No. 18-5188

IN THE

Supreme Court of the United States

MARCH TERM 2019

SCHRADER, HANK,
Petitioner,

—v.—

NEW TEJAS,
Respondent.

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

BRIEF FOR THE RESPONDENT

TEAM NUMBER 84
COUNSEL OF RECORD

NOVEMBER 18, 2019

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 viewed in the light most favorable to the nonmovant—as they would be in equivalent federal rules—or are the disputed issues of fact decided by the district court judge?

II. Whether the well-settled *In re Neagle* "necessary and proper" test, that this Court and lower courts have continuously adopted, governs whether the Supremacy Clause provides a federal officer with immunity from a state criminal prosecution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases: Page(s)

United States Court of Appeals Cases:

United States District Court Cases:

Constitutional Provisions:

Statutory Provisions:

Rules:

Secondary Sources:

OPINIONS BELOW

The United States Court of Appeals for the Thirteenth Circuit's decision is not reported, but is available at No. 18-5719 and reprinted at R. 1a–26a. The opinion and order of the United States District Court for the District of Madrigal is unreported, but is available at No. 17-cr-5142 and reprinted at R. 27a–42a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 2, 2018. The order granting certiorari appears in the Transcript of the Record on page 1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The central constitutional provision is the Supremacy Clause to the United States Constitution, listed in Article VI of the Constitution. 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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This case also involves the United States removal statute, allowing federal officers to remove state prosecutions against them to federal court, and parts of the New Tejas Penal Code relating to the state crimes that Schrader was charged with when assaulting White.

The applicable portions of The United States Constitution, United States Code, and the New Tejas statutes appear in the record on pages 45a–46a.

INTRODUCTION

The Supremacy Clause of the United States Constitution provides certain protections for the federal government and establishes boundaries for the states to ensure that the federal government is not impeded in exercising its constitutional powers. U.S. CONST. art. VI, cl. 2. That said, the Supremacy Clause does not grant federal officers blanket immunity for all criminal actions in all situations.

Over one hundred years ago, this Court interpreted the immunity defense provided to federal agents under the Supremacy Clause. *See In re Neagle*, 135 U.S. 1, 75 (1890). Since then, the issue has been rarely litigated—leaving lower courts to interpret the parameters and procedural mechanisms within the defense. *See, e.g.*, *See, e.g.*, *Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977). Today, this Court shall clarify the guidelines for how courts should handle such immunity defenses and what elements must be established in order for a federal agent to be shielded from state prosecution.

In doing so, this Court should affirm the decision of the Thirteenth Circuit Court of Appeals, reverse the district court's order dismissing the indictment, and remand for further proceedings.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. Schrader and White Enter into a Physical Altercation Following a Traffic Incident.

On November 8, 2016, Hank Schrader, a special agent with the Federal Bureau of Investigation, was celebrating his recent marriage on vacation with his family in

New Tejas. R. at 9a, 27a. Schrader was off duty during this vacation, in plain clothes, and had no obligation to arrest any individuals during the course of this trip. R. at 9a, 28a.

On the fifth day of Schrader's vacation, he and his family were driving to downtown Madrigal to visit the New Tejas History Museum. R. at 28a. During the drive, a red truck pulled in front of Schrader's vehicle. R. at 29a. The details of how the lane change occurred and who was at fault is disputed. *Id.*

What is undisputed, however, is the manner in which Schrader reacted to this lane change. *Id.* Schrader, enraged by the near accident, left his car and approached the other vehicle, belonging to an individual named White. *Id.* Schrader's family testified that Schrader was visibly angry—shouting and yelling at White during this traffic incident. R. at 2a. Before any physical altercation could occur, the light turned green and both men returned to their vehicles and proceeded with their days. R. at 29a–30a.

B. Schrader Tackles White to the Ground While White was Legally Obtaining Marijuana in the State of New Tejas.

Several hours after the traffic incident between Schrader and White, Schrader witnessed White stepping outside of a building. R. at 30a. This building was a legal marijuana dispensary titled "Pinkman's Emporium," meeting the minimal, non-descript advertising of New Tejas law. R. at 31a; *see* NEW TEJAS ADMIN. CODE § 51.014 (providing the details of marijuana dispensary requirements). White, a

habitual recreational marijuana user, had purchased two ounces of marijuana, which were clearly visible in a transparent plastic bag.[1] R. at 31a.

Schrader observed White walking out of the building and—attempting to use his status as an FBI Agent to redress a personal problem—yelled "[s]top! You're under arrest!" and charged at White. *Id.* In doing so, Schrader tackled White from behind and landed heavily on top of him, sending White crashing onto the concrete sidewalk and causing White to cry out in pain. *Id.* As a result of Schrader's aggressive conduct, White sustained serious injuries including a broken arm and chipped teeth. R. at 2a. White was subsequently transported to a local hospital and was not charged with any crime. R. at 32a.

C. The Madrigal Community Protests Schrader's Aggressive and Illegal Conduct.

The Madrigal Community reacted to the illegal and unjustified arrest of White with outrage. *Id.* The day following the incident, several hundred protestors gathered in downtown Madrigal, complaining White had been injured while legally purchasing marijuana under state law. *Id.* The Madrigal County District Attorney spoke at a rally at which she declared her intent to charge Schrader with aggravated assault.[2] R. at 33a.

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[1] It is undisputed that White's purchase and possession of marijuana fully complied with New Tejas law. R. at 31a.

[2] It should be noted that over the course of Schrader's career, four complaints of excessive force have been made against him. R. at 28a. Additionally, on a separate occasion, Schrader was reprimanded for reckless discharge of a firearm. *Id.*

II. PROCEDURAL HISTORY

Following Schrader's aggressive conduct towards White, the State of New Tejas indicted Schrader for assault and aggravated assault. R. at 2a, 33a; *see* NEW TEJAS PENAL CODE §§ 22.01–22.02 (defining "assault" and "aggravated assault" under New Tejas law). Subsequently, Schrader removed the case to federal court, where he moved to dismiss the case, alleging the Supremacy Clause provides him with immunity.[3] R. at 3a; *see* 28 U.S.C. § 1442; FED. R. CRIM. P. 12(b).

On September 14, 2017, the Madrigal District Court granted Schrader's motion to dismiss and improperly resolved the disputed issues of fact related to immunity, including the credibility of witnesses. *See* R. at 37a, 41a ("I will resolve any disputed issues of fact."). *But see* FED. R. CRIM. P. 12 (failing to permit a district court to adjudicate fact issues which overlap with the issues to be decided at trial). In doing so, the district court judge recognized that resolving material facts on his own, rather than leaving them to the jury, may constitute error. *See* R. at 37a ("If I am mistaken, I am confident that my colleagues on the appellate bench will correct me."). Nonetheless, the district court, using the incorrect Supremacy Clause test, granted Schrader's motion to dismiss. R. at 3a, 41a. The State of New Tejas appealed. R. at 3a.

On October 2, 2018, the United States Court of Appeals for the Thirteenth Circuit reversed the district court's dismissal of Schrader's indictment and remanded the case back to the district court. R. at 1a. The court clarified its narrow duty on

[3] Notably, Schrader is represented by private counsel. R. at 34a, n. 5. The federal government has taken no position on whether Schrader's misconduct is entitled to immunity. *Id.*

appeal was not to determine the merits of the case, but "to determine whether the prosecution may proceed to trial." R. at 3a. In doing so, the court disregarded the district court's findings of fact and construed any disputed facts in the light most favorable to the State. R. at 8a.

Construing the facts in this light, the court concluded the State of New Tejas carried the burden to disprove Schrader's defense of immunity. R. at 9a. In deciding this, the court used the same standard as the district court—"whether Agent Schrader did 'no more than what was necessary and proper' in fulfilling his federal duties." R. at 8a. Applying the facts to this test, the court held that: (1) arresting White was not "necessary" to accomplish Schrader's duties; (2) arresting White was not subjectively "proper"; and (3) arresting White was not objectively "proper." R. at 9a–11a.

Accordingly, the court concluded that, at the least, Schrader is an individual not above the law and is not entitled to avoid trial for his assault of White. R. at 13a; *see* U.S. CONST. amend. VI (signifying the importance of the jury system). Schrader appealed, and this Court granted certiorari. R. at 1.

