

No. 18–5188

**In The
Supreme Court of the United States**

HANK SHRADER,
Petitioner,

v.

NEW TEJAS,
Respondent.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT**

BRIEF FOR RESPONDENT

Team # 59

Counsel for the Respondent

QUESTIONS PRESENTED

- I. This Court's Supremacy Clause immunity jurisprudence and Federal Rule of Criminal Procedure 12 do not allow district courts to resolve genuine factual disputes that are relevant to the immunity claim or underlying criminal charge. The District Court made findings of fact that resolved genuine disputes relevant to both issues. In doing so, did the District Court violate this Court's jurisprudence and the plain meaning of Rule 12?

- II. This Court conducted both a subjective and objective analysis when applying its test for Supremacy Clause immunity in *In re Neagle*. The District Court disregarded evidence of Agent Schrader's subjective beliefs when deciding that he was entitled to immunity. In doing so, did the District Court apply the wrong test for Supremacy Clause immunity?

TABLE OF CONTENTS

QUESTIONS PRESENTEDi

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES.....iv

PARTIES TO THE PROCEEDING..... 1

DECISIONS BELOW 1

STATEMENT OF JURISDICTION 1

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS..... 1

STATEMENT OF THE CASE 2

A. Schrader takes a break from work..... 2

B. Schrader’s vacation hits a bump in the road..... 2

C. Schrader’s vacation turns violent 3

D. New Tejas seeks to protect its citizens 5

E. Schrader removes the prosecution to federal court 5

SUMMARY OF THE ARGUMENT..... 7

ARGUMENT..... 9

**I. A DISTRICT COURT FACED WITH A RULE 12 MOTION TO DISMISS
BASED ON SUPREMACY CLAUSE IMMUNITY MUST VIEW DISPUTED
FACTS IN THE LIGHT MOST FAVORABLE TO THE STATE**..... 9

 A. This Court has already established the proper procedural framework for
ruling on a claim of Supremacy Clause immunity in the habeas context..... 11

 B. The plain meaning of Rule 12 and this Court’s existing procedural
framework for Supremacy Clause immunity preclude district courts from
substituting their discretion for that of the jury. 12

 C. The District Court resolved disputed facts relevant both to immunity and
the assault, therefore the Thirteenth Circuit properly disregarded its
findings of fact..... 16

**II. THE NEAGLE TEST FOR SUPREMACY CLAUSE IMMUNITY MUST
INCLUDE BOTH AN OBJECTIVE AND SUBJECTIVE ANALYSIS**..... 19

A. The dual subjective and objective analyses protect federal supremacy while respecting federalism 21

B. A subjective analysis ensures the states’ ability to protect their citizens without interfering with federal law.25

C. The Thirteenth Circuit correctly found that Schrader’s actions were not “necessary and proper” for the enforcement of federal law.30

CONCLUSION33

APPENDIX 34

TABLE OF AUTHORITIES

SUPREME COURT CASES

<i>Arizona v. Manypenny</i> , 451 U.S. 232 (1981)	13
<i>Boyce Motor Lines, Inc. v. United States</i> , 342 U.S. 337 (1952)	10
<i>FTC v. Mandel Bros.</i> , 359 U.S. 385 (1959)	14
<i>Holden v. Hardy</i> , 169 U.S. 366 (1898).....	26
<i>In re Neagle</i> , 135 U.S. 1 (1890).....	passim
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987).....	14
<i>Olmstead v. United States</i> , 277 U.S. 438 (1928).....	28
<i>Roberts v. Sea-Land Servs., Inc.</i> , 566 U.S. 93 (2012)	14
<i>Tennessee v. Davis</i> , 100 U.S. 257 (1879)	9, 21, 22
<i>United States v Covington</i> , 395 U.S. 57 (1969).....	14
<i>United States v. Gaudin</i> , 515 U.S. 506 (1995)	14
<i>United States v. Lopez</i> , 514 U.S. 549 (1995)	21
<i>United States v. Marion</i> , 404 U.S. 307 (1971).....	14
<i>United States v. Morrison</i> , 529 U.S. 598 (2000).....	22
<i>United States v. Scheffer</i> , 523 U.S. 303 (1998)	17
<i>United States ex rel. Drury v. Lewis</i> , 200 U.S. 1 (1906)	11, 12, 22
<i>Willingham v. Morgan</i> , 395 U.S. 402 (1969)	13

FEDERAL COURT OF APPEALS CASES

<i>Baucom v. Martin</i> , 677 F.2d 1346 (11th Cir 1982)	26, 27, 29
<i>Clifton v. Cox</i> , 549 F.2d 722 (9th Cir. 1977)	12, 20, 28, 29
<i>Idaho v. Horiuchi</i> , 253 F.3d 359 (9th Cir. 2001)	10, 16, 20, 22
<i>Isaac v. Googe</i> , 284 F. 269 (5th Cir. 1922)	26
<i>Kentucky v. Long</i> , 837 F.2d 727 (6th Cir. 1988)	passim
<i>Maryland v. DeShields</i> , No. 86–5180, 1987 WL 38619, (4th Cir. Sept. 25, 1987)	20
<i>Morgan v. California</i> , 743 F.2d 728 (9th Cir. 1984).....	23
<i>New Mexico v. Dwyer</i> , No. 95–2221, 1997 WL 8874, (10th Cir. Jan. 10, 1997).....	19

<i>New York v. Tanella</i> , 374 F.3d 141 (2d Cir. 2004).....	10, 19
<i>Texas v. Kleinert</i> , 855 F.3d 305 (5th Cir. 2017)	19, 22, 26
<i>United States v. Barnard</i> , 490 F.2d 907 (9th Cir. 1973)	17
<i>Wyoming v. Livingston</i> , 443 F.3d 1211 (10th Cir. 2006).....	10, 20

FEDERAL DISTRICT COURT CASES

<i>Arizona v. Files</i> , 36 F. Supp. 3d 873 (D. Ariz. 2014).....	26, 27
<i>Connecticut v. Marra</i> , 528 F. Supp. 381 (D. Conn. 1981).....	22
<i>New Jersey v. Bazin</i> , 912 F. Supp. 106 (D.N.J. 1995)	20, 27
<i>Puerto Rico v. Torres Chaparro</i> , 738 F. Supp. 620 (D.P.R. 1990)	20, 26

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. VI, cl. 2.	9, 21
U.S. CONST. amend.	9, 21

STATUTES

28 U.S.C. § 1254(1).....	1
28 U.S.C. § 1442	13
Penal Code of New Tejas § 22.01(a)	17, 18
Penal Code of New Tejas § 50.01	18

RULES

Fed. R. Crim. P. 12(b)	13
Fed. R. Crim. P. 12(d)	14

PARTIES TO THE PROCEEDING

Petitioner is Hank Schrader, a special agent with the Federal Bureau of Investigation.

