary police powers protected by the Tenth Amendment.

## STATEMENT OF THE CASE

### A. Facts

Agent Hank Schrader traveled to New Tejas in November of 2016 on his honeymoon with his wife and children. (R. at 28a). Schrader and his family spent the first few days of the trip visiting amusement parks and historical sites. (R. at 28a). On November 8, 2016, Schrader planned to spend the day with his family visiting the New Tejas History Museum. (R. at 28a). As Schrader drove with his family down

Salamanca Avenue, he almost collided with a red truck driven by Mr. White. (R. at 29a).

In Schrader's version of the events, the red truck drove with excessive speed, pulled in front of him, and stopped suddenly, forcing Schrader to slam on the brakes. (R. at 29a). Mr. White believes that he neither sped nor braked suddenly after changing lanes. (R. at 29a).

After the near collision, both cars stopped at a red light. (R. at 29a). Schrader got out of his vehicle and approached Mr. White's truck. (R. at 29a). Schrader described himself as having "lost his temper." (R. at 29a). Schrader stated his own face was red and he was "furious." (R. at 29a). Schrader began yelling at Mr. White because he was angry that this man almost hit him. (R. at 29a). Schrader felt like he was trying to keep his new family safe. (R. at 29a). Mr. White told Schrader to back off and asked if he wanted to fight. (R. at 29a). Mrs. Schrader watched Mr. White shove her husband. (R. at 29a). She saw Schrader pull his arm back as if to punch Mr. White. (R. at 29a). Mrs. Schrader watched worried that violence would erupt. (R. at 29a). However, before Schrader could land a blow on Mr. White the cars behind them honked their horns alerting the men that the light had turned green. (R. at 30a). Both men returned to their vehicles and Schrader drove to the New Tejas History Museum with his family. (R. at 30a).

Unfortunately, a few hours later Schrader had a second encounter with Mr. White. (R. at 2a). After leaving the museum, Mr. White and his family looked for a restaurant where they could have lunch. (R. at 30a). As the family walked, Schrader

saw Mr. White step out of a licensed marijuana dispensary called “Pinkman’s Emporium,” holding a small, clear bag containing marijuana. (R. at 31a). Schrader yelled, “Stop! You’re under arrest!” (R. at 31a). He did not identify himself as a law enforcement officer. (R. at 38a). Seeing Schrader running towards him, Mr. White began to flee. (R. at 31a). Schrader launched into a flying tackle. (R. at 9a). Schrader slammed into Mr. White from behind sending him crashing onto the pavement. (R. at 31a). Mr. White screamed in pain. (R. at 31a). As a result of the maneuver, Mr. White suffered a broken arm and a chipped tooth. (R. at 2a). The owner of the dispensary, witnessing the attack, called 9-1-1. (R. at 31a). When the police arrived, Schrader told them that he was a federal officer arresting Mr. White for violating the Controlled Substances Act. (R. at 31a). Mr. White was transferred by ambulance to a local hospital to treat his severe injuries. (R. at 32a).

## **B. Procedural History**

Subsequent to the incident, the federal government never filed charges against Mr. White regarding marijuana possession. (R. at 32a). New Tejas filed charges against Schrader for aggravated assault because of the severity of injuries Mr. White suffered as the result of Schrader’s flying tackle. (R. at 2a). Schrader chose to remove the case to the United States District Court for Madrigal pursuant to 28 USC § 1442, known as the Officer Removal Statute (“the Statute”). (R. at 33a). Schrader filed a motion to dismiss under Federal Rule of Criminal Procedure 12(b), arguing that he is immune to state prosecution under the Supremacy Clause. (R. at 34a). After making findings of fact and law, the District Court granted Schrader’s motion to dismiss on the basis of Supremacy Clause immunity. (R. at 41a).

The District Court found Schrader credible and that he “testified clearly and without contradiction.” (R. at 37a). Further, it found that when arrested Mr. White he had no intent other than to enforce federal marijuana law. (R. at 38a). It determined that his tackle was reckless. (R. at 37a). However, it still found that the action was necessary and proper to the exercise of his duty. (R. at 39a). The District Court made this determination despite evidence of Schrader’s prior disciplinary history for reckless conduct which included four separate complaints regarding his use of excessive force and a reprimand for reckless discharge of a firearm. (R. at 28a). Moreover, the District Court credited Schrader’s testimony that he would have arrested Mr. White regardless of their prior confrontation. (R. at 28a). It made this determination despite evidence from Schrader himself that he “lost his temper” and felt like he needed to protect his family from Mr. White. (R. at 29a).

The State of New Texas appealed to the United States Court of Appeals for the Thirteenth Circuit. (R. at 1a). The Appellate Court reversed the District Court’s decision to grant Schrader’s Motion to Dismiss. (R. at 1a). The Appellate Court held that the District Court was not authorized to make findings of fact, but rather the facts must be viewed in the light most favorable to the non-movant, New Texas. (R. at 5a). Viewing the facts in the light most favorable to New Texas, the Appellate Court found that Schrader tackled Mr. White during the arrest to satisfy a personal vendetta. (R. at 11a). It made this finding based on the earlier confrontation between Schrader and Mr. White. (R. at 10a). Further, it determined that Schrader’s reckless tackle could not “honestly be considered reasonable in arresting Mr. White.” (R. at

11a). Therefore, the Appellate Court held that New Tejas sufficiently disproved immunity on multiple grounds. (R. at 8a). As such, it reversed the District Court's decision to grant Schrader's Motion to Dismiss. (R. at 8a).

Schrader then filed a Writ of Certiorari, which this court granted on March 18, 2019. This Court certified the following two questions: 1) When deciding a motion to dismiss a state criminal prosecution based on immunity under the Supremacy Clause, are disputed issues of fact decided by the district court or viewed in the light most favorable to the State? 2) What test governs whether the Supremacy Clause provides a federal officer with immunity from a state criminal prosecution? (R. at 1).

### C. Legal Background

The origins of the Supremacy Clause can be traced back to the foundations of the United States of America itself. The founders were fearful of tyranny, which an overly centralized system of government may cause. However, the founders were also aware that one level of government could improperly restrict the other in a federalist system. Some states were so concerned that the Constitution did not adequately protect their interests that they refused to ratify the Constitution without amendments. In order to allay the concerns of these states, James Madison proposed a series of amendments. One of these amendments was what is now known as the Tenth Amendment which provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” JAMES MADISON, AMENDMENTS TO THE CONSTITUTION, [8 JUNE], 1789 (*Founders Online*, National Archive). Madison stated that the rationale for the proposed amendments was to ensure that “the abuse of the powers of the general government may be guarded against in a more secure manner than is now done, while no one advantage, arising from the exercise of that power, shall be damaged or endangered by it.” *Id.* Essentially, the Tenth Amendment was designed to protect the states without encroaching upon or undermining federal power.

Ultimately, in response to this conflict, the founders adopted the Tenth Amendment as a mirror to the Supremacy Clause. The Supremacy Clause ensured that with regard to the powers reserved for the federal government, federal laws would supersede any contradictory state laws. *U.S. Const. art. VI § 2*. However, the Tenth amendment ensured that all rights not explicitly given to the federal

government would be reserved for the states. *U.S. Const. amend. X*. The framers expected the federal and state governments each to check the abuses of the other. *See The Federalist No. 28*, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“[T]he General [i.e., federal] Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government.... If [the rights of the people] are invaded by either, they can make use of the other, as the instrument of redress.”).

Derived from the Supremacy Clause, the Court has long held that federal officers are immune from state prosecutions for actions reasonable and necessary in the discharge of their federal responsibilities. *See, Wyoming v. Livingston*, 443 F.3d 1211, 1217 (10th Cir. 2006) citing *e.g., In re Neagle*, 135 U.S. 1, 75 (1890); *Ohio v. Thomas*, 173 U.S. 276, 284 (1899). Originally, this immunity was granted in the form of *habeas* relief from state prosecution. *In re Neagle*, 135 U.S. at 6.

