No. 2020-19

In the

Supreme Court Of The United States

Caesar Health Plan,

Petitioner,

v.

Livia Cleopatra,

Respondent.

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

BRIEF FOR RESPONDENT

Counsel for Petitioner

Team - 206

QUESTIONS PRESENTED

I. Whether a third-party payor has standing under a civil RICO claim for underwriting off-label drug prescriptions without showing a direct harm.

II. Whether a government official acting under the authority granted by the Emergency Miasmic Syndrome Act violated the Fourth Amendment by issuing a subpoena for medical records from a health insurance company.

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CONSTITIUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

This case involves the following constitutional provisions: U.S. amend IV, U.S. amend XIV. Each provision's pertinent text is reprinted in the Appendix.

Furthermore, this case involves the following statutes and regulations. 18 U.S.C. § 1964(c), 42 U.S.C. § 1983, R.C.L. § 18.8.100, R.C.L § 18.8.500, R.C.L. § 18.8.890, R.L.C. § 18.8.891, R.C.L. § 18.8.8 and R.C.L. § 30.50.120 Due to the quantity of statutory and regulatory provisions involved, their pertinent text is reprinted in the Appendix.

STATEMENT OF THE CASE

Miasmic Syndrome. The Respondent, Livia Cleopatra ("Cleopatra") is the sole proprietor of an American pharmaceutical company, Galen Research ("Galen"), and Commissioner of the Board of Health for the State of Romulus. R. at # 1. In September 2019, Galen began clinical trials in concert with the Alexandrian government, testing whether their existing, FDA-approved cancer medication, Glukoriza, could be an effective treatment for a highly contagious disease, Miasmic Syndrome. *Id.* Miasmic Syndrome is now a global pandemic, and fatal in at least 1% of cases. *Id.* According to the trials, Glukoriza cut the disease's fatality rate in half and significantly hastened patient recovery. R. at # 1. The research did indicate the possibility of some side effects. R. at # 3 fn. 3.

Julius-Caesar Health System ("Julius-Caesar") is comprised of Julius Medical Center and Caesar Health Plan ("Caesar"). R. at # 2. In November of 2019, Julius-Caesar agreed to make Glukoriza a preferred treatment for Miasmic Syndrome. *Id.* As part of the agreement Julius agreed to educate its providers about the benefits of Glukoriza as a Miasmic Syndrome treatment, and Caesar agreed to fully cover prescriptions for Glukoriza when ordered as a treatment for Miasmic Syndrome. R. at # 2-3. Unbeknownst to Galen, Julius Medical Center developed its own cocktail of off-label drugs to combat Miasmic Syndrome ("Treatment Protocol"). R. at # 5. Galen research did not participate in the development of Julius Medical Center's Treatment Protocol. R. at # 2. By February 2020, over 10,000 prescriptions for Glukoriza had been filled, covered, and paid for by Caesar. *Id.* Unfortunately, Glukoriza proved to

have no significant effect on improving symptoms of Miasmic Syndrome and patients who received Glukoriza as treatment suffered substantial side effects. *Id.*

Emergency Miasmic Syndrome Act. In response to a wide array of counterfeit and dangerous "miracle cures" for Miasmic Syndrome flooding the market, Romulus passed the Emergency Miasmic Syndrome Act ("EMSA"). R. at # 3. EMSA authorizes the Board of Health to inspect and collect records from any medical facility upon issuance of an administrative subpoena for evidence that the facility was knowingly or negligently providing substandard care for Miasmic Syndrome. *Id.* The EMSA permits the Board of Health to take necessary actions in response to findings of substandard care and empowers it to subpoena any other party that is believed to hold such evidence about a licensed medical facility. R. at # 4. Furthermore, the EMSA grants the Commissioner the unilateral authority to authorize subpoenas. *Id.*

Board of Health. In March 2020, the Board received reports that patients diagnosed with Miasmic Syndrome, who received treatment from Julius Medical Center, had notably worse health outcomes than patients seen elsewhere in the state. *Id.* Acting pursuant to the EMSA, and her authority as Commissioner, Cleopatra issued subpoenas ordering Julius Medical Center to submit its facilities to inspection, and ordered both Julius Medical Center and Caesar to immediately turn over copies of all medical records relevant to patients diagnosed with, tested for, or suspected of carrying Miasmic Syndrome. *Id.*

Upon review of the data collected from Caesar, the Board of Health determined that Julius Medical Center had been providing substandard care to its Miasmic

Syndrome patients and actively causing harm. R. at # 5. On March 30th, the Board of Health—by unanimous vote of the 11-member board—suspended Julius Medical Center's operating license. *Id.* During the time of license suspension, both Julius Medical Center and Caesar had trouble retaining clients. *Id.* On April 5th, Cleopatra resigned from her position as Board of Health Commissioner. *Id.* On April 14th, the Board of Health voted 6-5 to restore Julius Medical Center's operating license, upon Julius Medical Center's showing of proof that their patients' excess kidney morbidity had been completely resolved. *Id.*

Civil Action. On May 1st, 2020, Caesar filed a civil action against Cleopatra, in the Federal District Court for the District of Romulus, alleging two causes of action. R. at # 6. The first, Caesar filed a civil RICO action under 18 U.S.C. § 1964(c) against Cleopatra, as sole proprietor of Galen Research. *Id.* Caesar alleged that Galen induced Caesar to underwrite Glukoriza as a treatment for Miasmic Syndrome by means of fraud. *Id.* Caesar is seeking damages in the amount of all Glukoriza prescriptions covered by Caesar. *Id.* The second alleged cause of action is a 42 U.S.C. § 1983 civil rights claim against Cleopatra, as Commissioner of the Romulus Board of Health, alleging she authorized an unconstitutional search of their premise, prohibited under the Fourth Amendment. *Id.* at # 6. Cleopatra immediately filed a 12(b)(6) motion to dismiss for failure to state a claim for both allegations. *Id.*

PROCEDURAL HISTORY

District Court. Cleopatra filed a 12(b)(6) motion to dismiss based on (1) lack of standing to allege a RICO violation and (2) the subpoena and search executed by

Cleopatra was consistent with the Fourth Amendment. R. at # 7. Cleopatra further contends the action is barred under the Doctrine of Qualified Immunity. *Id.* The District Court denied the Motion in its entirety on May 30, 2020. *Id*.

On Appeal. Cleopatra filed a challenge against the Order with the United States Court of Appeals for the Fourteenth Circuit. *Id.* On July 3rd, the Fourteenth Circuit reversed the District Court and ordered the Motion be 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.*

SUMMARY OF THE ARGUMENT

First, the Fourteenth Circuit correctly reversed the decision of the District Court, granting the Motion to Dismiss in its entirely, as Caesar failed to state a claim on which relief can be granted. Caesar does not have standing under a civil RICO claim because Caesar was not a party directly harmed by Cleopatra. Caesar's decision to underwrite Treatment Protocol interrupted the causal connection and therefore proximate cause cannot be established.

