NO. 2020-01

IN THE SUPREME COURT OF THE UNITED STATES

CAESAR HEALTH PLAN, INC.,
PETITIONER,

V.

LIVIA CLEOPATRA.
RESPONDENT.

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

BRIEF FOR THE PETITIONER

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Counsel of Record
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QUESTIONS PRESENTED FOR REVIEW

I. Is the proximate cause element of a civil RICO matter satisfied (and therefore, standing conferred) where Caesar Health Plan, as third-party payor, alleges that they would not have underwritten a prescription for Glukoriza as a treatment for Miasmic Syndrome if Galen had not misrepresented the safety risks to prescribers?

II. Does a state government official who orders the warrantless search of medical records from a health insurance company violate the Fourth Amendment, where such search is conducted pursuant to state statutory authority when the search did not allow for precompliance review before a neutral magistrate? If so, is the official protected from liability under 42 U.S.C. § 1983 by the doctrine of Qualified Immunity?

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STATEMENT OF FACTS

I. Factual Background

A. Julius Medical Center and Caesar Health Plan

Julius Medical Center ("Julius") is the single largest healthcare provider in Romulus. (R. at 4.) Caesar Health Plan ("Caesar") is a health insurance company that works closely with Julius through an integrated third-party payor ("TPP") system. *Id.* While Julius and Caesar work closely through this system, they are legally separate entities with separate leadership, including separate boards of directors. *Id.*

B. The Proposed Plan to Treat Miasmic Syndrome and the Plan's Active Players

In May 2019, Miasmic Syndrome plagued the state of Romulus. (R. at 3.) Livia Cleopatra ("Cleopatra"), both the sole proprietor of Galen Research—a pharmaceutical company—and the commissioner of the Romulus Board of Health ("Board"), announced Glukoriza as an effective treatment for Miasmic Syndrome. *Id.* Per the results of the trial spearheaded by Galen, Glukoriza, typically a drug used for cancer patients, allegedly cut Miasmic Syndrome's fatality rate by at least half and allowed for a quicker recovery time. *Id.* However, Glukoriza needed to be administered at a higher dosage than it normally does when being used as a cancer treatment to have this success in treating Miasmic Syndrome; a Miasmic Syndrome patient would need four doses of the drug, costing $ 10,000 per dose for treatment. *Id.* Before the trial, Glukoriza had limited commercial success as a cancer treatment. (R. at 1.)

Once the trial results were released, Galen ran a campaign advocating for Glukoriza, directing its efforts both to prescribing physicians and insurance companies. (R. at 4.) In November 2019, Julius fell victim to Galen's campaign for Glukoriza and agreed to make the drug its preferred treatment for Miasmic Syndrome because of the information provided by Galen's trial research. Caesar then agreed to cover Glukoriza for Julius's clients. (R. at 5.)

C. The Romulus Legislature's Response to Miasmic Syndrome and its Effects

Due to Glukoriza's alleged effects on Miasmic Syndrome, counterfeited drugs promising a cure for Miasmic Syndrome entered the market. *Id.* In response, the Romulus legislature then passed the Emergency Miasmic Syndrome Act (EMSA). (R. at 6.) EMSA authorizes the Board to inspect and collect records from any medical facility once granted an administrative subpoena, with Cleopatra possessing the unilateral authority to authorize EMSA subpoenas, to collect evidence that the facility was knowingly or negligently providing substandard care for Miasmic Syndrome. *Id.* The relevant statute is PCL § 18.8.891, which grants wide discretion to the Board, not only allowing for searches of medical facilities, but also allowing for the search of *any* other party that the Board believes has evidence. (R. at 10)

Pursuant to this widespread authority, in March 2020, the Board set out to search Julius and Caesar. *Id.* First, the Board went to Julius. However, Julius's attorneys quickly arrived and challenged the subpoenas as overbroad and refused to allow an inspection or turn over any documents pending a court hearing on the subpoena's validity. *Id.* The agents of the Board left Julius as a result. *Id.*

Leaving empty handed, the agents next arrived at Caesar. *Id.* Seemingly learning from their mistakes at Julius, the Board's agents threatened Caesar's employees with obstruction of justice charges if they did not immediately submit to the search and turn over all relevant documents and records. *Id.* Under this stress, the employees were unable to quickly tell which records were related to Miasmic Care, and as a result, the agents demanded that the employees turn over all data on all claims received from Julius since the start of the pandemic, including the underlying medical data for each insurance claim. (R. at 7.)

Cleopatra, as a result of this search, suspended Julius's operating license for providing substandard care to patients for Miasmic Syndrome in March 2020. *Id.* Yet, on the same day, a whistleblower came forward with documents showing severe discrepancies for the trials conducted by Galen. *Id.* The whistleblower report suggested that the researchers conducting the trial had falsified data and failed to properly follow up with patients to assess for delayed side effects. *Id.* The documents suggested that some patients had started to show signs of kidney damage but were discharged from the trial before this could be confirmed. *Id.* While there is no evidence to suggest that Cleopatra was aware of these falsifications, she is the sole proprietor of Galen. *Id.* Cleopatra eventually resigned from the Board. (R. at 8.)

Over 10,000 prescriptions for Glukoriza had been filled at Julius and covered and paid for by Caesar. *Id.* Given this quantity of prescriptions, researchers at Julius were able to establish, with reasonable certainty, two facts: (1) Glukoriza has little to no effect at treating Miasmic Syndrome, and (2), Glukoriza led to substantial side

effects—loss of kidney function—in those who had received the drug. (R. at 5.) The Board, without Cleopatra, then voted to restore Julius's operating licensing, upon proof that the patients' excess kidney morbidity rate could be accounted for by patients of Glukoriza, which Julius was no longer using as a form of treatment. *Id.* However, during the time of the suspension, 15,000 patents dropped their membership from both Julius and Caesar and enrolled with new providers. *Id.*

II. Procedural History

Caesar filed a civil action against Cleopatra on May 1, 2020, in the federal district court for the District of Romulus. (R. at 8) Because Galen Research is a sole proprietorship, its owner Cleopatra must personally answer to any lawsuit. *Id.*

Caesar alleged two cases of action: first, a civil RICO action under 18 U.S.C. § 1964(c) against Cleopatra, in her capacity as sole proprietor of Galen, alleging that Galen induced Caesar to underwrite Glukoriza as a treatment for Miasmic Syndrome by means of fraud, and absent the fraud, no payments for the drug ever would have been made, seeking damages in the amount of all payments made by Caesar to Galen for Glukoriza as a Miasmic Syndrome treatment; and second, a 42 U.S.C. § 1983 civil rights claim against Cleopatra, in her capacity as Commissioner, alleging she authorized an unconstitutional search of their premises, prohibited under the Fourth and Fourteenth amendments, seeking damages for reputational injury and lost premiums from members who had left the Julius-Caesar system following the suspension of Julius's license. *Id.*

In response, Cleopatra filed a 12(b)(6) motion to dismiss both counts based on: first, Caesar not having standing to allege a RICO violation on the mere basis of its having reimbursed prescriptions for drugs manufactured by Galen; and second, the EMSA subpoena and its method of execution were not in violation of any cognizable constitutional right, even if all facts alleged by Caesar were proven. (R. at 9.) Moreover, Cleopatra alleges that even if some constitutional rights were violated, the suit is barred under the doctrine of Qualified Immunity because such rights were not clearly established at the time of the alleged injury. *Id.*

The District Court denied the motion in its entirety on May 30, 2020. *Id.* On June 11, Cleopatra appealed that denial to the 14th Circuit Court of Appeals. *Id.* On July 3, the 14th Circuit reversed the district court, and ordered the motion granted in its entirety. *Id.* Caesar petitioned the United States Supreme Court for a writ of certiorari on July 17th, and petition was granted on September 14, 2020. *Id.*

This Court should reverse the Fourteenth Circuit because I. Caesar meets the proximate cause standing requirement of a Civil RICO action; II. Cleopatra authorized a search that violated the Fourth Amendment; and, III. Cleopatra is not shielded by the doctrine of Qualified Immunity.