However, the Supreme Court has not decided a Supremacy Clause immunity case since 1920. *Livingston*, 443 F.3d at 1222; *See Johnson v. Maryland*, 254 U.S. 51 (1920). In this time, the law has evolved substantially at the circuit court level and in the federal legislature. In 1940, Congress enacted 28 USC § 1442. The purpose of the law is to take from state courts the indefeasible power to hold a federal officer or agent criminally or civilly liable for an act allegedly performed in the execution of their federal duties. H.R. REP. 112-17, 3, 2011 U.S.C.C.A.N. 420, 422. This does not mean federal officers can break the law; it just means that these cases are transferred to U.S. district court for consideration. *Id.* Congress wrote the statute because it

deems the right to remove under these conditions essential to the integrity and preeminence of the federal government within its realm of authority. *Id.*

As a result, when a federal agent wishes to raise a Supremacy Clause immunity defense, the agent does not need to seek *habeas*. After the passage of the Statute, federal agents wishing to raise a Supremacy Clause immunity defense can remove their case to federal district court, and seek a motion to dismiss under Rule 12(b) of the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 12(b). 12(b) allows for a district court to dismiss a case where a valid defense precludes a claim. Fed. R. Crim. P. 12(b).

However, both the procedure surrounding the removal, as well as the proper standards and procedure for immunity have created splits among the circuit courts. This split has created the need for the Supreme Court to once again address the immunity of officers under the Supremacy Clause.

### **SUMMARY OF THE ARGUMENT**

The Appellate Court properly held that a District Court must view the facts on a motion to dismiss in the light most favorable to the non-movant.

First, the Legislature has not authorized the District Court to deviate from the 12(b) motion to dismiss standard when a case is removed to federal court under 28 USC § 1442. The Federal Rules of Criminal Procedure bar the District Court from determining the facts relevant to a defense under 12(b)(1). A district court must abide by the procedures set by the Federal Rules of Criminal Procedure even in the context of Supremacy Clause immunity.

Second, this Court should utilize the light most favorable to the non-movant standard when a case is removed under 28 USC § 1442 as it balances the interests of the states and federal government. A crucial aspect of the federalist system is that each government is designed to check the abuses of the other in order to preserve individual rights. The light most favorable to the non-movant standard achieves this balance because it protects the state's right to have its case heard by a jury, it is in line with this Court's precedent in *Drury* that sought to balance the rights of the states and the federal government, and the early removal of cases to federal court sufficiently protects the federal government's interests.

Finally, even if the District Court may determine facts, this Court must correct clear error in findings of fact on appeal. A court on review may overturn a finding of fact for clear error even in cases involving credibility determinations if 1) documents or objective evidence contradict the witness' testimony or 2) the witness' story is so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. In this case, both objective evidence as well as Schrader's own implausible story merit overturning the District Court's findings of fact on the basis of clear error.

Next, the proper standard for Supremacy Clause immunity requires that an officer's action 1) be authorized by federal law and 2) his or her actions are no more than what was necessary and proper. This test has its basis in *Neagle*, the foundation of Supremacy Clause immunity. This Court should clarify the standard's two prongs by holding that 1) when an officer acts in a manner that goes against the Executive

Branch's restrictions on his or her discretion the action is not authorized by law and 2) in order for an action to be necessary and proper it must: 1) be objectively reasonable, 2) subjectively reasonable, and 3) must not disproportionately violate state law in the pursuit of a federal interest.

An action must be authorized by federal law. This Court has determined that authorization by law is a broad concept that considers not only statutory law, but also the Constitution and executive powers. The Executive Branch under Article II of the Constitution has broad discretion in enforcing the law. These powers extend to non-enforcement through agency guidance that directs how lower-level officials like Schrader exercise their authority. When an agent's actions violate executive agency guidance it cannot be said to be within his or her duties. In this case, Schrader's enforcement of the CSA violated the guidance issued by the Attorney General in regards to marijuana enforcement actions. Thus, his actions were not authorized by law.

An action must be necessary and proper. An action that is necessary and proper must be objectively reasonable. When an officer acts in a manner that he or she knows or reasonably should have known violates the Constitution that act is unreasonable. Second, the officer must not act on the basis of malice, self-interest, or with criminal intent. Such intentions are not "proper" nor are they "necessary." Finally, an action must do "no more" than what is necessary and proper and as such courts must balance the federal interest pursued with the state law interest implicated. When a violation just makes the enforcement of federal law more

expeditious or a slight interest is accomplished by an egregious violation of state law the act cannot be construed as necessary and proper.

## **ARGUMENT**

### **I. THE APPELLATE COURT PROPERLY HELD THAT ON A MOTION TO DISMISS THE FACTS MUST BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE.**

First, this Court should must utilize the light most favorable to the non-movant standard because the Legislature has not authorized the District Court to deviate from the 12(b) motion to dismiss standard when a case is removed under 28 USC § 1442. Next, This Court should utilize the light most favorable to the non-movant standard when a case is removed under 28 USC § 1442 in order to balance the interests of the states and federal government. Finally, even if the District Court may determine facts, both objective evidence as well as Schrader's own implausible story merit overturning the District Court's findings of fact on the basis of clear error.

#### **A. The Legislature Has Not Authorized The District Court To Deviate From The 12(b) Motion To Dismiss Standard When A Case Is Removed To Federal Court Under 28 USC § 1442.**

The Legislature has not authorized the District Court to deviate from the 12(b) motion to dismiss standard when a case is removed to federal court under 28 USC § 1442. The Officer Removal Act ("the Statute") permits the removal of state court cases to federal court where a federal officer raises an immunity defense. 28 USC § 1442.

##### *i. The Federal Rules Of Criminal Procedure Apply To Cases Removed Under 28 USC § 1442.*

In this case, the Federal Rules of Criminal Procedure are the relevant rules for procedural considerations because Schrader chose to remove this case under the

Statute. (R. at 2a). It is important to note that Schrader could have chosen a variety of different methods to assert his immunity defense. The different methods include: *habeas*, post-conviction suit to have the conviction overturned, declaratory relief, and injunctive relief. *In re Neagle*, 10 S.Ct. at 660, *Johnson*, 254 U.S. at 51; *Baucom v. Martin*, 677 F.2d 1346, 1347 (11th Cir. 1989). While these differing methods of asserting an immunity defense may have alternate procedures, the Statute explicitly removes a case from the state court system into the federal court system. 28 USC § 1442. *Whitehead*, 943 F.2d at 233 (describing the *habeas* and removal provisions in the Supremacy Clause context as “alternative[s]”). Therefore, in choosing this method to assert his immunity defense, Schrader also chose the Federal Rules of Criminal Procedure to govern his case.

*ii. The Federal Rules Of Criminal Procedure Bar The District Court From Determining The Facts Relevant To A Defense Under 12(b)(1).*

Federal Rule of Criminal Procedure 12(b) permits a party to “raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.” Fed. R. Crim. P. 12(b)(1). The Advisory Committee Notes indicate that “immunity” is among those defenses that can be raised in such a motion. *See Id.*, ADVISORY COMMITTEE NOTES.