Second, Cleopatra did not violate the Fourth Amendment because the search was reasonable, and pursuant to a subpoena authorized by the EMSA. However, if this Court should find a violation, Cleopatra is entitled to qualified immunity, therefore, Caesar cannot recover.

STANDARD OF REVIEW

Under Fed. R. Civ. P. 12(b)(6), a claim will be dismissed for failure to state a claim upon which relief can be granted if it does not plead "enough facts to state a

claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). In considering a motion to dismiss under Rule 12(b)(6), this Court must accept all well-pled allegations in a complaint as true. *Albright v. Oliver*, 510 U.S. 266, 268 (1994). Thus, a claim will survive a motion to dismiss only if the factual allegations in the pleading are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "Conclusory statements" are properly ignored. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If the concrete facts establish only a "possibility of liability, dismissal is required." *Id.*

RICO claims are also "subject to the heightened pleading standard of Fed. R. Civ. P. 9(b)." *Slaney v. The Intern. Amateur Athletic Federation*, 244 F.3d 580, 597 (7th Cir. 2001) (a "plaintiff is required to plead all averments of fraud with particularity"). At the very least the fraud must be described "with some specificity and state the time, place, and content of the alleged false representations, the method by which the misrepresentations were communicated and the identities of the parties to those misrepresentations." *Id.*

When a district court "grants a motion to dismiss under Rule 12(b)(6) for failure to state a claim, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff", it should be reviewed *de novo*. *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010).

Whether a government-defendant's conduct is entitled to qualified immunity presents a question of law, not one of legal facts and therefore, should be reviewed *de novo*. *Elder v. Holloway* 510 U.S. 510, 516 (1994); *See also Mitchell v. Forsyth*, 472

U.S. 511, 528 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Therefore, when reviewing a decision to deny qualified immunity, the reviewing court should use its full knowledge and all relevant precedent. *Holloway*, 510 U.S. at 516.

ARGUMENT

I. Caesar does not have standing under a civil RICO claim because Cleopatra and Galen's acts did not directly harm Caesar, therefore proximate cause cannot be established.

To recover under a civil RICO claim, a party must show an injury to business or property by reason of a violation of section 1962, *inter alia*.[1] 18 U.S.C. § 1964(c). Not only must the plaintiff show but for causation but proximate cause as well. *Hemi Grp., v. City of New York*, 559 U.S. 1, 9 (2010). This Court has explicitly rejected that a "but-for" causation would satisfy the §1964(c) "by reason of" language requirement. *Holmes v. Sec. In'r Protection Corp.*, 503 U.S. 258, 265- 268 (1992). To show proximate cause the plaintiff must show "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* The injury cannot be to attenuate – "a link that is too remote, purely contingent or indirect" will not suffice. *Id.* at 9-10. This Court established, and affirmed in *Holmes*, *Anza*, *and Hemi,* respectively, that a court should not go beyond the first step of analysis to find a link from the injured party to the cause. *Holmes*, 503 U.S. at 269. ("...[R]ecognizing claims of the indirectly injured would force courts to adopt complicates rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts..."); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006); *Hemi*, 559 U.S. at 10. The appropriate party

[1] Relevant portions reprinted in Appendix A.

to bring a RICO claim violation is the one who was directly injured by the actions of the offending party. *Hemi*, 559 U.S. at 10-11. When a party can show a direct causal connection, that does not stretch the causal chain, relief can be appropriately granted. *Id.* at 10-11.

In *Holmes*, the Court established three factors to consider in determining the directness of the injury:

> *First*, the less direct an injury is the more difficult it becomes to ascertain the amount of a plaintiff's damages that are a result of the violation. *Second*, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs with different levels of injury from the acts. *Third*, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct.

Holmes, 503 U.S. at 269-70 (emphasis added). The burden lies with the plaintiff to show that the RICO violation was the direct cause of the harm and that there were no other contributing factors. *Id.* at 459-61 (citing *Holmes*, 503 U.S. at 268-74). This Court has clearly established proximate cause cannot be shown as long as there is an independent factor in the causal chain. *Id.* at 461. The Fourteenth Circuit correctly points out the question is not "are the injuries sufficiently harrowing to justify RICO liability – but rather were Galen's actions *the direct cause* of the injuries that occurred to Caesar, as a third-party payor." Opinion of the Fourteenth Circuit, R. at # 32.

A. Caesar has not alleged any facts to indicate they have suffered a direct injury as a result of Cleopatra's actions.

The first *Holmes* factor requires this Court to consider the difficulty in ascertaining the injured parties' damages. *Holmes*, 503 U.S. at 269-70. The purpose of this Court implementing the proximate cause requirement is to prevent "uncertain

and intricate inquiries" to ascertain damages and overrunning RICO litigation. *Anza*, 547 U.S. at 460. Allowing a complex analysis would be counterintuitive to the proximate cause requirement and would "blur the lines between RICO and antitrust laws." *Id.* "The central question is whether the violation led directly to the injuries, or whether other independent factors may have contributed." *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 654 (2008). This Court has consistently held independent and intervening events will break the chain of causation. *Id.* at 643; *Holmes*, 503 U.S. at 268-74.

1. Caesar's injury resulted from the intervening actions of physicians and patients.

A third-party payor (hereinafter, "TPP"), in its simplest form, is a health care plan that pays health care providers or reimburses the patient for health care expenses. David D. Griner, Paying the Piper: Third-party Payor Liability for Medical Treatment Decisions, 25 GA. L. REV. 861 (1991). TPPs have no influence over the patient's treatment, however, every health insurance plan has a system of review to determine medical necessity. *Id.* It is not uncommon for a TPP to allege a monetary injury by misrepresentations or omissions about a drug's safety and efficacy. 11 Bus. & Com. Litig. Fed. Cts. § 112:28 (4th ed.). However, as the Eleventh Circuit explains, TPPs break even regardless of "fraudulent marketing by drug manufacturers or not." *Ironworkers Local Union 68 v. AstraZeneca Pharms., LP*, 634 F.3d 1352, 1364-69 (11th Cir. 2012). TPPs charge patients premiums in exchange for prescription-drug coverage and will cover the costs whether they are medically unnecessary or inappropriate. *Id.*

Off-label uses are widely accepted and necessary in the practice of medicine. "Once a drug or medical device has been approved or cleared by FDA, generally, healthcare professionals may lawfully use or prescribe that product for uses or treatment regimens that are not included in the product's approved labeling." FDA, *Good Reprint Practices for the Distribution of Medical Journal Articles and Medical of Scientific Reference Publications on Unapproved New Uses of Approved Drugs and Approved or Cleared Medical Devices* (Jan. 2009), hTPPs://www.fda.gov/regulatory-information/search-fda-guidance-documents/good-reprint-practices-distribution-medical-journal-articles-and-medical-or-scientific-reference ("*Good Reprint Practices*"). Off-label use is necessary for physicians to uphold their Hippocratic Oath to provide the best care for their patients. *See* James M. Beck & Elizabeth D. Azari, *FDA, Off-Label Use, and Informed Consent: Debunking Myths and Misconceptions*, 53 Food & Drug L. J. 71, 83 (1998).

