No. 19-1112

IN THE

# Supreme Court of the United States

STEPHANIE JONES,

*Petitioner,*

v.

JEREMY EDER, *et al.*,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF IN OPPOSITION

JUSTIN CARL PFEIFFER
*Counsel of Record*
KENNETH S. CANNATA
SAL P. LOPICCOLO, II
COUNTY ATTORNEY'S OFFICE
FORT BEND COUNTY
401 Jackson Street
Richmond, TX 77469
(281) 341-4555
justin.pfeiffer@
fortbendcountytx.gov

*Counsel for Respondents Fort Bend County, Josh Dale, and Bryan Baker*

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## QUESTIONS PRESENTED

Six years ago, law enforcement officers arrested petitioner after finding controlled substances during the execution of a no-knock search warrant. Petitioner sued under 42 U.S.C. § 1983. The district court granted summary judgment against petitioner and the Fifth Circuit affirmed. Petitioner lumps several merits issues into a single question presented.

Properly constructed, the questions presented are:

1. Whether the seizure of controlled substances in plain view during a no-knock search warrant violates the Fourth Amendment?

2. Whether officers have probable cause under the Fourth Amendment to execute an arrest incident to search for possession of controlled substances where the State's highest criminal court has held that the State's statute does not require law enforcement officers to negate the arrestee's possession of a valid prescription prior to arrest?

3. Whether the Controlled Substances Act, enacted as Title II of the Comprehensive Drug Abuse Prevention Act of 1970, Pub. L. 91-513, preempts Texas Health and Safety Code § 481.117(a)?

4. Whether Texas Health and Safety Code 481.117(a)—a statute duly promulgated by a State's legislature pursuant to a State's police powers—violates the Commerce Clause?

## RELATED PROCEEDINGS

United States Court of Appeals for the Fifth Circuit: Docket No. 19-20223, *Stephanie Jones v. Jeremy Eder, in his individual capacity; J. Dale, in his individual capacity; B. Baker, in his individual capacity; R. Ng, in his individual capacity; Fort Bend County*, judgment entered October 2, 2019, petition for rehearing denied December 12, 2019.

United States District Court for the Southern District of Texas, Houston Division: Docket No. 4:15-cv-02919, *Stephanie Jones v. Jeremy Eder, in his individual capacity; J. Dale, in his individual capacity; B. Baker, in his individual capacity; R. Ng, in his individual capacity; Fort Bend County*, judgment entered March 21, 2019.

In the District Court of Fort Bend County, Texas, 240th Judicial District: Docket No. 14-DCR-65418, *The State of Texas v. Stephanie Laska Jones*, judgment entered October 20, 2014.

In the District Court of Fort Bend County, Texas, 240th Judicial District: Docket No. 14-DCR-65419, *The State of Texas v. Stephanie Laska Jones*, judgment entered October 20, 2014.

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## INTRODUCTION

Petitioner Stephanie Jones seeks review of the Fifth Circuit's judgment affirming dismissal of her civil rights action. Officers arrested petitioner after finding controlled substances during the execution of a no-knock search warrant. Seven months after the grand jury indicted, prosecutors dismissed the charges. Petitioner later sued under 42 U.S.C. § 1983.

The district court granted summary judgment for respondents in fact bound decisions. The Fifth Circuit affirmed in an unpublished summary opinion. The court of appeals unanimously held that the seizure of petitioner's controlled substances and arrest did not violate the Fourth Amendment and that petitioner's other constitutional challenges to the Texas penal statute were not justiciable.

Petitioner seeks review of these holdings, combining the multiple merits issues in this case into a single question presented. Petitioner contends that the decision below conflicts with decisions of this Court. She does not even attempt to assert a split of authority on these questions. Petitioner also asserts that the Texas statute violates the Supremacy Clause and the Commerce Clause. Petitioner is mistaken.

*First*, the Fifth Circuit correctly applied this Court's precedents under the Fourth Amendment. Respondents seized controlled substances that were in "plain view" and of an immediately apparent incriminating character. *Horton v. California*, 496 U.S. 128, 135 (1990). Petitioner's arrest was thereby supported by probable cause "drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). The decision below is entirely consistent with this Court's Fourth

Amendment precedents. Certiorari "jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing," *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (Taft, C.J.), which is at the base of the petition.

*Second*, the Fifth Circuit's judgment would readily be affirmed on alternate grounds. Respondent officers are indisputably entitled to qualified immunity. Petitioner has not advanced any clearly established Fourth Amendment law violated. And the municipal-liability claims against respondent Fort Bend County fail for lack of pattern and policymaker. The outcome of this case would therefore be the same even if the Court were to rule for petitioner on the properly constructed Fourth Amendment questions presented.

*Third*, the Fifth Circuit correctly refused to entertain petitioner's other constitutional challenges as calling for an advisory opinion. There is no reason or precedent for this Court to determine the constitutionality of a Texas statute in a § 1983 action seeking only monetary damages, particularly where petitioner could not have qualified for injunctive relief even if she had asked for it.

*Fourth*, the constitutional challenges to the Texas statute do not raise substantial questions. The Supremacy Clause does not provide a cause of action. The federal Controlled Substances Act does not provide a private right of action. And the territorial application of a State's penal statute violating the Commerce Clause is an uncertworthy question.

*Fifth*, this case does not present a suitable vehicle for deciding any of the questions presented. Petitioner did not assert her Supremacy and Commerce Clause

arguments until late in the proceedings. Petitioner did not preserve error respecting key factual findings. Consideration of various forfeiture doctrines, therefore, would present numerous extraneous threshold issues, frustrating the Court from reaching the merits of the questions presented.

The petition should be denied.

## STATEMENT

1. Fort Bend County (Texas) Sheriff Troy E. Nehls created the Fort Bend County Narcotics Task Force ("Task Force") to provide "a mechanism to allow maximum coordination of effort focusing on illegal narcotics activity between all law enforcement agencies in Fort Bend County." Marcaurele Aff. Supporting Summ. J. Exh. C, at 1; R.1179.[1] The member agencies—largely municipal police departments—agreed to coordinate with Task Force members in every matter referred to the Task Force. *Id*.