SUMMARY OF THE ARGUMENT

I.

When deciding a motion to dismiss a state prosecution based on immunity under the Supremacy Clause, disputed issues of fact must be viewed in the light most favorable to the State and the district court shall not step into the shoes of the jury and resolve disputed issues of fact on its own. This approach is logical because 1)

equivalent federal rules ask for the same standard, 2) courts often view the evidence in the light most favorable to the State in similar circumstances, 3) viewing the evidence in the light most favorable to the State strikes the delicate balance that our Constitution requires, and 4) following this standard requires cases such as this to proceed to trial, where a jury of Schrader's peers can decide whether he is entitled to immunity.

First, equivalent federal rules call for the court to view the evidence in the light most favorable to the nonmoving party, and to leave disputed issues of fact for a jury rather than a judge. For example, summary judgments, like motions to dismiss, result in a complete disposal of the case. In summary judgments, the legal standard requires the evidence to be viewed in the light most favorable to the nonmoving party and allows the case to proceed to trial if there are any genuine issues of material fact. In this case, it is clear there is both conflicting testimony and disputed issues of fact. As such, the district court erred in concluding that Schrader was immune, as a matter of law, from state prosecution. The remaining disputed issues of fact prevent dismissal in a 12(b) pretrial motion.

Second, courts often view the evidence in the light most favorable to the state in similar circumstances—such as the habeas context. Third, viewing the evidence in the light most favorable to the State strikes the delicate balance that the Constitution requires. The rule allows states such as New Tejas to enforce its own criminal law, as the Tenth Amendment requires. At the same time, the rule still

provides federal agents such as Schrader with procedural guards to protect him against state hostility.

And finally, viewing the evidence in the light most favorable to the State promotes Sixth Amendment protections because it allows cases such as this—where there are disputed issues of fact—to proceed to trial. At trial, the jury will resolve the remaining disputed issues of fact that are relevant to the determination of the immunity defense. Allowing these facts to be resolved in a pretrial motion encroaches on Sixth Amendment protections. Further, trial is required in the instant case because the defense of immunity under the Supremacy Clause overlaps significantly with the elements of Schrader's offense, and therefore the district court's findings of fact overlap significantly with the issues a jury would decide at trial.

II.

The two-prong *In re Neagle* test this Court proposed over one hundred years ago is the appropriate test for immunity under the Supremacy Clause. Since the *In re Neagle* decision, this test has been modified—as the lower courts have applied it to different circumstances that arise—and should be applied while viewing the evidence in the light most favorable to the State.

The first prong of the test asks whether the agent's actions were outside the scope of his federal duties. The second prong asks whether the agent's actions were "necessary and proper" to carrying out his federal duties. When determining whether the agent's acts are "proper," courts looks at the element from both a subjective and objective perspective. First, the subjective element asks whether the agent had an

honest belief that his actions are proper. If the officer acts with malice or criminal intent, then he or she is deprived of this subjective belief. Next, the objective element asks whether the agent's actions were reasonable and objectively proper.

Although this Court's grant of certiorari only asked for the applicable rule in such cases, the State will not only advocate for the appropriate test, but will also show that Schrader does not meet the elements of the test—to provide the Court for more reason to allow this case to go to the jury.

In all, the district court erred by dismissing the State's indictment on Supremacy Clause grounds. Schrader's arrest and assault of White were not within the scope of his federal duties and thus does not meet the first prong of the test. Further, his actions were not necessary and not subjectively nor objectively proper. Clearly, viewed in the light most favorable to the State, there are disputed issues of fact relevant to the determination of the immunity defense.

The indictment should be reinstated—so that a jury is given the opportunity to resolve the disputed issues of fact and to determine whether Schrader's assault and arrest of White was necessary and proper to the performance of his federal duty.

ARGUMENT

I. WHEN DECIDING A MOTION TO DISMISS A STATE PROSECUTION BASED ON IMMUNITY UNDER THE SUPREMACY CLAUSE, DISPUTED ISSUES OF FACT MUST BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE AND RESOLVED BY THE JURY, NOT THE DISTRICT COURT.

The Supremacy Clause declares that "[t]his Constitution, and the [l]aws of the United States which shall be made in [p]ursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any [t]hing

in the Constitution or [l]aws of any State to the [c]ontrary notwithstanding." U.S. CONST. art. VI, cl. 2. Within the Supremacy Clause lies the defense of sovereign immunity. *In re Neagle*, 135 U.S. 1, 75 (1890) (examining a federal agent's immunity defense under the Supremacy Clause).

This defense of sovereign immunity, however, is not provided because of any desire on the part of the federal government to protect its employees or agents who willfully violate criminal statutes. *See Johnson v. Maryland*, 254 U.S. 51, 56 (1920) (stating that immunity does not protect federal employees from every action in every instance). Rather, it is a recognition that, if the federal government is going to be supreme in its area of operation, its employees and agents cannot always be held accountable under state criminal penalties for actions taken in compliance with their duties and obligations as federal officers or agents. *See Tennessee v. Davis*, 100 U.S. 257, 263 (1880).

When the elements of the defense are present, a federal actor is immune from prosecution. *See In re Neagle*, 135 U.S. at 75 (allowing a federal officer to escape criminal liability only if specific elements of a test are met). That being said, sovereign immunity has never been held to be *carte blanche*—freeing federal employees and agents from all of the consequences of their actions. *See Johnson*, 254 U.S. at 56 ("Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment.").

A. Equivalent Federal Rules call for the Court to View the Evidence in the Light most Favorable to the Nonmoving Party, and to Leave Disputed Issues of fact for a Trier of Fact Rather than a Judge.

This Court's adoption of the State's rule is consistent with other federal rules of procedure which have the same effect. *See, e.g.*, FED. R. CIV. P. 56 (requiring the court to view the evidence in the light most favorable to the nonmoving party in a motion for summary judgment). Further, these equivalent rules require a case to survive disposal when genuine issues of material fact remain. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (requiring disputed issues to be decided by a trier of fact—and not a judge—in summary judgment motions).

In the instant case, this Court should adopt the State's rule, requiring courts to view the evidence in the light most favorable to the state, on a 12(b) motion because 1) it comports with parallel rules in the federal rules of procedure; and 2) under this standard, there are still disputed issues in this case which must be decided by a jury.

i. Granting a Motion to Dismiss is the Legal Equivalent of Granting a Motion for Summary Judgment and Therefore Both Motions call for the Same Standards—Requiring Evidence to be Viewed in the Light most Favorable to the Nonmoving Party and Allowing a case to Proceed to Trial when Genuine Issues of Material fact Exist.

The practical effect of a 12(b) Motion to Dismiss under the Federal Rules of Criminal Procedure is the same as the effect of a Motion for Summary Judgment. *Compare* FED. R. CRIM. P. 12(b) (resulting in a complete dismissal of the case if a court grants the motion), *with* FED. R. CIV. P. 56 (resulting in a dismissal of the case if a court grants the moving party's motion). Both a motion to dismiss and a motion for summary judgment, if successful, result in a complete disposal of the case. *Id.*

Accordingly, this Court should treat both motions in a similar manner—particularly in cases such as this, in which there are mixed questions of law and fact. *Cf.* FED. R. CIV. P. 56 (allowing a grant of summary judgment only when the movant prevails as a matter of law and there is no genuine issue of material fact).

In a motion for summary judgment, under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is only proper if the movant shows that there is "no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23. In considering a motion for summary judgment, the court must examine all of the evidence in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Moreover, strict standards govern a grant of summary judgment, and "the judge's function is not himself to weight the evidence . . . but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 250–51 (1986) ("[T]his standard mirrors the standard for a direct verdict . . . if reasonable minds could differ as to the import of the evidence, . . . a verdict should not be directed.").