The FDA permits pharmaceutical companies to provide physicians with unsolicited off-label drug information through medical journals and publications that discuss studies, dosages, possible risks, and other safety information. *Good Reprint Practices*. When a drug is being used off-label there is always a level of risk that TPPs may suffer damages, however, to determine the motivation or origin of a physician's use of an off-label drug is too complex. *Sidney Hillman Health Ctr. of Rochester v. Abbott Labs.*, 873 F.3d 574, 577 (7th Cir. 2017). Further, it cannot be assumed that every off-label prescription causes harm to the patient. *Id.* Nor can it be assumed that every off-label use causes an injury to TPPs. *Id.*

It is the physicians and patients who are directly harmed from the misrepresentations of the materials provided by the drug manufacturer. While the TPPs may suffer a harm, the Seventh Circuit points out, "untangling the effects of improper promotions, from other influences on which physicians prescribe off-label is much more difficult" than the one step proximate cause analysis required. *Sidney,* 873 F.3d at 577. Misrepresentations made to physicians cannot establish a RICO claim by which TPPs can recover – they are several steps removed in the causal sequence. *Id.* at 578.

Allowing TPPs to recover under a civil RICO claim for a drug manufacturer's misrepresentations would open the flood gates to litigation. While this Court holds that proximate cause cannot be applied using a bright-line rule, there must be some line drawn in the sand. Allowing TPPs to recover for harms attributed to off-label use would result in mass litigation, burdening both the court system and drug manufacturers.

In the case at hand, Caesar alleges a direct line of causation exists because Caesar covered the cost for Glukoriza when prescribed as treatment for Miasmic Syndrome. This narrative ignores several steps. The chain of causation runs like this: Galen Research contracts with the Nation of Alexandria to conduct clinical trials; based on the results of the trials Glukoriza is brought to the United States; Galen campaigns to both physicians and health insurance companies relying on the results of the trial; Julius-Caesar Health System makes Glukoriza the "preferred treatment" for Miasmic Syndrome; Julius Medical Center independently creates a Miasmic

Syndrome Treatment Protocol which combines Glukoriza with several other off-label drugs; Julius Medical Center prescribes 10,000 prescriptions of Glukoriza; Caesar Health Plan covers the prescriptions; and patients who received the Treatment Protocol began suffering from kidney failure. This is a distinct difference from what Caesar alleged caused the direct harm and from what the timeline illustrates. Caesar's alleged harm relies on the actions of physicians, patients, Julius-Caesar Health System, and Julius Medical Center before the harm even reaches Caesar Health Plan. The harm is attenuate. The link of causation is being stretch beyond the bounds of what this Court has found to be appropriate in RICO cases.

The physicians are the ones who relied on the research provided by Galen on the belief that Glukoriza would minimize the symptoms of Miasmic Syndrome. The physicians then prescribed Glukoriza with a combination of other drugs for off-label treatment. The physicians themselves, in conjunction with the Treatment Protocol, are both intervening factors which this Court must consider when linking the injury to the injurious conduct. Given these facts, Caesar cannot establish a RICO claim because they were not *directly* harmed as there is a break in the causal chain.

2. Caesar has not alleged with any specificity they directly relied on Galen's misrepresentations.

The First and Second Circuits have held a TPP can recover under RICO by showing evidence that the TPP was *directly* induced to cover the drugs that would have not been otherwise covered. *See Desiano v. Warner- Lambert Co.*, 326 F. 3d 339 (2d. Cir. 2003) (Finding if a TPP is able to show evidence of direct reliance they can recover damages); *See e.g., In re Neurontin Marketing and Sales Practices Litigation*,

712 F.3d 21, 25 (1st Cir. 2013) (TPPs recovered by showing a direct reliance on a drug manufacturer's misrepresentations and omissions). A TPP must allege in the complaint how and why they choose to pay for the drugs, or how the defendants conduct led to the purchase of the drug. Pamela Bucy Pierson, RICO Trends: From Gangsters to Class Actions, 65 S. C. L. REV. 213, 253 (2013); *Se. Laborers Health & Welfare Fund v. Bayer Corp.*, 444 Fed. Appx. 401, 410 (11th Cir. 2011). A generalized allegation will not be sufficient to satisfy proximate cause. *UFCW Local 1776 v. Eli Lilly and Co.*, 620 F. 3d 123, 134-35 (2d. Cir. 2010). In *Bayer*, the Eleventh Circuit found that the plaintiff TPP had not articulated a direct injury to satisfy the proximate cause requirement, because there was no indication the TPP would have independently determined the drug was not medically necessary if the drug manufacturer had disclosed the suppressed materials. *Bayer Corp.*, 444 Fed. Appx. at 410. Without more, it cannot be reasonably inferred that the drug manufactures conduct led to the purchase of the drug. *Id.*

The Second, Third, Ninth, and Eleventh Circuits find that even when there is evidence of a contract or agreement between the TPP and the drug manufacturer, if the TPP cannot establish a direct line between the false misrepresentations and the injury, proximate cause is not met. *Eli Lilly*, 620 F. 3d at 123; *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235 (3d. 2012); *United Food & Commercial Workers Central Pennsylvania & Regional Health & Welfare Fund v. Amgen, Inc.*, 400 Fed. Appx. 255 (9th Cir. 2010); *see Ironworkers Local Union 68 v. AstraZeneca Pharmaceuticals, LP*, 634 F.3d 1352 (11th Cir. 2011). Further, the

allegations cannot be generalized, rather, the complaint must specifically state the physicians, prescriptions, and statements on which the TPP directly relied. *See Eli Lilly*, 620 F. 3d at 134-35 ("generalized proof of reliance" does not suffice due to the many "considerations… taken into account" by prescribing physicians").

Caesar has failed to allege enough facts with specificity they relied on Galen's misrepresentations. The record indicates that Julius Medical Center agreed to educate its providers about Glukoriza as a Miasmic Syndrome treatment. R. at # 3. Caesar only agreed to fully cover the prescriptions when Glukoriza was prescribed for Miasmic Syndrome. *Id.* Caesar did not allege any specific physicians, prescriptions or statements on which it relied on Galen's misrepresentation.

As discussed above, a TPP has no authority to influence a patient's treatment plan. Based on the agreement between Caesar and Julius Medical Center, Caesar had agreed to fully cover the cost of Glukoriza whether or not they agreed with the health treatment. As indicated in the record, Caesar removed Glukoriza from its approved formulary as a Miasmic Syndrome treatment *only* at the recommendation of Julius Medical Center. R at # 3. Caesar did not independently decide to remove Glukoriza. Caesar cannot allege any circumstances in which the relied on specific physicians, specific statements, or specific prescriptions.