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SUMMARY OF THE ARGUMENT

I.

Accountability is at the core of American society. If the law does not set out to hold both individuals and organizations responsible for their wrongdoings, then one of the foundational principles of the American legal system would crumble. Today's case boils down to Cleopatra and Galen trying to evade accountability.

Galen fraudulently misrepresented Glukoriza's safety and efficacy for the treatment of Miasmic Syndrome to the medical community. As a result, Julius provided Glukoriza to its patients, and Caesar covered the entire cost of the treatment. Julius had treated 10,000 patients and Caesar had spent $400,000,000 in underwriting costs of the treatment before the dangers of Glukoriza became known—the very same dangers Galen knew about from the start of its trials.

Galen's fraudulent misrepresentations qualify as a RICO violation. Caesar can seek redress under 19 U.S.C. § 1964(c) because Caesar meets the proximate cause standing requirements for a civil RICO action. Caesar's financial loss was directly caused by Galen's fraudulent misrepresentations concerning Glukoriza. There are no separate or intervening causes that sever the chain of causation between Caesar's financial injury and Galen's misrepresentations. While the independent judgment of the doctors employed by Julius can be considered an intervening cause, this Court ought to adopt the approach of the First, Third, and Ninth Circuits and hold that such judgments do not sever the chain of causation. To say the doctor's independent

judgment in this case is an intervening cause, would allow Galen to use victims, the prescribing doctors, of its fraud as a means to escape accountability.

While Galen ought to be held accountable for paying back the losses incurred by Caesar, this case is also about giving Caesar the opportunity to hold an opportunist accountable. By granting Caesar standing within this civil RICO action, this Court would send the message to both opportunistic pharmaceutical companies and average Americans alike: accountability is still a core principle honored in the American legal system.

II.

Similarly, Cleopatra seeks to reduce the Fourth Amendment "to a form of words" and does not want to be held accountable for doing so. This case rests upon the understanding that Cleopatra disregarded the constitutional requirements of the Fourth Amendment and now claims that her incompetent actions should be shielded by a doctrine designed to protect reasonable and responsible government agents.

As director of the Board, Cleopatra authorized unconstitutional subpoenas to search Julius, and with this authorization, the board's agents descended to conduct their search. When the Board's search of Julius was of no avail, the agents then turned to Caesar. Faced with the threat of compliance or jail, and without an attorney present to advise Caesar's employees, the agents searched *all* of Caesar's records—violating not only Caesar's right to privacy, but the privacy of all the clients whose healthcare records were stored at Caesar.

The search conducted by the Board's agents violated the Fourth Amendment because the search was without precompliance review. Moreover, Caesar—a health insurance company—is not a member of a pervasively regulated industry that would exclude the necessity of compliance with some of the basic warrant requirements. Grasping at straws, Respondent is left asking this Court to apply the *Biswell* Balancing Test, inapplicable to Caesar as it is neither a pervasively regulated industry nor an entity that fits any of the pertinent factors of the test—as there is no urgent federal interest that would be frustrated by a warrant, and there is no need for unannounced inspections to ensure compliance with PCL § 18.8.891.

III.

Cleopatra cannot be shielded from her actions by the doctrine of Qualified Immunity. Her actions were plainly unconstitutional violations of the Fourth Amendment. Even in light of the novel context surrounding the search, the principles dictating that this type of search was unlawful were clearly set out in 2015 in *City of Los Angeles, Calif. v. Patel*, and moreover, the underlying principles that the officers should have complied with for warrantless searches has been established for decades. Cleopatra's violations of such settled law indicate that either she knowingly disregarded established Fourth Amendment principles or that she is plainly incompetent—both of which deny Cleopatra the opportunity to claim Qualified Immunity. By holding that Cleopatra violated the Fourth Amendment, and that she is not protected by Qualified Immunity, this Court ensures that the Fourth

Amendment is not reduced to "a form of words," and instead remains a necessary protection against unlawful government intrusion.

This Court should reverse the Fourteenth Circuit because I. Caesar meets the proximate cause standing requirements of a Civil RICO action; II. Cleopatra authorized a search that violated the Fourth Amendment; and, III. Cleopatra is not shielded by the doctrine of Qualified Immunity.

ARGUMENT

I. CAESAR HEALTH PLAN MEETS THE PROXIMATE CAUSE STANDING REQUIREMENT OF 18 § U.S.C 1964(C) CIVIL RICO ACTION

The Racketeer Influenced and Corrupt Organizations Act (RICO), passed fifty years ago, was originally intended to combat organized crime in the United States. *Russello v. United States*, 464 U.S. 16, 26—27 (1983). Its usage has been expanded beyond the scope of organized crime because of its civil remedy provision, which allows injured plaintiffs to recover for injuries to their business or property caused by a defendant's violation of RICO. 18 U.S.C. § 1964.

The civil remedy provision is understood to require a plaintiff to (1) show that a plaintiff has suffered injury to his or her business or property and (2) that the injury suffered by the plaintiff was proximately caused by the RICO violation. *See Holmes v. Sec. Inv,'r Prot. Corp.*, 503 U.S. 258, 268—69 (1992) (establishing the proximate cause prong of the analysis); *Sedima v. Imrex Co.*, 473 U.S. 479, 496 (1985) (establishing the business injury prong of the analysis). Proximate cause is a foundational requirement for standing within a civil RICO action. *See Holmes*, 503 U.S., at 268—69). The Supreme Court noted that proximate cause "reflects 'ideas of what justice demands, or of what is administratively possible and convenient"" *Holmes*, 503 U.S. at 268 (quoting W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS § 41, at 264 (5th ed. 1984)).

There are two requirements to show proximate causation within the civil RICO context: (1) that the RICO violation directly caused the injuries suffered by the plaintiff and (2) that the plaintiff satisfy the functional factors for including

proximate cause within a civil RICO claim. *See Id.* at 268—70. It is undisputed that Caesar has suffered an injury to their business or property, but more contentious is whether their injury was proximately caused by Cleopatra and Galen's RICO violation.

Caesar has standing because because (A) Galen's RICO violation directly caused Caesar's injury and there are no intervening causes or more directly injured plaintiffs to sever causation and (B) Caesar satisfies the functional factors of *Holmes* as damages are easily calculable, not challenging to apportion across plaintiffs, and Caesar is the most direct victim to hold Galen and Cleopatra accountable.

A. Caesar's Injury was Directly Caused by Galen's Fraduluent Misrepresenations about Glukoriza's Efficacy as an Off-Label Treatment for Miasmic Syndrome.

Within a Civil RICO action, proximate cause is measured by direct causation. *Id.* at 268. An injury that "is 'too remote,' 'purely contingent,' or 'indirect' is insufficient." *Hemi Grp., LLC v. City of N.Y.,* 559 U.S. 1, 3 (2010). At the inception of any discussion concerning proximate cause within a civil RICO action, it is important to specify the conduct constituting the RICO violation and the resulting injury suffered by the plaintiff. *Saint Luke's Health Network, Inc. v. Lancaster Gen. Hosp.,* 967 F.3d 295, 301 (3d Cir. 2020).

Galen and Cleopatra's conduct, publishing a fraudulent study and actively misrepresenting the efficacy of Glukoriza as an off-label treatment for Miasmic Syndrome, qualifies as a RICO violation. *See* 18 U.S.C. § 1341; 18 U.S.C. § 1962(c). Caesar relied on these generalized fraudulent misrepresentations and decided to

underwrite the entire cost of Julius's Glukoriza prescriptions—a loss of $400,000,000—constituting a business injury. Caesar's injury is directly caused by Galen's misrepresentations because (1) Caesar's reliance is an example of the third-party reliance authorized in *Bridge v. Phoenix Bond & Indemnity Co.*, (2) there are no separate or intervening causes that sever the chain of causation between Caesar's injury and Galen's misrepresentation, and (3) Caesar is the most direct victim within the chain of causation.