Here, because a 12(b) motion to dismiss has the same legal consequences as a summary judgment, courts should use the same standards when deciding the two. *See* FED. R. CRIM. P. 12(b) (resulting in a dismissal of a case); FED. R. CIV. P. 56 (resulting in a dismissal of a case). Accordingly, the facts should be viewed in the light most favorable to the nonmoving party—the State. *See Diebold, Inc.*, 369 U.S. at 655 (viewing the evidence on a summary judgment in the light most favorable to

the nonmovant). When there is a genuine issue of material fact—as there is here—the case should survive a 12(b) motion, and those facts should be left for a jury to decide, instead of a judge. *See Anderson*, 477 U.S. at 249 (stating if there are still disputed facts, then the case should be left to a jury and summary judgment should not be granted). Therefore, this Court should adopt the rule which requires facts on a 12(b) motion to be viewed in the light most favorable to the nonmoving party and prevents the granting of a 12(b) motion if there are remaining disputed facts.

ii. Whether or not Schrader was Entitled to Dismissal of the Charges Brought Against him by the State Depends upon Proper Application of Rule 12(b)—which Prevents a Granting if There are Remaining Disputed Issues of fact.

The State agrees—a 12(b) motion to dismiss was the proper procedural mechanism for Schrader to use in raising his immunity defense under the Supremacy Clause. *See* FED. R. CRIM. P. 12(b); *Long*, 837 F.2d at 727 (holding that a federal immunity defense should be decided as a Rule 12(b) motion). However, in order for this Court to properly examine whether or not Schrader was entitled to dismissal of the charges brought against him by the State requires a proper application of Rule 12(b) of the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 12(b).

First, when a federal officer, such as Schrader, is charged with a state crime, he or she may remove the state prosecution to federal court. *See* 28 U.S.C. § 1442(a) (permitting removal of a "criminal prosecution that is commenced in a State court and that is against . . . any officer . . . of the United States"). Then, the federal officer must plead a federal defense to the prosecution. *Mesa v. California*, 489 U.S. 121, 129 (1989).

This is exactly the case before this Court today. *See* R. at 2a–3a. Schrader removed the state prosecution to federal court, arguing that because he was a federal officer enforcing federal law, the Supremacy Clause provided him with immunity to state criminal prosecution. R. at 34a. As such, Schrader moved to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b). *Id.*

In cases such as this, the district court must properly apply Federal Rule of Criminal Procedure 12(b) when examining the merits of a federal agent's claims. *See* FED. R. CRIM. P. 12(b). Under Rule 12(b)(2), "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue," and sovereign immunity is a defense which may properly be raised through a 12(b) motion. *Id.* However, once the right to removal has been determined by the court, and the agent's motion to dismiss is being examined, the burden shifts to the state to come forward with evidence which raises a material issue of fact concerning the validity of the supremacy defense. *New York v. Tanella*, 281 F. Supp.2d 606, 612 (E.D.N.Y. 2003).

Once the State has come forward with evidence as to the defense of immunity, all reasonable inferences and evidence must be viewed in the light most favorable to the State. *See Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343, n. 16 (1952); *Tanella*, 281 F. Supp.2d at 612; *Morgan v. California*, 743 F.2d 728, 733 (9th Cir. 1984). At that point, if there are contested facts which are material to that defense, the agent is not entitled to a dismissal of the charge under Rule 12(b). *Morgan*, 743 F.2d at 733.

In *Kentucky v. Long*, the Sixth Circuit stated a Rule 12(b) motion is the proper vehicle for a federal officer charged with a state crime to assert the defense of immunity. 837 F.2d 727, 728 (6th Cir. 1987). However, the court also stated that on the motion, the district court should only sustain such a defense if the state fails to come forward with any evidentiary showing disputes issues of fact exist to rebut the federal officer's claim. *Id.*

Here, the district court erred in applying Rule 12(b) by concluding Shrader was immune, as a matter of law, from state prosecution. R. at 27a. As it will be described in regard to the second issue before this Court, a federal officer is immune from state prosecution for acts performed in the course of the officer's duties only where the acts were necessary and proper to the performance of the officer's duty. *See infra* Part II. If there are disputed issues of fact which are relevant to the determination of the immunity defense—as there are in this case—then these disputed issues of fact should be viewed in the light most favorable to the state, and not by the district court judge. *See Morgan*, 743 F. 2d at 233 (requiring disputed facts to be left for a jury to decide).

In this case, there are conflicting accounts of the events which occurred between Schrader and White at the initial traffic incident prior to Schrader assaulting White. *See* R. at 29a ("[t]he details of the lane change are disputed"). Additionally, the accounts of what Schrader said prior to assaulting White are also in dispute. *See id.* ("[n]either man remembers precisely what was said."). There was also live testimony presented at the district court hearing. R. at 34a, 37a.

As discussed below, the conflicting evidence and testimony, if credited and viewed in the light most favorable to the State, was sufficient to establish the assault of White was not necessary and proper. *See infra* Part II. However, the district court improperly resolved the disputed issues of fact on its own and credited Schrader's testimony rather than the State's. *See* R. at 37a (including the district court's findings of fact and stating, "I credit Agent Schrader's testimony…"). Under these circumstances, it was improper for the district court to dismiss the indictment prior to a trial. *See Tanella*, 281 F. Supp.2d at 612. Because there were material issues of fact concerning the validity of the supremacy defense, the court should have viewed the disputed facts in the light most favorable to the State. *See id.* (making all reasonable inferences in favor of the State).

B. Courts Often View the Evidence in the Light most Favorable to the State in Other Supremacy Clause Contexts.

Notably, circuit courts already implement the standard the State advocates for—viewing the evidence in the light most favorable to the State—in similar circumstances. *See, e.g.*, *United States v. Yashar*, 166 F.3d 873, 880 (7th Cir. 1999) (viewing the facts most favorable to the government on a motion to dismiss an indictment filed by the agent); *Morgan*, 743 F.2d at 733 (viewing the evidence in the light most favorable to the State when determining whether a pretrial habeas petition should be granted on Supremacy Clause grounds); *Birsch v. Tumbleson*, 31 F.2d 811 (4th Cir. 1929) (denying the issuance of a writ of habeas corpus to a federal warden charged with homicide in state court because there were genuine issues of material fact that needed to be decided by a jury). This Court should now adopt the

same rule for cases such as this—where a federal agent attempts to escape criminal liability in a 12(b) motion.

An example of when courts have viewed the evidence in the light most favorable to the State is in the habeas corpus context.[4] In *Morgan v. California*, federal agents were involved in a minor traffic collision and charged with misdemeanor offenses as a result of altercations which stemmed from the collision. 743 F.2d at 729–30. The agents subsequently petitioned for a writ of habeas corpus and the district court granted their petition and directed the agents be released from custody. *Id.* at 730. The state challenged the district court's grant, and the Ninth Circuit reversed the district court's decision granting the agent's habeas petitions because there was a genuine dispute as to whether the agents were in pursuit of their federal duties at the time of the incident which caused the state prosecution. *Id.*

In coming to this conclusion, the Ninth Circuit held "when material facts are 'involved in uncertainty and the subject of conflicting testimony,' they should be resolved by the verdict of a state court jury." *Id.* at 732. Because there was conflicting evidence, the court stated "[r]egardless of the conclusion which the judge himself might reach, if there is a substantial conflict of evidence as to basic or controlling facts the Federal Court should refuse to exercise its discretion to release the relator

[4] These habeas corpus cases are relevant to the analysis because defendants can raise Supremacy Clause immunity through a writ of habeas corpus as well. *See* 28 U.S.C. § 2241(c)(2). Most of the Supremacy Clause immunity cases reviewed involve writs of habeas corpus instead of Rule 12(b) motions because of the age of the cases. *See, e.g.*, *In re Neagle*, 135 U.S. at 55 (examining immunity under the supremacy clause in 1890). The removal statute that allows a federal officer to remove a state prosecution to federal court did not exist prior to the enactment of Section 1442 in 1948. *See* 28 U.S.C. § 1442 (creating an avenue for federal officers to remove a state prosecution against them to federal court).

and should remand [the case] for trial by the State Court." *Id.* Further, the court emphasized error on the district court's part because it was required to "view the disputed evidence in the light most favorable to the State" when determining whether the Agent met the requisite elements. *Id.* at 733.