Caesar has not, and cannot, provided any specific statements demonstrating Galen endorsed or promoted the Treatment Protocol independently created by Julius Medical Center. In fact, Galen learned of the Treatment Protocol *after* it was implemented by Julius Medical Center. Therefore, Caesar cannot possibly show they

directly relied or were induced by Galen's research because the research did not indicate Glukoriza is safe to be taken with other drugs. Caesar cannot show they specifically relied on Galen thus, Caesar cannot show a direct the injury.

The first *Holmes* factor weighs in favor of Cleopatra and Galen Research. At the motion to dismiss stage, Caesar has not alleged enough facts to plausibly allow this Court to find a direct link between Galen's research and Caesar alleged injury. If this Court were to ascertain damages, they would be in direct opposition of their previous holding in *Holmes*.

B. Allowing Caesar to recover for indirect injuries would expose Cleopatra to risk of multiple recoveries.

The second *Holmes* factor requires this Court to consider the risk of multiple recoveries. *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co.*, 943 F.3d 1243, 1251 (9th Cir. 2019). Courts should avoid multiple party recovery when the damages overlap – which would fail the second *Holmes* factor. *Id.* at 1252; *See Holmes*, 503 U.S. at 269. If an indirect parties' injuries are recognized, the court would be forced to adopt complex rules to distribute damages to parties with varying levels of injury. *Kaiser Foundation Health Plan, Inc. v. Pfizer, Inc.*, *(In re Neurontin Mktg. & Sales Practices Litig.)*, 712 F.3d 21, 36 (1st. Cir. 2013).

As established above, there are at least three independent parties before the harm reaches Caesar (physicians, patients, Julius Medical Center). If this Court allows Caesar to recover damages, it would set a precedent that TPPs, and every party in between, can recover monetary losses for off-label prescriptions. This precedent would allow third and fourth parties to recover losses – which would expose

Cleopatra to multiple recoveries. To assess the appropriate damages to each individual this Court would have to develop and adopt an algorithm to determine the value of a second, third, and fourth party removed from the direct injury.

The question then must be raised, how does a court attribute a TPP loss to the use of an off-label drug based on research and other intervening factors? Miasmic Syndrome is a global problem; affecting not only the United States but every nation. Miasmic Syndrome has caused a harsh economic downturn, creating a ripple effect resulting in substantial job loss. Caesar's alleged harm is paying for the prescriptions of Glukoriza and the loss of 15,000 beneficiaries, however, there is no easy way to determine what, if any, financial losses are a result of Galen's research or the result of the economic downturn. For example, during the COVID-19 pandemic, 26.8 million people lost health insurance coverage due to unemployment alone. Rachel Garfield, Gary Claxton, Anthony Damico, and Larry Levitt, Eligibility for ACA Health Coverage Following Job Loss (May 13, 2020) hTPPs://www.kff.org/coronavirus-covid-19/issue-brief/eligibility-for-aca-health-coverage-following-job-loss/. If Miasmic Syndrome has the same consequences as COVID-19, there is no feasible way for this Court to ascertain the loss of Caesar's beneficiaries. Therefore, to attribute damages to Caesar would result in complex rules and algorithms, thus the second *Holmes* factor weighs in favor of Cleopatra.

C. Caesar is not an immediate victim, thus allowing recovery would not deter future misconduct.

The third *Holmes* factor asks this Court to consider whether holding the defendant liable would pursue justice by deterring injurious conduct, or if there are

more immediate victims that would be expected to pursue their own claims. *Holmes*, 503 U.S. at 269-270. As this Court held in *Anza*, upholding the *most* direct causal link is important if the direct victims ever wish to pursue their own claims and seek relief. *Anza*, 547 U.S. at 460. When a court finds a causal connection based on deterring injurious conduct, they are forgetting other more direct parties who can pursue a claim. Allowing an indirect party to recover only in pursuit of justice and to serve as a deterrent, the court is exposing the wrongdoer to multiple party recovery. The second *Holmes* factor expressly warns against this. *See Holmes*, 503 U.S. at 269.

The District Court's decision to deny Cleopatra's Motion to Dismiss rests on the third *Holmes* factor. It is their position that if they find TPPs sever the chain of causation, pharmaceutical manufacturers will be insulated from their actions by physicians and pharmacy managers. Opinion of the District Court of Romulus, R. at # 16. However, Cleopatra respectfully disagrees. Caesar is attempting to recover for alleged injuries that Julius Medical Center, physicians, and patients suffered. If this Court would allow Caesar to recover, they would establish a precedent that TPPs are more direct than patients who suffer a personal injury harm, and physicians who suffer an economic harm.

Considering the *Holmes* factors, the direct causal link does not point to Caesar. Caesar's factual allegations rely on independent factors which this Court has found to be intervening events, thus, Caesar is not a direct party who was injured by the acts of Cleopatra and Galen. Therefore, this Court should not permit TPPs injuries

to satisfy the proximate cause requirement as they are not direct parties. Respectfully, this Court should grant Cleopatra's Motion to Dismiss.

II. Cleopatra did not violate the Fourth Amendment, however, even if this Court should find a violation, Cleopatra is entitled to qualified immunity, therefore, Caesar cannot recover.

To recover under 42 U.S.C. § 1983, this Court has established plaintiff must show (1) a constitutional or statutory right was violated by the government-defendant, *and* (2) the unlawfulness of the government-defendant's conduct was "clearly established" at the time the violation occurred. *District of Columbia v. Wesby*, 138 S. Ct. 577, 588-590, 199 L. Ed. 2d 453 (2018); *See also Mitchell*, 472 U.S. at 526. When a plaintiff fails to satisfy both requirements, the government-defendant does not have a defense to liability, but rather, an entitlement to *immunity from suit* and a dismissal in their favor. *Forsyth*, 472 U.S. 511, 526 (1985) (citing) *Harlow*, 457 U.S. at 818. Qualified immunity is "entitlement not to stand trial or face the other burdens of litigation." *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (citing *Forsyth*, 472 U.S. at 526-530). The decision of a district court to deny a government-defendant's qualified immunity claim, falls within a class of appealable orders, notwithstanding "the absence of a final judgment." *Id.*

Caesar cannot satisfy the requirements set forth by this Court because they have failed to allege facts indicating their Fourth Amendment rights were violated and Cleopatra's actions were clearly established as unlawful at the time of the violation. The Fourteenth Circuit properly highlights the novelty of the *specific circumstances* surrounding the instant action. The court below properly concludes

because "this *particular* confluence of fact and law" has *never* appeared before this Court, or any court for that matter, Cleopatra is entitled to qualified immunity and her Motion to Dismiss the claim under 42 U.S.C. § 1983 should be granted. Opinion of the Fourteenth Circuit, R. at # 37-8 (emphasis added).