The City of Rosenberg Police Department is a Task Force member. App. 11.[2] Respondent Jeremy Eder ("Eder") was a Rosenberg Police Lieutenant. *Id*. Respondent Josh Dale is the Task Force Commander. *Id*. at 48. Respondent Bryan Baker is the sergeant assigned to the Task Force. *Id*.[3]

In December 2013, Eder reported to the Task Force suspicious activity concerning petitioner Stephanie Jones's husband, who is a federally convicted drug

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[1] All "R." citations refer to the Electronic Record on Appeal and citation thereto in conformance with Fifth Circuit Rule 28.2.2.

[2] All "Pet." and "App." citations refer to the petition and appendix in Case No. 19-1112.

[3] Only respondents Dale and Baker are employees of the Fort Bend County Sheriff's Office. *See id*.

dealer. *United States v. Sherman McAndrew Jones*, No. 4:03-cr-00152-1 (S.D. Tex. Aug. 21, 2003) (possession with intent to distribute crack cocaine). Task Force members developed reliable information that petitioner's husband was continuing to traffic in crack cocaine. App. 11. On January 29, 2014, Eder obtained a no-knock search warrant for the residence occupied by petitioner and her husband for "any illicit contraband [described in the warrant affidavit as] relative to the trafficking of narcotics." App. 48-49.[4]

On January 31, 2014, the Task Force executed the warrant. *Id*. at 2. Task Force members seized a glass beaker, a police radio, and a digital scale containing a white-powder residue on it. *Id*. at 14. Petitioner testified that the powder residue came from her "put[ting] flour on it." Jones Dep. at 61-62 (Jan. 19, 2017); R.539-40.

Another Task Force member found one-and-one-half pills on a windowsill in the master bedroom. App. 2, 13. Through consultation with representatives from the poison control center, Eder identified the pills as hydrocodone and alprazolam ("Xanax"). *Id*. at 2. Both substances are within Penalty Group 3 of the Texas Controlled Substances Act. Tex. Health & Safety Code § 481.104(a)(2) & (4). As enacted by the Texas Legislature in 1989,[5] Texas Health and Safety Code § 481.117(a) prohibits possession of any substance within Penalty Group 3 unless obtained "directly from

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[4] Eder also obtained an arrest warrant for petitioner's husband for possession of less than one gram of crack cocaine in a school zone. Eder Summ. J. Mot. Ex. 13 (Offense Report) at 4; R.577.

[5] Tex Health & Safety Code Act, 71st Leg., R.S., ch. 678, § 1, sec. 481.117(a), 1989 Tex. Gen. Laws 2230, 2937.

or under a valid prescription or order of a practitioner acting in the course of professional practice."

Police, thereafter, arrested petitioner and charged her with two counts of possession of a controlled substance in a school zone. App. 2. Although a grand jury indicted petitioner on both counts, the prosecution later dismissed citing insufficient links between petitioner and the drugs. App. 17.[6]

2. In October 2015, petitioner filed suit, pursuant to 42 U.S.C. § 1983, asserting sundry causes of action under the Fourth and Fourteenth Amendments against four police officers and Fort Bend County. Petitioner asserted claims for unlawful seizure of her person and property under the Fourth Amendment; for violations of her rights to privacy and to be free from unreasonable seizure under the Fourteenth Amendment against the four officers; and for municipal liability against Fort Bend County for failure to train, supervise, and discipline the officers. *See Monell v. Dep't of Social Servs. of N.Y.C.*, 436 U.S. 658 (1978). Upon the recommendation of the magistrate judge, the district court dismissed all petitioner's claims against Fort Bend County and the Fourteenth Amendment claims against the four police officers. App. 137-60.

Petitioner, thereafter, filed a motion for leave to amend her complaint for a second time. *Id*. at 3. The magistrate judge granted the motion, resuscitating

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[6] *Texas v. Stephanie Laska Jones*, Nos. 14-DCR-65418 & 14-DCR-65419 (Fort Bend Cnty. 240th Dist. Ct. Oct. 20, 2014). Police arrested petitioner's husband on similar charges, Dale Aff. Supporting Summ. J. ¶ 34; R.618, which were also dismissed. *Texas v. Sherman McAndrew Jones*, Nos. 14-DCR-65416 & 14-DCR-65417 (Fort Bend Cnty. 240th Dist. Ct. Sept. 3, 2014).

the claims just dismissed. The four police officers—with two different but aligned counsel—filed motions for summary judgment based on qualified immunity. The magistrate judge recommended granting and denying the motions in part. *Id*. 46-136.[7] The magistrate judge recommended granting the officers qualified immunity on petitioner's Fourth Amendment claims for seizure of the hydrocodone and Xanax and petitioner's arrest but denying qualified immunity on petitioner's claim that the officers illegally seized six-hundred dollars in U.S. currency. *Id*. at 81-87.

All parties filed timely objections. Noting the magistrate judge's "yeoman's work in this case," *id.* at 44, the district court substantially departed from the magistrate judge's recommendations. *Id*. at 41-45. The district court granted the officers summary judgment regarding petitioner's Fourth Amendment currency claims,[8] but denied just Eder summary judgment concerning the seizure of the hydrocodone and Xanax and petitioner's arrest. *Id*. at 42-44. The district court allowed the parties another opportunity for motion practice respecting the remaining Fourth Amendment claims against Eder and the *Monell* claims against Fort Bend County. *Id*. at 44-45.

Upon consideration of these motions, the magistrate judge recommended concluding that Eder's seizure of

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[7] On January 8, 2018, the magistrate judge entered her first report and recommendation regarding these motions, *id.* at 89-136, and amended it on February 21, 2018, substantially narrowing the triable issues, *id*. at 46-88. Petitioner wantonly includes quotations from the magistrate judge's first report, which the magistrate judge herself substantially amended *before* the district court ruled on the parties' objections. Pet. at 5, 7-9, 19.

[8] Petitioner abandoned her Fourth Amendment claim based on currency seizure in briefing to the Fifth Circuit. *Id*. at 2 n. 1.

the pills did not constitute a Fourth Amendment violation because such was permitted under the "plain view" doctrine enunciated in *Arizona v. Hicks*, 480 U.S. 321 (1987). App. 38-39. The magistrate judge recommended that because Eder made an inquiry into the substances and reasonably concluded that the pills constituted contraband, Eder had probable cause to arrest petitioner. *Id.* 39 & 40 n. 74. Because Eder's action did not violate petitioner's Fourth Amendment rights, the magistrate judge recommended determining that no *Monell* liability could possibly attach to Fort Bend County. *Id*. at 39.

