Team #208

No. 2020-01

IN THE

Supreme Court of the United States

CAESAR HEALTH PLAN, INC.,

Petitioner,

v.

LIVIA CLEOPATRA,

Respondent,

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

BRIEF FOR PETITIONER
ORAL ARGUMENT REQUESTED

TEAM 208

Attorneys for Petitioner

QUESTIONS PRESENTED

1. 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?

2. 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 a state statute which does not authorize precompliance review before a judicial entity? If so, is the official protected from liability under 42 U.S.C. § 1983 by the doctrine of Qualified Immunity?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

FEDERAL CIRCUIT COURT CASES

FEDERAL DISTRICT COURT CASES

OTHER

OPINIONS BELOW

The District Court for Romulus denied Respondent's Motion to Dismiss on both counts because: (1) Petitioner adequately pled the causation requirement under 18 U.S.C. § 1964(c) to substantiate its civil RICO claim, (2) Respondent violated Petitioner's Fourth Amendment Rights, and (3) Respondent cannot escape liability under the Qualified Immunity doctrine.

The Appellate Court for the Fourteenth Circuit reversed the District Court's ruling and grated Respondent's Motion to Dismiss on both counts.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1964(c)

42 U.S.C. § 1983

Emergency Subpoenas in relation to Miasmic Syndrome § 18.8.891

STATEMENT OF THE CASE

A year and a half ago Miasmic Syndrome ("Miasmic") started to spread globally, infecting millions, and killing thousands throughout the nation of Alexandria—resulting in a pandemic. Record ("R.") at 1. Prior to the pandemic, Glukoriza only had limited market penetration for cancer treatment and sold approximately 1000 doses per year throughout the nation. Id. Galen Research ("Galen")—trying to capitalize on pushing a miracle cure to quell the citizens' fears—performed trials to test the effectiveness of Glukoriza as a treatment for Miasmic. Id. Respondent, Livia Cleopatra, responsible for the trials is the sole proprietor of Galen. Id.

Based off its own trials, Galen claimed using Glukoriza off-label at a much higher administration would cut Miasmic's fatality rate by at least half and hasten recovery time by several days.[1] R. 1. After these findings, Galen started mass producing Glukoriza and jumpstarted its marketing scheme that relied heavily on its trial data. R. 2. Galen sent out sales reps to entice physicians to prescribe off-label Glukoriza, while simultaneously engaging in marketing campaigns to lure health insurance companies to cover this drug as a treatment for Miasmic. Id. Galen struck gold when finally scoring a notable client, Julius-Caesar Healthcare System, to take a chance on Galen's off-label "miracle." Id.

In response to the nationwide pandemic, a wide array of counterfeit, adulterated and otherwise dangerous drugs flooded the market as "miracle cures." R. 3. The Romulus legislature passed the Emergency Miasmic Syndrome Act ("EMSA"). Id. The EMSA created distinct regulations for hospitals and non-hospitals. R. 8, 9. The Commissioner may authorize an administrative subpoena to admit personnel of the Board onto a hospital's premises to inspect for evidence, or require the hospital to provide records and documents, substandard care for Miasmic.[2] R. 9. In addition, the Board can subpoena "any other person or entity within the State, which may require that person to provide any records or documents to the Board" that the Board "in its discretion" requires. R. 9. Respondent, sole proprietor of Galen, found herself to be coincidentally appointed as Commissioner of the Board. R. 4.

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[1] Glukoriza's approved dosage is one dose per month over six months. Galen recommended four doses over a two-week period, for treatment of Miasmic. R. 1.

[2] Commissioner has unilateral authority to authorize EMSA subpoenas. R. 4.

Julius-Caesar, a formal partnership between two legally separate entities, agreed in tandem to use Galen's off-label Glukoriza in hopes of ending the pandemic. R. 2. Julius Medical Center ("Julius"), the single largest healthcare provider in Romulus, agreed to educate its providers about benefits of Glukoriza as a treatment. Id. Caesar Health Plan ("Caesar"), a health insurance program, in turn agreed to fully cover prescriptions for Glukoriza when ordered as treatment for Miasmic.[3] Id. Only after three months, over 10,000 prescriptions for Glukoriza were written and paid for by Julius-Caesar.[4] R. 3.