A. Caesar's constitutional right was not violated by Cleopatra.

The Fourth Amendment provides to the people the right "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". U.S. Const. amend. IV. The Fourth Amendment is only implicated when "the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 553 U.S. 27, 33 (2001); *See generally*, *Katz v. United States*, 389 U.S. 347 (1967); *See also*, *United States v. Jones*, 565 U.S. 400 (2012). While the Court has consistently held "searches conducted outside the judicial process, without prior approval by [a] judge ... are *per se* unreasonable", this is subject to a few "specifically established" and "well-delineated" exceptions. *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2452 (2015) (quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz*, 389 U.S. at 357)).

Caesar has failed to allege facts that indicate Cleopatra violated their Fourth Amendment rights for three reasons. The first, Cleopatra can only be held liable for issuing the subpoena. The second, the subpoena issued by Cleopatra was reasonable

under the Fourth Amendment. Lastly, if liability is found, the alleged search falls within the administrative searches exception and was reasonable on those grounds.

1. Cleopatra can only be held liable for issuing the subpoena.

The theory of vicarious liability has been defined as the imposition of liability upon a supervisory party for the actionable conduct of a subordinate that relies on the relationship between the two. *Liability*, Black's Law Dictionary (11th ed. 2019). The Doctrine of *Respondeat Superior* falls within this theory in holding employers, or supervisors, liable for the wrongful acts committed by their employees, or subordinates, within the scope of their agency. *Respondeat Superior*, Black's Law Dictionary (11th ed. 2019). This Court has consistently held that vicarious liability is inapplicable to actions initiated pursuant to 42 U.S.C. § 1983, thus, "…[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Iqbal*, 556 U.S. at 676 (internal citations omitted); *See also*, *Polk County v. Dodson*, 454 U.S. 312, 325 (1984) ("Section 1983 will not support a claim based on a *respondeat superior* theory of liability.") (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978)). "Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 677.

In the instant case, the only conduct Cleopatra could be held liable for is issuing the subpoena.[2] Cleopatra was not present at the time her subordinates delivered and executed the subpoena to Caesar. She did not threaten Caesar's staff

[2] Relevant portions reprinted in Appendix B.

with arrest if they did not turn over documents. Nor did she instruct the agents to threaten the staff at Caesar with jail time for not complying. If any misconduct occurred, it was at the hands of the agents executing the subpoena. Cleopatra cannot be held vicariously liable for the agent's actions. Given the inapplicability of vicarious liability and *respondeat superior* the *only* act attributable to Cleopatra is the composition of the subpoena, which was reasonable.

2. The subpoena issued by Cleopatra was reasonable under the Fourth Amendment.

This Court has long recognized that the authority to examine documents without a "warrant founded on probable cause", when done through statutory authority, does not violate the "unreasonable searches and seizures" clause of the Fourth Amendment. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 195 (1946). In that vein, execution of a subpoena is nothing more than a "constructive" search and seizure, and the burden to analyze the Constitutional soundness of a subpoena is "reasonableness". *Id.* at 195-208; *See also Donovan v. Lone Steer*, 464 U.S. 408, 415 (1984). To be considered reasonable under the Fourth Amendment the subpoena must be "(1) sufficiently limited in scope, (2) relevant in purpose, (3) and specific in directive so that compliance will not be unreasonably burdensome." *Lone Steer*, 464 U.S. at 415 (quoting, *See v. City of Seattle*, 387 U.S. 541, 544 (1967)); *See also Walling*, 327 U.S. at 208 ("[T]he Fourth…at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be particularly described, if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant.") (internal quotation marks omitted).

Although administrative agencies have the ability to lawfully issue subpoenas without a warrant, the subpoenaed party has the right question the reasonableness of the subpoena before suffering penalties for refusing to comply. *Lone Steer*, 464 U.S. at 415; *See also*, *City of Seattle*, 387 U.S. at 544-545; *See also*, *Patel* 135 S.Ct. at 2452. The subpoenaed party may question the reasonableness of the subpoena by filing an action in district court, however, they do not have the right to insist that a judicial warrant be issued before complying with an otherwise valid administrative subpoena. *Lone Steer*, 464 U.S. at 415. Furthermore, pre-compliance review of the administrative subpoena need not actually occur, but rather, the subpoenaed party must simply be afforded an opportunity to question the reasonableness of the subpoena *before* suffering penalties for noncompliance. *Patel*, 135 S.Ct. at 2452-53. This Court has never defined explicit parameters for pre-compliance review. *Id.*

The Board of Health has been statutorily granted the responsibility to safeguard the wellbeing of the people of Romulus. RCL § 18.8.100[3]. In response to Miasmic Syndrome pandemic the Board of Health was granted additional administrative authority to protect the people of Romulus. RCL § 18.8.890-891[4]. Cleopatra, as Commissioner of the Board of Health, was given the sole authority to issue subpoenas to obtain records "in order to determine if a licensed Hospital is providing substandard care for Miasmic Syndrome." RCL § 18.8.891(b)[5]. Caesar, the insurance company in partnership with Julius Medical Center, a hospital treating

[3] Relevant portions reprinted in Appendix D
[4] *supra*
[5] *supra*

patients for Miasmic Syndrome, falls well within the reach of Cleopatra's authority under the statute.

The subpoena issued by Cleopatra on March 13, 2020, was sufficiently limited in its scope, relevant in its purpose, and specific in directive so that compliance would not be unduly burdensome. The subpoena directed Caesar to produce documents "[r]elated to the diagnosis and/or treatment of Miasmic Syndrome" or "[r]elated to patients who are suspected of carrying Miasmic Syndrome" including "all insurance claims and medical records…dated on or after May 1, 2019." R. at # 11. The scope was limited for Caesar to produce documents temporally anchored to the onset of Miasmic Syndrome and, additionally, only documents *specifically* relating to patients receiving care or suspected of carrying Miasmic Syndrome. The purpose of this subpoena was to determine whether Julius Medical Center was administering substandard care to the patients being treated at their facility for Miasmic Syndrome – a purpose in line with the responsibility of the Board of Health as set forth in RCL §18.8.890. Finally, the directive within the subpoena issued by Cleopatra was clear and unduly burdensome. The subpoena was clear in the documents requested, the time and place to comply, and the statute by which the subpoena was issued under.

As the Court highlighted in *Lone Steer*, part of the protection afforded by the issuance of an administrative subpoena is the subpoenaed parties' ability to question the reasonableness of the subpoena in district court *before penalties are applied*. No penalties to this date have been implemented against Caesar. As an *additional* safeguard, and to avoid flooding the courts, RCL § 18.8.891 affords a subpoenaed

entity the ability to petition the subpoena to the entire Board of Health. Caesar had *two* opportunities to question the reasonableness of the subpoena they received before complying. The failure of Caesar to seek pre-compliance review by either petitioning the Board of Health or filing an action in district court prior to complying with the subpoena does not invalidate the reasonableness and constitutionality of the subpoena.