Most relevant to the pending petition, the magistrate judge also recommended denying petitioner's summary-judgment challenge to the constitutionality of Texas Health and Safety Code § 481.117(a). *Id*. at 23-26. Petitioner challenged the Texas statutory provision as applied to her, asserting that the provision subjected persons to arrest for possessing a controlled substance even where they had a valid prescription.[9] The magistrate judge recommended concluding that any controversy regarding the statute was nonjusticiable as such would constitute an advisory opinion.[10]

On March 21, 2019, the district court accepted the magistrate judge's recommendations, granted Eder

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[9] Although not in petitioner's then-live pleading, the magistrate judge entertained petitioner's as-applied challenge. *Id*. at 24. The district court denied petitioner's motion to file a third amended complaint to augment her constitutional challenge to the Texas statute. *Id*. at 7-8. The Fifth Circuit affirmed the district court's denial of petitioner's motion for leave to amend. *Id*. at 4.

[10] The magistrate judge properly analyzed the Texas statute under the rubric of the Fourth Amendment right to be free from arrest without probable cause. *Id*. at 26.

and Fort Bend County summary judgment, and entered a final judgment. *Id*. at 5-8.

3. Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed in a *per curiam* unpublished summary opinion on October 2, 2019. *Id*. at 1-4. After noting that "the district court based its decision largely on the detailed findings and recommendations submitted by the magistrate judge," *id*. at 3 n. 3, the Fifth Circuit concluded that the "district court committed no reversible error * * * *essentially* on the basis carefully explained in the magistrate's recommendations and district court's orders adopting them," *id*. at 4 (emphasis added).

The Fifth Circuit expressly affirmed the district court's denial of petitioner's summary-judgment challenge to the constitutionality of Texas Health and Safety Code § 481.117(a). *Id*. at 4 n. 4. The Fifth Circuit agreed with the district court's conclusion that "ruling on such a matter would be improper and constitute an advisory opinion." *Id*.

The Fifth Circuit denied panel rehearing and rehearing en banc. *Id*. at 161-62. No member of the panel nor any judge in regular active service requested that the court be polled. *Id*. at 162.

## REASONS FOR DENYING THE PETITION

### I. THE COURT OF APPEALS' DECISION THAT RESPONDENTS DID NOT VIOLATE PETITIONER'S FOURTH AMENDMENT RIGHTS IS CORRECT AND DOES NOT WARRANT THIS COURT'S REVIEW.

Petitioner's Fourth Amendment assertions do not raise substantial questions. Neither the seizure of her hydrocodone and Xanax nor her arrest raise questions warranting review by this Court.

#### A. The Court Of Appeals' Decision Rejecting Petitioner's Challenges To The Seizure Of Her Hydrocodone And Xanax Was Correct And Does Not Warrant This Court's Review.

Eder's seizure of the hydrocodone and Xanax did not constitute a Fourth Amendment violation. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The text of the Amendment requires that (1) "all searches and seizures must reasonable" and (2) "a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." *Kentucky v. King*, 563 U.S. 452, 459 (2011). "A 'seizure' of property occurs when there is some meaningful interference

with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Both the warrant and the plain-view doctrine authorized Eder's seizure of the pills.

1. "The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons or things to be seized.'" *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (quoting U.S. Const. amend. IV)). "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Id*.

Here, respondent officers indisputably had a valid warrant to search petitioner's residence. The warrant authorized searching for "any illicit contraband described in the [warrant] affidavit," which in turn included "any evidence relative to the trafficking of narcotics." App. 49. Eder's search warrant affidavit defined "evidence relative to the trafficking of narcotics" as including "[m]aterials used in the cultivation, packaging, harvesting, weighing and distributing illegal contraband" and "[c]ontrolled substances namely Cocaine." Eder's Mot. to Dismiss Exh. 1 at 2-3; R.44-45.

The magistrate judge's incredulity that cocaine could be pressed into tablet form, App. 35 n. 73, is irrelevant. Petitioner proffers no argument as to the warrant's invalidity or overbreadth. *See United States v. Leon*, 468 U.S. 897, 923 (1984) (allowing suppression where judge issuing warrant "was misled by information in an affidavit that the affiant knew was

false or would have known was false except for his reckless disregard of the truth").

Here, the warrant allowed Task Force officers to search for "**any illicit contraband, as described in said affidavit**." App. 12. In addition to the two pills, Task Force officers seized a glass beaker, a police radio, and a digital scale containing a white-powder residue on it. *Id*. at 14; Jones Dep. at 61-62 (Jan. 19, 2017); R.539-40. Under these circumstances, the hydrocodone and Xanax—outside any container and without any obvious prescription source—reasonably constituted illicit contraband within the scope of the warrant.

Last, before seizing the pills, Eder contacted poison control, which confirmed that the pills constituted hydrocodone and Xanax. Under the Texas Controlled Substances Act, these pills are indisputably within Penalty Group 3. Tex. Health & Safety Code § 481.104(a)(2) & (4). Petitioner does not and cannot contest this basic fact, but instead asserts her legal right to possession due to having a prescription. Pet. 13.

2. Even if the seizure of the hydrocodone and Xanax was not within the search warrant, which was the conclusion reached by the magistrate judge, the plain-view doctrine allows it. The "plain-view" doctrine applies where "the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." *Horton*, 496 U.S. at 135 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (Stewart J., concurring in result)).

To justify a seizure, the incriminating nature of the evidence must be "immediately apparent." *Id*. at 136. The incriminating nature of evidence is immediately

apparent if the officers have probable cause to believe that the item "may be contraband or stolen property or useful as evidence of a crime." *Texas v. Brown*, 460 U.S. 730, 742 (1983). "A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Id*.