The light most favorable to the non-movant standard prevents the court from determining the merits of the case. In contrast, allowing the District Court to determine the facts regarding immunity substitutes the judgement of a single judge for a trial on the merits. A merit trial or trial on the merits is a trial based on the essential facts of the case rather than on any technical rule of practice like failure of

proper service or some jurisdictional defect. *Daniels v. Robbins*, 182 Cal. App. 4th 204, 105 Cal. Rptr. 3d 683 (Cal. Ct. App. 2010) (Holding a “trial on the merits” occurs when the termination of a suit reflects on the merits of the action and tends to show that the accused is innocent of wrongdoing); *Trial on the merits*, BLACK’S LAW DICTIONARY (11th ed. 2019) (Defining a “trial on the merits” as “A trial on the substantive issues of a case, as opposed to a motion hearing or interlocutory matter”).

The District Court determined the issues that would have been raised in a trial for aggravated assault in state court. Specifically, the District Court found that when Schrader attempted to arrest Mr. White, he was motivated solely to fulfill his federal duties and enforce federal law, and that Schrader’s conduct was “necessary and proper” in the accomplishment of his federal duties. Thus, the District Court determined essential issues of fact. Therefore, allowing a District Court to determine issues of fact in essence amounts to a trial on the merits which violates 12(b).

*iii. The District Court Must Abide By The Procedures Set By The Federal Rules Of Criminal Procedure.*

The District Court must abide by the procedures set by the Federal Rules of Criminal Procedure based on the Rules Enabling Act and the lack of explicit guidance to deviate. The Rules Enabling Act establishes that the court may not interpret the rules of decision in a way that will alter the way the court adjudicates an individual’s rights. Deviating from the 12(b) standard established in the Federal Rules of Criminal Procedure does alter the way a court adjudicates an individual’s rights. The

only way this alteration would be permissible is if the Legislature expressly allowed a deviation which it has not done in regards to cases removed under 28 USC § 1442.

*1. Deviating From The Light Most Favorable To The Non-Movant Standard Violates The Rules Enabling Act*

First, this Court has interpreted the Rules Enabling Act and its amendments as precluding courts from adopting rules of procedure that abridge rules of decision, such as 12(b). In the Rules Enabling Act, Congress authorized this Court to put into effect the rules of procedure subject to its review, 28 U.S.C. § 2072(a), but with the limitation that those rules “shall not abridge, enlarge or modify any substantive right,” § 2072(b). This Court has long held that this limitation means that a court cannot put into effect rules in a way that infringes on states’ rights. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); see *Hanna v. Plumer*, 380 U.S. 460, 464 (1965); *Burlington Northern R. Co. v. Woods*, 480 U.S. 1 (1987).

The test to determine whether a court’s interpretation of a rule violates the Rules Enabling Act is not whether the rule affects a litigant’s substantive rights, because most procedural rules do affect a litigant’s substantive rights. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445 (1946). Rather, what matters is what the rule itself regulates. If the rule governs only “the manner and the means” by which the litigants’ rights are “enforced,” it is valid; if it alters “the rules of decision by which [the] court will adjudicate [those] rights,” it is not. *Murphee*, 326 U.S. at 446 (internal quotation marks omitted). *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406–07 (2010).

In this case, the use of a different standard that deviates from the light most favorable to the non-movant under 12(b) would impact the way a court would adjudicate substantive rights. The substantive right at stake is New Tejas' right to enforce its police power. *U.S. v. Lopez*, 514 U.S. 549, 561 (1995) (Holding that under the federal system, states possess primary authority for defining and enforcing criminal law). As such, no court may interpret the standard of 12(b) in a way that undermines this substantive right as doings so violates the Rules Enabling Act.

*2. The Legislature Has Not Authorized The Court To Deviate From the 12(b) Standard In A Way Permitted By The Rules Enabling Act.*

Furthermore, the Legislature has never stated that 28 USC § 1442 should be subject to a standard other than the standard prescribed by 12(b). The Legislature could have chosen to explicitly change the Federal Rules of Criminal Procedure in either its Advisory Notes or in the Statute itself. *Mistretta v. U.S.*, 488 U.S. 361, 367 (1989) (Holding that Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States). However, the legislature has not done so.

First, the Legislature has not allowed federal courts to utilize a standard other than the light most favorable to the non-movant standard in the Advisory Notes of 12(b). Under 12(b), the Legislature has explicitly allowed for courts to determine facts with regards to the admissibility of evidence under 12(b)(4). However, this case is not one of evidence admissibility. Instead, this case involves a motion to dismiss based on a defense governed by 12(b)(1), which does not grant courts the power to determine

facts. In the Notes of the Advisory committee to 12(b)(4), which addresses the Government's Intent to use Evidence, the committee states that 12(b)(4) leaves with the court discretion to determine in advance of trial defenses and objections raised by motion or to defer them for determination at the trial. The rule under which Schrader brings his defense is 12(b)(1), which states that a party may raise by pretrial motion any defense, objection, or request that the court can determine *without* a trial on the merits. The Notes of the Advisory Committee in this section do not state that the court may make factual determinations.

Second, the Legislature has not amended the Statute to deviate from the standards set out in 12(b). The Legislature's silence on this standard in regards to immunity is in stark contrast to other statutes which have codified a different standard for motions to dismiss such as the Private Securities Litigation Reform Act. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998-99 (9th Cir. 2018). The Act requires a plaintiff to identify in his complaint "each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). Otherwise, a complaint stating a violation of the Private Securities Reform Act will not survive a motion to dismiss. Congress has not codified a different standard under the Statute.

Furthermore, the Legislature had opportunities to amend the Statute, as it has amended the Statute already multiple times. *See* June 25, 1948, c. 646, 62 Stat. 938;

Oct. 19, 1996, Pub.L. 104-317, Title II, § 206(a); 110 Stat. 3850, Pub.L. 112-239 , Div. A, Title X, § 1087, Jan. 2, 2013, 126 Stat. 1969. However, none of these amendments address the intent for courts to deviate from the standard set out in 12(b). As such, deviation from the 12(b) standard impermissibly violates the Rules Enabling Act. Thus, this Court must abide by the rules set out in the Federal Rules of Criminal Procedure which utilize the light most favorable to the non-movant standard.

**B. The Light Most Favorable To The Non-Movant Standard Balances The Interests Of The States And The Federal Government.**

The light most favorable to the non-movant standard balances the interests of the federal government and the states. In *Neagle*, this Court determined that the purpose of Supremacy Clause immunity is to protect the exercise of federal law from attempts to hinder it by the states. *Neagle*, 135 U.S. at 62. At the same time, the Constitution mandates a system of dual-sovereignty. *Gamble v. U.S.*, 139 S.Ct. 1960, 1968 (2019). Each government is designed to check the abuses of the other in order to preserve individual rights. *Murphy v. N.C.A.A.*, 138 S.Ct. 1461, 1476 (2018). As such, this Court must balance the rights of the federal government and the states in order to protect individual liberty. The light most favorable to the non-movant standard achieves this balance because it protects the state's right to have its case heard by a jury, it is in line with this Court's precedent in *Drury* that sought to balance the rights of the states and the federal government, and the early removal of cases to federal court sufficiently protects federal interests.

*i. This Court Should Utilize The Light Most Favorable To The Non-Movant Standard In Order To Protect The States Right To A Jury Trial In Criminal Cases.*

This Court should utilize the light most favorable to the non-movant standard when a case is removed under 28 USC § 1442 in order to preserve the role of the jury. The state has a right to present its case before a jury to resolve questions of fact in order to determine the guilt or innocence of the defendant. However, because the defense of immunity under the Supremacy Clause often overlaps significantly with the elements of the offense, when a District Court makes determinations of facts it infringes on the role of the jury. As such, it violates the rights of the state.