Here, there is also conflicting testimony. R. at 29a–31a (signifying the conflicting accounts on what occurred prior to Schrader's assault of White). Schrader and White have contradictory accounts of what occurred during the traffic incident prior to White's assault and also have contradictory accounts of the moments immediately prior to White's assault. *See id.* The record also mentions that the court heard testimony by both White's family and by Schrader—which are more than likely conflicting. R. at 34a.

Although the appropriate standard required to judge to view such in the light most favorable to the State and allow a jury to decide disputed issues of fact, he did not. *See* R. at 37a–39a (listing the judge's findings of fact that he improperly decided on his own). Instead, the judge, *sua sponte*, improperly decided the disputed issues of fact in the manner that he saw fit. *See id.* In fact, the district court judge, himself, recognized that he will "resolve any disputed issues of fact that may be material to immunity, including the credibility of witnesses" and then proceeded to say "[i]f I am mistaken, I am confident that my colleagues on the appellate bench will correct me." R. at 37a. This shows that even the judge recognized the problematic effects that could arise from himself resolving disputed issues of fact on his own. *See id.*

As the Ninth Circuit has held, when there is uncertainty or conflicting testimony, the determinations should be left to a jury.[5] *See Morgan*, 743 F.2d at 732. And prior to making this decision, when the district court is examining the evidence to see whether immunity applies, the court should view the evidence in the light most favorable to the State. *Id.* at 733 (creating a rule which requires district courts to view disputed evidence in the light most favorable to the State).

In fact, in the context of qualified immunity, this Court has also held disputed issues of fact must be viewed in the light most favorable to the State. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (requiring the evidence to be viewed in the light most favorable to the injured party in a civil case against an agent where qualified immunity is raised). The Second, Sixth, and Tenth Circuit have also held the same. *See, e.g.*, *Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006); *New York v. Tanella*, 374 F.3d 141, 148 (2d Cir. 2004); *Long*, 837 F.2d at 752.

For example, in *New York v. Tanella*, the United States District Court for the Eastern District of New York dismissed a manslaughter indictment against a federal drug enforcement agent on the grounds that he was entitled to federal immunity under the Supremacy Clause in connection with a shooting which arose after a car chase and drug operation. 374 F.3d at 148. The State appealed, and the Second Circuit ultimately affirmed the district court's holding because there was no genuine

[5] Petitioners may cite to many cases where a district court was authorized to grant an Agent's motion to dismiss based on immunity. However, this Court should clarify whether those cases involved disputed issues of fact—as this one does. *See* R. at 27a. Had this been a case with solely stipulated facts and no disputed facts, then the procedure would be different. *See, e.g.*, *Baucom v. Martin*, 677 F.2d 1346, 1347 (11th Cir. 1982) (allowing a district court to grant a writ of habeas corpus because the underlying facts were not in substantial dispute).

fact issue. *Id.* However, the Second Circuit was clear to say that in cases such as this, when determining whether the agent meets the immunity defense, the court must "view the evidence in light most favorable to the State and assume the truth of the allegations in the indictment." *Id.*

Therefore, it is clear that circuit courts are already implementing the correct standard for 12(b) motions related to a federal officer's immunity. *See, e.g.*, *id.* This correct standard requires the district court to view the evidence in the light most favorable to the State and not to decide the disputed facts on its own. *See supra* Part I(A). So long as there are genuine factual disputes concerning whether the federal officer's conduct met the immunity test, then the case should not be dismissed. *See Long*, 837 F.2d at 752 (holding that a 12(b) motion to dismiss should be denied when there is a genuine factual dispute concerning whether the federal officer's conduct was necessary and proper). Rather, the case should continue, and the factual disputes should be determined by a jury of the federal officer's peers.

C. Viewing the Evidence in the Light most Favorable to the State Strikes the Delicate Balance that the Constitution Requires.

While the Constitution affords federal officers with a substantive right to immunity, "the power of a federal court to enjoin state criminal prosecutions [under the Supremacy Clause] should be sparingly exercised." *Morgan*, 743 F.2d at 731. The use of such power tramples on a State's sovereign authority to enforce its criminal law and undermines the fundamental precept that no one is above the law. *See* Austin Raynor, *The new State Sovereignty Movement*, 90 IND. L. J. 613 (2015) (describing the relationship between state sovereignty and the federal government).

The State's proposal of how a district court should decide a motion to dismiss a state criminal prosecution under the Supremacy Clause—by viewing the disputed issues of fact in the light most favorable to the State—strikes this delicate balance between the federal government and the state.

i. The Tenth Amendment Provides the State of New Tejas with the Authority to Enforce its own Criminal laws Within its Territory.

Allowing a rule which will require a court to look at evidence on a 12(b) motion to dismiss based on a federal agent's immunity when attempting to evade state prosecution will also coincide with the Tenth amendment's police power. *See* U.S. CONST. amend. X (providing states with a police power). The Tenth Amendment provides "[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." *Id.* Under this authority, states have the power to enforce their own laws within its criminal territories. *Printz v. United States*, 521 U.S. 898, 890 (1997); *New York v. United States*, 505 U.S. 144, 148 (1992).

In *United States v. Lopez*, Justice Kennedy's concurrence emphasized the importance of a delicate balance between state and federal powers and how the Federal Government cannot intrude on a state's powers. 514 U.S. 549, 577 (1995) (Kennedy, J. concurring). Specifically, Justice Kennedy stated "[w]ere the Federal Government to take over regulation of the entire areas of traditional state concern, . . . the boundaries between the sphere of federal and state authority would blur and political responsibility would become illusory." *Id.*

Here, the rule that the State puts forth creates these delicate "boundaries between the sphere of federal and state authority" that the Constitution calls for. *Id.* The rule still provides federal actors with immunity when it is warranted, but also allows the State to present evidence to defend itself so it can prosecute its own crimes and enforce its own laws. *See Lopez*, 514 U.S. at 564 (recognizing "criminal law enforcement as an area "where States historically have been sovereign"). *But see* Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L. J. 2195 (2003) (providing the limitations of a federal officer's immunity defenses in state prosecutions). Therefore, the State's position—encouraging Courts to view disputed issues in 12(b) motion's based on immunity in the light most favorable to the State—coincides with Tenth Amendment constitutional protections.

ii. Schrader Already has Procedural Protections in Place that Protect him Against State Hostility.

The State's proposed rule, requiring a view of the disputed evidence in the light most favorable to the State, will also not impede on federal officers' rights in immunity suits such as this because of the already present safeguards for the federal government against state hostility. *See, e.g.*, 28 U.S.C. § 1442(a)(1) (providing federal officers with protection by allowing them to remove state criminal prosecutions against them to federal court).

An example of a current safeguard is the removal statute, located in Chapter 28, Section 1442 of the United States Code. *Id.* This provision allows federal officers, such as Schrader, to remove any state civil action or criminal proceeding initiated

against him to federal court as a way to protect against the potential biases of in-state proceedings. *Id.* Removal in cases such as this serve substantial federal interests. *See Willingham v. Morgan*, 395 U.S. 402, 407 (1969) (indicating that the federal officer removal statute reflects Congress' judgment that "federal officers, and indeed the Federal Government itself, require the protection of a federal forum").

Therefore, in the instant case, the State's proposed rule will not encourage any type of federal-stale clash or risk any antifederal bias in the state courts because there is already federal forum which protects federal officers from state courts' potential hostility to federal policies and institutions. *Willingham*, 395 U.S. at 407. If this case proceeds to trial, where the jury will examine the disputed issues of fact, then Shrader will also be safeguarded because the trial will occur in federal court before a federal district judge and be reviewed in a federal court of appeals. *See* 28 U.S.C. § 1442; *id.* ("one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.").

D. Viewing the Evidence in the Light most Favorable to the State Requires this Case to Proceed to Trial—Where a Jury of Schrader's Peers can Decide Whether he is Entitled to Immunity.