Respondent is the State of New Tejas.

DECISIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is reprinted at R. 1. The District Court's decision is reprinted at R. 27.

STATEMENT OF JURISDICTION

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

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant federal statutes are set forth at R. 44–45 and reprinted in the Appendix. The relevant New Tejas statutes are set forth at R. 45–46 and reprinted in the Appendix. The Supremacy Clause provides that “the Laws of the United States . . . shall be the supreme Law of the Land.” The Tenth Amendment provides that “[t]he 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.”

STATEMENT OF THE CASE

A. Schrader takes a break from work.

In November 2016, Hank Schrader embarked on a family vacation to Madrigal, New Tejas with his new wife and her young children. R. at 28. Entirely unrelated to any of his official duties as a special agent with the Federal Bureau of Investigation (FBI), this vacation was both a honeymoon and a break from work. R. at 28. Over the course of his nearly twenty-year career at the FBI, Schrader was stationed in several states and charged with investigating a variety of crimes, including wire fraud and racketeering. R. at 28. Notably, however, Schrader was never involved in any drug trafficking investigations. R. at 28. Schrader's record at the FBI, despite several commendations, is troubling. R. at 28. Four complaints of excessive force have been made against him, and he was previously disciplined for reckless discharge of a firearm. R. at 28.

B. Schrader's vacation hits a bump in the road.

After spending the first few days of their trip swimming and sight-seeing, Schrader and his new family decided to visit the New Tejas Natural History Museum. R. at 28. Early on November 8, Schrader began driving his family towards the museum in their rental car. R. at 29. During their drive, Walter White, a citizen of New Tejas, made a lane change in his truck and pulled in front of Schrader's car. R.

at 29. Schrader braked sharply and yelled an expletive as White's truck merged ahead of him. R. at 29.¹

As the vehicles reached a stoplight, Schrader stormed out of his car and marched towards White's truck. R. at 29. It is undisputed that Schrader was livid. R. at 29. Schrader admitted that he was angry and his wife claimed that he was red-faced and furious. R. at 29. Schrader's approach prompted White to leave his truck and turn towards Schrader, who began yelling. R. at 29. Despite initiating the confrontation, Schrader later claimed that his only purpose in approaching White was to keep his new family safe. R. at 29. The confrontation intensified as the two men exchanged words and, almost, physical blows; White admitted shoving Schrader in the chest, and Schrader drew back his arm, seemingly ready to strike White. R. at 29, 30. Yet, before violence could erupt, the stoplight turned green and other cars began to honk, prompting the two men to return to their vehicles. R. at 30.

C. Schrader's vacation turns violent.

After returning to the rental car and apologizing for his angry outburst, Schrader drove his family to the museum, where they spent several hours. R. at 30. Hungry, the family sought out a restaurant in downtown Madrigal. R. at 30. As the family searched for food, Schrader once again ran into White. R. at 31. Just a few feet in front of him, Schrader noticed White walk out of a building labeled "Pinkman's

¹ Both parties dispute the details of the lane change. R. at 29. Schrader alleges that White was speeding and immediately braked once he pulled in front of Schrader's car. R. at 29. White, however, denies both speeding and braking. R. at 29.

Emporium” carrying a transparent plastic bag. R. at 31. A small amount of marijuana was plainly visible in the bag. R. at 31. It is undeniable that White’s purchase and possession of the marijuana complied fully with New Tejas’s widely-publicized and well-supported new law. R. at 31.

As White left Pinkman’s Emporium with his legally purchased marijuana, Schrader yelled, “Stop! You’re under arrest!” but did not identify himself as a federal law enforcement officer. R. at 31. Noticing the man who had confronted him earlier running towards him, White began to run away. R. at 31. Yet, before he could get far, Schrader lunged towards him, tackled him violently from behind, slammed him into the concrete sidewalk, chipped several of his teeth and broke his arm. R. at 31. With Schrader’s full weight on top of him, White yelled out in pain and complied with Schrader’s demands. R. at 31. The owner of Pinkman’s Emporium witnessed the violent encounter and called 9-1-1 as Schrader placed White in handcuffs. R. at 31. A visit to the hospital later revealed the severity of White’s injuries. R. at 32.

Local police soon arrived at the scene and found Schrader informing White that he was under arrest for violating 21 U.S.C. § 844. R. at 31. Section 844 provides that intentional possession of marijuana, without a valid prescription, violates federal law. 21 U.S.C. § 844. Schrader later testified that he was unaware that purchase and possession of marijuana was legal under New Tejas law. R. at 31. It was not until the local police arrived that Schrader, for the first time, identified himself as an FBI agent. R. at 31. An ambulance then transported White to a local hospital where he

was treated for his injuries. R. at 32. Despite Schrader’s “arrest,” White was never charged with violating 21 U.S.C. § 844 or any other crime. R. at 32.

D. New Tejas seeks to protect its citizens.

While White recovered from his brutal run-in with Schrader, the Madrigal community erupted into protest; hundreds of demonstrators rallied against Schrader’s attack on White for legally exercising his rights as a New Tejas citizen. R. at 32. The Madrigal County District Attorney, Mrs. Wexler, addressed the crowd at the rally, lamenting the “illegal and unjustified” arrest of White and the “unconscionable” injuries he suffered. R. at 33. Wexler also announced her intention to prosecute Schrader and protect the interests of the New Tejas citizenry through enforcement of the state’s marijuana law. R. at 32. Shortly after, New Tejas indicted Schrader for assault and aggravated assault under Sections 22.01 and 22.02 of the Penal Code of New Tejas. R. at 32.

E. Schrader removes the prosecution to federal court.

After he was indicted, Schrader removed the state prosecution to the United States District Court for the District of Madrigal under 28 U.S.C. § 1442. R. at 33. New Tejas did not challenge removal. R. at 34. Schrader argued to the District Court that the Supremacy Clause immunized him from state prosecution. R. at 34. Consequently, he moved to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b). R. at 34. Throughout this litigation, Schrader has

consistently argued that the enforcement of federal law was his only motivation in attempting to arrest White. R. at 31, 32.