*1. The State Has A Right To Be Heard By A Jury Who Must Determine The Guilt Or Innocence Of The Defendant.*

First, the State has a right to be heard by a Jury who must determine the guilt or innocence of the defendant. According to 23(a) of the Federal Rules of Criminal Procedure if the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves. Fed. R. Crim. P. 23(a). Thus, both the defendant and prosecution would need to waive a right to a jury trial. Therefore, the prosecution has a right to have a jury hear their case. In this case, Schrader is charged with a felony under Section 22.02 (b) of the Penal Code of New Tejas. As such, Schrader is entitled to a jury trial. *U.S. Const. amend. VI; See: Duncan v. Louisiana*, 391 U.S. 145, 151 (1967). Therefore, the State of New Tejas, who is prosecuting Agent Schrader, has a right to have its case against Schrader heard by a jury.

In a jury trial, it is the role of the jury to act as the finder of facts. As this Court held in *Scheffer*, the fundamental premise of the criminal trial system is that the jury is the lie detector, and that the determination as to the weight and credibility of

witness testimony belongs to jury. *U.S. v. Scheffer*, 523 U.S. 303 (1998). Furthermore, the jury's constitutional responsibility is not merely to determine facts, but to apply law to facts and draw ultimate conclusion of guilt or innocence. *U.S. v. Gaudin*, 515 U.S. 506 (1995). Thus, the state has a right to have the jury determine the guilt or innocence of those it prosecutes.

*2. Because The Defense Of Supremacy Clause Immunity Overlaps Significantly With The Elements Of The Offense, A District Court Cannot Make Determinations Of Fact Without Infringing On The Role Of The Jury.*

However, because the defense of Supremacy Clause immunity often overlaps significantly with the elements of the offense, a District Court cannot make determinations of fact on the issue of immunity without improperly determining guilt or innocence. Making determinations of guilt or innocence infringes on the role of the jury.

In this case, Schrader has raised the State defense of “justification” in addition to the federal defense of Supremacy Clause immunity. If Schrader is not granted Supremacy Clause immunity, he has raised the defense of justification to present at the trial for aggravated assault. At the state level, Section 50.01 of the Penal Code of New Tejas provides that “it is a defense to prosecution that the conduct in question is justified under this chapter.” Penal Code of New Tejas § 50.01; (R. at 46a). Specifically, Schrader asserts that his actions were justified under Section 50.02 of the Penal Code of New Tejas. Under this section,

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...if: (1) the actor reasonably believes the arrest...is

lawful and (2) before using force, the actor manifests his purpose to arrest or search and identifies himself as a peace officer... (Penal Code of New Texas § 50.02).

Thus, in a jury trial for aggravated assault, a jury would need to determine whether Agent Schrader “reasonably believe[d] the arrest . . . [wa]s lawful” and that Agent Schrader only used force that was “immediately necessary to make or assist in making an arrest,” and identified himself as a peace officer. Penal Code of New Texas §§ 50.01, 50.02.

Similarly, Schrader has raised the federal defense of immunity, which is only applicable if he was acting reasonably in the course of his duties as a federal officer. The District Court held that when Schrader attempted to arrest Mr. White, he was motivated solely to fulfill his federal duties and enforce federal law. (R. at 38a). The District Court also found that Schrader’s conduct was “necessary and proper” in the accomplishment of his federal duties. (R. at 39a). Thus, the District Court made the same determinations that would be necessary to determine guilt or innocence in a jury trial for aggravated assault.

This is an example of a judge impermissibly undermining the role of the fact finder by determining a defendant’s ultimate guilt or innocence. In contrast, the light most favorable to the non-movant standard prevents a district court from making this improper determination. Under the light most favorable to the non-movant standard, if the court considered the facts in the light most favorable to the non-movant, and still found the defense was applicable, then the court could grant a motion to dismiss without improper fact finding.

*ii. Using This Court's Precedent, The Second, Sixth, And Tenth Circuits Have Held That The Proper Standard For A Motion To Dismiss Is The Light Most Favorable To The Non-Movant Standard.*

Using the reasoning most applicable to existing Supreme Court Precedent, the Second, Sixth, and Tenth Circuits have held that the proper standard for a motion to dismiss is the light most favorable to the non-movant standard. In *Drury*, the Court held that a District Court may not grant a petition for *habeas* where there is a material question of fact that suggests that the official acted with excessive force. *U.S. ex rel. Drury v. Lewis*, 200 U.S. 1 (1906). This Court explained that 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 a federal court, upon a writ of *habeas corpus*, may be freed from state custody and prosecution. *Drury*, 200 U.S. at 9.

Although the Statute provides for removal as an alternative to filing a *habeas* petition in order to raise the immunity defense, District Courts have still relied on the ruling in *Drury*, as one of the most recent Supreme Court decisions on Supremacy Clause immunity. The Second Circuit stated that the task of determining immunity has been described as “a delicate balancing act, and we are conscious of the care that we must exercise in undertaking it.” *New York v. Tanella*, 374 F. 3d 141, 148, (2d Cir. 2004) citing *Drury*, 200 U.S. at 7 (1906). After this careful analysis, the Second Circuit determined that in reviewing this matter, the court views the evidence “in the light most favorable to the State and assume[s] the truth of the allegations in the indictment.” *Tanella*, 374 F. 3d at 148.

Additionally, the Sixth Circuit again relied on *Drury's* holding that when the facts upon which state court jurisdiction depend are open to dispute, the federal court should permit the state court to determine those facts. *Com. of Ky. v. Long*, 837 F.2d 727, 746 (6th Cir. 1988). In *Long*, the court held that the Supremacy Clause required that a state's indictment of a federal agent be dismissed before trial because the state failed to show that facts were in dispute as to whether the officer's actions were necessary and proper. *Id.* at 752.

Similarly, the Tenth Circuit held that on review of a dismissal based on Supremacy Clause immunity, the court must review the evidence in the light most favorable to the non-moving party and assume the truth of the allegations in the indictment. *Wyoming v. Livingston*, 443 F.3d 1211, 1219 (10th Cir. 2006). In *Livingston*, the Tenth Circuit distinguished earlier Supremacy Clause immunity cases, *Neagle* and *Thomas*, from *Drury*. *Id.* The court reasoned that while it was apparent that the federal officers in both *Neagle* and *Thomas* had acted reasonably in discharging their duties, in *Drury* the Court was confronted with the question of whether Supremacy Clause immunity applies when it is unclear whether officers acted reasonably. *Livingston*, 443 F.3d at 1219. Citing to *Drury*, the Tenth Circuit reasoned that only "exceptional" cases warrant exercising the "exceedingly delicate" jurisdiction of federal courts to usurp state prosecutions. *Id.* Ultimately, the court utilized the light most favorable to the non-movant standard in order to determine whether to grant the motion to dismiss. *Id.* at 1226.

Using the most applicable Supreme Court precedent the Second, Sixth, and Tenth Circuits have held that the proper standard for a motion to dismiss is the light most favorable to the non-movant.

*iii. The Early Removal Of Immunity Disputes To Federal Court Sufficiently Protects The Federal Government's Interests Making A Light Most Favorable To The Non-Movant Standard The Appropriate Standard To Balance Federal And State Interests.*

The early removal of immunity disputes under the Statute to federal court sufficiently protects the Federal Government's interests, making a light most favorable to the non-movant standard the appropriate standard to balance federal and state interests. In the Removal Clarification Act of 2011, the Legislature explained that the purpose of the Officer Removal Act of 1940 is to remove from state courts cases where a federal officer is being held criminally or civilly liable for an act performed while executing one of his or her federal duties. H.R. REP. 112-17, 3, 2011 U.S.C.C.A.N. 420, 422. In the Removal Clarification Act of 2011, the Legislature has clarified that the terms "civil action" and "criminal prosecution" include any proceeding, such as a subpoena for documents or testimony, under the federal officer removal statute. 28 U.S.C. § 1442; clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 368. This allows any federal officer subpoenaed pursuant to a state pre-suit discovery statute to remove the civil action or criminal prosecution to U.S. district court under 28 U.S.C. § 1442. H.R. REP. 112-17, 6, 2011 U.S.C.C.A.N. 420, 0. As a result, a case where a federal officer raises an immunity defense is removed at the earliest possible stage of state proceedings.