As discussed above, the implications of the State's proposed rule guarantee several different constitutional protections. *See supra* Part I(C). One of these protections is that, once a district court views the evidence on a 12(b) motion in the light most favorable to the State, it will likely be prevented from dismissing the case because of the disputed facts which show Schrader is not entitled to immunity as a matter of law. *See* FED. R. CRIM. P. 12(b) (allowing dismissal of a case only when the

case can be resolved through a pretrial motion and without a trial on the merits). Accordingly, this case will proceed to trial where a jury of Shrader's peers will decide the disputed facts, and therefore decide whether his conduct at the time of assaulting White entitles him to immunity. *Id.* This is proper because 1) it supports Sixth Amendment principles; and 2) the defense of immunity under the supremacy clause overlaps significantly with the elements of Schrader's offense and therefore the district court's findings of fact overlap significantly with the issues that a jury would decide at trial.

i. The Sixth Amendment Provides Schrader with the Protection of an Impartial Jury who will Decide this Case's Disputed Issues of fact; and the Adoption of Shrader's Proposed Rule Would Encroach on Sixth Amendment Protections.

The State's proposed rule also coincides with Sixth Amendment protections because viewing the evidence in the light most favorable to the State will more likely allow a case to proceed to a jury for them to resolve, rather than a judge. *See* U.S. CONST. amend. VI (providing that the accused shall enjoy the right to trial by jury). The Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him." *Id.*

In cases such as this, when a federal officer's entitlement to immunity turns on disputed questions of material fact, the officer must face trial before a jury of his peers, who can resolve these factual disputes during a trial on the merits of the case.

See Morgan, 743 F.2d at 733 (leaving disputed issues of fact for a jury and not a judge). Here, the state's proposed rule, requiring the district court to view the disputed facts on a 12(b) motion in the light most favorable to the State, follows the notion of the Sixth Amendment because it more likely than not allows the State to survive a 12(b) motion if possible, so the case can go to a jury. *See Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1147 (9th Cir. 1996) ("the jury, not the judge, must decide the disputed 'foundational' or 'historical' facts").

Additionally, if this Court were to adopt Schrader's proposed rule, then it would encroach upon the core of the Sixth Amendment and the well-settled principles which support the Sixth Amendment because it would be allowing a federal judge to decide disputed issues of fact—including testimony and credibility determinations—rather than a jury. *See Chesapeake & O.R. Co. v. Martin*, 283 U.S. 209, 216 (1931) ("the question of the credibility of witnesses is one for the jury alone"). Allowing a judge to decide disputed issues of fact would usurp the jury's role in finding testimony credible. *Id.* These disputed facts should be left to a jury, and not the judge alone, in order to protect our nation's fundamental and fair system of justice. The State's proposed rule, disallowing a judge from deciding disputed issues of fact and instead requiring the court to view them in the light most favorable to the State, also promotes the spirit of the Sixth Amendment.

ii. The Defense of Immunity Under the Supremacy Clause Overlaps Significantly with the Elements of Schrader's Offense, and Therefore the District Court's Findings of fact Overlap Significantly with the Issues that a jury Would Decide at Trial.

The facts of this case contain disputed issues of fact which are relevant to the determination of Schrader's immunity defense. *See* R. at 28a–29a (disputing Schrader's conduct prior to him tackling White to the ground). Accordingly, the district court's findings of fact overlap significantly with the issues that a jury would typically decide at trial. *See* R. at 37a–39a (stating the district court's findings of fact that the judge decided, even if disputed). *But see Morgan*, 743 F.2d at 733 (requiring disputed issues of fact to be decided by a jury). As such, the judge improperly decided the disputed issues and moving forward, courts should not be permitted to do so. *See generally* Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L. J. 1125 (2003) (signifying the importance of a jury deciding questions of fact).

As a general rule, where there are disputed issues of fact that are relevant to the determination of an immunity defense, those disputed issues of fact should be resolved at trial, not in a pretrial motion to dismiss the indictment. *See United States ex. rel. Drury v. Lewis*, 200 U.S. 1, 7–8 (1906) (denying a request for pretrial habeas relief because a factual question concerning whether the suspect was shot before or after he surrendered was to be determined at trial and not in a pretrial motion); *Morgan*, 743 F.2d at 733–34 (reversing the granting of a pretrial habeas petition because disputed issues of fact concerning whether the DEA agents were performing a federal duty at the time of the incident and whether the DEA agents had acted were

left to be determined at trial); *Long*, 837 F.2d at 752 (holding a 12(b) motion to dismiss should be denied when there is a genuine factual dispute concerning whether the federal agent's conduct was necessary and proper).

In *United States v. Aleman*, a police officer was indicted on seven counts of conspiring to make statements and false statements. 286 F.3d 86, 88 (2d Cir. 2002). In a pretrial motion, the officer requested the indictment be dismissed based on the alleged promise of immunity. *Id.* The district court declined to hold a hearing to determine the merits of the officer's motion because it was precisely the question which a jury would decide regarding a specific count of the indictment, to which the officer had pled not guilty. *Id.* at 90. On appeal, the Second Circuit agreed that "it is ludicrous to ask the court to usurp the functions of the jury." *Id.* Further, the court held a pretrial hearing on the ultimate factual issue would have been improper. *Id.*

Here, Schrader's motion to dismiss was improperly granted because the defense of immunity under the Supremacy Clause overlaps significantly with the elements of the offense that the State charged Schrader with. *See* R. at 6a (stating Schrader asserted the defense of "justification" based on "arrest and search."); *see also* NEW TEJAS PENAL CODE §§ 50.01–50.02 (providing the defenses Schrader raised). Section 50.02 of the New Tejas Penal Code provides "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 or search is lawful." NEW TEJAS PENAL CODE § 50.02(a)(1).

In this case, if a jury eventually concludes Schrader "reasonably believe[d] the arrest . . . [wa]s lawful" and that Schrader only used force that was "immediately necessary to make or assist in making an arrest," then he will be acquitted of any crime under state law. *Id.*; *see* NEW TEJAS PENAL CODE § 50.01 (providing that "[i]t is a defense to prosecution that the conduct in question is justified under this chapter." Therefore, the findings of fact made by the district court overlap significantly with the issues that a jury would decide in any trial of this matter and therefore are improper. *See* FED. R. CRIM. P. 12(b) (allowing a court to resolve an immunity defense by pretrial issue only if the "court can determine [it] without a trial on the merits.").

In this case, when viewing the evidence in the light most favorable to the State, is sufficient to establish that Shrader is not immune as a matter of law from state prosecution. At the least, there are disputed issues of fact which must be resolved by a jury. *See Morgan*, 743 F. 2d at 233 (holding that a jury and not a judge should decide disputed issues of material fact). The indictment should be reinstated, so that a jury is given the opportunity to resolve the disputed issues of fact and to determine whether Schrader's actions were necessary and proper to the performance of his federal duty. *See In re Neagle*, 135 U.S. at 75 (stating the immunity defense to warrant a "necessary and proper" standard).

II. THE TWO-PRONG *IN RE NEAGLE* TEST—ASKING WHETHER THE AGENT'S ACTIONS FELL WITHIN HIS FEDERAL DUTIES AND WHETHER HIS ACTIONS WERE NECESSARY AND PROPER—GOVERNS WHETHER THE SUPREMACY CLAUSE PROVIDES A FEDERAL OFFICER WITH IMMUNITY FROM A STATE CRIMINAL PROSECUTION, AND SCHRADER IS NOT ENTITLED TO IMMUNITY UNDER THIS TEST.

This case requires this Court to "walk the fine line created between the goal of protecting federal officials acting in the scope of their duties and the obligation to avoid granting a license to federal officials to flout state laws with impunity." *Whitehead v. Senkowski*, 943 F.2d 230, 234 (2d Cir. 1991). This Court has described this "as a delicate balancing act" and recognized it must be "conscious of the care [it] must exercise in undertaking it." *Lewis*, 200 U.S. at 7.

In light of this delicate topic, Schrader urges this Court to apply a seldom-litigated principle of federal constitutional law—federal Supremacy Clause immunity to bar the State of New Tejas from prosecuting him for assault and aggravated assault. *See* R. at 34a; *see also* NEW TEJAS PENAL CODE §§ 22.01–22.02. And although this Court has allowed the Supremacy Clause to protect federal officers from state prosecution under certain circumstances, this Court has also provided guidelines and limitations as to when it does. *See In re Neagle*, 135 U.S. at 34 (holding a federal officer is only immune if certain elements of a test are met).