1. Caesar's reliance is an example of third party payor reliance as authorized in *Bridge v. Phoenix Bond & Indemnity Co.*

A relationship of direct causation can be shown within the civil RICO context through both first-party and third-party reliance. *See Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 656 (2008) (declaring that a court cannot require a plaintiff to show first-party reliance for standing within a civil RICO action because third party reliance would also satisfy the proximate cause requirement within the remedial scheme of RICO). In *Bridge*, the plaintiffs were participants at a country tax lien auction. *Id.* at 643. The county had enacted a rule to ensure a fair distribution of tax liens; an organization that participated in the auction as a bidder had to do so under its own name and not use its agents or employees to submit concurrent bids on the organization's behalf. *Id.* The plaintiffs alleged that the defendants had violated this rule, and as a result of the violation, committed a RICO violation by submitting the false attestations of compliance. *Id.* at 643—44.

The plaintiff's theory of injury rested upon the notion that the defendant's RICO violation allowed the defendant to receive a disproportionate share of the tax

liens from the county auction, and therefore, the plaintiffs were deprived of their ability to obtain their proper share. *Id.* at 644. The Court accepted this theory of direct causation, even though it was built upon third party reliance; the defendant's false attestations of compliance with the county rule were made to the county, and not to any of the plaintiffs specifically. *Id.* at 661. The Court reasoned that proximate cause is flexible and does not require the application of a binary rule in every case. *Id.* at 654. The Court emphasized that what mattered was that the plaintiff had suffered an injury that was directly caused by the defendant's RICO violation, not whether the defendant had committed the fraud directly aimed at the plaintiff. *Id.* at 658.

Here, the third-party reliance of Caesar on Galen's fraud is analogous to *Bridge*. Galen and Cleopatra ran a clinical trial for the off-label usage of Glukoriza, and fraudulently misrepresented the results to the medical community. (R. at 6.) After completing this trial, Galen ran marketing campaigns based on this fraudulent information and ended up convincing Julius and its doctors to prescribe Glukoriza for off-label treatment of Miasmic Syndrome and to have Caesar underwrite the *entirety* of the prescription cost. (R. at 3.) Similar to *Bridge*, the false assertions concerning Glukoriza were not made directly to Caesar (the plaintiff), but rather, to the medical community at large. As such, there exists proximate cause between Galen's RICO violation and Caesar's injuries.

2. There are no separate or intervening causes that sever the chain of causation between Caesar's injury and Galen's misrepresentations.

When determining whether there is direct causation for a proximate cause analysis, it is important to consider if direct causation has been severed by any separate or intervening causes. *See Hemi Grp.*, 559 U.S. at 15 (emphasizing that a theory of causation that relied on the independent actions of too many parties severed the chain of causation). If the plaintiff's injury is from a cause that is distinct or separate from the defendant's RICO violation, then the chain of causation is severed. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006).

For example, in *Anza*, the Supreme Court rejected the argument that a competitor steel company defrauding the State of New York was a direct cause of the plaintiff steel company's loss of business. 547 U.S. at 458. The Court reasoned that "[b]usinesses lose and gain customers for many reasons" and that the loss of business could have been attributable to a plethora of other causes, distinct from their competitor's RICO violation, that intervene and sever causation. *Id.* at 459.

Here, unlike in *Anza*, there is no distinct cause to sever the chain of causation. Caesar's reliance on the fraudulent study resulted in a drastic injury, underwriting the cost of treatment of Glukoriza. If Galen had not fraudulently misrepresented the results of their study within a global pandemic, there is nothing to indicate that Caesar would have taken such a risk on underwriting the entire cost of treatment. Galen's fraud is the cause of Caesar's injury.

However, it may be argued that Caesar brought on the injuries the company suffered simply through poor business practices, and such practices act as a distinct cause severing causation. Specifically, Caesar had chosen to utilize Julius as a major

provider within their client base, and through this choice, suffered a loss by choosing the wrong medical center to partner with. However, to allow Galen to claim that Caesar's business practices are a distinct cause that severs the chain of causation between Galen's fraud and Caesar's injury would odiously allow them to hide from the problem that Galen, itself and itself alone, created.

Prior to Julius's decision to go forward with the Galen prescription regimen, with prescriptions fully underwritten by Caesar, Julius had been a wholly competent medical center. The only reason Julius fell out of compliance with the Board is because the medical center followed and implemented the off-label prescription fraudulently advocated for by Galen.

i. The Court should adopt the approach taken by the First, Third, and Ninth Circuits when considering whether a doctor's independent judgment is an intervening cause within a third party payor's civil RICO action.

Within the specific context of TPP's bringing a civil action against a pharmaceutical company, there is a circuit split over whether the independent judgment of a doctor prescribing a drug is flagged as a potential intervening factor.

Three Circuits, the First, Third and Ninth, have held that a doctor's independent judgment is not an intervening cause. *See Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co.*, 943 F.3d 1243, 1257 (9th Circuit 2019) (holding that a physician's independent judgment does not sever the chain of causation between a pharmaceutical company's RICO violation and a TPP's injury); *In re Avandia Mktg.*, 804 F.3d 633, 645. (3d Cir. 2015) (detailing that pharmaceuticals

know that doctors and patients are not generally paying for the cost of a prescription, a TPP is, and therefore a doctor's independent judgment does not sever causation); *Kaiser Found Health Plan, Inc. v. Pfizer, Inc.*, 712 F.3d 21, 38—9 (1st Cir. 2013) (emphasizing that because pharmaceuticals understand how prescriptions are financed, a doctor's independent judgment is not an intervening cause).

Two Circuits, the Second and Seventh, have found that the doctor's independent judgment is an intervening cause. *See Sidney Hillman Health Ctr. of Rochester v. Abbott Labs.*, 873 F.3d 574, 576 (7th Cir. 2017) (stating that a doctor's independent judgment cuts off chain of causation between a third-party payor, however noting that a patient is not injured financially if they pay no copay on their prescription); *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121,135 (2d Cir. 2010) (outlining how a doctor's independent judgment severs the chain of causation because doctors presumably consider more than a pharmaceutical's published information when writing a prescription).

This Court should adopt the reasoning of the First, Third, and Ninth Circuits that a doctor's independent judgment is not an intervening cause. This Court should follow these circuits because the First, Third, and Ninth Circuits, unlike the Second and Seventh Circuits, consider the nature of how prescriptions are financed. Such considerations are always relevant and important, but most especially in a pandemic.

Specifically, the independent judgment of a doctor requires the consideration of cost—how much a patient pays for the medical care that he or she is receiving. As emphasized by all three circuits, pharmaceutical companies understand how

prescriptions are financed; an insurer covers the cost of a prescription, not the doctor or the patient. A doctor, when prescribing a medication, has an ethical duty to ensure access to healthcare regardless of economic means. *See* A Code of Medical Ethics, Op. 11. 1. 4 (Am. Med. Ass'n 2017). Therefore, when doctors prescribe a drug, their independent judgment requires them to not just consider the drug's efficacy, but also its cost to the patient. To say the doctor's independent judgment in this case is an intervening cause would allow Galen to use the victims of its fraud, the prescribing doctors, as a means to escape accountability.

ii. The Court should reject the concerns of the Second and Ninth Circuits over the off-label usage as an intervening cause within a third-party payor's civil RICO action.