The goal of the Supremacy clause is to strike a balance between the plenary powers of the federal government and the plenary powers of the state government. *See The Federalist No. 28*, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The state has an interest in enforcing its police power. Under the federal system, states possess primary authority for defining and enforcing criminal law. *U.S. v. Lopez*, 514 U.S. 549, 561 (1995). Prosecuting Schrader for aggravated assault of one New Tejas' residents, Mr. White, is how New Tejas chose to enforce its police power.

While the federal government has an interest in enforcing its own laws through federal officers, allowing a federal district court judge to make factual determinations does not strike a balance between the state and federal government, as it voids the interests of the state by eliminating the state's option to present its case. A light most favorable to the non-movant standard allows the state to be heard by a jury where there is a genuine issue of material fact.

Thus, the early removal of immunity disputes under the Statute to federal court sufficiently protects the federal government's interests, making a light most favorable to the non-movant standard the appropriate standard to balance federal and state interests.

**C. Even If The District Court May Determine Facts, This Court Must Overturn Findings Of Fact When There Is Clear Error.**

This Court must correct clear error in findings of fact on appeal. *U.S. v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). A court on review may overturn a finding of fact for clear error even in cases of credibility determination if 1) documents or objective evidence contradict witness' testimony or 2) the witness' story is so internally

inconsistent or implausible on its face that a reasonable fact finder would not credit it. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985).

In this case, both objective evidence as well as Schrader's own implausible story merit overturning the District Court's findings of fact on the basis of clear error. First, objective evidence contradicts Schrader's story because the District Court failed to consider his past disciplinary history. Second, even if this Court only considers Schrader's testimony, the inconsistencies including his failure to search the dispensary or arrest the owner for sale of marijuana in line with his stated federal purpose should have been implausible on its face to any reasonable fact finder.

*i. The Objective Evidence Regarding Schrader's Disciplinary History Contradicts The District Court's Credibility Determinations.*

This Court has held that it may overturn a lower court's finding of fact regarding credibility when objective evidence contradicts the court's determination. *Anderson*, 470 U.S. at 575.

In this case, the District Court determined that Schrader's use of a flying tackle was reckless. (R. at 37a). Despite this fact, the District Court determined that the action was "necessary and proper" to the exercise of his duty. (R. at 39a). However, the FBI does not condone reckless conduct. The record reflects that the FBI reprimanded Schrader for reckless conduct on a different occasion and received four separate complaints regarding his use of excessive force. (R. at 28a). Therefore, the FBI's punishment of reckless conduct should have indicated to a reasonable fact finder that such conduct was neither necessary nor proper. Thus, the District Court's

finding that his actions were necessary and proper is contradicted by the objective evidence provided by his disciplinary record.

*ii. Even If The District Court Only Considered Schrader's Testimony, A Reasonable Fact Finder Would Not Credit His Testimony.*

This Court can overturn the District Court's finding of fact because Schrader's story is so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. *Anderson*, 470 U.S. at 575

In this case, The District Court determined that Schrader's purpose was to arrest Mr. White for a federal crime. (R. at 38a). Further, it determined that Schrader would have arrested Mr. White regardless of their prior encounter. (R. at 38a). However, Schrader's own testimony shows that he had an ulterior motive because he did not investigate the store that sold Mr. White the marijuana and he testified about his anger at the earlier incident. Schrader's stated purpose was to enforce federal marijuana laws. He testified that he saw Mr. White leaving Pinkman's Emporium carrying a clear bag of marijuana. "Emporium" clearly implies that site was a store. Thus, based on Schrader's own testimony he saw Mr. White exiting what was clearly a storefront carrying a clear bag containing marijuana. The sale of marijuana is prohibited under federal law and is a more serious offense than possession of a small amount of marijuana. Yet, Schrader took no steps to investigate the store despite being legally permitted to do so. Based on his stated purpose to enforce federal law he should have investigated Pinkman's Emporium. Had he entered the store, a marijuana dispensary, he would have seen marijuana for sale and a federal crime being committed. A reasonable finder of fact would question why he did not enter the

building to search for additional drugs or those who may have sold Mr. White the marijuana. The inconsistent treatment of Mr. White demonstrates Schrader's bias.

Further, Schrader testified that he was angry at Mr. White because he worried for the safety of his wife and children. (R. at 29a). Schrader's testimony about his anger renders two different findings of fact clearly erroneous. First, the District Court found that Schrader did not intend to injure Mr. White. (R. at 38a). The fact that he was angry and scared for his children in conjunction with his use of a reckless flying tackle undermines his own testimony that he did not intend to harm Mr. White. Second, the District Court found that Schrader would have arrested Mr. White regardless of his prior confrontation. (R. at 38a). However, the reasonable finder of fact would consider his inconsistent enforcement of drug law in light of Schrader's testimony about his anger at Mr. White. His personal vendetta against Mr. White for putting his family at risk explains why he only arrested Mr. White and did not investigate the store that was selling marijuana. The fact that he arrested and assaulted someone for possession but did not arrest the person selling shows that he had motives outside the enforcement of federal law and should not be allowed to claim otherwise. Thus, the District Court's determination that his testimony was without contradiction and, therefore, credible should be overturned for clear error. (R. at 37a).

**II. AN OFFICER IS ONLY ENTITLED TO IMMUNITY UNDER THE SUPREMACY CLAUSE IF HIS OR HER ACTIONS ARE 1) AUTHORIZED BY LAW AND 2) NO MORE THAN WHAT IS NECESSARY AND PROPER.**

This Court in *Neagle* established that a federal agent may be immune under the Supremacy Clause if his actions are both 1) authorized by law and 2) he does no more than what is necessary and proper. This Court has not addressed Supremacy

Clause immunity since 1920. However, this Court has addressed authorization by law in other contexts. In order for an action to be authorized by law, it must not only take into account the laws passed by Congress, but also Executive Branch policy considerations. In order for an action to be no more than what is necessary and proper it must 1) be objectively reasonable, 2) be subjectively reasonable, and 3) the federal enforcement goal must not be disproportionate to the state law violation.

**A. An Officer's Actions Must Be Authorized By Federal Law.**

Supremacy Clause immunity only applies when a federal officer's actions are authorized by federal law. *Neagle*, 135 U.S. at 75. Since, *Neagle*, this Court has contemplated when an officer's actions are within the scope of his or her authority. *See: Barr v. Matteo*, 360 U.S. 564 (1959). This Court concluded in *Barr* that so long as it is within the "outer perimeter" of the officer's duty it is within the officer's authority of law. *Id.* at 575. One source of the law is the executive powers of the President. *Neagle*, 135 U.S. at 63. As part of the President's power, he or she has substantial discretion and can choose through his or her agency heads not to enforce laws. *See: Heckler v. Cheney*, 470 U.S. 821 (1985). As such, an action is only authorized by federal law if it complies with Executive Branch policies.

*i. An Officers Actions Are Not Authorized By Law When They Violate Executive Branch Nonenforcement Decisions.*

An action is only authorized by law when it is within the scope of Executive Branch policy. *Neagle*, 135 U.S. at 63. In *Neagle*, this Court considered the role of the President in enforcing the law and determined that authorization of law is not solely limited to the existence of a statute. *Id.* This Court determined that although there

was no law explicitly authorizing US Marshalls to protect Supreme Court justices, it held that any obligation that can be inferred from the Constitution or derived from the scope of the agent's duties constitutes a "law" for the purposes of Supremacy Clause immunity. *Id.* at 59. This Court then turned to Article 2, Section 3 of the Constitution, which provides that it is the President's duty to "take care that the laws be faithfully executed." *Id.* at 63. Part of this duty includes the appointment of department heads and delegation of his authority to carry out and manage the "thousands of acts" required under Article 2, Section 3. *Id.* at 64. This includes acts that are not made explicit that are essential to enforce the Constitution. *Id.* at 66. In effect, one source of law is the Executive's power under Article 2, Section 3 of the Constitution.