Petitioner relies on *Arizona v. Hicks*, 480 U.S. 321 (1987), to assert that the seizure violated her right to privacy. Pet. 13-14. *Hicks* is not applicable to these facts. In *Hicks*, an officer's movement of stereo equipment to record serial numbers constituted a search "separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment." 480 U.S. at 324-25. Petitioner does not dispute that a Task Force member found the hydrocodone and Xanax on a windowsill, requiring no movement of these objects. *See Coolidge*, 403 U.S. at 465 ("any evidence seized by the police will be in plain view, at least at the moment of seizure") (Stewart, J., concurring in result). Rather, petitioner relies on the heightened expectation of privacy that one has in his or her residence. Pet. 12 n. 36. Petitioner's "reliance on privacy concerns that support that prohibition is misplaced when the inquiry concerns the scope of an exception that merely authorizes an officer with a lawful right of access to an item to seize it without a warrant." *Horton*, 496 U.S. at 141-42.

Eder seized the pills from petitioner's home during a lawful search authorized by a valid warrant. When discovered, it was immediately apparent that the pills constituted contraband. *See Brown*, 460 U.S. at 742. This seizure, therefore, raises no substantial Fourth Amendment question.

### B. The Court Of Appeals' Decision Rejecting Petitioner's Challenges To Her Arrest Was Correct And Does Not Warrant This Court's Review.

Petitioner appears to challenge the validity of her arrest. Pet. 13 ("seizing the People therein, and seizing their controlled substances when they have prescriptions therefor (and there is no probable cause to believe otherwise)"). "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck*, 543 U.S. at 152. After Eder determined that the pills constituted substances within Penalty Group 3 under the Texas Controlled Substances Act, Eder arrested petitioner and charged her with two counts of possession of a controlled substance in a school zone.

The relevant question to determine probable cause is "whether a reasonable officer could conclude—considering all of the surrounding circumstances, including the plausibility of the explanation itself—that there was a 'substantial chance of criminal activity.'" *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018) (quoting *Illinois v. Gates*, 462 U.S. 213, 243 n. 13 (1983)). Such specifically includes examining "the events leading up to the arrest, and * * * 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

Within six weeks before the warrant's issuance, respondent officers confirmed a purchase of 3.6 grams of crack cocaine from petitioner's husband at petitioner's residence by a confidential informant. Eder's

Mot. to Dismiss Exh. 1 at 4; R.46. Within two days before the warrant's issuance, another crack-cocaine purchase was confirmed. *Id*. at 5; R.47. Moreover, petitioner's husband was known to have engaged in instances of crack-cocaine distribution, as he had previously pleaded guilty to possession with intent to distribute crack cocaine. *Sherman McAndrew Jones*, No. 4:03-cr-00152-1 (S.D. Tex. Jun. 20, 2003). Against this backdrop, Task Force members executed the search warrant issued by an independent magistrate. In addition to the hydrocodone and Xanax, Task Force members found a glass beaker, a police radio, and a digital scale containing a white-powder residue on it. App. 14; Jones Dep. at 61-62 (Jan. 19, 2017); R.539-40.

Petitioner bases her warrantless arrest complaint exclusively on her possession of valid prescriptions. Pet. 13. This argument fails for three reasons. First, petitioner did not produce the prescriptions to her own defense counsel prior to the grand jury indicting her. App. 15-16. The inquiry into probable cause is confined to "the facts known to the arresting officer at the time of the arrest." *Devenpeck*, 543 U.S. at 152. Second, petitioner contends in isolation that possessing prescriptions conclusively demonstrates the illegality of her arrest. But this Court has consistently admonished lower courts that viewing a single fact in isolation, rather than considering it as a factor in the totality of the circumstances, is mistaken. *See*, *e.g.*, *Wesby*, 138 S. Ct. at 588; *Pringle*, 540 U.S. at 372 n. 2; & *United States v. Arvizu*, 534 U.S. 266, 277-78 (2002). Third, possession of a prescription is not an affirmative element of the offense under Texas law, but rather a defense to prosecution. That is determinative of the reasonableness of Eder's arrest of petitioner. *See Gates*, 462 U.S. at 244 n. 13 ("the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,'

but the degree of suspicion that attaches to particular types of noncriminal acts").

Texas law did not and does not require law enforcement officers to negate the arrestee's possession of a valid prescription prior to arrest. The Texas Controlled Substances Act places the burden on the criminal defendant to negate the *mens rea* of the offense by proving possession under a valid prescription. *Threlkeld v. Texas*, 558 S.W.2d 472, 473 (Tex. Crim. App. 1977) (noting the Texas Legislature's express abrogation of that court's prior rule placing the burden on the State to negate an exception within a penal statute).[11] Texas state courts have continued this approach. *Dowden v. Texas*, 455 S.W.3d 252, 255 (Tex. App.—Fort Worth 2015, no pet.) ("A person claiming the benefit of an exemption or exception [under this chapter which includes § 481.117(a)] has the burden of going forward with the evidence with respect to the exemption or exception." (quoting Tex. Health & Safety Code § 481.184(a))).

Because petitioner raises no substantial question that respondent officers violated her Fourth Amendment rights, the lower courts properly entered judgment against petitioner for her claims against Fort Bend County.[12]

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[11] In this case, the highest criminal appellate court in Texas interpreted a substantively similar predecessor of the relevant portion of the Texas Controlled Substances Act.

[12] Frustrated with the result and confines of state law, the magistrate judge wrote that she does "not condone the decisions of Defendant Fort Bend in obtaining a felony indictment based on two prescribed pills found in Plaintiff's home." App. 40 n. 74. First, under Texas law, a prosecutor choosing to indict "is an agent of the state, not the county in which the criminal case happens to be prosecuted." *Esteves v. Brock*, 106 F.3d 674, 678

## II. THE COURT SHOULD NOT GRANT CERTIORARI WHERE THE OFFICERS' ENTITLEMENT TO QUALIFIED IMMUNITY AND FORT BEND COUNTY'S LACK OF *MONELL* LIABILITY ARE APPARENT IN THE RECORD.