Within the specific context of TPP's bringing a civil action against a pharmaceutical company, there are concerns in lower courts over whether the off-label usage of a drug is an intervening factor. The concern is that if a drug is not being used for its intended purposes, and instead being used in a novel and unintended way, it is unfair to hold a pharmaceutical company liable. *See Painters*, 943 F.3d at 1258 (emphasizing that it is harder to show proximate cause for a drug being used off-label as opposed to on-label); *Abbott Labs.,* 873 F.3d at 576—77 (describing how off-label usages acts as an independent factor alongside a doctor's independent judgment that severs the chain of causation); *UFCW Local 1776,* 620 F.3d at 135 (detailing how off-label usage is one of the many potential intervening causes that could sever the chain of causation).

Here, the concerns raised by the lower courts about off-label usage are inapplicable. Galen fraudulently misrepresented Glukoriza as an effective off-label treatment for Miasmic Syndrome in the midst of a global pandemic. Meaning, Glukoriza's off-label usage is intrinsic to Galen's fraud. In *Painters*, *Abbott Labs*, and *UFCW Local*, the off-label usage was not intrinsic to the fraud, as it is here. Moreover, giving Caesar the opportunity to hold Galen accountable for its fraudulent misrepresentations about Glukoriza's off-label safety and efficacy would serve the important purpose of deterring other pharmaceutical companies from partaking in similar dangerous, opportunistic behavior. *See Kaiser,* 712 F.3d at 39—40 (emphasizing that allowing for well-financed TPPs to have standing in a civil RICO action would have a powerful deterrent effect on pharmaceuticals acting fraudulently). As such, off-label usage should not be considered an intervening cause.

3. Caesar is the most direct victim in the chain of causation when considering the finacial injury suffered.

Direct causation can also be severed by the existence of a more direct victim of a RICO violation; the Court feels that the most directly injured victim is in the best place to sue and allowing a more remotely injured victim to bring suit relies on a chain of causation that is too attenuated. *See Anza*, 547 U.S. at 458 (emphasizing that the most direct victim of the RICO violation, the State of New York, was in a better position to sue than a competitor steel company who was tangentially injured by the defendant's RICO violation).

An example of where a more direct victim severed causation is *Anza*. There, the state of New York was the most direct victim of the fraud, as the state suffered

great financial injury. *Id.* Because of this great financial injury, the Court cut off causation to other remote victims. *Id.* In contrast, in *Bridge* the more direct victim—the county who received false attestations—suffered no financial injury from the RICO violation, and therefore, causation was not severed. *Bridge*, 553 U.S. 658—59. Meaning, the party who suffers financial injury is an important consideration for this Court.

Here, Caesar is the most direct victim. There is not a more direct victim to Galen's fraud as it relates to the sunk costs of paying for Glukoriza. Moreover, Galen's fraud did not cause a financial injury to any of the other victims in the same ways Caesar suffered financial injury. Caesar underwrote the cost of prescription *wholly*, and therefore suffered the *entire* financial cost of this injury.

B. Caesar Meets the Three Functional Factors Outlined in *Holmes*.

Caesar's standing is not only satisfied under the direct causation requirement but is also satisfied under the three functional factors laid out in *Holmes*. The *Holmes* court emphasized that direct causation was the test for proximate cause, but also buttressed the direct causation test by announcing three practical factors that justified direct causation. 503 U.S. at 269. There are three factors which help the Court evaluate whether proximate cause exists as a practical matter, and not merely in the abstract. *Kaiser*, 712 F.3d at 35—36. These functional factors include (1) the difficulty in ascertaining the amount of the victim's damages that resulted from the RICO violation, (2) the challenge of apportioning damages among various levels of removed plaintiffs and potential duplicative recovery, and (3) whether a more directly

injured victim can be counted on to hold the defendant accountable. *Holmes*, 503 U.S. at 269. Caesar satisfies these factors because (1) its damages are not difficult to calculate, (2) it is not a challenge to apportion damages across the potential victims of Galen's fraud, and (3) there is not a more directly injured victim than Caesar to hold Galen accountable.

1. It is not difficult to calculate Caesar's damages.

The first practical factor from *Holmes* is the difficulty in ascertaining the amount of the victims' damages that resulted from the RICO violation. *Id.* If the damages appear to be too speculative, the court views the injury as too far removed to be directly caused from the RICO violation. *Id.*

An example of damages that were too speculative comes from *Anza*. Due to the litany of potential factors that could impact damage calculations, beyond the RICO violation, the Court did not feel comfortable in ascertaining and calculating how much loss was attributable to the RICO violation. *Id.*

Anza contrasts with *Bridge*. In *Bridge*, the Court did not find damages to be speculative, as the alleged injury was the plaintiffs lost proportional share of auctioned tax lien's; the damages were calculable and attributable to the RICO violation. *Bridge*, 553 U.S. at 644.

Here, Caesar's damages are calculable and attributable to Galen's RICO violation. Caesar's injury is the sunk cost of underwriting the treatment of Miasmic Syndrome with Glukoriza at Julius. The cost of underwriting a single treatment is calculated by multiplying the cost per dose against Galen's recommended dosage

regime, which totals to $40,000 per treatment of individual patients. (R. at 2.) Julius treated 10,000 patients for Miasmic Syndrome with Glukoriza before stopping this treatment regimen. (R. at 3.) At $40,000 per patient across 10,000 patients Caesar lost $400,000,000 in underwriting costs. The calculation of what damages to award is straightforward. Furthermore, the damages are attributable to Galen. Caesar's decision to underwrite the costs for Glukoriza was built on the misrepresentations of Galen that Glukoriza was an effective treatment. Caesar underwrote based on Galen's misrepresentations, and suffered an enormous, calculable, and attributable cost.

2. It is not a challenge to apportion damages across the potential victims and prevent duplicative recovery.

The second functional factor from *Holmes* is the challenge of apportioning damages across several plaintiffs and the risk of duplicative recovery. 503 U.S. at 269. In this case, the potential victims have all suffered unique and distinct injuries. Meaning there are no challenges to apportioning damages and duplicative recovery is a nonissue.

Anza provides an example of when there was a challenge to apportion damages and duplicative recovery was an issue. Under the plaintiff's theory of causation, there was nothing stopping other competitor companies from suit; the theory of lost sales was applicable to any of the defendant steel companies competitors. *Anza*, 547 U.S. at 459. If multiple competitors chose to bring the same, or similar RICO actions against the defendant steel company, it would have been a major challenge to apportion damages across all of the potential plaintiffs and just as hard to prevent a

duplicative recovery. *Id.* Apportioning damages and duplicative recovery becomes an issue if the claims arise from the same injury. *Id.*

Here, the challenge of apportioning damages and preventing duplicative recovery is small, and ultimately, a nonissue. As stated above, the damages that would be rewarded to Caesar are for the cost of underwriting the use of Glukoriza at Julius. These damages are calculable and discrete. The cost for underwriting was borne by Caesar, and Caesar alone, so other plaintiffs would not be entitled to make claims for this particular injury. Therefore, it is not a challenge to prevent duplicative recovery for this injury, and it is easy to apportion these damages to Caesar.

The Respondents may make the that there is still a challenge in apportioning damages and preventing duplicative recovery as between Julius and Caesar. As a closely coordinated general partnership, both entities could have similar claims. Namely, they both lost a large portion of their client base due to Galen's RICO violation. However, this is only a possibility and not an actuality. Caesar's direct injury is the cost of underwriting Glukoriza, while Julius's direct injury is the suspension of its medical license. Their injuries are wholly distinct, making the apportionment of damages distinct.

Similarly, it is not difficult to apportion damages across the injured patients and Caesar so that duplicative recovery is prevented because of the different injuries suffered. Here, the patients suffered a physical injury, but not a financial one. As noted above, *supra* at 11, a patient who does not pay a copay for their prescription suffers no financial injury. *Abbott Labs.*, 873 F.3d at 576. Because Caesar's injuries

are distinct from their patients, it is not difficult to apportion damages across the two victims and prevent a duplicative recovery.