In ruling on Schrader's motion to dismiss, the District Court first held that it was proper for it to decide any disputed issues of material fact. R. at 37. The court held an evidentiary hearing and made several findings of fact. R. at 40. The court found that Schrader believed that his federal duties "included arresting individuals who committed federal crimes in his presence, regardless of state law." R. at 37. It further determined that Schrader was "motivated solely to fulfill his federal duties and enforce federal law." R. at 38. Finally, it found that "[a]lthough Agent Schrader never expressly identified himself as a law enforcement officer, his instruction to Mr. White that he was under arrest manifested a purpose to arrest Mr. White and under the circumstances, identified Agent Schrader as a peace officer." R. at 38. The court relied on those findings in determining that Schrader's actions satisfied the "necessary and proper" test for Supremacy Clause immunity. R. at 40, 41. The District Court then granted the motion to dismiss, holding that Schrader was "entitled to immunity under the Supremacy Clause." R. at 41.

New Tejas appealed, and the United States Court of Appeals for the Thirteenth Circuit disregarded the District Court's findings of fact. R. at 8. Instead, the Thirteenth Circuit held that any disputed issues of material fact must be viewed in the light most favorable to the State. R. at 8. Turning to the test for Supremacy Clause immunity, the court agreed with the District Court that the proper test includes both a subjective and an objective component. R. at 10, 11. The Thirteenth

Circuit disagreed, however, with the District Court’s application of those components, finding that Schrader’s conduct was neither subjectively nor objectively proper. R. at 10, 11. As such, the Thirteenth Circuit held that Schrader was not entitled to immunity and reversed and remanded the case for trial. R. at 13. Schrader appealed the Thirteenth Circuit’s decision, and this Court granted certiorari on March 18, 2019.

SUMMARY OF THE ARGUMENT

The purpose of Supremacy Clause immunity is to enforce the supremacy of federal law without derogating the States’ constitutional authority. This tension between federal and state interests requires a clear procedural framework for district courts to apply when ruling on Supremacy Clause immunity and a clear test for when that immunity applies.

This Court created such a procedural framework in the habeas context. In *Drury*, this Court held that a “conflict of evidence” regarding the existence of immunity transforms that immunity claim from a pretrial bar to a defense. Thus, a district court must deny a habeas petition based on Supremacy Clause immunity if the State and the officer present conflicting evidence about any element of the immunity claim. The *Drury* framework applies equally to motions to dismiss based on Supremacy Clause immunity. When an officer moves to dismiss a state prosecution under Federal Rule of Criminal Procedure 12(b)(1), that Rule’s plain meaning precludes the District Court from resolving factual disputes relevant to the ultimate question of guilt or innocence. Facts relevant to a claim of Supremacy Clause

immunity often overlap with those relevant to the ultimate question of guilt or innocence. Rule 12(b)(1)'s standard, like the *Drury* framework, requires that the District Court view the facts in the light most favorable to the State in order to determine whether there is a genuine issue of material fact relevant to the immunity. If there is, the court must deny the motion and the officer can present the immunity claim as a defense at trial. Because the facts relevant to immunity and the assault charge must be viewed in the light most favorable to the State, The Thirteenth Circuit properly disregarded the District Court's findings of fact.

In order to fulfill the purposes of Supremacy Clause immunity, the correct test must include both a subjective and an objective analysis. This Court established the test for Supremacy Clause immunity in *In re Neagle*. The *Neagle* test requires that the officer (1) have authority to enforce federal law and (2) do no more than what is necessary and proper to enforce that law. The facts of *Neagle* itself support a consideration of the officer's subjective beliefs and the reasonableness of his actions when determining the second prong. The majority of circuits agree. This consideration allows states to protect their citizens from officers acting for purely personal or malicious reasons. It *also* provides officers with grace for acting objectively unreasonably based on subjectively reasonable beliefs. Schrader concedes that his actions were objectively unreasonable. The evidence further supports that he acted to satisfy a personal vendetta rather than to enforce federal law when assaulting White. Therefore, the Thirteenth Circuit properly reversed the District Court's grant of Supremacy Clause immunity.

ARGUMENT

I. A DISTRICT COURT FACED WITH A RULE 12 MOTION TO DISMISS BASED ON SUPREMACY CLAUSE IMMUNITY MUST VIEW DISPUTED FACTS IN THE LIGHT MOST FAVORABLE TO THE STATE.

Together, the Supremacy Clause and Tenth Amendment define the constitutional delineation between federal supremacy and state sovereignty. The United States Constitution “and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2. But “[t]he 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.” U.S. CONST. amend. X. This harmonization of federal and state authority becomes problematic, however, when states seek to enforce their laws against federal officers.

The federal government “can act only through its officers and agents, and they must act within the States.” *Tennessee v. Davis*, 100 U.S. 257, 263 (1879). Thus, to protect the supremacy of federal law, this Court held in *In re Neagle* that federal officers are immune from state prosecution when their actions are “warranted by the federal authority they possess.” 135 U.S. 1, 62 (1890). Those officers must (1) have had federal authority for their actions and (2) not have done “more than what was necessary and proper.” *Id.* at 75. This immunity is unique—it is rooted in the text of the Constitution itself. Thus, in theory, it does not determine whether an officer has

a *defense* to the criminal charge. Rather, it determines whether the officer is, in enforcing supreme federal law, *immune* from prosecution.

Few courts have addressed how a district court should treat disputed facts on a motion to dismiss based on Supremacy Clause immunity. Of those that have, all but one agree with the Thirteenth Circuit that the court must view disputed facts in the light most favorable to the State. *See Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006); *New York v. Tanella*, 374 F.3d 141, 148 (2d Cir. 2004); *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988); *but see Idaho v. Horiuchi*, 253 F.3d 359, 376 (9th Cir. 2001) (en banc), *vacated as moot* 266 F.3d 979 (9th Cir. 2001). Of the four circuits that have addressed this question, even fewer have discussed their reasoning. *See Livingston*, 443 F.3d at 1226 (citing *Tanella* for the conclusion that “[t]he appellate 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”); *Tanella*, 374 F.3d at 148 (merely stating “[i]n reviewing this matter, we view the evidence in the light most favorable to the State and assume the truth of the allegations in the indictment”) (citing *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n.16 (1952)); *but see Horiuchi*, 253 F.3d at 376 (emphasizing that “having the district court hear the evidence and make factual findings before the state prosecution can go forward will act as a substantial safeguard against frivolous or vindictive criminal charges by states”); *Long*, 837 F.2d at 376 (requiring the district court to view evidence in the light most favorable to the state if the state raises a “*genuine* factual issue” as to whether immunity is appropriate (emphasis in original)).

A. This Court has already established the proper procedural framework for ruling on a claim of Supremacy Clause immunity in the habeas context.