Under Julius's tests, researchers established that (1) Glukoriza had no significant effect in curing Miasmic, and (2) a substantial number of patients who received the condensed administration suffered substantial side effects—including death. Id. Julius-Caesar jointly made the decision to remove Glukoriza from its recommended treatments for Miasmic and Caesar removed the drug from its approved formulary. Id.

After Julius-Caesar's informed decision to remove Glukoriza, the Board received an "anonymous" report of Julius's supposed substandard care. R. 4. Commissioner, acting alone, issued two warrantless administrative subpoenas against both Julius, a hospital, and Caesar, a non-hospital health insurance provider. While the subpoena against Julius is not in the record, Caesar's subpoena collapsed

[3] This is because Julius-Caesar operate in close coordination, and almost all of Julius' patients are members of Caesar.

[4] Galen's on-label prescription costs $60,000. Its 1000 on-label prescriptions equate to $60,000,000 in the entire nation of Alexandria prior to 2019. Galen's off-label prescription costs $40,000. The 10,000 off-label prescriptions equate to $400,000,000 in just only three months.

the EMSA's distinction between hospitals and non-hospitals *immediately* "commanding" Caesar, a non-hospital, "to admit" the Board to its premises "for the purposes of conducting an inspection and search," as well as "commanding" Caesar to "produce" any and all records related to diagnosis of Miasmic, treatment of Miasmic, patients suspected of carrying Miasmic, including but not anywhere limited to all insurance claims and medicals records in Caesar's possession related to any services or patients in the population since the Miasmic pandemic began. R. 11.

A week after "issuing" the subpoenas, Respondent "executed" them at Julius and Caesar's premises without prior notice on the compliance deadline with two groups of armed agents who simultaneously arrived at both entities at the break of dawn threatening arrest. R. 4, 5, 12. The front desk staff at Caesar's, unable to quickly tell which records were pertinent, feebly submitted all claims received from Julius since the start of the pandemic, including the medical data underlying each claim. R. 4. First time seeing the subpoena, the front desk staff was faced with two options: (1) immediately comply or (2) face a nonexistent statutory authority to arrest. R. 5.

From this immediate turnover of a massive cache of private, medical data, the Board determined Julius was providing substandard care. Commissioner, expected to recuse herself in the event of a conflict of interest, specifically penned the Board report herself. R. 11. As an act of concealing her company's failed promise of a miracle drug, Commissioner characterized Julius's substandard care not as a result of her recommended condensed administration of Glukoriza, but as a result of Caesar's

protocol of using other harmless de-toxifying herbal remedies like fennel and gentian. R. 5. Following the report, the Board suspended Julius's operating license resulting in a loss of over 15,000 patients in the Julius-Caesar integrated system and enrolled with new providers and insurance companies. R. 6.

Ironically, on the same day as the Board's report, a whistleblower came forward with documents showing severe discrepancies in the results of Galen's trial effectiveness and side effects of using Glukoriza as an off-label prescription.[5] R. 5. The whistleblower revealed not only that Glukoriza's ability to cure Miasmic was a fluke, but that the administration of the drug created substantial side effects including death. Id. Galen failed to disclose the severity of Glukoriza's side effects and misrepresented the true nature of using Glukoriza as an off-label prescription. R. 6. Shortly after, the Board replaced Commissioner and voted to restore Julius's operating license. Id.

Following Commissioner's fraudulent scheme and abuse of authority, Caesar filed a complaint in the United States District Court for the District of Romulus. Id. The Complaint alleges two causes of action against Respondent: (1) a civil RICO violation under 18 U.S.C. § 1964(c) and (2) a 42 U.S.C. § 1983 civil rights claim. Id. Respondent filed a 12(b)(6) Motion to Dismiss on both counts. R. 7. The District Court denied Respondent's motion in its entirety. R. 13. The Respondent appealed to the United States Court of Appeals for the Fourteenth Circuit. R. 28. The Fourteenth

[5] Suggested researchers falsified data and failed to properly follow up with patients to assess for delayed side effects. R. 14.

Circuit reversed the district court, and ordered the motion granted in its entirety. R. 28. Caesar petitioner the United States Supreme Court for a writ of certiorari, and petition was granted. R. 40.

SUMMARY OF THE ARGUMENT

The Appellate Court erred in granting Commissioner's Motion to Dismiss on both counts: (1) the civil RICO violation under § 1964(c), and (2) the civil rights violation under § 1983.