In affirming the district court's judgment, the Fifth Circuit did not sanction a far departure "from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). Regardless, the Fifth Circuit's summary opinion does not warrant review because petitioner has no avenue for relief. The respondent officers are entitled to qualified immunity because petitioner never cited any specific clearly established law supposedly violated. Fort Bend County's purported lack of training and supervising officers is insufficient

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(5th Cir. 1997). Second, because absolute prosecutorial immunity shields the prosecutor's decisions, petitioner never asserted a claim against him. *See Van de Kamp v. Goldstein*, 555 U.S. 335, 343-44 (2009). Third, the above discussion demonstrates that the Texas statute places the burden of proving a valid prescription on the criminal defendant, who, here, did not provide her criminal defense counsel with any prescriptions prior to indictment. App. 15-16. Fourth, the magistrate judge omits key information from Eder's warrant affidavit, particularly a confidential informant's purchase of 3.6 grams of crack cocaine from petitioner's residence and an additional subsequent confirmed purchase. Eder's Mot. to Dismiss Exh. 1 at 4-5; R.46-47. Without valid prescriptions, the prosecutor reasonably believed that he could prove the case beyond a reasonable doubt. The prosecutor's management of the case, moreover, may well have been partially motivated by a compelling public-safety need to impose bail conditions on petitioner; and the decision to dismiss by an equally legitimate need to preserve the identity of the confidential informant(s)—none of which is within the purview of a federal district court to opine.

for *Monell* liability; nor is it even an appropriate *Monell* defendant here.

### A. Petitioner's Failure To Cite Any Clearly Established Law Makes Review By This Court Unwarranted.

"[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *Wesby*, 138 S. Ct. at 589 (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). Lower courts may grant a dispositive motion in favor of the governmental actor based on either step in the qualified-immunity analysis, *Pearson v. Callahan*, 555 U.S. 223, 242 (2009), and "'should think hard, and think hard again,' before addressing both qualified immunity and the merits of the underlying constitutional claim." *Wesby*, 138 S. Ct. at 589 n. 7 (quoting *Camreta v. Greene*, 563 U.S. 692, 707 (2011)).

Here, the Fifth Circuit accepted the district court's determination that petitioner suffered no deprivation of her Fourth Amendment rights by the seizure of her hydrocodone and Xanax and her arrest without inquiry into the second prong of qualified immunity. Putting aside the correctness of those determinations, the officers were "at least entitled to qualified immunity." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam).

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Reichle*, 566 U.S. at 664). It is marked by "controlling authority" or "a robust 'consen-

sus of cases of persuasive authority.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

As discussed, *supra* I.B, Texas law does not require an officer to negate the possibility that the possessor might have a valid prescription to have a reasonable belief that an arrestee committed an offense under Texas Health and Safety Code § 481.117(a), which justifies both the seizure and the arrest. To hold that petitioner's arrest lacked probable cause, petitioner must "identify a case where an officer acting under similar circumstances as Officer [Eder] was held to have violated the Fourth Amendment." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam). That case does not exist because petitioner herself challenges the Texas statute's constitutionality. An officer cannot be "plainly incompetent or * * * knowingly violate the law," *Mullenix*, 136 S. Ct. at 308, where the officer followed state law, and, a petitioner, at the same time, challenges the constitutionality of that very same state law, *see id*. ("The dispositive question is 'whether the violative nature of particular conduct is clearly established.'" (quoting *Al-Kidd*, 563 U.S. at 742)).[13]

[13] The magistrate judge stated that respondents Dale, Baker, and an officer represented by different counsel could not be liable for Eder's actions because petitioner failed to provide any evidence suggesting "personal involvement in any aspect of Plaintiff's arrest." App. 85. Petitioner did not file objections to this factual finding, forfeiting any such argument as to these respondents. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985).

### B. Petitioner's Claims Against Fort Bend County Otherwise Lack Merit Making Review By This Court Unwarranted.

To prove municipal liability, petitioner "must demonstrate that a municipal decision [by a policymaker] reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 411 (1997). Petitioner sued Fort Bend County for failure to train, supervise, and discipline its officers. Putting aside the obvious problem that Eder was a Rosenberg police officer and not a Fort Bend County sheriff's deputy, there is neither a pattern of violations nor a Fort Bend County policymaker.

1. It is well accepted that a "pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train" or supervise. *Connick v. Thompson*, 563 U.S. 51, 62 (2011). "Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Id*.

The requisite pattern is particularly difficult for petitioner to establish for her January 31, 2014, arrest, by a Task Force created by Sheriff Nehls on October 31, 2013. *See* Marcaurele Aff. Supporting Summ. J. Exh. C at 5; R.1183. Regardless, petitioner made no attempt to allege even a pattern of unconstitutional conduct by Task Force members owing to deficient Task Force policies, procedures, or supervision. That leaves petitioner with a theory based on "single-incident liability." In *City of Canton v. Harris*, this Court posed a hypothetical for "single-incident

liability" in which a city armed its officers without training "in the constitutional limitations of the use of deadly force." 489 U.S. 378, 390 n. 10. "Given the known frequency with which police attempt to arrest fleeing felons and the 'predictability that an officer lacking specific tools to handle that situation will violate citizens' rights' * * * the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." *Connick*, 563 U.S. at 63-64 (quoting *Bryan Cnty.*, 520 U.S. at 409). Properly applying a duly promulgated Texas statute does not fit within the still-mythical, single-incident theory of *Monell* liability.[14]

2. Municipal liability requires the "execution of a government's policy or custom * * * made * * * by those whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694. This Court subsequently stated "only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988).

Though not definitively determined by the lower courts here, Sheriff Nehls created the Task Force, and, therefore, may be assumed to be the relevant policy-

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[14] In petitioner's principal brief to the Fifth Circuit, petitioner did not present any argument concerning a pattern of previous violations by Fort Bend County. Petitioner instead asserted Fort Bend County's alleged sentience in "consistently confus[ing] Chapter 481 of the Texas Health and Safety Code with Chapter 483," Appellant's Br. 37 (*see also* R.1535), which thereby forfeits the pattern issue. *See Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec.*, 549 U.S. 443, 455 (2007).

maker.[15] Marcaurele Aff. Supporting Summ. J. Exh. C, at 1-5; R.1179-83. In addition to the myriad reasons to deny the petition, is the failure to name a Fort Bend County policymaker. Sheriff Nehls is not a county policymaker in his capacity of operating a multi-agency narcotics task force. The Fifth Circuit's thirty-year-old, pre-*McMillian* precedent is not an impediment to reaching this conclusion.

a. Sheriff Nehls acts as a policymaker for the State of Texas rather than Fort Bend County in his creation and supervision of a multi-agency drug Task Force. *See McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 784–96 (1997) (determination made under Alabama law). Such precludes the County's *Monell* liability, *see Brandon v. Holt*, 469 U.S. 464, 471 (1985), because Fort Bend County's liability under § 1983 turns on whether the official is the final policymaker for the local government in a particular area or on a particular issue, *Jett*, 491 U.S. at 737.