The *Neagle* test imposes limits on a federal officer's immunity from state prosecution. In order to properly impose these limits, district courts need clear guidance on when to grant motions to dismiss based on Supremacy Clause immunity. But this Court need not start from scratch in crafting this guidance, as it already addressed the issue in the habeas context. *See United States ex rel. Drury v. Lewis*, 200 U.S. 1, 8 (1906).

In *Drury*, this Court held that “conflict[s] of evidence” as to whether the *Neagle* test has been satisfied render the immunity a “matter of defense” rather than a threshold bar to suit. *Id.* There, a military officer was charged with homicide after shooting and killing Crowley, a young man suspected of theft. *Id.* at 2. The officer claimed Crowley was fleeing arrest when he shot him. *Id.* at 3. This Court denied habeas relief when the State presented evidence that Crowley may have stopped running and surrendered before the officer fired at him. *Id.* at 8. If Crowley had surrendered, then “it could not reasonably be claimed that the fatal shot was fired in the performance of a duty imposed by the Federal law.” *Id.* Based on this “conflict of evidence,” this Court denied habeas relief and held that “[t]he assertion that Crowley was resisting arrest, and in flight when shot, was [a] matter of defense.” *Id.* In so holding, this Court recognized that “[t]he circuit court was not called on to determine the guilt or innocence of the accused” when ruling on the habeas petition. *Id.* Thus, when there is a “conflict of evidence” relevant to the immunity claim, habeas relief is

inappropriate and the officer can raise Supremacy Clause immunity as a defense at trial.

This framework properly balances the tension between the supremacy of federal law and the notion that this Court “ought not to encourage the interference of the Federal court below with the regular course of justice in the state court.” *Id.* at 7. To properly apply this framework, the federal court assumes the state’s evidence is true and asks whether the officer’s actions were “necessary and proper.” The *Drury* Court performed this analysis and determined that, “if the question of Crowley being a fleeing felon was open to dispute on the evidence . . . it was for the state court to pass upon it, and its doing so could not be collaterally attacked.” *Id.* at 8. This holding ensured that the state court could prosecute the case, free from interference by the federal court, and determine for itself whether the officer was entitled to immunity.

This Court should uphold the *Drury* framework and clarify its applicability to motions to dismiss. A district court faced with a motion to dismiss based on Supremacy Clause immunity should ask whether there is a “conflict of evidence” about the existence of immunity. If so, then the court must deny the motion. The officer can then present evidence of his immunity as a defense at trial.

B. The plain meaning of Rule 12 and this Court’s existing procedural framework for Supremacy Clause immunity preclude district courts from substituting their discretion for that of the jury.

The *Drury* framework properly fits within the modern procedural mechanisms for assertions of Supremacy Clause immunity. The type of habeas litigation arising in *Drury* and *Neagle* is rare. *Clifton v. Cox*, 549 F.2d 722, 725 n.5 (9th Cir. 1977). This

rarity is likely due to the enactment of the federal officer removal statute, 28 U.S.C. § 1442. *Id.* Section 1442(a)(1) allows for removal of state criminal prosecutions to federal court when commenced against “any officer . . . of the United States or any agency thereof, in an official or individual capacity . . . on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals.” A core purpose of this removal statute “is to have the validity of the defense of official immunity tried in a federal court.” *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). The statute does not, however, specify the procedure the federal court must use when trying the state prosecution. But this Court has held that “the federal court conducts the trial under federal rules of procedure while applying the criminal law of the State,” and “retains the highest regard for a State’s right to make and enforce its own criminal laws.” *Arizona v. Manypenny*, 451 U.S. 232, 241–43 (1981). Thus, the Federal Rules of Criminal Procedure apply to cases removed under § 1442.

Agent Schrader moved to dismiss the indictment under Federal Rule of Criminal Procedure 12(b)(1). Rule 12(b)(1)’s plain meaning prohibits a district court from resolving disputed issues of fact that would otherwise be put to the jury in determining the ultimate question of guilt. “The defense of immunity under the Supremacy Clause, however, often overlaps significantly with the elements of the offense.” R. at 6. Rule 12(b)(1) provides defendants with the ability to “raise by pretrial motion any defense . . . that the court can determine without a trial on the merits.” A court can determine a defense “without a trial on the merits” if a “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) (analyzing a former version of Fed. R. Crim. Pro. 12(b)(1)). This rule preserves the jury’s “constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence.” *United States v. Gaudin*, 515 U.S. 506, 514 (1995). Thus, dismissal under Rule 12(b)(1) is inappropriate when disputed facts essential to the question of guilt overlap with those essential to the defense raised.

To interpret Rule 12 otherwise would give effect to one of its parts while ignoring the meaning of its whole. The Federal Rules of Criminal Procedure carry the force of law. *United States v. Marion*, 404 U.S. 307, 319 (1971). Thus, “traditional tools of statutory construction” apply. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). And when faced with the construction of separate provisions of the same rule, the court’s “task is to fit, if possible, all parts into an harmonious whole.” *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (quoting *FTC v. Mandel Bros.*, 359 U.S. 385, 389 (1959)). Rule 12(d) provides that “[w]hen factual issues are involved in deciding a motion, the court must state its essential findings on the record.” This suggests that a court may make factual findings when deciding a pretrial motion. However, resolution of disputed facts that concern the alleged offense would contradict 12(b)’s limitation to defenses “that the court can determine without a trial on the merits.” The only harmonious reading of Rule 12(b) and (d) is that a court can make factual findings that are essential *only* to the determination of the defense asserted on the 12(b) motion, but *not* those that are essential to the trial on the merits.

In *Kentucky v. Long*, the Sixth Circuit addressed the same tension between federal supremacy and state sovereignty as this Court faced in *Drury*. 837 F.2d at 730. *Long*, however, involved a Rule 12(b) motion to dismiss rather than a writ for habeas corpus. *Id.* In *Long*, the court recognized that the purpose of Supremacy Clause immunity is to avoid, not just conviction, but prosecution entirely. *Id.* Thus, the court held “when the Supremacy Clause is raised as a defense by a federal officer charged with a state crime, the court has a duty to make a prompt ruling on that issue.” *Id.*

But the court also ensured that this ruling was deferential to the State’s interests. *Id.* The court provided the State with the opportunity to overcome the officer’s immunity claim by “an evidentiary showing sufficient at least to raise a *genuine* factual issue whether” the *Neagle* test was satisfied. *Id.* Requiring it to provide “sufficient” evidence that raises a “genuine factual issue” places a high burden on the State. This high burden is appropriate, however, in the context of immunity, given the constitutional interests at stake. Yet, that high burden does not give the judge discretion to decide factual disputes. It requires, rather, that the judge determine whether the depth of the state’s evidence is sufficient to render those disputes “genuine.”