The President and, by extension, the Executive Branch have the power to enforce laws and, as such, consideration must be given to the enforcement and nonenforcement decisions made by policymaking officials. The decision not to prosecute or enforce is committed to an agency's absolute discretion. *Heckler*, 470 U.S. at 831. This Court has held that the decision not to enforce is generally not suitable for judicial review. *Id.* This is because nonenforcement decisions require "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* At their core, nonenforcement decisions are about ordering agency priorities. *Id.*

Similarly, in the context of prosecutorial discretion, a prosecutor can adopt "general policies" of nonenforcement under the Constitution. *See: Reno v. Flores*, 507

U.S. 292 (1993). In *Flores*, this Court considered whether the Attorney General and, by extension, Immigration and Naturalization Services could adopt a policy that declined to enforce an immigration law that required the release of undocumented minors arrested without their parents to “responsible adults.” *Id.* at 295. The Court determined that as part of the Attorney General’s powers of prosecutorial discretion he or she may adopt “reasonable presumptions and generic rules.” *Id.* at 313.

The DC Circuit Court of Appeals provided an in-depth analysis of the historical basis for nonenforcement powers in a case regarding prosecutorial discretion. *See: In Re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013). A President may pardon or decline to enforce a law because of policy considerations. *Id.* at 263. The reasoning for this power lies in the founders’ concerns over individual liberty. *Id.* at 264 (quoting James Madison in *The Federalist No. 47* writing, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.”) The court gave the example of a president deciding not to enforce marijuana laws. *Id.* at 265.

Where the Executive Branch has issued guidance that directs the exercise of discretion, an officer may not act in a manner contrary to such guidance. Under *Barr*, an action is authorized by law when it is properly within the officer’s discretion. *Barr*, 360 U.S. at 575. Part of this lies in determining what is within the officer’s supervision or control. *Id.* at 573. When the Executive Branch issues guidance to direct or supervise its employees and officers, it limits their exercise of discretion. This is solely within the power of the executive agencies and is not even reviewable

by this Court. Thus, it would be nonsensical to claim that a single officer subject to such guidance acts with authority of law when he or she violates it.

Thus, *Neagle* establishes that for the purposes of Supremacy Clause immunity the President's decisions regarding the enforcement of law sets the limits of authorization. Part of the President's power is choosing not to enforce laws. As such, officer's exercising their discretion may not violate the Executive Branch's nonenforcement decisions.

*ii. The Attorney General's Guidance At The Time Of The Attack Limited The Exercise Of Discretion When Enforcing Federal Marijuana Law.*

Schrader contends that he was enforcing the Controlled Substances Act ("CSA") when he tackled Mr. White. However, the Executive Branch had exercised nonenforcement discretion in the realm of marijuana. In 2013, Washington and Colorado sought to legalize marijuana through state ballot initiatives. LETTER FROM ERIC HOLDER TO JAY INSLEE & JOHN HICKENLOOPER (August 29, 2013). The Governors reached out to Attorney General Eric Holder to determine the federal government's position. In response, Holder released what is known as "The Cole Memo." MEMORANDUM FROM DAVID COLE ON GUIDANCE REGARDING MARIJUANA ENFORCEMENT ("The Cole Memo")(August 29, 2013). The Cole Memo states that "the guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states." COLE MEMO at 1. Further, it observes that

the federal government has traditionally relied on state and local law enforcement agencies to address marijuana... the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is

limited to possession of small amounts of marijuana for personal use. COLE MEMO at 2.

The Memo observes that when states legalize marijuana with robust controls it is likely to achieve the Congressional priorities of reducing criminal activity. COLE MEMO at 3. As such, the Cole Memo guides federal officers and agents to refrain from enforcing federal marijuana laws when states have legalized marijuana. COLE MEMO at 1. Thus, the Cole Memo limits the discretion exercised by those within the Department of Justice.

In this case, although the Cole Memo was rescinded by Attorney General Jeff Sessions in 2018, it was still in effect on November 8, 2016 when Schrader caused grievous injury to Mr. White. Though Schrader claims that he did so to enforce federal marijuana law, his actions were contrary to federal law.

Schrader is an agent of the FBI, which is within the Department of Justice. 28 U.S.C. § 532. The Attorney General, through the executive authority granted to him by the President, had set forth a policy of nonenforcement of federal marijuana law in states that legalized the drug. New Tejas had legalized marijuana through a ballot initiative. (R. at 2a). Thus, even though Schrader claims he was enforcing the CSA, he was doing so against the guidance of the Department of Justice. The founders' viewed the prosecutorial discretion of the Executive Branch as an essential check on Congress. Thus, it is antithetical to the Constitutional scheme of governance to view an Executive Branch officer's actions as authorized by law, when they go directly against the policy of the Executive Branch. As such, Schrader's actions were not

authorized by law because they violated the Department of Justice’s nonenforcement guidance.

Therefore, the existence of guidance from the Attorney General’s office to guide the exercise of “investigative discretion” of all federal enforcement activity serves as a clear limit on a lower level agent’s discretion. As such, where an officer acts in a discretionary manner that contravenes Executive Branch guidance on how that discretion should be exercised, it exceeds the scope of his or her authority.

As such, Schrader’s actions were not authorized by law because he should not have enforced federal marijuana law in New Tejas.

**B. An Officer’s Actions Must Be No More Than What Was Necessary Or Proper.**

In *Neagle*, this Court determined that Supremacy Clause immunity must be granted when an officer does no more than what was necessary and proper in the pursuit of his or her legally authorized duties. *Neagle*, 135 U.S. at 75. Confusion has emerged over what constitutes “no more than what was necessary and proper.” This Court should clarify that an action is “no more than what was necessary and proper” if 1) it is objectively reasonable, 2) it is subjectively reasonable, and 3) it does not disproportionately violate state law in the pursuit of a federal interest.

*i. This Court Should Reaffirm The Objective Test It Established In Drury And Neagle.*

*Drury* requires that the officer’s actions be objectively reasonable to access Supremacy Clause immunity. In *Drury*, this Court considered where the outer limit of Supremacy Clause immunity lies. *Drury*, 200 U.S. at 1 (1906). This Court observed that it is an “exceedingly delicate jurisdiction” to release a person from trial by a

state. *Drury*, 200 U.S. at 7. Further, it noted that cases involving this issue are “exceptional.” *Id.* *Drury* involved a US military officer who was protecting a fort. *Id.* at 2. The officer observed a man stealing copper from the fort. *Id.* The officer then ordered a soldier to shoot the man. *Id.* at 3. Pennsylvania indicted the officer for manslaughter. *Id.* at 2. There was a dispute over whether the officer ordered the soldier to shoot the man as he fled or after he surrendered. *Id.* at 7. This Court held that if the officer ordered that the soldier shoot after the man had surrendered, the action could not be reasonably claimed to be within the scope of a duty imposed by federal law. *Id.* at 8. In effect, this Court in *Drury* contemplated whether the evidence showed that the officer’s actions were objectively reasonable. This serves as the basis for distinguishing between those actions that are necessary and proper and those that are neither necessary nor proper.