In *McMillian*, this Court concluded that that the Monroe County, Alabama, sheriff is a final policymaker for the State of Alabama, rather than Monroe

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[15] Having the policymaker as a required element of *Monell* liability is essential "to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers." *City of Okla. City v. Tuttle*, 471 U.S. 808, 821 (1985) (reversing Tenth Circuit for imposing liability "simply because the municipality hired one 'bad apple'"). Determining who constitutes the relevant policymaker is a question of state law. *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). And the policymaker's own action or acquiescence in longstanding practices "must have caused the deprivation of the rights at issue." *Id*. As noted, petitioner does not rest on an action by Sheriff Nehls; but rather, alleged inaction (acquiescing to deficient training and supervision of his subordinates and respondent Eder, who was not even the Sheriff's subordinate).

County, when acting in a law enforcement capacity. 520 U.S. at 784-96. This Court, consequently, affirmed the Eleventh Circuit's conclusion that Monroe County bore no *Monell* liability for allegations that the sheriff "intimidated [a convicted co-conspirator] into making false statements and suppressed exculpatory evidence" in a § 1983 suit brought by a former death-row inmate. *Id.* at 783-84. There, the Court relied on Alabama's constitutional structure, Alabama's statutes, and the common-law understanding of a sheriff's functions. *Id.* at 784-96.

Although there are some differences between Alabama and Texas law, the similarities far outweigh the differences. Like Alabama, no county official has the authority to "instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime." *Id*. at 790. Article 2.13 of the Texas Code of Criminal Procedure provides that a sheriff (and other peace officers) have "the duty * * * to preserve peace within the officer's jurisdiction." *See also Minor v. Texas*, 219 S.W.2d 467, 468 (Tex. Crim. App. 1949) (The sheriff has a "duty to preserve the peace and arrest all offenders, and when authorized by the Code [of Criminal Procedure], he shall interfere, without warrant, to prevent and suppress crime.") The Texas Constitution establishes county sheriffs under the state's power of the judiciary, which contrasts with Alabama's establishment in the executive department.[16] Tex. Const. art. 5, § 23. Like Alabama, however, county sheriffs are only removable by judi-

[16] *McMillian*, 520 U.S. 787-89. The importance of this distinction is debatable. *Cf. id*. at 801-02 ("Sheriffs in Arkansas, Texas, and Washington, just like sheriffs in Alabama, enforce the State's law, but that does not make them policymakers for the State rather than the county.") (Ginsburg, J., dissenting).

cial action. *See McMillian*, 520 U.S. at 788. County sheriffs are removable by the judges of the Texas district courts with the verdict of a jury. Tex. Const. art. 5, § 24. The judges of the district courts are in turn state actors, *see* Tex. Const. art. 5, § 8.

Texas and Alabama share the common-law understanding of a sheriff's power and duties. *See* Tex. Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 3-4 (Republic of Texas adopting the common law of England as its rules of decision). Since at least the Norman Conquest in 1066, English sheriffs (or "shire-reeves") were the King's officer in the English counties ("shires"). *McMillian*, 520 U.S. at 793. "Although chosen locally by the shire's inhabitants, the sheriff did all the king's business in the county and was the keeper of the king's peace." *Id*. (internal citations and quotation marks omitted). And the present office of the sheriff represents "an unbroken lineage from the Anglo-Saxon shire-reeve." *Id*. (citation omitted).

"As the basic forms of English government were transplanted in our country, it also became the common understanding here that the sheriff, though limited in jurisdiction to his county and generally elected by county voters, was in reality an officer of the State, and ultimately represented the State in fulfilling his duty to keep the peace." *Id*. at 794 (footnote omitted). His functions and duties "pertain chiefly to the affairs of state in the county." *Id.* (citation omitted). Accordingly, the creation, execution, and operation of the multi-agency drug Task Force is a state law-enforcement function. *Cf.* Tex. Gov't Code § 411.0097(a) (authorizing the Texas Department of Public Safety to establish policies and procedures respecting multicounty drug task forces).

b. The Fifth Circuit did not address this question because it affirmed the district court's conclusion that respondent officers did not violate petitioner's constitutional rights. Prior to *McMillian*, the Fifth Circuit concluded—without a particularly searching analysis—that "the unique structure of county government in Texas" meant that a Texas sheriff is a county policymaker in the area of law enforcement. *Turner v. Upton Cnty., Tex.*, 915 F.2d 133, 136 (5th Cir. 1990) (citing a case citing E. Jones, J. Ericson, L. Brown, & R. Trotter, Practicing Politics in Texas (3d ed. 1977)). Turner alleged that the sheriff, district attorney, and non-state actors forced Turner "to stand trial on what they knew to be a trumped-up charge * * * and to convince her to plead guilty to an offense of which they knew she was innocent." *Id*. at 135. Indeed, the *Turner* court explained that the complaint's allegations do not "concern the way in which the sheriff enforced a state or county law or policy established by another branch of one of those entities [but rather that the sheriff] abused the powers inherent in his role as chief policymaker for how the peace would be kept in Upton County." *Id*. Such a brazen abuse of authority as alleged in *Turner* is hardly an exercise of the state's police powers, but constitutes an *ultra vires* act regardless of whether the sheriff is a state or county policymaker.[17]

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[17] The Second Circuit criticized *Turner* on similar grounds. *See Roe v. City of Waterbury*, 542 F.3d 31, 40 (2d Cir. 2008). The Second Circuit's view is that "the sheriff in *Turner* was not a final policymaker—his conduct amounted only to tortious acts under the color of law." *Id*. A contrary conclusion, according to the Second Circuit, "cannot be reconciled with *Pembaur* and *Praprotnik's* prohibition against finding municipal liability based on *respondeat superior*." *Id*. at 41.