A state’s mere allegations are insufficient to defeat a motion to dismiss. *Id.* at 752. Rather, the burden is on the State to present sufficient evidence to raise a genuine issue of material fact about whether the officer’s actions satisfied the *Neagle* test. *Id.* This framework still “safeguard[s] against frivolous or vindictive criminal

charges” by requiring that the State provide enough evidence to convince the District Court that such a genuine issue exists. *Horiuchi*, 253 F.3d at 376.

In *Drury*, this Court found it inappropriate to grant habeas relief and strip the state court of the ability to decide the case when a “conflict of evidence” existed regarding the existence of immunity. Likewise, Rule 12(b)(1) prevents the District Court from dismissing the case pretrial when there are disputed facts regarding the elements of the offense. When these facts overlap, and viewing the evidence in the light most favorable to the State, there is a dispute as to the existence of immunity, the District Court must deny the motion to dismiss. However, the officer can still present evidence of immunity as part of his defense at trial, like the officer was permitted to do in *Drury*. Rule 12 supports and reiterates this framework, allowing for dismissal when “the court can determine [the motion] without a trial on the merits.” Operating together, *Drury* and Rule 12(b)(1) mandate that, if the disputed evidence is relevant to both the existence of immunity *and* proof of the underlying offense, it must be resolved at trial. As the Thirteenth Circuit stated, “[t]his rule strikes the proper balance between federal and state interests.” R. at 7.

C. The District Court resolved disputed facts relevant both to immunity and the assault, therefore the Thirteenth Circuit properly disregarded its findings of fact.

In considering Schrader’s motion to dismiss, the District Court inappropriately resolved factual disputes that the jury would resolve when analyzing the elements of the assault charge. It is “[a] fundamental premise of our criminal trial system [] that ‘the jury is the lie detector.’” *United States v. Scheffer*, 523 U.S. 303, 313 (1998)

(emphasis in original) (quoting *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973)). Thus, determinations as to “the weight and credibility of witness testimony” are left to the jury. *Id.* Yet, the District Court explicitly determined the credibility of both Schrader and District Attorney Wexler. Schrader’s credibility is a key question that the jury must determine when deciding (1) the necessity of his attack on White in carrying out his federal duties, (2) the motivation behind his attack, and (3) White’s reasonable belief regarding whether Schrader identified himself as an officer. Each of these findings should have been left to the jury.

First, the District Court credited Schrader’s testimony that he believed his federal duties “included arresting individuals who committed federal crimes in his presence, regardless of state law.” In its Conclusions of Law, the District Court stated that 18 U.S.C. § 3052, the statute describing *permissive powers* of the FBI, defines Schrader’s specific federal duties. The State, however, presented conflicting evidence regarding Schrader’s belief, and the objective scope, of his federal duties. Schrader was never instructed to investigate, or involved in an investigation of, drug trafficking. The State’s evidence created at least a genuine question of material fact regarding both Schrader’s belief of, and the actual scope of, his federal duties.

Next, the District Court credited Schrader’s testimony that “he was motivated solely to fulfill his federal duties and enforce federal law.” The question of Schrader’s motivation is directly relevant to the mens rea requirement of the assault charge. *See* Penal Code of New Texas § 22.01(a). The State presented testimony from both White and Mrs. Schrader that a heated encounter occurred between the two men on the

same day as the alleged assault. Viewing this evidence in the light most favorable to the State, there is at least a genuine question of material fact regarding Schrader's subjective motivations in tackling White.

Finally, the District Court conceded that "Agent Schrader never expressly identified himself as a law enforcement officer." Yet, the court concluded "his instruction to Mr. White that he was under arrest manifested a purpose to arrest Mr. White and under the circumstances, identified Agent Schrader as a peace officer." The question of whether Schrader identified himself as an officer is directly relevant to what White knew and reasonably should have believed for purposes of the assault charge, and to Schrader's state law justification defense. *See* Penal Code of New Texas § 22.01(a)(3); *see also* Penal Code of New Texas § 50.01. The State presented evidence that Schrader failed to identify himself and immediately began running towards White upon shouting at him to stop and that he was under arrest. White, in response, turned and ran away. This evidence, viewed in the light most favorable to the State, at least raises a genuine question of fact regarding whether Schrader identified himself as, and whether White knew he was, a peace officer.

The District Court should not have resolved these factual disputes. It credited Schrader's testimony relevant to both the immunity and underlying offense rather than the State's evidence. The *Drury* framework precludes resolution of the disputed facts relevant to Schrader's immunity claim. Rule 12 delegates the credibility determination regarding evidence relevant to the underlying offense to the jury. Thus, the District Court erred in making its Findings of Fact.

Viewed in the light most favorable to the State, these three pieces of evidence undermine Schrader’s immunity claim. If an arrest for possession of marijuana was not within his federal duties, then his action could not be necessary for accomplishment of those duties. If he was motivated by his previous encounter with White, then his actions were subjectively unreasonable. And if Schrader never identified himself as an officer, then he is not entitled to a justification defense and it is more likely that his actions constituted assault. Because the question of immunity could not be resolved without resolution of these factual disputes, it should be a “matter of defense” to be litigated at trial.

II. THE *NEAGLE* TEST FOR SUPREMACY CLAUSE IMMUNITY MUST INCLUDE BOTH AN OBJECTIVE AND SUBJECTIVE ANALYSIS.

This Court established a two-prong test for Supremacy Clause immunity in the paradigm case *In re Neagle*. 135 U.S. 1, 75 (1809). To be immune from state prosecution, the *Neagle* test requires that (1) the federal officer have authority to act under the laws of the United States, and (2) his actions must have been “no more than what was necessary and proper” to accomplish his federal duties. *Id.* Supremacy Clause immunity is rarely invoked. However, the majority of circuits consider the objective reasonableness of the federal officer’s actions and his subjective beliefs when analyzing the “necessary and proper” prong. *See Texas v. Kleinert*, 855 F.3d 305, 314–15 (5th Cir. 2017); *New York v. Tanella*, 374 F.3d 141, 148 (2d Cir. 2004); *New Mexico v. Dwyer*, No. 95–2221, 1997 WL 8874, at *3 (10th Cir. Jan. 10, 1997); *Kentucky v. Long*, 837 F.2d 727, 745 (6th Cir. 1988); *Maryland v. DeShields*, No. 86–5180, 1987 WL 38619, at *6 (4th Cir. Sept. 25, 1987); *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir.