3. The alleged search falls within the administrative searches exception and was reasonable on those grounds.

The general rule that "searches conducted outside the judicial process, without prior approval by [a] judge ... are *per se* unreasonable", is subject to a few "specifically established" and "well-delineated" exceptions. *Patel*, 135 S. Ct. at 2452 (quoting *Gant*, 556 U.S. at 338 (quoting *Katz*, 389 U.S. at 357)). One exception to this general rule is administrative searches. *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967). Generally, administrative searches are those, (1) where the warrant and probable-cause requirement are impracticable because of special needs and, (2) which the primary purpose behind the search is "[d]istinguishable from the general interest [of] crime control." *Patel*, 135 S. Ct. at 2452 (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)); (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)). Additionally, the subject of an administrative search must be afforded the opportunity to seek pre-compliance review before suffering any penalties. *See Patel*, 135 S. Ct. at 2452-53 (The Court rationalized that while the statute at issue was facially invalid, if the

searches authorized by the statute were "performed pursuant to an administrative subpoena" they would be constitutional).

Given the impracticality of the probable cause requirement, these types of searches are held to a reasonableness standard. *Skinner*, 489 U.S. at 619 (citing *United States v. Sharpe*, 479 U.S. 675, 682 (1985); *Schmerber v. California*, 384 U.S. 757, 768 (1966)). Whether or not a search or seizure is reasonable depends on "all of the circumstances surrounding the search or seizure *and* the nature of the search or seizure itself." *United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337-342 (1985)). With reasonableness being "the touchstone" of the Fourth Amendment, an analysis of whether or not the search or seizure was reasonable includes the balancing and assessing of "the degree to which [a search or seizure] intrudes upon an individual's privacy and … the degree to which [the search or seizure] is needed for the promotion of legitimate governmental interests." *United States v. Knight*, 534 U.S. 112, 118-19 (2001); *See also*, *Montoya*, 473 U.S. at 537 ("The permissibility of a particular law enforcement practice is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests'") (citations omitted); *See also*, *Camara*, 387 U.S. at 536-37 ("[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails").

The facts surrounding the present action indicate that the alleged search of Caesar was a reasonable administrative search. It is indisputable that the purpose of

issuing the subpoena to Caesar was for a purpose other than general crime control. As discussed previously, the Board of Health and Cleopatra are responsible for safeguarding the wellbeing of the people of Romulus as it pertains to the spread and treatment of Miasmic Syndrome, and thus, have been given the authority to take discretionary measures to ensure patients are not receiving substandard care. The only documents requested by the subpoena, issued by Cleopatra, were documents pertaining to "the diagnosis and/or treatment of Miasmic Syndrome" or "[r]elated to patients who are suspected of carrying Miasmic Syndrome" including "all insurance claims and medical records…dated on or after May 1, 2019." R. at # 11.

The aforementioned lends way to the existence of the special needs that make the probable cause and warrant requirements impracticable. The nation is currently suffering from a global health pandemic. This alone brings special needs into play as the Board of Health must be able to monitor the treatment of the novel virus. As the District Court properly highlights, "[it] would be unreasonable and unproductive to require that the Board [of Health] have evidence that a crime was committed, before it could conduct an inspection to determine the needs of public health." District Court Opinion R. at # 20.

Caesar was afforded the ability to seek not one, but two separate types of pre-compliance review, and additionally, no penalties have been imputed to them by Cleopatra or the Board of Health. Receipt of the subpoena alone satisfied the pre-compliance review component. Caesar then had the ability to file an action in district court to question the reasonableness of the subpoena. As an *additional* measure to

satisfy the pre-compliance review requirement, RCL § 18.8.891 allows the subpoenaed entity to seek review of the subpoena from the full Board of Health. Cleopatra independently issued the subpoena to Caesar; thus, the Board of Health is neutral and appropriate to determine the reasonableness of the subpoena.

While neither of the opportunities for review were expressly dictated on the subpoena, Caesar had the ability to look up the statute, which was included on the subpoena. Additionally, the ability to question the validity of a subpoena in a court of law is a long-standing tradition. Ignorance of the law and rights afforded under it on behalf of Caesar and their employees does not make the administrative search conducted unreasonable.

4. Cleopatra reasonably believed Caesar was a "closely regulated" industry.

Warrantless searches are permitted in closely regulated industries, or, those "long subjected to close supervision and inspection." *Marshall v. Barlow's, Inc.*, 436 U. S. 307, 313 (1978). An industry is closely regulated when the government has a heighten interest in regulation and the privacy interests of the owner are weakened. *New York v. Burger*, 482 U.S. 691, 702 (1987). This Court opined in *Patel*, "history is relevant when determining whether an industry is closely regulated for Fourth Amendment purposes." *Patel*, 135 S. Ct. at 2454. Therefore, courts will analyze, the history of warrantless searches in the industry, the extent of the regulatory scheme, whether other states have similar schemes, and whether the industry "poses a clear and significant risk to the public welfare", to determine if a business is closely regulated. *Zadeh v. Robinson*, 928 F.3d 457, 465 (5th Cir. 2019); *see Burger*, 482 U.S.

at 704; *see Patel*, 135 S. Ct. at 2454. The health insurance industry has a long and storied history of being regulated heavily by the government.[6]

This Court has held that because business owners in a closely regulated industry "have a reduced expectation of privacy" the "warrant and probable-cause requirements necessary to satisfy the traditional Fourth Amendment standard of reasonableness, have lessened application in this context." *Burger*, 482 U.S. at 702 (citing *Marshall v. Barlow's, Inc.*, 436 U. S. 307, 323 (1978). The expectation of privacy for commercial premises is different from, and indeed less than, a similar expectation in an individual's home. *Id.* As this Court notes, certain industries are so heavily regulated by the government there is no reasonable expectation of privacy. *See Id.* at 700 (citing *Katz*, 389 U.S. at 351-352). In accordance with the aforementioned rationale, warrantless inspection of a closely regulated business will be deemed reasonable only 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.

Burger, 482 U.S. at 702-703 (internal quotes omitted). The first factor requires the statute to be sufficiently comprehensive so that a business owner may be aware their property will be subject to periodic inspections for a specific reason. *Burger*, 482

[6] *See generally* PATIENT PROTECTION AND AFFORDABLE CARE ACT; ELDER JUSTICE ACT, 111 P.L. 148, Part 1 of 3, 124 Stat. 119*;see also https://harvardlawreview.org/2016/01/rethinking-closely-regulated-industries/ see also* Wasley, Terree, *Health Care in The Twentieth Century: A History of Government Interference and Protection,* Business Economics, vol. 28, no. 2, 1993, pp. 11–16. JSTOR, available at www.jstor.org/stable/23486008.