Similarly, *Neagle* requires that an officer’s actions be objectively reasonable. This Court in *Neagle* cites to *Jenkins* approvingly. *Neagle*, 135 U.S. at 73 (determining that *Ex Parte Jenkins* was “very analogous” to the facts in *Neagle*). In *Ex Parte Jenkins*, the district court set forth very clear limits on Supremacy Clause immunity holding that where federal agents “have transcended the rightful limits of their authority, and have wilfully [*sic*] or ignorantly violated the law, no considerations of policy or sympathy will press upon this court to rescue them from punishment.” *Ex parte Jenkins*, 13 F. Cas. 445, 452 (C.C.E.D. Pa. 1853).

Further, objective reasonability is implied in *Neagle* because this Court determined that Neagle was authorized to take the assailants life *and* justified in

doing so. *Neagle*, 135 U.S. at 76. If the Court intended the rule to be that any action regardless of reasonability was allowed, then this Court would not have needed to make the determination that Neagle acted in a manner that was justified. Thus, the earlier cases also demonstrate that only an agent's objectively reasonable actions are entitled to Supremacy Clause immunity.

Further, the Second, Fifth, Sixth, Ninth, and Tenth Circuits have required an objective standard. *See: Livingston*, 443 F.3d at 1222; *Horiuchi*, 253 F.3d at 366; *Long*, 837 F.2d at 745; *State v. Kleinert*, 855 F.3d 305, 315 (5th Cir. 2017); *Tanella*, 374 F.3d at 147. The Second, Fifth, Sixth, and Tenth Circuits each cite to the Ninth Circuit's decision in *Clifton* for the objective test. *See: Livingston*, 443 F.3d at 1220 (quoting *Clifton* for the proposition that "necessary and proper" test "must rest not only on the subjective belief of the officer but also on the objective finding that his conduct may be said to be reasonable."); *Horiuchi*, 253 F.3d at 366 (observing that lower courts have refined the standard for immunity since *Drury*, citing *Clifton* for the standard); *Long*, 837 F.2d at 745 (construing *Clifton* as containing both a subjective and objective element); *Whitehead*, 943 F.2d at 234 (citing both *Long* and *Clifton* for the objective standard). The Ninth Circuit in *Clifton* derived the objective standard from *Neagle*. *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977). It reasoned that in *Neagle* the Supreme Court granted the officer immunity under the Supremacy Clause because it found that his belief that the assailant he killed had a knife was objectively reasonable. *Clifton*, 549 F.2d at 728. Thus, the objective test is generally accepted by the lower courts in line with this Court's precedent in *Neagle*. As such,

this Court should hold that a federal officer must have an objectively reasonable belief that his or her actions are necessary and proper.

*1. It Is Never Objectively Reasonable For An Officer To Act In A Manner That He Or She Knows Will Violate Constitutional Rights.*

This Court should further hold that an action is objectively unreasonable when an officer knew or should have known that it would violate an individual's constitutional rights. This Court has held, in the context of qualified immunity, that an action is objectively unreasonable if presuming that an officer had knowledge of and respect for constitutional rights, the officer "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate" a person's constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Thus, the objective test in *Harlow* draws the line on immunity at the point where an officer knew or should have known that he or she was going to violate constitutional rights.

This Court should adopt this test because it allows the states to function as a check on the federal government. The purpose of dual-sovereignty under the Constitution is to allow for the states to serve as a check on the federal government. *Gamble*, 139 S. Ct. at 1968. This Court's reasoning for adopting the "objective test" in the qualified immunity context is just as applicable to the situation of ensuring that states can check federal excesses. This Court balanced the rights of individuals against those of the government in adopting the "objective test." *Id.* at 817. This Court determined that the "objective test" would preclude immaterial litigation and ensure the federal government could function while addressing lawless conduct. *Id.* at 819.

Here, the federal interest is in ensuring that it can apply its Constitutional laws without interference by the states. *Neagle* at 62. The states interest is in protecting the life and limb of its citizens. In *Neagle* this Court raised concerns over the states' ability to use frequent and unfettered prosecution to stop the enforcement of federal law. *Id.* at 61. This is similar to the concerns raised in *Harlow* where this Court considered that insubstantial lawsuits would grind the federal government to a halt. Both cases raised concerns over chilling official action and creating a de facto bar to enforcement of federal law. However, the objective standard served as a middle ground that prevents lawlessness. Likewise, when an officer acts in a manner that he or she knows will violate the Constitution, he or she should not be immune to state criminal law. To allow officers engaged in lawless conduct to avoid prosecution would undermine the rule of law and encourage lawlessness. As such, this Court should adopt the objective standard because it allows for state prosecutions in cases where the states serve as a vital check on abuses of federal power as envisioned by the founding fathers.

*ii. This Court Should Hold That An Action Is Only Necessary  
And Proper If It Is Subjectively Proper.*

This Court should adopt the Fifth Circuit's approach to the subjective element expressed in *Kleinert* because it draws the line between the acts a federal officer commits on behalf of the federal government and those he commits for his own benefit. In *Kleinert*, the Fifth Circuit held that any evidence of personal interest, malice, or criminal intent will negate subjective reasonableness. *State v. Kleinert*, 855 F.3d 305 (5th Cir. 2017). This approach is supported by *Neagle* because this Court

focused on the officer's "well-founded belief." *Neagle*, 135 U.S. at 76. This Court in *Neagle* emphasized that the officer's belief that the assailant posed a threat to the judge was "well-founded" and, therefore, justified. *Neagle*, 135 U.S. at 76. A belief cannot be well-founded when it is motivated by either criminal intent, malice, or other factors. The criminal intent, malice, or personal interest test used by the Fifth Circuit in *Kleinert* is in line with the well-founded belief language present in *Neagle*.

Furthermore, The Fifth Circuit cited the Eleventh Circuit's subjective reasonableness rule in establishing its test in *Kleinert*. *Id. citing Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982). The Eleventh Circuit in *Baucom* used the presence of criminal intent, malice, or self-interest as a method of distinguishing a good faith act in error, which the immunity covers, from one that falls outside of the scope of the Supremacy Clause. *Baucom*, 677 F.2d at 1350.

Similarly, the Sixth and Second Circuit have employed the "honest belief" test. *See: Tanella*, 374 F.3d at 147; *Long*, 837 F.2d at 745. The honest belief test, put differently, considers whether the officer had no motivation other than doing his or her job. *Whitehead*, 943 F.2d at 234. While the federal government can only act through its officers, not every action by a federal officer can be fairly construed as an act of the federal government. If federal officers have motivations other than enforcing federal law, then the Supremacy Clause is not implicated because the federal government is not acting through those officers. The prosecution of these officers does not risk deterring good faith or honest enforcement because the state's prosecution is for the criminal conduct of the officer that is wholly distinguishable

from his or her federal duties and federal actions. As the Eleventh Circuit observed in *Baucom*, the “dishonest public official who profanes his official trust may do more harm to our society than common criminals, and be much more difficult to investigate and convict.” *Baucom*, 677 F.2d at 1351. Thus, enforcement of state law against federal officials acting dishonestly to use their office as a shield for criminal conduct serves the public interest in enforcement of the law and also serves the federal interest by ensuring that a few bad apples do not spoil public sentiment on federal law as a whole.

Some lower courts have questioned the validity of the subjective element, but their concerns either misinterpret or misapply this Court’s precedent. The Ninth Circuit in *Horiuchi* observed that other circuits had not taken into account this Court’s rejection of the subjective prong in the qualified immunity context. *Horiuchi*, 253 F.3d at n.11. The Tenth Circuit, citing *Horiuchi*, engaged in an expanded discussion of *Harlow* concluding that “it may also be appropriate to reject the subjective element of the Supremacy Clause immunity test.” *Livingston*, 443 F.3d at 1221-222.