3. There is not a more directly injured victim than Caesar to hold Galen accountable.

The third functional factor outlined in *Holmes* is determining whether a more directly harmed victim is able to hold the defendant accountable. 503 U.S. at 269—70. Caesar is the most directly injured party, and other potential plaintiffs are not in a better position to hold Caesar accountable. If the primarily injured party can sue to hold the defendant accountable, the Court wants that party to sue. *Hemi Grp.*, LLC, 599 U.S. at 10.

As discussed above, the injury suffered by Caesar was the lost money spent funding Glukoriza. Caesar paid this cost alone, and therefore is the most directly injured in this respect. Here, there is not another potential plaintiff who was more directly affected by Galen's RICO violation to hold the defendant accountable.

Respondents may raise the argument that while Caesar did underwrite the total cost of treatment for Glukoriza, the patients, who pay for insurance, are a more direct financial victim. A patient who utilizes Caesar's insurance pays a premium for Caesar to insure them. In an indirect way, patients are the ones who end up having to pay for Glukoriza. However, this argument is flawed in a major way. The patients' financial loss is an indirect injury that would not satisfy the first two *Holmes* functional factors. *Holmes*, 503 U.S. at 269. It is impossible to address how much of an individual patient's premium went towards their Miasmic Syndrome Treatment because the cost was not paid directly out of their own pocket. The ability to ascertain

the correct amount of damages is highly speculative as it is impossible to tell how much of another's patient's premium may have ended up going into the insurance pool to pay for Glukoriza. It is incredibly difficult to apportion damages across all of these potential plaintiffs, and the chance for duplicative recovery is rife. While an insured patient suffers some financial injury, the patient does not suffer a financial injury that would satisfy the relevant *Holmes* factors, and it is not one that is more direct than the one suffered by Caesar for underwriting the cost of Glukoriza treatment. As such, there is no more directly injured victim than Caesar to hold Galen accountable.

II. THE SEARCH CONDUCTED BY THE AGENTS FROM THE BOARD OF HEALTH VIOLATED THE FOURTH AMENDMENT.

The Fourth Amendment generally requires a warrant to address the "concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). The warrant requirement places a neutral magistrate between the citizen and the law enforcement officer who has an interest in stopping crime. *Johnson v. United States*, 333 U.S. 10, 14 (1948). By placing a neutral magistrate between the citizen and law enforcement, the warrant requirement's intent is to remove the biased officer from acting in the heat of the moment to stop crime, while simultaneously protecting privacy interests. *See Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (explaining that the Fourth Amendment seeks to safeguard against "exploratory rummaging in [a] person's belongings"). Because the warrant requirement sets out to protect privacy interests, it stipulates that a warrant must describe with particularity "the place to be searched,

and the persons or things to be seized." *Id.* Such particularity limits who and what the officers can search, thereby protecting privacy interests.

A. The Basic Purposes of the Warrant Requirement Were Not Satisfied when the Agents from the Board of Health Performed a Search of Caesar Health Plan Pursuant to Statutory Authority.

The Supreme Court has recognized that the basic purposes of the warrant requirement can be satisfied through other means in a "closely guarded" set of circumstances. *Chandler v. Miller,* 520 U.S. 305, 309 (1997). One of these closely guarded circumstances, and most relevant here, is the administrative search of commercial property made pursuant to statutory authority. *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 420 (2015). Unlike searches of private homes, statutory authority permitting warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment. *See, e.g., United States v. Biswell*, 406 U.S. 311, 312 (1972). The greater latitude to conduct warrantless searches of commercial property reflects the notion that commercial property owners have different expectations of privacy than individuals in their homes. Due to these differences, privacy interests in commercial spaces may be adequately protected despite administrative schemes authorizing warrantless searches.

1. The search of Caesar Health Plan is unconstituional because the Fourth Amendment requires an opportunity for precompliance judicial review before the government can conduct a search pursuant to statutory authority and such review was not given.

Except in certain well-defined circumstances, a search is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.

See, *e.g., Payton v. New York*, 445 U.S. 573, 586 (1980). The Court has recognized exceptions to this rule when, first, 'special needs, beyond the normal need for law enforcement make the warrant and probable-cause requirement impracticable.'" *See, e.g., Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 603 (holding the Government's interest in regulating the conduct of railroad employees to ensure safety is a special need because the employees were engaged in "safety-sensitive tasks" and great injury could ensue). Second, even if there are special needs present in a particular case, a search must be distinguishable from the general interest in crime control. Third, the Court has held that absent consent, exigent circumstances, or the like, for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker. *Patel*, 576 U.S. at 420. Precompliance review ensures that searches made pursuant to such "special needs" exceptions "are not the random or arbitrary acts of government agents." *Skinner*, 489 U.S. at 622.

The magistrate fulfills this role because, first, the magistrate must confirm that the individual or individuals conducting the search acted within the statutory limits. *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 538 (1967). Second, the magistrate ensures that the search complies with the Fourth Amendment. *Id.* at 538—39. To ensure Fourth Amendment compliance, the search must be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome" and protect privacy interests. *Id.* at 544.

For example, in *Patel*, the Court prohibited warrantless on-the-spot searches of hotel registers, because "a hotel owner who refuses to give an officer access to his or her registry can be arrested on the spot. The Court has held that business owners cannot reasonably be put to this kind of choice." *Patel*, 576 U.S. 409 at 421 (citing *Camara*, 387 U.S. at 533 ((holding that "broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty")). With the choice being between having a search and facing criminal charges, "[t]he practical effect of this system is to leave the occupant subject to the discretion of the official in the field," which is exactly what precompliance review sets out to protect against. *Camara*, 387 U.S. at 532. Without precompliance review, a subpoena for a search creates a risk that it will exceed the statutory limits and lead to harassment by the official in the field of those subject to the search. *Id.* This creates concern on two levels, one a practical effect and the other, a deeper legal effect—officers will harass individuals while simultaneously infringing upon the deeply engrained right to privacy that the Constitution vigorously sets out to protect.

Unlike in *Patel*, where the Court found the search unconstitutional, in *Donovan v. Dewey*, the Court approved a warrantless inspection scheme under the Federal Mine Safety and Health Act. 452 U.S. 594, 603—4 (1981). Pursuant to this statutory authority, officials were required to inspect all underground mines at least four times per year and mandated officials to follow-up if the mines were in violation. *Id.*; 30 C.F.R. §§ 100.1—100.5. The statute clearly delineated how often searches were

to occur and what was subject to the search when the officials arrived, leaving little opportunity for harassment or privacy violations.

Here, we concede that there is a special need in this case and that PCL § 18.8.891 is distinguishable from general crime control. The Board certainly has a special need in identifying and stopping the counterfeit production of Glukoriza in the medical market, and the creation of PCL § 18.8.891 was created for that reason, attempting to ensure the health and safety of the Romulus population and not for general crime control.

However, the Board failed to comply with the third factor in determining whether a search made pursuant to statutory authority is constitutional, that is precompliance review, as there was no such review in this case, allowing for a search that was effectively limitless in scope. The Board's agents descended upon Caesar the morning of March 19, 2020, demanding immediate delivery of a massive cache of data and threatening jail to anyone who failed to comply. (R. at 1.) Without the precompliance review that was required, the employees at Caesar were harassed into complying with the search. (R. at 5.)