Both the Thirteenth Circuit and the district court recited the correct standard for immunity. *See* R. at 8a, 35a. This standard recognizes the circumstances when immunity is rightfully applicable to shield a federal officer; but also recognizes the mere fact of federal employment does not confer blanket immunity from state law. *In re Neagle*, 135 U.S. at 75; *see* Rebecca E. Hatch, Annotation, *Construction and*

Application of United States Supreme Court Decision in Cunningham v. Neagle*, 135 U.S. 1, 10 S. Ct. 658, 34 L. Ed. 55 (1890), Establishing Standard for Supremacy Clause Immunity as to Actions of Federal Officers or Agents Alleged to Be in Violation of State Law,* 53 A.L.R. Fed. 2d 269 (providing a history on Supremacy Clause immunity).

This test—originated roughly 125 years ago and continuously modified and approved since—asks whether the Agent did "no more than what was necessary and proper" in fulfilling his federal duties. *In re Neagle*, 135 U.S. at 75. However, courts have generally regarded this *In re Neagle* test as establishing a two-prong test for immunity: (1) whether the officer was performing an act that federal law authorized such officer to perform; and (2) whether the officer's actions were necessary and proper to fulfilling his or her federal duties. *See id.* (establishing the bare bones framework of the Supremacy Clause immunity test); *see also Whitehead*, 943 F.2d at 231 (clarifying the two-prong test derived from the *In re Neagle* test); *Long*, 837 F.2d at 744 (using a two-prong test that originated from *In re Neagle*).

Due to the analysis in the first issue, it is clear that in applying this standard, this Court must do so by viewing the facts in the light most favorable to the State. *See supra* Part I; *see also Tanella*, 374 F.3d at 148 ("In 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"). Further, once this immunity defense is raised, as it has been here, the State's burden is merely to come "forward with an evidentiary showing sufficient at least to raise a genuine factual issue whether the federal officer

was . . . doing no more than what was necessary and proper for him to do in the performance of his duties." *Id.*; *Long*, 837 F.2d at 752.

As requested by the Court, the State will provide reasons why this Court should adopt the appropriate immunity test listed above. *See* R. at 1 (providing the issues this Court requested be briefed when granting Schrader's petition for writ of certiorari). However, in addition to advocating for the appropriate test, the State will also show the several ways it can disprove Schrader's immunity defense under this test.

A. This Court Recognized the Proper Test for Supremacy Clause Immunity in *In re Neagle* and Lower Courts Subsequently Clarified the Application of the test.

The defense of Supremacy Clause immunity from state prosecution was first recognized in the landmark case of *In re Neagle*. 135 U.S. at 34. In that case, Supremacy Clause immunity was granted to a deputy United States Marshal who was charged with protecting a Supreme Court justice who had been threatened by a litigant. *Id.* Due to this threat and an immediate altercation with the litigant, the Marshal was forced to shoot the litigant twice. *Id.* This Court held that the Marshal was "innocent of any crime against the laws of the State" because he "did no more than what was necessary and proper for him to do." *Id.*

Since the seminal case of *In re Neagle*, circuit courts across the nation have applied this "necessary and proper" test, but also clarified the elements within the test and specified the way in which Courts should apply the test. *See, e.g.*, *Clifton*, 549 F.2d at 723 (using the *In re Neagle* necessary and proper test when determining

whether a DEA should be afforded immunity from state prosecution when shooting a suspect after the suspect shot the Agent's partner).

The modified *In re Neagle* test is the test that the State proposes this Court adopt: that a state does not have jurisdiction to prosecute a federal agent for conduct in violation of state law if (1) the federal agent was performing an act that he was authorized to do by the law of the United States; and (2) in performing that authorized act, the federal agent did no more than was necessary and proper for him to do. *See In re Neagle*, 135 U.S. at 75; *Clifton*, 549 F.2d at 723. For an act to be necessary and proper for purposes of the Supremacy Clause, the federal agent must subjectively believe the act was necessary and proper, and the agent's subjective belief must be objectively reasonable. *See Clifton*, 549 F.2d at 730 (stating that "necessary and proper" determination "must rest not only on the subjective belief of the [agent" that his or her actions were reasonable, "but also on the objective findings that [the agent's] conduct may be said to be reasonable under the existing circumstances"); *see also Livingston*, 443 F.3d at 1229 ("Supremacy Clause immunity cases require courts to evaluate the circumstances as they appear to federal officers at the time of the act in question").

The only case Schrader may rely upon in proposing a test other than the well-settled necessary and proper test is *Idaho v. Horiuchi*. *See generally* 215 F.3d 359 (9th Cir.) (en banc), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001). In this case, the United States District Court for the District of Idaho examined whether an FBI agent could escape state prosecution when he shot and killed three individuals in a standoff.

Idaho v. Horiuchi, No. CR 97-097, 1998 U.S. Dist. Lexis 7667, *20–21 (Idaho May 14, 1998). The district court initially attempted to strip the necessary and proper test and instead replace it with a lenient objective test. *Id.* This lenient test, however, was never actually validated or approved by any circuit court, and is not currently good law. *See Horiuchi*, 215 F.3d at 986 (lacking a proper holding because the case was subsequently reheard en banc and reversed).

After issuing an opinion holding the officer's acts were reasonable, the Ninth Circuit elected to rehear the case in an en banc panel and by a vote of 6-5, reversed the district court's dismissal. *Horiuchi*, 266 F.3d at 979*; see* Waxman, *supra* at 2198 (describing the gray and unresolved outcome of the *Horiuchi* case). The Ninth Circuit reversed because there were too many facts in dispute. *Horiuchi*, 266 F.3d at 979. Then, the Ninth Circuit invited briefing on whether the case should be reheard again. *Id.* Instead of responding, the State of Idaho dropped the charges altogether—leading the Ninth Circuit to vacate the en banc opinion, the panel opinion, and the opinion of the district court. *Id.* Therefore, the *Horiuchi* case and any law within it is a nullity and this Court should not accept the *Horiuchi* test Schrader proposes.

B. The First Prong of the Applicable Immunity Test asks Whether the Agent's Actions were Outside the Scope of his Federal Duties, and in this case, Schrader's Assault and Arrest of White were Outside the Scope of his Federal Duties.

As discussed above, courts have established that before arriving at the "necessary and proper" analysis, the first prong of the Supremacy Clause immunity analysis requires the Court to examine whether a federal agent was performing an act that he was authorized to do, or was acting within the scope of his federal duties.

See supra Part II(A); *see also Long*, 837 F.2d at 752 (establishing the first prong of the immunity test to determine whether the federal agent was performing an act he was authorized to do); *Livingston*, 443 F.3d at 1214 (stating the first prong to be whether the agent was acting within the scope of his authorities). In this case, Schrader was performing an act he was not authorized to do by the laws of the United States. *Compare* R. at 30a–31a (stating how Schrader arrested White for doing a completely legal act, purchasing marijuana in a state where it was legal, while Schrader was on vacation and had no duty to arrest), *with Tanella*, 374 F.3d at 142 (examining an agent's actions when he had probable cause to arrest an individual for possession of a controlled substance in a buy-and-bust drug operation).

An example of when this Court refused to provide a federal officer with immunity is in *United States ex rel. Drury v. Lewis*. 200 U.S. 1, 50 (1906). In that case, this Court denied habeas relief based on federal immunity to two army officers because of a disputed fact regarding whether the officer's shot at the victim was "in the performance of a duty imposed by the Federal law." *Id.* at 8. Specifically, one of the suspects who had been fleeing from the officer "stopped, turned around facing the pursuing soldier . . ., threw up his hand, [and] said, 'Don't shoot,' 'I will come back,' or 'I will give up.'" *Id.* Because of this disputed fact on whether the suspect was actually surrendering, this Court held, in shooting the suspect, the officer was not acting within his federal duties and thus should not be afforded immunity. *Id.*

Here, similar to *Drury*, Schrader was not acting within his federal duties when he assaulted White. *See* R. at 28a (stating Schrader was on his vacation with family

and off-duty when he arrested White). Schrader was on his honeymoon vacation with his family and wife, and was under no duty to carry out his federal duties. *Id.* Moreover, White was doing something completely legal in the State of New Tejas when Schrader attacked him. *See* R. at 31a ("It is undisputed that Mr. White's purchase and possession of the drug fully complied with New Tejas law."). Additionally, prior to tackling White, Schrader "never expressly identified himself as a law enforcement officer." R. at 38a. Finally, Schrader was never specifically commanded by a superior to arrest White. R. at 39a. Therefore, Schrader's federal duties did not include assaulting White for conducting a completely legal activity, meaning his actions do not meet the first prong of the requisite immunity test. *See Long*, 837 F.2d at 752 (establishing the first prong of the immunity test to ask whether the agent was acting within the scope of his authorities).