However, this Court’s decision in *Harlow* shows that the public policy concerns that justified the removal of the subjective element in the qualified immunity context, do not justify removal of the subjective element in the Supremacy Clause immunity context. In *Harlow*, this Court eliminated the subjective element from the test for qualified immunity. *Harlow*, 457 U.S. at 818. This Court focused on how the subjective element allowed insubstantial cases to proceed. *Id.*

This concern is distinguishable from the Supremacy Clause immunity context. Qualified immunity applies to officers' immunity from civil suit. Civil suits can be brought by any person allowing for a large number of insubstantial claims. Eliminating a subjective test in the qualified immunity context mitigates this problem because eliminating it makes it more difficult for any claim to survive a motion to dismiss. In contrast, Supremacy Clause immunity has been referred to as a "seldom litigated corner of constitutional federalism." *Livingston*, 443 F.3d at 1213. Thus, the number of claims that involve Supremacy Clause immunity does not warrant the same concerns.

Therefore, the criminal intent, malice, or self-interest test serves as an important limitation of Supremacy Clause immunity that ensures that protection only extends to the actions an officer takes on behalf of the federal government.

*iii. This Court Should Hold That A Federal Officer's Actions Are Not Necessary And Proper Where The Violation Of State Law Is Disproportionate To The Federal Policy The Officer Is Carrying Out.*

This Court should hold that a federal officer's actions are more than what is necessary and proper where the violation of state law is disproportionate to the federal policy the officer is carrying out. An action is only entitled to protection when it does "no more than what was necessary and proper for him to do." *Neagle*, 135 U.S. at 75. A balancing approach has been proposed by both the Eleventh and Tenth Circuits. *See: Livingston*, 443 F.3d 1211 (10th Cir. 2006); *Baucom*, 677 F.2d at 1350. This Court's opinion in *Johnson* utilizes a similar approach to distinguish between situations when state law and federal law apply. This Court reaffirmed in *Johnson*

that not every action taken by a federal officer while conducting his or her duties is protected by the Supremacy Clause. *Johnson*, 254 U.S. 51 (1920). This Court distinguished between state actions that attempt to command the federal government and those that incidentally touch an agent's conduct. *Id.* at 57. Balancing of the federal and state interest involved in a Supremacy Clause immunity case provides a method for distinguishing between the former and the latter.

*1. The Powers Of The States And Federal Government  
Inevitably Overlap Despite Attempts To Clearly  
Delineate Between The Two.*

*Johnson* stands for the proposition that the states can sometimes regulate the conduct of federal officers. The question that has vexed the courts is when they may do so. This Court has attempted to delineate when a federal officer's action crosses the boundary between areas of federal control and areas of state control. *Johnson*, 254 U.S. at 56. When an officer's actions are within the realm of federal control and authority, a state may not attempt to exercise control. *Id.* at 57. However, when a state regulates the incidental conduct of a federal officer in an area within the state's control there is no entitlement to immunity under the Supremacy Clause. *Id.* at 57.

However, while this Court has attempted to separate areas of federal and state control, overlap is an inevitable feature of dual-sovereignty. The system of federalism often results in overlapping regulations. *Gamble*, 139 S. Ct. at 1969. Indeed, states can even choose to legalize activities that the federal government criminalizes. *Id.* This is because the powers of the states and the federal government inherently overlap. *Id.* Given this inevitability, it is imperative to balance the interests of the

states and the federal government in order to satisfy the demands of the Supremacy Clause and the Tenth Amendment.

*2. To Resolve Conflicts Between The States And The Federal Government This Court Should Balance State And Federal Interests.*

This Court has held that when Congress passes laws that affect the states, it must treat them with the esteem due to them as joint participants in the federal system. *Alden v. Maine*, 527 U.S. 706, 758 (1999). Likewise, when the federal government enforces its laws, it must respect state sovereignty. This means that while the federal government has every right to enforce its laws, it must also consider how its methods of enforcement implicate state sovereignty.

Where there is a disproportionate violation of state law for a slight federal policy interest, *Neagle* supports the exclusion from Supremacy Clause immunity because the officer's actions cannot be characterized as "no more" than what was necessary and proper. *Neagle*, 135 U.S. at 75. The "no more than" language requires a consideration of the severity of the state law violation in relation to the federal policy being enforced.

In line with this principle, the Eleventh Circuit in *Baucom* held that simply because "a deliberate violation of state law may render federal law enforcement more convenient is insufficient to shield the agent from state prosecution." *Baucom*, 677 F.2d at 1350. In essence, the court in *Baucom* recognized that while federal law enforcement is important, an officer is not entitled to Supremacy Clause immunity if he or she violates state law solely to make enforcement of federal law easier.

Illustratively, the need for a balancing approach was highlighted by the Tenth Circuit in *Wyoming v. Livingston*. In *Livingston*, officers of the United States Fish and Wildlife Service (“USFWS”) were tasked with collaring and tracking wolves as part of a wolf reintroduction program. *Livingston*, 443 F.3d at 1214. Under USFWS procedure, it was generally the practice to secure permission from landowners before entering private land. *Id.* However, the agents failed to do so and trespassed on private property. *Id.* at 1215. Wyoming filed charges for trespassing and littering. *Id.* at 1216. In that case, the federal government had an interest in carrying out its wolf reintroduction program, but the state also had an interest in enforcing trespassing laws. The court noted that Wyoming in the appeal had not raised the argument that its interest in enforcing its laws against trespassing and littering outweighed the federal interest in wolf monitoring. *Id.* at n. 5. Thus, the court was forced to leave for another day the question of “whether federal officers are entitled to Supremacy Clause immunity where their state law violation was disproportionate to the federal policy they were carrying out...” *Id.* This case gives this Court an opportunity to resolve the question posed by the Tenth Circuit.

Therefore, this Court should hold that where a state law violation is disproportionate to the federal policy being enforced the officer is not entitled to Supremacy Clause immunity. In this case, the federal interest is miniscule in comparison to New Texas’ interest. Mr. White was never charged by the Federal Government for possession of marijuana. This is likely because the federal government has typically left the enforcement of individual possession to the states

and the Department of Justice had adopted a policy of non-enforcement against those in compliance with state laws legalizing marijuana. Thus, even if Schrader's actions were authorized by law, the federal interest in enforcing federal marijuana law was so slight that charges against Mr. White were never filed. However, Schrader used so much force that he hospitalized Mr. White, resulting in New Tejas filing charges for aggravated assault. Schrader's actions cannot be said to have done "no more" than what was necessary and proper because they used violent force in pursuing something that was at best a slight interest for the Federal Government. As such, Schrader committed a disproportionate violation of New Tejas' law in pursuit of minor federal interest.

Thus, federal officers actions do more than what is necessary proper when they disproportionately violate state law to accomplish a minor federal interest.

## CONCLUSION

The balance between the states and the federal government is an essential feature of constitutional federalism. In order to protect the rights of states, this Court must utilize the light most favorable to the non-movant standard in line with the Federal Rules of Criminal Procedure. This Court should further hold that federal officers are entitled to Supremacy Clause immunity when their actions are authorized by law and they do no more than what was necessary and proper. Construing the facts in the light most favorable to New Tejas, Schrader is not entitled to immunity under the Supremacy Clause as his actions were not authorized by law, and exceeded what is permitted as necessary and proper. Therefore, this Court should affirm the decision of the Appellate Court which reversed the District Court's decision to grant Schrader's Motion to Dismiss.

Respectfully submitted,  
/s/ Team #55  
Team #55  
Counsel for the Respondent  
November 18, 2019

**CERTIFICATE OF SERVICE**

By our signature, we certify that a true and correct copy of Respondent's 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 #55  
Team #55  
Counsel for Respondent  
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 Respondent, New Tejas, contains 12,762 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 #55  
Team #55  
Counsel for Respondent  
November 18, 2019

## APPENDIX

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.