PCL § 18.8.891(b) states that the subpoena may require those individuals subject to the search to hand over any records or documents to the Board, as its discretion may require. (R. at 8.) The statute puts no limits on the extent of the search or how often such searches can occur. The agents of the Board can simply arrive at *any* location subject to the statute *whenever* they want and take *whatever* documents the agents feel are necessary at the time of the search. As stated in *Camara*,

precompliance review by a neutral magistrate helps to ensure a search conducted pursuant to statutory authority is sufficiently limited in scope. The Board's agent directly violated this mandate and performed a search that exceeded the bounds of reasonableness by raiding Caesar and taking not just files related to the treatment of Miasmic Syndrome, but all the documents the employees could find. The search conducted by the Board did not even *pretend* to comply with the general particularity requirements of searches conducted pursuant to the Fourth Amendment, or the limited scope requirements of searches conducted pursuant to statutory authority.

Moreover, there is no pattern or schedule for the searches like in *Donovan*. In fact, PCL § 18.8.891(b) is in direct opposition to the language in *Donovan* as the statute leaves the choice of what to search and who to search to the agents in the field. The Board is also authorized to subpoena any party that the Board believes has evidence about a licensed medical facility that is producing counterfeit drugs for the treatment of Miasmic Syndrome. (R. at 9.) PCL § 18.8.891 not only fails to limit officers' discretion, but rather, encourages such discretion by allowing for searches that go beyond authorization and for granting power to the Board's agents to search parties whom the officers simply believe may have evidence.

Caesar's staff first resisted the search. (R. at 6) However, with the threat of criminal charges looming over their heads, the staff ultimately complied. *Id.* As articulated in *Patel*, with the choice being between having a search or facing criminal charges, the staff was ultimately at the mercy of the Board's will. When trying to comply with the Board, Caesar's employees were unable to quickly tell which records

were pertinent to Miasmic Syndrome treatment. (R. at 5.) Because the staff was not moving quickly enough for the Board, the Board required Caesar to turn over data on *all* claims received from Julius since the start of the pandemic, including the medical data underlying each claim. *Id.* The search in this case allowed the Board to act in the heat of the moment, completely disregarding any privacy interests that Caesar or its clients have, while rummaging through the documents of the establishment regardless of whether those documents were pertinent to the issue at hand. Julius is the largest healthcare provider in Romulus, and with Caesar being the insurance company that works closest with Julius, medical records and medical data for countless Romulus citizens were divulged. Such behavior by the Board could have and should have been prevented through precompliance review. As such, this Court should find the search unconstitutional.

B. The Pervasively Regulated Industries Exception is Inapplicable.

The pervasively regulated industry exception to the Fourth Amendment permits warrantless administrative inspections of businesses operating in certain industries subject to regulation. *New York v. Burger*, 482 U.S. 691 (1987). The *Burger* rule states that when a particular industry is pervasively regulated, "where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment." *Id.* at 702. But where a statute authorizing warrantless searches has a reach so broad that it may allow warrantless searches against nearly

anyone, rather than "only to a single industry, where regulations [are] . . . already . . . pervasive," the same logic does not apply. *See Mashall v. Barlow's Inc.*, 436 U.S. 307, 321 (1978).

1. Caesar is not a member of a pervasively regulated industry.

An industry is pervasively regulated when there exists "such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." *Id.* at 313. As such, the pervasively regulated industry exception applies only in "relatively unique circumstances" where such a heavy history of regulation is present. *Marshall*, 436 U.S. at 313; *Burger*, 482 U.S. at 701 (describing the "narrow focus" of the exception). In the past forty-five years, this Court has found the exception applicable only with respect to four industries, each of which presented an unusual risk of harm to the public. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (holding that the liquor industry is pervasively regulated); *Biswell*, 406 U.S. at 311 (holding that firearm and ammunitions sales are pervasively regulated industries); *Donovan v. Dewey*, 452 U.S. 594 (1981) (holding that mining is a pervasively regulated industry); *Burger*, 482 U.S. 691 (holding that automobile junkyards are pervasively regulated industries).

As a result, the test for what counts as a pervasively regulated industry is strict. An industry is pervasively regulated only when there exists "such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." *Marshall*, 436 U.S. at 313. Thus, the

inquiry turns on "the pervasiveness and regularity of the federal regulation," *Donovan*, 452 U.S. at 606. Those entering an industry in which government inspectors are prominent and prevalent may not retain a significant expectation of privacy. *See id.*

First, Caesar is a health insurance company, and does not fall under the umbrella of one of the industries that the Court has considered to be pervasively regulated. Nearly every business in the United States is subject to some type of regulation, whether that be federal, state, or local regulations. Per the Court's prior rulings, an industry is not closely regulated simply because it must comply with laws. Rather, the question is whether the industry expects to be subject to regular, ongoing searches pursuant to a regulatory regime. It is critical for this Court to remember that "the extent of any privilege of search and seizure without a warrant which [it] sustains, the officers interpret and apply themselves and will push to the limit." *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting). Considering Caesar as a pervasively regulated industry would open the door for *any* industry that is subject to *some* form of regulation, to qualify for the exception. Meaning, if Caesar is considered a pervasively regulated industry, the exception would swallow the rule.

Caesar is not subject to regular, ongoing searches under a comprehensive regulatory regime. In this case, the relevant statute in question is PCL § 18.8.891. PCL § 18.8.891 authorizes searches by the Board of Health, which generally regulates hospitals. (R. at 8.) However, Caesar is an insurance company—an entity not

typically subject to PCL § 18.8.891. As a result, there is no predictable and guided regulatory presence that diminishes Caesar's privacy interests because Caesar is not ordinarily subject to the regulatory statute. A predictable and guided regulatory presence is an important consideration in determining whether an industry is pervasively regulated, and there is no semblance of predictability when considering Caesar's relationship with PCL § 18.8.891. But despite this, Caesar was still subject to searches at the discretion of the Board's agents. Now, it is undisputed that Caesar is closely coordinated with Julius. As a result, it may be argued that Julius-Caesar Health, as a whole, would be subject to the search and not just Caesar. However, Julius and Caesar, while they operate in close coordination, are legally separate entities with separate leadership and separate boards of directors. As such, the searches were unconstitutional because neither Julius nor Caesar is a pervasively regulated industry.

2. Even if the Court considers Caesar pervasively regulated, PCL § 18.8.891 does not satisfy the test applied to pervasively regulated industries.

Burger only allows for a warrantless search if three criteria are met: (1) there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made, (2) the warrantless inspections must be necessary to further the regulatory scheme, and (3) the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *Id.* at 702—03. The burden is on the party seeking the exemption to meet each prong and show the need for the

exemption. *United States v. Jeffers*, 342 U.S. 48, 51 (1951). Cleopatra has not brought forward any of the necessary evidence to satisfy these criteria.

While there may be a substantial government interest here, namely ending the false manufacturing of Glukoriza, Cleopatra has failed to demonstrate that a warrantless inspection is necessary to further the regulatory scheme established by the Board and that the statute sufficiently limits the discretion of the Board's officers. In determining whether a warrantless inspection is necessary, it is important to ask whether such elimination is needed for the Board to carry out its intended plans—to establish if a licensed hospital or other entity is providing substandard care for Miasmic Syndrome. Quite simply, it is not necessary in this case.

Any reasons that the Board may put forward to claim necessity are unsubstantiated. For example, if the Board was concerned that Caesar was going to alter any documents or falsify information in the time it would have taken to seek a warrant, having such apprehensions would be baseless. The Board could have seized the documents without searching them until the proper judicial review was granted, thereby eliminating any opportunity for Caesar to alter the sought-after documents. *See Riley v. California*, 573 U.S. 373, 401 (2014) (holding that the police were able to seize a cell phone pending a search warrant to prevent evidence destruction); *see also Illinois v. McArthur*, 531 U.S. 326, 327 (2001) (holding officers' refusal to allow defendant to enter residence without an officer present until a search warrant was attained as a "reasonable seizure" that did not violate the Fourth Amendment). Instead of exploring these other available options, the agents of the Board simply

seized the documents and threatened criminal sanctions to force compliance. If the agents had just taken the proper documents, held onto them until the proper review was conducted, instead of using any means necessary to obtain what they sought, the agents would have received the same information without violating the Fourth Amendment.