C. The Second Prong of the Applicable Immunity Test Asks Whether the Agent's Actions were "Necessary" to Carrying out his Federal Duties, Which Schrader's Were not.

The second prong of the appropriate test for immunity under the Supremacy Clause examines whether the conduct was "necessary and proper" to carrying out the agent's federal duties. *See Tanella*, 374 F.3d at 143; *Brown v. Nationsbank Corp.*, 188 F.3d 579, 583 (5th Cir. 1999); *Long*, 837 F.2d at 752. Under this prong, the Court will first look to the "necessity" of the agent's conduct at the time of the incident. *See Id.* An act is "necessary" if it is needed for some purpose or reason, essential or when it must exist or happen and cannot be avoided or is inevitable. *Necessary*, Black's Law Dictionary (11th ed. 2019).

In the instant case, the district court improperly construed Schrader's actions as being "necessary" by stating that "the federal government empowered Agent Schrader to make warrantless arrests for individuals committing federal crimes in his presence." R. at 21a; *see* 18 U.S.C. § 3052. However, just because Schrader was allowed to make warrantless arrests does not mean he is able to execute these arrests in unnecessarily hazardous or dangerous ways. *See, e.g.*, *Mesa*, 489 U.S. at 122 (prohibiting immunity of a federal agent's actions when he was charged with reckless driving and related offenses).

Cases which hold federal agents liable for reckless driving while on duty are illustrative of how an agent can be liable for his actions if they are not "necessary" to carrying out his federal duties. *See id.* In such cases, the rule provides that an officer is immune from prosecution for an on-duty traffic incident caused by reckless driving only if "the accident resulted from an exigency or an emergency related to his federal duties which dictated or constrained the way in which he was required to, or could, carry out those duties."[6] *North Carolina v. Cisneros*, 947 F.2d 1135, 1139 (4th Cir. 1991); *Puerto Rico v. Torres Chaparro*, 738 F. Supp. 620, 621 (D.P.R. 1990), *aff'd* 922 F.2d 59 (1st Cir. 1991) (holding an agent was immune for speeding because it was necessary to "proceed as fast as possible"); *Lilly v. West Virginia*, 29 F.2d 61, 64 (4th Cir. 1928) (allowing immunity to shield an officer when "speed and the right of way are a necessity").

[6] Although such cases are about removal under 28 U.S.C. § 1442, rather than immunity, it still demonstrates the fact that officers are not granted with blanket authority to remove to federal court at any time. *See Mesa*, 489 U.S. at 122 (providing standards for when a federal officer should be held for his negligent or reckless actions).

Here, there was no "exigency or emergency" related to Schrader's federal duties which required him to employ any force whatsoever. *See* R. at 2a (stating that Schrader assaulted and arrested White while Schrader was on vacation, off duty, and when White was merely walking out of a building). Rather, the facts show Schrader tackled White because he witnessed White walking out of a building with a clear bag of marijuana, in a State where it was highly publicized that marijuana was legal. *See id.* (describing the well-publicized ballot initiative that led to legalization of marijuana in New Tejas). As soon as he saw White with this marijuana, Schrader yelled "[y]ou're under arrest!," charged at White, and tackled him to the ground. *Id.*

Not only did Schrader's federal duties fail to require him to arrest White, but they certainly did not require him to employ the particular force that he used in doing so. *See id.* (describing the serious injuries that White sustained because of the excessive force Shrader used in tackling him to the concrete ground). Despite the fact that the possession of marijuana is legal in the State of New Tejas, Schrader still arrested White, and in the execution of arresting him, tackled him to the floor and caused him to suffer serious injuries. R. at 38a ("the flying tackle resulted in severe injuries to Mr. White"); *see also* NEW TEJAS PENAL CODE §§ 22.01–22.02 (providing New Tejas' assault and aggravated assault statutes that Schrader violated). Therefore, Schrader's conduct does not meet the "necessary" element in the second prong of the applicable test. *See In re Neagle*, 135 U.S. at 75.

D. The Second Prong of the Immunity Test also Requires an Examination of Whether the Agent's Conduct was both Subjectively and Objectively Proper, both of Which are not met in this case.

Immunity has two components, one being a subjective state of mind component, and the other being an objective component in which the conduct of the official is measured against known fixed legal principles. *See Clifton*, 549 F.2d at 728 ("Determination of whether petitioner's shooting . . . was necessary and proper . . . must rest not only on the subjective belief of the officer but also on the objective finding that his conduct may said to be reasonable under the existing circumstances"); *see also Wood v. Strickland*, 420 U.S. 308, 321 (1975) (recognizing both an objective and subjective component in immunity tests). In this case, Schrader's conduct in arresting White and using excessive force in doing so is neither subjectively nor objectively proper.

i. Schrader's Conduct was not Subjectively Proper Because he Acted with Malice and Used the Tools of his job to Satisfy a Personal Problem.

Viewed in the light most favorable to the State, Schrader's subjective motivations deprive him of immunity. *See Clifton*, 549 F.2d at 728 (requiring courts to look at the agent's subjective motivations at the time of the incident). In the record, it appears the district court proposed an immunity test absent subjective intent. R. at 21a. This, however, is inconsistent with the trend in the lower courts—as most courts have adopted a subjective approach. *See, e.g.*, *Clifton*, 549 F.2d at 728.

Subsequent cases after *In re Neagle* have indicated the appropriate test does have an element of subjectivity. *See, e.g.*, *Brown v. Cain*, 56 F. Supp. 56, 58 (E.D. Pa.

1944) ("The inquiry must, therefore, be as to the honesty of the relator's belief that the arrest was justified and that the shooting was reasonably necessary to accomplish it."). In fact, the subjective element first appeared in district court decisions in the mid-20th century.[7] *Id.* Following that decision, many circuit courts have also included a subjective element when conducting the "necessary and proper" immunity analysis. *See, e.g.*, *Clifton*, 549 F.2d at 728. Therefore, when examining whether Schrader's conduct is proper, this Court must look at his conduct both objectively and subjectively.[8]

An example of when a federal officer was stripped of immunity because of his subjective motivations is the case *Arizona v. Files*. 36 F. Supp. 3d 873, 875 (D. Ariz. 2014). There, a federal Wildlife Services employee trapped his neighbor's dog and was prosecuted by the State or Arizona for animal cruelty. *Id.* The United States District Court for the District of Arizona held the federal employee was not entitled to immunity because him and his neighbor had fueds and personal problems prior to the incident. *Id.* The district court was "convinced that [the federal employee] set out to trap [the dog] not because he felt it was part of his job to do so, but because [he]

[7] Although this is a federal district court case, it serves as persuasive authority because this Court has decided no Supremacy Clause immunity case since 1920. *See Johnson v. Maryland*, 254 U.S. 51, 55 (1920). Thus, "[m]odern Supremacy Clause immunity doctrine has . . . largely been developed in the lower federal courts." Waxman, *supra* at 2198.

[8] In arguing that a subjective analysis is not appropriate, the district court relied on other tests that only take an objective approach when examining an officer's conduct. *See* R. at 12a (distinguishing immunity defenses under the Supremacy Clause to other civil immunity grounds). The District Court, however, fails to recognize that these examples are for less severe contexts than the one at hand—when a federal agent has committed a state crime. *Compare Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (describing the objective standard to see whether an agent has probable cause to conduct a search), *with* R. at 2a (describing the state crimes that Schrader was charged with).

sought to use the tools of his job and the authority of an urban specialist to satisfy a personal problem." *Id.*

Here, we have a strikingly similar situation. Viewing the evidence in the light most favorable to the State, it is clear that Schrader tackled White prior to his arrest for reasons irrelevant to his job. *See* R. at 28a–30a (outlining the personal events between Schrader and White prior to the arrest); *Files*, 36 F. Supp. 3d at 875. Rather, Schrader, like *Files*, "sought to use the tools of his job and the authority" of an FBI agent "to satisfy a personal problem." *Compare* R. at 11a (describing the personal issues that Schrader and White had between each other prior to the arrest), *with Files*, 36 F. Supp. at 884 (describing the way a federal employee misused his power from his job in order to handle a personal problem).