1977); *New Jersey v. Bazin*, 912 F. Supp. 106, 116 (D.N.J. 1995); *Puerto Rico v. Torres Chaparro*, 738 F. Supp. 620, 622 (D.P.R. 1990), *aff'd per curiam*, 922 F.2d 59 (1st Cir. 1991). *But see Wyoming v. Livingston*, 443 F.3d 1211, 1221–22 (10th Cir. 2006) (expressing concern with the inclusion of a subjective standard in the Supremacy Clause immunity analysis in dicta), *cert. denied* 549 U.S. 1019 (2006); *Idaho v. Horiuchi*, 253 F.3d 359, 366–67 n.11 (9th Cir. 2001) (en banc) (suggesting in dicta that a subjective standard should not be a part of the test for Supremacy Clause immunity), *vacated as moot* 266 F.3d 979 (9th Cir. 2001).

The Thirteenth Circuit focused exclusively on the *Neagle* test’s “necessary and proper” prong when reviewing the District Court’s dismissal of the State’s case against Schrader.² At issue on appeal is what test this Court should adopt for Supremacy Clause immunity. More specifically, the issue is whether that test should consider the federal officer’s subjective beliefs.

This Court, in accordance with the majority of circuits, should clarify that the “necessary and proper” prong of the *Neagle* test includes a consideration of both the objective reasonableness of the officer’s actions and his subjective beliefs. This test strikes the proper balance between federal supremacy and state sovereignty. It allows state prosecutions only when the federal officer’s actions were objectively unreasonable or undertaken for reasons unrelated to his federal duties.

² The Thirteenth Circuit failed to address whether Agent Schrader had authority. However, because this Court should continue to consider the first prong of *In re Neagle*, the State contends that on remand, the issue of whether Agent Schrader had authority should be reevaluated.

The Thirteenth Circuit correctly considered objective and subjective factors when it denied Schrader’s motion to dismiss. Schrader’s actions were not necessary for the performance of his federal duties, the force used to arrest White was objectively unreasonable, and Schrader’s subjective motivation was not to enforce federal law. Therefore, this Court should affirm the Thirteenth Circuit’s finding that Schrader lacked immunity under the Supremacy Clause.

A. The dual objective and subjective analyses protect federal supremacy while respecting federalism.

When the founders crafted the United States Constitution, “some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States.” *Tennessee v. Davis*, 100 U.S. 257, 266 (1879). In theory, this “division of sovereignty” clearly defines those powers granted to the federal government and those retained by the states. *Id.* at 272. Sometimes conflicts arise between federal and state law. When they do, the Supremacy Clause governs, and federal law is supreme. U.S. CONST. art. VI, cl. 2.

The Tenth Amendment states that “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.” U.S. CONST. amend. X. The Constitution “withhold[s] from Congress a plenary police power.” *United States v. Lopez*, 514 U.S. 549, 566 (1995). Thus, the police power is reserved for the States. *Id.* Implicit within the police power is the right for states to enact and enforce their own criminal laws. *See United States v. Morrison*, 529 U.S. 598, 618 (2000) (“Indeed, we can think of no better example of the police power, which the Founders denied the National Government

and reposed in the States, than the suppression of violent crime and vindication of its victims.”).

There is an inherent tension between the operation of the Supremacy Clause and the Tenth Amendment. The federal government “can act only through its officers and agents, and they must act within the States.” *Davis*, 100 U.S. at 263. There are, therefore, times when a federal officer must take actions that, on their face, violate a state’s criminal law. *See, e.g., Horiuchi*, 253 F.3d at 363–64. When this occurs, those federal officers may be immune from state prosecution. *See Davis*, 100 U.S. at 272; *see also Kleinert*, 855 F.3d at 320 (“Supremacy Clause immunity . . . confirms that the Constitution and laws of the United States are ‘supreme’ and cannot be obstructed . . . by the laws of the individual states.”). That immunity is not absolute. *See, e.g., Davis*, 100 U.S. at 281 (providing, for example, that federal officers do not have “immunity to commit murder in a State”); *Connecticut v. Marra*, 528 F. Supp. 381, 385 (D. Conn. 1981) (“It goes without saying . . . that federal immunity is not absolute and does not extend to all actions of federal agents, or even to all . . . actions taken during the course of their official duties.”).

In analyzing an officer’s Supremacy Clause immunity claim, courts must give deference to both the supremacy of federal law and to the States’ ability to enforce their criminal laws. *See Drury*, 200 U.S. at 7 (“It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court [may be] taken out of the custody of the officers of the State, and finally discharged therefrom”); *Morgan v. California*, 743 F.2d 728, 731 (9th Cir. 1984)

(“The power of the federal court to enjoin state criminal prosecutions . . . should be sparingly exercised.”). This Court recognized that need for deference to both sovereigns when it announced the test for Supremacy Clause immunity in *In re Neagle*.

In *Neagle*, the U.S. Attorney General assigned a federal marshal, Neagle, to protect Justice Stephen Field after Field was nearly attacked and repeatedly threatened by disgruntled litigants, the Terrys. *In re Neagle*, 135 U.S. at 52. While Field rode circuit in California, Mr. Terry accosted the Justice on a train and began striking him in the face. *Id.* at 52–53. Neagle arose, announced that he was an officer, and commanded Terry to stop, when Terry reached into his jacket. *Id.* Believing he was reaching for a weapon, Neagle shot and killed Terry. *Id.* After California indicted Neagle for murder, the District Court granted his habeas petition. *Id.* at 3. The State appealed the dismissal to this Court. *Id.*

This Court first considered whether Neagle was even authorized to protect Justice Field as he rode circuit. *Id.* at 58. Neither party contested that Neagle was specifically instructed to travel with and protect Field. *Id.* The question, instead, was whether that instruction was authorized by federal law. *Id.* Conceding that there was no explicit statutory directive authorizing that duty, this Court nevertheless found that Neagle had authority under federal law to protect Field. *Id.* at 58–59. The source of the authority, this Court reasoned, was inferable from the Constitution itself and the need of the federal government to enforce its supremacy. *Id.* at 59.

This Court recognized, however, that the federal government’s power to enforce federal law “does not derogate from the power of the state to execute its laws at the same time and in the same places.” *Id.* at 60–61. Instead, the Supremacy Clause provides a federal officer with immunity only when the officer’s conduct was authorized by federal law and the officer does “no more than what was necessary and proper.” *Id.* at 75. Having established that Neagle’s conduct was duly authorized, this Court reasoned that his subjective belief that he needed to protect Field from imminent death was, given the circumstances, “well-founded.” *Id.* at 76. As such, this Court found that Neagle was entitled to immunity and affirmed the writ. *Id.*

The two-part *Neagle* test properly balances the delicate tensions at play when a state prosecutes a federal officer. The first prong serves as a threshold question, ensuring that the officer seeking immunity was actually acting as the enforcement mechanism of federal law. The Supremacy Clause is not invoked by the prosecution of an officer acting without general federal authorization. Neither party disputed that Neagle was a federal officer. Therefore, he had authority to enforce federal law under the first prong of the test.