The statute does not sufficiently limit the discretion of the Board's agents once they arrived on scene to search by obtaining precompliance review as explained *supra*. PCL § 18.8.891 does nothing, in terms of the certainty and regularity of its application, to provide a constitutionally adequate substitute for a warrant. The statute in practice, as exhibited by the behavior of the board's agents, does not put a meaningful constraint on the agent's discretion regarding who to search, what to search, and how frequently to search. As such, the statute did not allow for a warrantless search of Caesar under the pervasively regulated industries exception.

C. It is Inappropriate to Apply the Biswell Balancing Test.

In a last stitch effort to establish constitutionality, the Respondent's may bring forth the Courts reasoning in *United States v. Biswell* to justify the search of Caesar. In *Biswell*, the Court—using a balancing test—held that the warrantless search of a gun dealer's locked storeroom during business hours as part of an inspection made pursuant to the Gun Control Act of 1968 was constitutional and did not violate the Fourth Amendment. 406 U.S. 311, 316 (1972). The Court balanced the urgency of the federal interest, and both the degree to which those interests would be frustrated by requiring a warrant as well any threats to legitimate privacy interests. *Id.* The Court

stated, "close scrutiny of this [gun] traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders . . . inspection is a crucial part of the regulatory scheme . . ." making "unannounced, even frequent, inspections" necessary. *Id.* at 315. Those subject to the search had minimal privacy interests because gun dealers are a part of a pervasively regulated industry. Gun dealers know they are being regulated and are subject to inspectors. Dealers must have a federal license, and in applying for this license, are given documents that describe their obligations and define the inspector's authority, leading to minimal privacy interests. *Id.* Because of the compelling government interest and low privacy interests, the balance tipped in favor of the warrantless search.

However, the *Biswell* balancing test is inapplicable in this case. First, Caesar is not a pervasively regulated industry. But even if the Court wants to assume that Caesar is pervasively regulated, none of the pertinent factors identified in *Biswell* are present here. There is no urgent federal interest that would be frustrated by a warrant, and there is no need for unannounced inspections to ensure compliance with PCL § 18.8.891. While there certainly is an important interest present in this case, specifically, ending the production of Glukoriza, the interest would not be frustrated by a warrant.

Moreover, the board's agents did not search Julius, the single largest healthcare provider in the state of Romulus, but rather the insurance company. Julius-Caesar acts as an integrated payor-provider. (R. at 1.) Under this system,

almost all of Julius's patients are members of Caesar. (R. at 2.) As such, when Julius agreed to make Glukoriza its preferred Miasmic Syndome treatment, Caesar agreed to fully cover the prescriptions. (R. at 1.) However, the decision to make Glukoriza a preferred treatment rested solely in the hands of Julius—the single largest healthcare provide in Romulus. While Julius and Caesar are certainly well connected, they are legally separate entities with separate leaders and separate boards of directors. Caesar, as an insurance company, helps its clients *pay* for medical care, but Caesar is *not* choosing the medical care its clients seek. The insurance company is not administering the drug. The insurance company is not falsely advertising the drug; medical providers are responsible for these acts. Even if the interest is urgent, the search was misdirected at the insurance company.

The Board could have achieved its same objective—obtain insurance documents—if it had announced its search and obtained a warrant first. The privacy interests in this case are distinct from those present in *Biswell*. There are no licensing agreements in this case that neatly outline obligations and searches to be held throughout the upcoming year. Rather, both individuals and entities subject to PCL § 18.8.891 are at the whim of the agents conducting the search, unaware of when the searches will occur or what the searches will entail. Here, there was no regulatory inspection that furthered any urgent federal interest and the possibility of abuse and threat to privacy were high, leading to an unconstitutional search in violation of the Fourth Amendment.

III. CLEOPATRA IS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE SETTLED LAW EXISTED PERTINENT TO WARRANTLESS SEARCHES

THAT WOULD HAVE MADE A REASONABLE OFFICER AWARE OF HIS UNLAWFUL CONDUCT.

Qualified immunity is a Court-made addition to 42 U.S.C. § 1983 that protects government officials from prosecution for their actions. The doctrine seeks to recognize the difficult job that government officials are placed in and gives officers the ability to make decisions where the law or facts are unclear, without fear of facing liability, so long as they are acting responsibly and reasonably. However, this is not a blanket, catch-all policy. In *Harlow*, the Court expressly noted the importance of achieving "balance" between holding officials accountable and minimizing "social costs" to "society as a whole" when reviewing qualified immunity cases. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

Officers are entitled to qualified immunity unless they meet two elements as detailed in *Wesby*. First, that the officer violated a federal statutory or constitutional right. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). Second, that the unlawfulness of the officer's conduct must have been "clearly established at the time." *Id.*

In this case, the law is abundantly clear concerning the principle of precompliance review in warrantless searches. The Court began to emphasize the importance of precompliance review in the mid-20th century and solidified its importance with the standard set by *Patel* in 2015. *Patel*, 576 U.S. at 409. Any reasonable government official would be familiar with *Patel*. As such, to authorize a warrantless search, without exigency, consent, or recourse to independent third-party review, was a either a knowing violation of the United States Constitution, or

simply plain incompetence. Qualified immunity protects neither knowing violations nor incompetence, and therefore, the doctrine of qualified immunity does not protect Cleopatra. To grant qualified immunity in this case would dramatically tip the balance against holding officials accountable and set a precedent for minimizing the Constitutional protections owed to individuals when being searched in the United States—at great societal cost.

A. The Search Conducted by the Board of Health, Authorized by Cleopatra, violated the Fourth Amendment.

As described in Section II of this brief, *supra*, the first *Wesby* factor is satisfied because the issuance of the subpoena and the search itself, did in fact violate Caesar's rights under the Fourth Amendment. Therefore, we move to element two.

B. The Unlawfulness of Cleopatra's Conduct was Clearly Established at the Time of the Search.

With regards to knowingly violating the law, *Wesby* explains that "clearly established" means that at the time of the officer's conduct, the law was sufficiently clear that a reasonable official would understand that what they were doing was unlawful. *Wesby,* 138 S. Ct. at 589. The law's contours must be so well defined as to provide such an understanding. *Wesby*, 138 S. Ct. at 581. This does not necessitate precedent for the officer's exact action, but that in the light of pre-existing law, its unlawfulness must be apparent. *See e.g., Anderson v. Creighton*, 483 U.S. 635, 640.

1. The novel circumstances surrounding this case do not grant qualified immunity because an applicable, sufficiently clear legal principle existed.

In this case, a sufficiently clear legal principle already existed on the issue of warrantless searches. A sufficient legal principle is one that has a "sufficiently clear foundation in then-existing precedent." *Wesby,* 138 S. Ct. at 589. Such principles must be "settled law," which means that a "controlling authority" or "consensus of cases" have determined the rule or principle. *Wesby*, 138 S. Ct. at 589. The rule or principle cannot be merely suggested but must be sufficiently clear such that a "reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Wesby,* 138 S. Ct. at 590. Therefore, rules must be specific enough for a reasonable officer to draw conclusions about their actions; too general a rule would be one where the "unlawfulness of the officer's conduct does not follow immediately from the conclusion that [the rule] was firmly established." *Wesby,* 138 S. Ct. at 590.