U.S. at 702; *See Donovan v. Dewy*, 452 U.S. 594, 602 (1981) (Finding improving health and safety conditions in Nation's mines to be a substantial government interest). The second factor requires that if business owners are subjected to warrantless inspections, they must be necessary to "further the regulatory scheme." *Id.* at 702-703 (citing *Donovan*, 452 U.S. at 603 (Requiring a warrant for every inspection would be burdensome and not further the Mine Safety and Health Act – which would not prevent safety and health violations). The requirement of the third factor is two-fold – the statute must advise the premise owner that a lawful search is being made that "is carefully limited in time, place, and scope." *Id.* at 703 (citing *Donovan*, 452 U.S. at 600; quoting *United States v. Biswell*, 406 U.S. 311, 315 (1972)).

In the present case, Cleopatra reasonably considered Caesar a "closely regulated" business. The State of Romulus had significant interest in implementing the EMSA to establish a regulatory scheme to protect the people and public welfare during the Miasmic Syndrome outbreak. The EMSA authorizes the Board of Health to take "all reasonable actions within its authority to determine whether the level of service provided to Miasmic Syndrome patients at each licensed Hospital is in compliance with all relevant standards." RCL § 18.8.890. Further, the EMSA stipulates the Commissioner of the Board of Health may subpoena any person *or entity* for records "as the Board may in its discretion require in order to determine if a licensed Hospital is providing substandard care for Miasmic Syndrome." RCL § 18.8.891 (b). Because of their close relationship with Julius Medical Center, Caesar is an entity that would be subject to EMSA.

At the onset of Miasmic Syndrome, Romulus was flooded with "an array of counterfeit and adulterated drugs promising a miracle cure" to the disease. R. at # 3. The legislature recognized the potential consequences; therefore, they enacted the EMSA. There was a clear and significant risk health insurances companies would be underwriting these "miracle cures", therefore, it is reasonable health insurance companies, given the surrounding circumstances, would be closely regulated.

The execution of the subpoena at Caesar satisfied the three requirements set forth by this Court in *Burger*. As this Court has previously held, the government has a significant interest in improving health and safety. Therefore, implementing the EMSA was central to the importance of protecting public welfare during the Miasmic Syndrome pandemic. Requiring a warrant would be burdensome as it would frustrate the public health purpose of the EMSA. Additionally, the enactment of the EMSA, a statute authorizing administrative searches, serves as a constitutionally adequate substitute for a warrant.

B. Even if this Court finds Cleopatra violated Caesar's constitutional rights, she is entitled to qualified immunity.

A plaintiff wishing to recover under 42 U.S.C. § 1983 must establish not only that the government actor violated their constitutional or statutory right, but also that the unlawfulness of the government actor's conduct was "clearly established". *Wesby*, 138 S. Ct. at 589. Meaning, at the time of the government actor's conduct, the law was "sufficiently clear" such that "every reasonable official would understand that what [they] are doing is unlawful", putting the constitutionality of the government actor's conduct "beyond debate." *Id.* (quoting *Ashcroft v. al-Kidd*, 563

U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 630 (1987)). The rule cannot simply be suggested or implied from existing legal precedent, but rather, it must be dictated by "a robust consensus of cases of persuasive authority." *Wesby*, 138 S. Ct. at 589 (internal citation omitted).

Therefore, a right that is "clearly established" must be defined with *specificity* and cannot be defined generally. *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (emphasis added) (quoting *Kiesla v. Hughes*, 138 S.Ct. 1148 (2018). This Court has consistently held that statements of law which are general are "not inherently capable of giving fair and clear warning" to government actors. *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). Although it is not required to have a case "directly on point" that outlines the exact circumstances of the government actor's conduct, the existing precedent must address circumstances similar enough that the government actor's conduct is "beyond debate." *Wesby*, 138 S. Ct. at 589 (internal citations omitted). The Doctrine of Qualified Immunity is intended to protect "all but the plainly incompetent or those who knowingly violate the law" by giving government actors room to make judgments that are "reasonable but mistaken" about legal questions that have no answers. *al-Kidd*, 563 U.S. at 743 (citations omitted).

Cleopatra firmly denies violating the rights of Caesar, however, should this Court find a violation did occur, Cleopatra is entitled to qualified immunity because her conduct as Board of Health Commissioner was not clearly established as unlawful. Given the presence of a novel health pandemic, the instant matter contains

a plethora of uncertainties and factual circumstances untested by the boundaries of the law. There are no controlling authorities with facts sufficiently similar to those surrounding the actions of Cleopatra. The existence of precedent that simply discusses the Fourth Amendment and even administrative searches generally, is not specific enough to give a clear warning that issuing the subpoena in this case was unlawful. Therefore, the alleged unlawfulness of her conduct cannot be "clearly established".

The Fourteenth Circuit properly highlights that the District Court's focus on this Court's holding in *Patel* was improper. Opinion of the Fourteenth Circuit, R. at # 37. To rely so heavily on a single case ignores the clear notion from the precedent discussed *supra*, that to meet the burden of "clearly established", the rule must be derived from a *robust consensus of cases*. A single case is far from robust, especially when the case at hand is so factually different than *Patel*.

The factual circumstances surrounding *Patel* are not sufficiently similar in such a way that would put Cleopatra's conduct "beyond debate". *Patel* involved the facial challenge of a Los Angeles statute which required hotel operators to keep specific records, and the failure to produce the records was punishable by jail time and a fine. *Patel*, 135 S. Ct. at 2445. Cleopatra, as Commissioner of the Board of Health, during a pandemic, under EMSA, issued a subpoena to Caesar, an insurance company closely affiliated to a licensed hospital caring for Miasmic Syndrome patients, to investigate if the hospital was providing substandard care. R. at # 3-4.

No reasonable government official in similar circumstances to Cleopatra would conclude that *Patel* would control their conduct.

Further, in *Patel* no subpoena was ever issued. In fact, this Court acknowledged that if the searches authorized by the statute in *Patel* were performed pursuant to an administrative subpoena, the searches would be constitutional, because the subpoenaed party would have the ability to challenge the subpoena in a district court. *Patel*, 135 S. Ct. at 2453. Therefore, a reasonable government actor in Cleopatra's position could reasonably conclude, issuing an administrative subpoena would be constitutional as it afforded the opportunity for pre-compliance review.

Non-existing law cannot be considered "clearly established". The EMSA was enacted just *five* months before Cleopatra issued the subpoena to Caesar. Consequently, it was the first subpoena issued under the authority of the act. R. at # 3. Given the incredibly short amount of time EMSA had been enacted, no court had made any type of determination regarding the statute, thus, no law existed. In addition to there being no controlling precedent related to EMSA, no authority exists with facts similar enough to these particular circumstances. While this Court does not require a case to match exactly, the legal precedent must clearly prohibit the government agents conduct in the particular circumstance. No precedent has determined that a Board of Health Commissioner cannot issue a subpoena against an insurance company that works closely with a hospital that is purportedly administering substandard care to patients suffering from a novel virus.