The second prong ensures that federal officers will not use that authority as a pretense for violating state law. The officer’s actions must have been necessary and proper for the furtherance of his actual federal duties. In order to determine whether Neagle’s actions were necessary and proper, this Court first had to define what his duties were. Because Neagle’s superior specifically ordered him to protect Field, this Court determined the protection fell within his duties.

Next, this Court analyzed whether Neagle’s action of stopping Terry from harming Field was necessary for the accomplishment of that duty. This Court considered the reasonableness of Neagle’s subjective beliefs when determining whether his action was necessary to protect Field. Neagle subjectively believed that Terry would kill Field if Neagle did not act in some way to stop him. That belief, and Neagle’s decision to act upon it, were objectively reasonable.

Finally, this Court analyzed whether the means by which Neagle stopped Terry, shooting and killing him, were “no more than what was necessary and proper for him to do.” Neagle subjectively believed that killing Terry was the only way to prevent Terry from killing Field. That subjective belief was objectively reasonable. Therefore, his action—shooting Terry—was reasonable.

The structure of this Court’s analysis in *Neagle* exemplifies that the “necessary and proper” prong must include both the officer’s subjective beliefs and the objective reasonableness of his beliefs and actions. Otherwise, had Neagle believed that he had no duty to protect Field, or that he could have protected Field without killing Terry, the State would still have been powerless to prosecute him. This Court’s analysis leaves no room for such a perversion of federalism.

B. A subjective analysis ensures the states’ ability to protect their citizens without interfering with federal law.

The simple fact that an individual is “an officer of the United States . . . does not exempt him . . . from criminal liability for what he does beyond the scope of his official duties.” *Isaac v. Googe*, 284 F. 269, 270 (5th Cir. 1922). A mere “error in judgment is not enough to establish criminal responsibility.” *Torres Chaparro*, 738 F.

at 622. However, once a federal officer “misuses his . . . position to further wholly personal interests,” he “cannot cloak himself with immunity under the Supremacy Clause.” *Arizona v. Files*, 36 F. Supp. 3d 873, 884 (D. Ariz. 2014). Further, a federal officer who acts “out of malice or with some criminal intent” will no longer be protected by Supremacy Clause immunity. *Id.* at 878. Courts’ considerations of federal officers’ subjective beliefs enable states to protect their citizens while not encroaching upon federal law.

It is an essential function of federalism that the States’ police powers “may be lawfully resorted to for the purpose of preserving the public . . . safety.” *Holden v. Hardy*, 169 U.S. 366, 392 (1898). The states may exercise discretion in determining “not only what the interests of the public require, but what measures are necessary for the protection of such interests.” *Id.* (internal quotations omitted). Thus, as the majority of the circuits have held, it is up to the states to determine when, and how, to prosecute an officer who violates their criminal laws by acting beyond the scope of his federal duties. *See, e.g., Kleinert*, 855 F.3d at 317 (citing *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982) for the notion that “any evidence of ‘personal interest, malice, [or] actual criminal intent’ will negate subjective reasonableness” and holding that the objective analysis asks whether the officer’s “*belief* in the propriety of his conduct was objectively reasonable” (emphasis in original)).

An officer acting for purely personal reasons does not subjectively believe his actions were necessary and proper for the enforcement of federal law. *See Files*, 36 F. Supp. 3d at 884. In *New Jersey v. Bazin*, the United States District Court for the

District of New Jersey addressed whether an officer subjectively believed that assaulting a union representative was necessary and proper for the fulfillment of his federal duty to investigate mail fraud. 912 F. Supp. at 116. The officer, a postal inspector, was assigned to investigate a theft at a post office. *Id.* at 109. The inspector grew frustrated while interrogating an uncooperative postal employee and her union representative. *Id.* After the failed interrogation ended, the inspector took his frustration out on the union representative, intentionally “slamming the metal door to his office against [her] body.” *Id.* New Jersey indicted the inspector for assault. *Id.*

The inspector argued that he should be “immune from state criminal prosecution under *In re Neagle*.” *Id.* at 115. Applying the test from *Neagle*, the court examined whether the inspector subjectively believed that his actions were necessary and proper for the accomplishment of his duty to investigate mail fraud. *Id.* at 116. The court correctly stated that a federal officer is not protected by *Neagle* “when he acts out of personal interest, malice, or with criminal intent.” *Id.* (citing *Baucom*, 677 at 1350). The court held that the inspector “could not have reasonably believed that [his actions] were necessary and proper to the discharge of [his] duties” when he assaulted the union representative during his investigation. *Id.* As such, the court properly denied immunity. *Id.* See also *Files*, 36 F. Supp. 3d at 884 (denying Supremacy Clause immunity where a retired officer’s subjective intent was clearly to antagonize his neighbors and his actions had no relation to enforcing federal law).

Like New Jersey and Arizona, New Texas has an interest in protecting innocent victims from rogue federal officers. States must be able to prosecute federal officers

who violate state law to vindicate purely personal interests. Otherwise the delicate balance of federalism is disrupted and the states' police powers are weakened. As Justice Brandeis cautioned in his dissent in *Olmstead v. United States*: "Our government . . . teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." 277 U.S. 438, 468 (1928). Where it is necessary for a federal officer to break state law to enforce federal law, the government may have to become a lawbreaker. But as the courts in *Bazin* and *Files* recognized, a federal officer acting only to satisfy a personal objective does not believe that his actions are necessary to enforce federal law. Therefore, protection of his unnecessary and improper actions only "breeds contempt for the law" and "invites anarchy." Considering a federal officer's subjective belief when determining Supremacy Clause immunity prevents the disintegration of federalism and allows States to maintain their ability to prosecute lawbreakers.

The consideration of an officer's subjective beliefs also provides the *officer* with an additional level of protection from state prosecution. A test that considers both the objective and subjective reasonableness of the officer's beliefs and conduct allows for immunity even if the officer's actions were objectively unreasonable. *See Clifton*, 549 F.2d at 728. So long as *the officer* reasonably thought his actions were necessary or justified, then he can still potentially cloak himself with immunity.