However, this does *not* mean that a case needs to be directly on point. *Wesby,* 128 at 590. The Court has clearly stated that case law does not need to be factually identical in order to provide a sufficient legal principle. *United States v. Lanier*, 520 U.S. 259, 269 (1997). In *Lanier*, the court observed that there could be "multiple factual distinctions" as long as "prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Lanier*, 520 U.S. at 269. The Court was clear that "general statements of law" could provide the fair warning government officials were entitled to in order to be aware they were violating established rights. *Lanier*, 520 U.S. at 271. As such, it is evident that the facts do not need to be identically similar between cases, but rather only that the principle of law

to be applied to the facts is sufficient enough to inform officers that their actions are unlawful.

As applied specifically to warrantless searches, "a body of relevant case law" is usually necessary to "clearly establish' the answer" with respect to probable cause. *Wesby,* 138 S. Ct. at 581, quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). With respect to the Fourth Amendment, the Court has provided great guidance. As the law surrounding warrantless searches has been discussed extensively above, Petitioner will not repeat the discussion, except to illustrate to the extent to which this principle is "settled law."

In this case, such a body of relevant case law exists. *Patel*, held in 2015, sets the standard for precompliance review in warrantless searches that more than sufficiently puts the government on notice. Patel was decided in 2015, four years before the EMSA was enacted. As explained in Section II of this brief, *Patel* stated unambiguously that "the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decision maker." *Patel*, 576 U.S. at 420. This is the standard for courts to follow, which is clear and applicable to our case.

Additionally, case law addressing warrantless searches reaches back beyond *Patel's* holding for decades. *See*, *e.g. Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967) (emphasizing the importance of a neutral magistrate in checking whether a search is within the bounds of statutory limits); *Donovan v. Lone Steer* 464 U. S. 408, 415 (1984) (finding where the Court held that a warrantless search, authorized by just a subpoena, was only lawful when the searched party was afforded

an opportunity to "question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court."); *see also Wilson v. Layne*, 526 U.S. 603 (1999); *Ashcroft v. al-Kidd*, 563 U.S. 731, 747 (2011); *Mullenix v. Luna*, 577 U.S. 7 (2015). As *Patel* notes, the Supreme Court has "held repeatedly" that warrantless searches are "per se unreasonable," with only a few specific exceptions. *Patel* 576 U.S. at 418. The notion of precompliance review is a legal principle deeply rooted within Fourth Amendment law.

Cleopatra made an affirmative choice not to give precompliance review, when she directly stated that those subject to the search should be forced to turn over documents or be charged with committing a criminal offence. (R. at 11.) Caesar's employees were threatened with arrest for obstruction of justice for insinuating they would not submit to the search. (R at 4.) As in *Patel*, the choice was between compliance or arrest.

Such a choice between compliance or arrest is exactly the kind of choice precompliance review seeks to protect against. Therefore, despite the facts of the individual case being different, the underlying principle is near identical. It is evident that there is a body of settled law that addresses the specific principle in our case. The law has clearly defined the parameters of warrantless searches, indicating how and why precompliance review is necessary. The occurrence of new facts that have not appeared before this court is not invalidating, because the facts do not change the underlying principle that occurs in *Patel*, *Camara*, or any other Fourth Amendment case discussing the important fundamental rights that the Fourth Amendment

protects. Whilst the exact circumstances in our case have not been visited before, the underlying principle has been repeatedly addressed.

Respondent may argue that this case can be distinguished because the EMSA which authorized the subpoena is a novel statute, barely a year old. But this is not the standard the law requires; it requires a body of settled law that addresses the principle to such an extent a reasonable officer could understand it, and such a body of settled law exists here.

For the court to insist that this case does not involve sufficiently settled law because of its occurrence in a pandemic poses the kind of intolerable risk that "searches authorized . . . will exceed statutory limits." *Patel*, 576 U.S. at 421. It is crucial that our institutions do not compromise on basic civil and constitutional rights just because the State of Romulus is facing a pandemic. This is a time when rights need to be firmly upheld, because giving leeway now would set a dangerous precedent for the society that emerges from this crisis.

3. Cleopatra could reasonably have understood her conduct was unlawful and either knowingly violated the law or was plainly incompetent.

As indicated in *Wesby*, the Court must look at the entire legal landscape when assessing whether a reasonable officer could interpret his or her conduct as lawful. *Wesby*, 138 S. Ct. at 582. Element two can be met in two ways; (1) the action was so clearly in violation of Plaintiff's rights that the Defendant was either "plainly incompetent", (2) or the Defendant knowingly violated the law. *Wesby*, 138 S. Ct. at 585.

The reasonableness of an action is an objective standard, assessed by looking at the "totality of circumstances." *Wesby*, 138 S. Ct. at 587. This turns on whether the law in that context was sufficiently settled for government officials to be clearly aware that their actions were unlawful. *Wilson*, 526 U.S. at 603 (holding that a police officer could have believed bringing the media to an arrest was lawful because there was neither settled law on this constitutional question, nor controlling authority that clearly established a legal principle on which the officer could rely). It does not depend on factually identical situations, but on whether the officer acted reasonably considering the circumstances before them. *Luna*, 577 U.S. at 7 (holding that a police officer using deadly force against a fugitive was reasonable considering the threats posed to the officer in that situation). When there is such sufficient consensus in the courts as to the lawfulness or unlawfulness of an action, reasonable officers are expected to be aware of the lawfulness of their *own* actions. *Ashcroft*, 563 U.S. at 747.

As discussed above, the legal landscape establishes a clear standard for warrantless searches. It is reasonable to assume that government officers in Cleopatra's position would have either known about the standard and the unlawfulness of their conduct or were incompetent to a point of being unaware of clear and well-established law. Either instance would mean qualified immunity is inapplicable.

The manner in which the search was undertaken was brazenly unlawful. The agents at Caesar forced the staff to choose between arrest or handing over the documents and records. A reasonable officer in Cleopatra's position would be aware

of the extensive case law that has sought to protect against the type of search the Board conducted. There is ample case law describing the lawfulness surrounding warrantless searches and the need for precompliance review, thus meeting the standard to lose qualified immunity established by the Supreme Court. *See e.g. Ashcroft,* 563 U.S. at 746.

Further, *Patel* was established in 2015, giving Cleopatra sufficient time to become informed. Despite *Patel* stating unambiguously that the subject of the search must be offered a chance for precompliance review, Cleopatra did not ensure such an opportunity was in place. She wrote and enforced the subpoena in such a manner that clearly offered no chance for review. (R. at 11.) Cleopatra's language in the subpoena demonstrates she was well aware of her actions when acting speedily, insistent that the search would be conducted before anyone, including the staff, had a chance to fully comprehend the situation. (R. at 12.) She wrote that they were "not leaving anything to chance" and wanted to eliminate the possibility of any resistance from either the public or Caesar. *Id.* This demonstrates that Cleopatra had a full understanding of the impact of her actions in eliminating precompliance review.

Additionally, it is alleged that a week went by between Cleopatra becoming aware of the allegations against Julius-Caesar and taking the decision to issue a subpoena. (R. at 26.) There was then an additional six days before the subpoenas being issued on March 13th, and the search taking place on March 19th. (R. at 4, 11.) There was substantial time for a precompliance review, but Cleopatra simply elected not to because she wanted the agents to "show up at the compliance deadline." (R. at

12.) Coupled with the body of case law making clear her actions were unlawful, it is evident Cleopatra was acting with either clear knowledge of the unlawfulness of her actions or was plainly incompetent.

To ask this Court to accept the idea that an officer in Cleopatra's position would be unaware of Fourth Amendment law, first forming in the 1900s, and chose to order a warrantless search despite ample time for a review, is beyond reasonable belief. But even if this is the case, Cleopatra's actions exhibit such plain incompetence as to still make her ineligible for qualified immunity. The legal standard in this case is clear, and Cleopatra wantonly failed to meet it. As such, Cleopatra should not be granted qualified immunity.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals for the 14th Circuit's decision.

Respectfully submitted this 16th day of October, 2020.

Team 200

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Counsel for the Petitioner