The Fifth Circuit recently held that the county sheriff was not a municipal policymaker under § 1983 in enforcing detention orders because the sheriff "is legally obligated to execute all lawful process and cannot release prisoners committed to jail by a magistrate's warrant." *ODonnel v. Harris Cnty., Tex.*, 892 F.3d 147, 156 (5th Cir. 2018). Post *McMillian*, the Fifth Circuit has neither reexamined *Turner* nor directly addressed the question of whether a Texas sheriff is a county policymaker in his law-enforcement capacities.[18] Although "[i]t may not be possible to draw an elegant line that will resolve this conundrum" in all circumstances, *Praprotnik*, 485 U.S. at 126-27, operating a multi-agency drug task force is a core state law enforcement function for the reasons explained above. Because Sheriff Nehls acted as a Texas policymaker, petitioner has no avenue of relief against respondent Fort Bend County.

## III. THE COURT OF APPEALS' DECISION THAT PETITIONER CALLED FOR AN ADVISORY OPINION IS CORRECT AND DOES NOT WARRANT REVIEW.

The Fifth Circuit's determination that petitioner's other challenges to Texas Health and Safety Code § 481.117(a) do not present a justiciable controversy is correct. Petitioner seeks this Court to review two additional constitutional questions regarding this Texas statute: (1) whether the Supremacy Clause causes the Federal Comprehensive Drug Abuse Prevention Act of

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[18] *See*, *e.g.*, *Robinson v. Hunt Cnty., Tex.*, 921 F.3d 440, 448 (5th Cir. 2019) (sheriff "final policymaker with regard to the HCSO [Hunt County Sheriff's Office] Facebook page") & *Brady v. Fort Bend Cnty., Tex.*, 145 F.3d 691, 702 (5th Cir. 1998) (sheriff county's final policymaker in filling available deputy positions).

1970[19] to preempt Texas Health and Safety Code § 481.117(a); and (2) whether § 481.117(a) violates the Commerce Clause. Pet. 14-19. Because petitioner failed to seek any sort of injunctive relief in either her actual or attempted pleadings, petitioner calls for this Court to issue an advisory opinion.[20]

"[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968). In addition to Article III's case or controversy requirements, "the rule against advisory opinions also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.'" *Id* at 96-97 (quoting *United States v. Fruehauf*, 365 U.S. 146, 147 (1961)). Having determined that respondents did not violate petitioner's Fourth Amendment rights, the lower courts properly refused to issue a determination as to Texas Health and Safety Code § 481.117(a)'s constitutionally because such a determination would not have "affect[ed] the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

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[19] Comprehensive Drug Abuse and Control Act of 1970, Pub. L. 91-513, tit. II, §§ 100, *et seq.*, 84 Stat. 1236, 1242-84 (1970) ("This title may be cited as the 'Controlled Substances Act.'")

[20] Not even petitioner's putative third amended complaint—properly rejected by the district court two-and-a-half years after the scheduling order's deadline for amendments—sought injunctive relief. *See* App. 6-8. Rather, petitioner sought monetary damages in the district court. App. 26.

Further, petitioner could not have raised a plausible claim for injunctive relief. Even if Texas Health and Safety Code § 481.117(a) was preempted by the federal legislation or violated the Commerce Clause, which it does not, *see infra* IV, an arrest six years ago "does nothing to establish a real and immediate threat" that such would be repeated. *City of L.A. v. Lyons*, 461 U.S. 95, 105 (1983). Petitioner's standing would rest "on the likelihood that [she] will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing [caused by respondents]." *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974). As in *Golden v. Zwickler*, petitioner's past prosecution under a statute she contends is unconstitutional is "hardly a substitute for evidence that [her further harm] is a prospect of 'immediacy and reality.'" 394 U.S. 103, 109 (1969).

It follows that petitioner would not be able to present a justiciable cause of action for injunctive relief. With petitioner's § 1983 claim disposed, no justiciable case or controversy remained. And the lower courts—mindful of the prohibition against advisory opinions—properly declined to proceed any further.

## IV. PETITIONER'S SUPREMACY AND COMMERCE CLAUSE CHALLENGES TO TEXAS HEALTH AND SAFETY CODE § 481.117(A) DO NOT WARRANT THIS COURT'S REVIEW.

Even if petitioner presented a justiciable case or controversy, her additional constitutional challenges do not warrant review by this Court. Section 1983 requires a plaintiff to "assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (emphasis in original). This Court's "implied right of action cases

should guide the determination of whether a statue confers rights enforceable under § 1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

A. Petitioner asserts that the Supremacy Clause renders Texas Health and Safety Code § 481.117(a) unconstitutional. Pet. 14-17. The Supremacy Clause does not create a cause of action. *Armstrong v. Exceptional Child Ctr., Inc*., 575 U.S. 320, 325 (2015). "'[T]hat clause is not a source of any federal rights'; it 'secure[s] federal rights by according them priority whenever they come in conflict with state law.'" *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989) (quoting *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 613 (1979)).

In enacting the Controlled Substances Act ("CSA"), Congress provided an enforcement mechanism by criminalizing possession of "a controlled substance unless such was obtained directly, or pursuant to a valid prescription order, from a practitioner, while acting in the course of his professional practice." CSA, Pub. L. 91-513, tit. II, § 44, 84 Stat. at 1264 (1970) (codified 21 U.S.C. § 844(a)). Congressional intent—as discerned from the statutory text and legislative history—is the only acceptable basis for implying a private right of action. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "Without [affirmative Congressional intent to allow a private remedy], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

Petitioner cites a federal criminal statutory provision regulating the same subject as the challenged Texas statute. Pet. 16 (quoting 21 U.S.C. § 844(a)). It is immediately clear that the lack of "rights-creating" language so critical to this Court's cases finding Congres-

sional intent to create a private remedy is completely absent from 21 U.S.C. § 844(a). *See Sandoval*, 532 U.S. at 288-89 (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n. 13 (1979)). Section 844(a) is a bare criminal statute without any indication of a civil-enforcement mechanism. *See Cort v. Ash*, 422 U.S. 66, 79-80 (1975) (no private right of action under 18 U.S.C. § 610, as such was "a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone"); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (no private right of action for aiding and abetting a § 10(b) violation of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b))).