In *Clifton v. Cox*, the 9th Circuit held that the necessary and proper prong of the *Neagle* test "does not require a petitioner to show that his action was in fact

necessary or in retrospect justifiable, only that he reasonably thought it to be.” *Id.* The 9th Circuit affirmed the District Court’s dismissal on grounds of immunity. *Id.* at 729. It found that the officer honestly and reasonably believed it was necessary to shoot a fleeing suspect and that he did not act “out of malice or with some criminal intent” in doing so. *Id.* at 728–29. The court considered the confusion of the situation, the officer’s first-hand observations, and the officer’s background knowledge about the suspects potentially being armed and dangerous. *Id.* at 729. The District Court found that the officer honestly believed that the suspect had shot another officer and “would pose a danger to the lives of the pursuing officers” if he escaped. *Id.* These findings, in the view of the 9th Circuit, were not clearly erroneous. *Id.* Thus, the officer’s subjective beliefs protected him from prosecution.

The *Neagle* test acutely focuses on the officer’s behavior in light of his authority and beliefs. An “error in judgment in what the officer conceives to be his legal duty” will not strip him of Supremacy Clause immunity. *Baucom*, 677 F.2d at 1350. But if an officer acts for purely personal or malicious reasons, he is acting *ultra vires* and without federal authority. *Id.* An officer cannot reasonably believe that such actions are necessary for the fulfillment of his federal duties. The states should not be stripped of their police powers merely because those officer’s actions *could be* deemed reasonable if instead motivated by the enforcement of federal law.

C. The Thirteenth Circuit correctly found that Schrader’s actions were not “necessary and proper” for the enforcement of federal law.

As the Thirteenth Circuit correctly noted, Schrader had broad authority as an FBI agent to enforce federal law and make arrests without warrants under 18 U.S.C.

§ 3052. R. at 11. Therefore, the first prong of the *Neagle* test is not in dispute. However, this statute did not provide him with carte blanche to exercise this authority by brutally assaulting White for a minor federal misdemeanor. In fact, even Schrader stipulated that his use of force was excessive and objectively unreasonable.

Both Schrader's subjective beliefs and his actions fail *Neagle's* "necessary and proper" prong. As established in Part II.A., *supra*, to determine whether Schrader's actions were "necessary and proper" for the performance of his federal duties, this Court must first decide what Schrader's duties actually were. Then, this Court should consider whether his action of arresting White was in furtherance of those duties. Finally, this Court should analyze whether he did "no more than what was necessary and proper for him to do" to arrest White. In making these determinations, this Court should consider Schrader's subjective beliefs, the reasonableness of those beliefs, and the reasonableness of his actions based on those beliefs. Because the State presented sufficient evidence to at least raise a genuine issue of material fact regarding each of those questions, dismissal was inappropriate. Therefore, this Court should affirm the Thirteenth Circuit's reversal.

First, Schrader's employment history and the fact that he was on vacation suggest that the enforcement of federal marijuana laws was not within the scope of his federal duties. Unlike in *Neagle*, where the marshal was specifically instructed to protect Field while he rode circuit, Schrader was never instructed to enforce drug laws generally, or marijuana laws specifically. In the nearly twenty years that Schrader has worked as an FBI agent, he has never been involved in a drug

investigation. Rather, his duties involve white collar investigations into wire fraud and racketeering, crimes entirely unrelated to the possession of marijuana. No one instructed Schrader to suddenly start enforcing federal drug laws for the first time while on vacation.

Also unlike the marshal in *Neagle*, who was on the train solely to protect Justice Field, Schrader was on vacation with his family when he tackled and arrested White. More akin to the inspector in *Bazin* who had already concluded his interrogation and the defendant in *Files* who was retired from federal office, Schrader was not behaving as a federal officer before he arrested White. Rather, over the several days of his vacation before the arrest, he did not perform a single act in furtherance of a federal duty. Notably, he made no other drug arrests, despite spending the entirety of his vacation in New Tejas and the public's widespread support of that state's new marijuana laws. Because he had never been involved in a drug investigation before and he was on vacation at the time, it is unlikely that Schrader subjectively believed that enforcing marijuana laws was within the scope of his federal duties. Even if he did, that belief is objectively unreasonable in light of the circumstances. The Thirteenth Circuit was therefore correct in finding that the enforcement of federal marijuana laws was not within the scope of Schrader's federal duties.

Next, Schrader's arrest of White did not further one of his actual federal duties. Schrader had no duty to enforce federal marijuana laws. Unlike the marshal in *Neagle* who believed that stopping Terry was the only way to protect Justice Field,

Schrader had no reason to believe that arresting White was the only way to follow a direct order or to prevent further harm. Therefore, Schrader's claimed subjective belief that the arrest was necessary was unreasonable.

Finally, even if the arrest *was* in furtherance of Schrader's federal duties, it was not necessary and proper for Schrader to tackle and severely injure White in order to arrest him. Similar to the inspector in *Bazin* who had no reason to believe that he needed to assault the union representative because her client failed to cooperate with his investigation, Schrader had no reason to believe that he needed to slam White against the concrete in order to arrest him. While White did turn and run from Schrader, Schrader never identified himself as a federal officer in order to stop him. Schrader knew that White only recognized him as the man who had angrily confronted him in traffic earlier that day. Therefore, Schrader had no reason to believe that White was fleeing arrest as opposed to simply running, afraid of further confrontation.

In fact, there is evidence to suggest that Schrader intended instead to antagonize White, like the defendant in *Files* intended to antagonize his neighbors. Schrader confronted White earlier that day for cutting him off in traffic. That confrontation rapidly escalated. But for the traffic light turning green, it is likely the confrontation would have resulted in a physical altercation. Schrader's protestations that he only wanted to protect his family are belied by the fact that he initiated the confrontation. The repeated complaints against Schrader for excessive force and reckless behavior also undermine his claim that he acted merely to protect his family.

When Schrader saw White outside of Pinkman's Emporium, Schrader seized the opportunity to finish what he started earlier in the day. Like the officer in *Files* who used his federal authority for a personal vendetta, Schrader abused his position as an F.B.I. agent "to further wholly personal interests." As such, Schrader lacked the subjective intent to enforce federal law.

The Thirteenth Circuit correctly found that Schrader, despite having general federal authority, is not entitled to Supremacy Clause immunity. Under the second prong of the *Neagle* test, his actions were objectively unreasonable and motivated by subjective beliefs unrelated to his federal duties.

CONCLUSION

Because the District Court (1) failed to view the facts in the light most favorable to the State and (2) disregarded evidence relevant to Schrader's subjective beliefs, this Court should affirm the Thirteenth Circuit's reversal of the District Court's dismissal of the indictment.

Respectfully submitted,

Counsel for Respondent, Team Number 59

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.

18 U.S.C. 3052 provides:

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have

reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

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

(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. . . .

Section 22.01 of the Penal Code of New Tejas:

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:

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:

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:

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.