Similar to *Files*, Schrader and White had personal problems prior to the incident. *See* R. at 2a (describing the traffic incident between Shrader and White). A few hours prior to the arrest and assault outside of the building, Schrader and White almost entered into a physical altercation due a disputed traffic incident. *Id.* The two "stepped outside of their vehicles and nearly came to blows," and Schrader was "visibly angry," "shouting and yelling" at White. *Id.* Therefore, hours later, while still enraged, Schrader observed White and sought to misuse his title as a federal agent to get revenge for a personal problem. *Compare Files*, 36 F. Supp. 3d at 874 (describing a situation where a federal employee improperly used his job title to solve a personal problem he had with another individual), *with* R. at 2a–3a (providing a

description of the personal problems that Schrader and White had prior to the incident that led to this appeal).

Additionally, a federal officer loses his *Neagle* protection when he acts out of personal interest, malice, or with criminal intent. *Baucom*, 677 F.2d at 1350. While a state opposing a Supremacy Clause immunity defense need not necessarily show the federal officer acted with malice, if the evidence shows a federal officer acted "out of malice or with some criminal intent," the officer's conduct certainly will fall outside of the scope of the defense. *See id.*

Here, in this subjective analysis, it is apparent Schrader's actions were not only subjectively improper, but they bleed into the category of malice and criminal intent. *See id.* This category strips Schrader of any immunity protection he could potentially have under the Supremacy Clause. *See Clifton*, 549 F.2d at 728 (stating that an officer who acts with malice or criminal intent is not immune under the Supremacy Clause).

ii. Schrader's Conduct was not Objectively Proper Because he Employed Means that Could not Honestly be Considered Reasonable in Arresting White.

In addition to a subjective standard, the second part of the requisite *In re Neagle* test also views the officer's conduct through an objective lens. *In re Neagle*, 135 U.S. at 75. The objective standard asks whether the federal agent employed means that could not honestly be considered reasonable in arresting the individual. *See Clifton*, 549 F.2d at 728. In other words, federal officers are protected from state prosecution only when they employ reasonable means in accomplishing their federal duties. *Id.* In *Clifton v. Cox*, the Ninth Circuit stated this objective element asks

whether the agent's "conduct may be said to be reasonable under the existing circumstances." 549 F.2d at 728.

Here, in respect to this objective element, the parties agree the force employed by Schrader was objectively unreasonable.[9] *See* R. at 11a (noting both parties and the district court all agreed that the force employed by Schrader was objectively unreasonable). In fact, at the motion to dismiss hearing, "the State presented expert testimony that the use of a flying tackle was improper and reckless under these circumstances." R. at 38a, n.7. Therefore, even if Schrader believed that arresting White for the possession of marijuana—despite it being legal in New Tejas—was reasonable, there is no argument or reasoning in the record that could explain how Schrader would find *tackling* White to be reasonable as well. *See Clifton*, 549 F.2d at 728 (requiring the officer's actions to be objectively reasonable); *see also* R. at 11a (providing the district court's thoughts that the force employed by Schrader when arresting White was objectively unreasonable).

Notably, based on the district court's decision in this case, Schrader would like the objective prong to turn on whether he, as a federal officer, violated clearly established law. *See* R. at 11a–12a. However, as the lower court held, "immunity does not depend on whether the law was clearly established." R. at 12. Rather, the objective standard which Schrader proposes comes from qualified immunity—a

[9] The Thirteenth Circuit's dissent in this case suggests that the Supremacy Clause forbids scrutiny of an officer's use of force. R. at 12a, n.7. This suggestion, however, is wholly unsupported—as no circuit court has adopted such a sweeping view of immunity, and the Supreme Court has emphasized the applicable "necessary and proper" test that the State proposes in this brief to determine whether an agent is entitled to immunity. *See In re Neagle*, 135 U.S. at 75.

doctrine which is wholly inapplicable to the case at hand. *Compare In re Neagle*, 135 U.S. at 75 (examining an officer's potential immunity from a state prosecution), *with Owen v. Independence*, 445 U.S. 622, 638 (1980) (establishing the qualified immunity test that started Section 1983 civil claims).

Conversely, the immunity invoked by Schrader in this case derives from the Supremacy Clause of the Constitution, and none of the applicable standards to the Supremacy Clause tests ask whether the officer violated clearly established law. *See In re Neagle*, 135 U.S. at 75. Therefore, when examining whether Schrader's conduct was objectively proper, this Court need only look to see whether Schrader's conduct, force included, was objectively unreasonable. *See Clifton*, 549 F.2d at 728.

Here, as discussed above, the parties and the district court do not dispute that the force Schrader employed was objectively unreasonable. *See supra* Part II(D)(ii); R. at 12a–13a. Further, the district court found Schrader's conduct was "improper and reckless." R. at 12a–13a. In fact, the district court judge recognized, "[t]here is no question Agent Schrader acted foolishly, in a manner ill-befitting a federal law enforcement officer." R. at 37a.

Therefore, not only was Schrader's conduct subjectively improper, it was also objectively improper. The state has met its burden of disproving Schrader's immunity defense under the Supremacy Clause under the appropriate test because 1) his actions were not authorized under his federal duties; and 2) his actions were not necessary and not subjectively nor objectively proper. *See In re Neagle*, 135 U.S. at

75 (providing the applicable necessary and proper test for Supremacy Clause immunity cases).

In order for the State to prevail on this appeal, it merely needs to carry its burden to disprove Schrader's defense on immunity on one of the above grounds. *See* R. at 9a, n.6. In its opinion, the lower court stated that under "its precedent, alternative holdings bind future panels." *See id.* As such, it is clear when viewing the evidence in the light most favorable to the State, the State has carried its burden to disprove the defense of immunity on several independent grounds, all using the well-settled *In re Neagle* test that this Court established over a hundred years ago, with the appropriate modifications from the lower courts. *See In re Neagle*, 135 U.S. at 75; *Clifton*, 549 F.2d at 730.

CONCLUSION

As advocated in this brief, the disputed issues of fact in this case should not have been decided by the district court judge, but instead, should be decided by a jury of Schrader's peers. When viewing the facts of this case in the light most favorable to the State, and applying those facts to the appropriate Supremacy Clause immunity clause test, it is clear that the State has several avenues for disproving Schrader's immunity defense.

Ultimately, Schrader may be able to escape the State of New Tejas' state charges against him. This, however, is for a jury to decide. A jury may well find that his use of force was justified and acquit him, but we are a nation of laws and no man—be it a federal officer—is above the law. As such, Schrader's conduct must be governed by the laws, just like everyone else.

For the foregoing reasons, this Court should affirm the decision of the Thirteenth Circuit Court of Appeals, reverse the district court's order dismissing the indictment, and remand for further proceedings.

Respectfully submitted,
/s/ Team #84
Team #84
Counsel for 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 #84
Team #84
Counsel for Respondent, November 18, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.6 and Supreme Court Rule 33.1, the undersigned hereby certifies that the Brief of Respondent, New Tejas, contains 13, 458 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 #84
Team #84
Counsel for Respondent, November 18, 2019

APPENDIX

Article VI of the Constitution of the United States of America 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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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. . . .

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

Definitions:

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

21 U.S.C. § 812 provides in pertinent part:

Schedule I

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

Section 22.01 of the Penal Code of New Tejas provides:

Assault

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

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

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

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

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

Section 22.02 of the Penal Code of New Tejas provides:

Aggravated Assault

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

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

Section 50.01 of the Penal Code of New Tejas provides:

Justification as a Defense.

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

Section 50.02 of the Penal Code of New Tejas provides:

Arrest and Search

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

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

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