Putting aside the fatal lack of a private cause of action for 21 U.S.C. § 844(a), Texas Health and Safety Code § 481.117(a) is not preempted. Congress enacted the CSA with a saving clause expressly preserving state law. CSA, Pub. L. 91-513, tit. II, § 708, 84 Stat. at 1284 (1970) (codified 21 U.S.C. § 903). "[A]bsent a positive conflict, *none* of the Act's provisions should be 'construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates * * * to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State.'" *Gonzales v. Oregon*, 546 U.S. 243, 270-71 (2006) (quoting 21 U.S.C. § 903) (emphasis added)).

It seems, therefore, that petitioner relies solely on impossibility-based conflict preemption. Pet. 15. This Court "will find preemption where it is impossible for a private party to comply with both state and federal law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Petitioner fails to demonstrate impossibility. *See Wyeth v. Levine*, 555 U.S. 555, 573

(2009) ("Impossibility pre-emption is a demanding defense.") Here, both the Texas and federal statutes allow possession of controlled substances with a prescription. Petitioner does not raise a substantial question of preemption warranting this Court's review.

B. Petitioner also asserts that Texas Health and Safety Code § 481.117(a) violates the Commerce Clause. Pet. 17-19. The Commerce Clause provides that "Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *S.–Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) (applying dormant Commerce Clause, which seems to be the basis of petitioner's challenge). Further, unlike the federal Controlled Substances Act, discussed *supra* IV.A, the dormant Commerce Clause confers "rights, privileges, or immunities" within the meaning of § 1983. *Dennis v. Higgins*, 498 U.S. 439, 446 (1991).

"To determine whether a law violates this so-called 'dormant' aspect of the Commerce Clause, [the Court] first asks whether it discriminates on its face against interstate commerce." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). "[D]iscrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id*.

Petitioner raises no substantial argument that out-of-state interests are disfavored over local interests in the application of the Texas statute. Instead, she argues that the Texas statute is so out of line with the

requirements of other states as to "place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory." Pet. 19 (quoting *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959)). But petitioner is not an out-of-state motor carrier nor even an out-of-state resident. The Commerce Clause's dormant aspect concerns itself with shifting the costs of regulation to nonresidents, because when "the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-68, n. 2 (1945).

Rather, Texas Health and Safety Code § 481.117(a) is a valid exercise of the State's police power. *See United Haulers Ass'n,* 550 U.S. at 347. Hypothetically transforming petitioner into a non-Texas resident, the Texas statute would survive the test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). "[W]hen a State legislates to safeguard the health and safety of its people * * * the crucial inquiry [is] whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental. *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978). Petitioner offers only conjectural burdens on interstate commerce. Pet. 18. Her Commerce Clause argument does not warrant review by this Court.[21]

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[21] Further, any monetary damages or attorney's fees caused by a state statute's invalidity under the Commerce Clause—rather than a municipal policy—could not be awarded against Fort Bend County. *See L.A. Cnty. v. Humphries*, 562 U.S. 29, 32-33, 38 (2010) (reversing attorney's fees award against county where state statute caused deprivation).

## V. THIS CASE WOULD BE AN EXCEEDINGLY POOR VEHICLE FOR CERTIORARI REVIEW.

Even if this Court were inclined to address the questions presented by this petition, this case would be an exceedingly poor vehicle for so doing.

As noted, the primary arguments are foreclosed for lack of justiciability. The lower courts did not address petitioner's arguments that Texas Health and Safety Code § 481.117(a) violated the Supremacy and Commerce Clauses holding that such sought an advisory opinion.

That problem should pose an insuperable barrier to the Court's consideration of the arguments. At a minimum, it would stymie this Court's efforts to reach the merits of petitioner's claims. The parties would be required to brief, and this Court would be required to consider, all of these extraneous threshold issues before even reaching the merits arguments.

Additionally, petitioner did not preserve arguments regarding respondents Fort Bend County, Dale, and Baker. Petitioner did not articulate a Fort Bend County policy or custom as the "moving force" behind the alleged Fourth Amendment violations in either her objections to the magistrate judge's report, R.1534-35, or in her principal brief to the Fifth Circuit, Appellant's Br. 36-37. Petitioner also did not object to the magistrate judge's finding that Task Force Director Dale or Task Force Sergeant Baker had no personal involvement in the seizure of petitioner's pills nor in her arrest. Application of the various forfeiture doctrines would present further extraneous threshold issues before this Court may reach the merits with respect to these respondents.

As noted, the lower courts did not address whether petitioner alleged the requisite pattern of deliberately indifferent instances of training and supervision deficiencies sufficient to trigger *Monell* liability. Further, the lower courts did not address if Fort Bend County is even a proper defendant for the customs and practices of the Task Force. The Fifth Circuit has never reexamined whether this Court's decision in *McMillian* compels a conclusion that a Texas sheriff is a state policymaker rather than a county policymaker in conducting the law enforcement activity of a multi-agency task force. Because the four police officers have qualified immunity for the reasons explained, *supra* II.A, whether petitioner sued the proper municipal entity for *Monell* liability—or even if one actually exists—becomes a central question in the event the Court grants certiorari.

In the face of these major vehicle problems, petitioner offers no convincing reason why the Court should grant certiorari. Petitioner formalistically recites that the question presented is exceedingly important, but her inability to point to any circuit splits belie that contention. Further, petitioner did not even attempt to plead her theories that the CSA preempts Texas Health and Safety Code § 481.117(a) and violates the Commerce Clause until after the magistrate judge recommended granting summary judgment against her. App. 23-26. If the issues regarding the Texas statute's constitutionality are as important as petitioner suggests, they are likely to arise again in a justiciable controversy in the future. And, if the Court wanted to examine those questions, the proper vehicle would be where the State of Texas is represented and the lower courts have developed a decisional record. That is not this case.

## CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

JUSTIN CARL PFEIFFER
*Counsel of Record*
KENNETH S. CANNATA
SAL P. LOPICCOLO, II
COUNTY ATTORNEY'S OFFICE
FORT BEND COUNTY
401 Jackson Street
Richmond, TX 77469
(281) 341-4555
justin.pfeiffer@
fortbendcountytx.gov

*Counsel for Respondents Fort Bend County, Josh Dale, and Bryan Baker*

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