If the Court finds that Caesar does not fall within the closely regulated business exception, Cleopatra is still entitled to qualified immunity. This Court has found a substantial government interest in improving public health and safety. Therefore, it was reasonable for Cleopatra to believe that Caesar was an entity described in the EMSA. Additionally, no law exists that expressly states health insurance companies operating during a global pandemic are *not* closely regulated. Given the overwhelming absence of factually similar precedent, it cannot be said that the actions of Cleopatra were "clearly established" as unlawful. Thus, Cleopatra is entitled to qualified immunity. Respectfully, Cleopatra requests this Court affirm the Fourteenth Circuit's holding.

CONCLUSION

It is for the foregoing reasons, this Court should affirm the Fourteenth Circuit Court of Appeal's holding to grant the Motion to Dismiss.

APPENDIX A

18 U.S.C. § 1964 Civil Remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962 [18 USCS § 1962]. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

APPENDIX B

State of Romulus
Department of Health
Livia Cleopatra, Commissioner

SUBPOENA FOR INSPECTION AND PRODCUTION OF DOCUMENTS
SPECIAL PUBLIC HEALTH NEED - EMSA

To CAESAR HEALTH PLAN (THE "ORGANIAZATION") AND ITS PERSONNEL,

Under the authority granted by the Emergency Miasmic Syndrome Act (PCL § 18.8.891), you are hereby COMMANDED to admit to the Organization's premises the personnel of the Romulus Board of Health, for the purposes of conducting an inspection and search for information relevant to potential negligent or substandard care for Miasmic Syndrome. You are further COMMANDED to product to such personnel all records related to medical care at Julius Medical Center, which are:

1) Related to the diagnosis and/or treatment of Miasmic Syndrome, or
2) Related to patients who are suspected of carrying Miasmic Syndrome

Records sought under this subpoena include all insurance claims and medical records in the possession of the Organization which are related to such services and/or patient population, and which are dated on or after May 1, 2019.

Compliance with this subpoena will take place at 8 AM on March 19, 2020. Failure to comply by the Organization, through its personnel, may result in such legal actions by the Board of Health as are necessary to protect the public health. The Board is empowered to impose monetary penalties, and in appropriate situations to revoke a facility's operating license in the event of noncompliance with an EMSA subpoena. Illegally interfering with the execution of this legally-authorized collection of information is a criminal offence.

. Livia Cleopatra .
Livia Cleopatra, Commissioner

March 13, 2020

APPENDIX C

Romulus Consolidated Law (RCL)

Chapter 18 – Health Care and Public Health

Subchapter 18.8 – Board of Health

§ 18.8.001 – Definitions [Sections a-ff omitted] gg) Hospital: A facility or institution engaged principally in providing services by or under the supervision of a physician.

§ 18.8.100 – Responsibilities of the Board

a) The primary responsibility of the Board shall be the safeguarding of the Public Health, which shall be broadly construed to include the physical and mental wellbeing of the people of the State.

b) The Board shall especially focus on the control and elimination of contagious disease within the state.

c) The Board shall, in its discretion, take all actions as shall be necessary in support of these goals, within the powers delegated to it under the laws of the State of Romulus.

§ 18.8.500 – Licensing of Hospitals

a) It shall be unlawful for any Hospital to conduct business within the State, without possessing an Operating License issued by the Board.

b) The Board shall issue an Operating License upon a majority vote of the Board, if the Board in its sole discretion determines that the operation of the Hospital shall be in the interest of the Public Health, according to such procedures and regulations as the Board may set.

c) Upon a finding a licensed Hospital's continued operation is no longer in the interest of the Public Health, the Board by a majority vote may take any or all of the following actions:
    1) Instruct the Hospital to make certain changes, such that the Hospital's continued operation will be in the interest of the Public Health;
    2) Require the Hospital to pay an appropriate and proportional monetary fine;

3) Suspend the Hospital's Operating License, until a date certain or until such date as certain requirements are met; and
4) Permanently revoke the Hospital's Operating License.

§ 18.8.890 – Miasmic Syndrome Response

a) The Board shall be responsible to take all reasonable actions within its authority to determine whether the level of service provided to Miasmic Syndrome patients at each licensed Hospital is in compliance with all relevant standards in the medical field.
b) If any Hospital is found to provide Miasmic Syndrome care which is not in compliance with all relevant standards in the medical field, the Board will consider this as evidence that the Hospital's operations are not in the interest of the Public Health.

§ 18.8.891 – Emergency Subpoenas in relation to Miasmic Syndrome

a) The Commissioner of the Board may authorize an administrative subpoena to any licensed Hospital, which may require the Hospital to:
    1) Admit personnel of the Board onto their premises to inspect for evidence that the facility is providing substandard care for Miasmic Syndrome; and
    2) Provide such records or documents to the Board as the Board may in its discretion require in order to determine if the Hospital is providing substandard care for Miasmic Syndrome.
b) The Commissioner of the Board may authorize an administrative subpoena to any other person or entity within the State, which may require that person to provide any records or documents to the Board as the Board may in its discretion require in order to determine if a licensed Hospital is providing substandard care for Miasmic Syndrome.
c) A subpoena issued under this section shall be no broader than is reasonably required to determine whether a Hospital is providing substandard care for Miasmic Syndrome.
d) If an entity fails to comply with a subpoena issued under this section:
    1) If the entity is a licensed Hospital, the Board may treat this as evidence that the Hospital is providing substandard care for Miasmic Syndrome, and further may treat the act of refusal itself as evidence that the Hospital is providing care contrary to the Public Health; and
    2) If the entity is not a licensed Hospital, the Board may seek a court order to enforce compliance with the subpoena.
e) Upon petition by an entity which is the target of a subpoena under this section, the full Board shall review the subpoena and may amend or quash it, if the

Board agrees to do so by majority vote. No entity that so petitions will be penalized for its refusal, during the pendency of its petition, to comply with a subpoena under this section. During the pendency of any such petition, the entity will preserve all evidence as is sought by the subpoena. Failure to preserve such evidence may constitute Obstruction of Justice.

f) The Board shall only issue a subpoena under this section:

1) Upon reasonable suspicion that the Hospital about which information is sought may be providing substandard care for Miasmic Syndrome; or

2) To a licensed Hospital at random, as part of a documented and fair methodology for conducting random inspections.

Chapter 30: Criminal Law Subchapter 30.50: Interference with Public Administration

§ 30.50.120 – Obstruction of Investigation

It shall be a misdemeanor to obstruct or impede any duly authorized agent of the State of Romulus in that agent's conduct of a search or investigation authorized by law.