Caesar adequately pleads that Commissioner's fraudulent scheme is the proximate cause of the insurance company's injury. Courts focus on whether a RICO violation directly causes a victim to suffer immediate harm. Commissioner fully intended that her fraudulent scheme could not have succeeded unless she conned Caesar, the single largest health care provider in the state of Romulus. Commissioner's whistleblower report showed that Galen's trials were a fluke, did not cure Miasmic, and led to death. Commissioner used extensive resources to push Glukoriza, which included directing its marketing campaigns to insurance companies such as Caesar. Thus, Caesar relied on Commissioner's fluke that her miracle drug could cure Miasmic. Due to the severity of possible death from this miracle drug, Caesar adequately pleads with more generalized proof of reliance.

The Appellate Court failed to find that the three primary policy concerns in Holmes lets Caesar prevail on its RICO claim. First, Caesar requests a concrete amount of the difference between the off-label cost of Glukoriza and the on-label cost, which is $40 million. Second, no overlapping recoveries exist, because Caesar only

pleads economic harm and does not include patients' physical harm or physicians' reputational harm. Third, Caesar stands in the best position to deter Commissioner from further engaging in her scheme because only Caesar suffered the direct economic harm to cover the miracle drug.

Caesar adequately pleads a Fourth Amendment violation and Commissioner cannot escape the fruits of her illegal search because she is plainly incompetent. At the break of dawn, Commissioner's armed agents raided Caesar and demanded compliance with a subpoena that Commissioner herself penned. Directly going against her own state's statute as well as this Court's clear precedent, Commissioner thought she would be sneaky and exclude the option to challenge position to the Board on her written subpoena. Commissioner manifestly failed to afford Caesar the opportunity for precompliance review before a neutral decision maker—even though the Board is a constitutionally meaningless neutral decision maker. The subpoena exceeded its statutory authority by not only allowing its armed agents onto the premises of Caesar, but also by running away with almost all of Caesar's medical data. Since Commissioner did not "expect any backtalk," she also had her agents bully Caesar's staff into forced compliance with the threat of arrest, which these agents had no statutory authority to do. In addition, Caesar, a private insurer, is not a pervasively regulated industry, nor does the statute allow the Board to search *any* entity without an adequately constitutional substitute for a warrant.

Qualified Immunity tied the Appellate Court's hands behind its back and failed to: (1) address whether there was a constitutional violation, (2) whether the Board's

subpoenas are constitutional, and (3) failed to compensate Caesar for its constitutional harm. It is time for this Court to end the mighty aegis shield over governmental wrong doers like Commissioner, just because a court says she was the first to behave badly. Commissioner either declined to educate herself of this Court's ruling in Patel or ignored the lesson when she waited a week to execute the subpoena, not because she had to but because she wanted to. Thus, it seems Commissioner is plainly incompetent on the full force of the United States Constitution.

STANDARD OF REVIEW

This Court reviews questions of law *de novo*. Pierce v. Underwood, 487 U.S. 552, 558 (1998). Petitioner appeals the Fourteenth's Circuit's reversal of the District Court's denial of Respondent's Motion to Dismiss. On a motion to dismiss, this Court accepts as true the factual allegations in the record, viewing facts in the light most favorable to the Petitioner. Ashcroft v. al-Kidd, 563 U.S. 731, 734 (2011).

ARGUMENT

Highly sophisticated crime continues to deplete billions of dollars from the United States economy each year. Intending to combat these criminal activities from destabilizing the nation's economy, Congress passed RICO to broaden avenues of relief.

Under 18 U.S.C. § 1964(c), a RICO claim allows for any person to recovery injuries suffered "by reason of" an 18 U.S.C. § 1962 violation. 18 U.S.C. § 1964(c). Commissioner, as sole proprietor for Galen, economically injured Caesar in violation of 18 U.S.C § 1962 by inducing Caesar to "fully" cover Glukoriza as a treatment for Miasmic through fraudulent misrepresentations of its benefits and harmful side effects. R. 3. Thus, Caesar may recover damages through a civil RICO claim.

Commissioner has filed a 12(b)(6) Motion to Dismiss, arguing Caesar lacks standing to allege a RICO violation. R. 14. RICO standing requires Caesar to suffer injury to its property or business and have the predicate RICO offense create the "but for" and proximate causation of the injury. Anza v. Ideal Steel Supply Corp, 547 U.S. 451, 457 (2006). With the purpose of having "an effect in deterring wrongful conduct" in mind, proximate causation serves only to "recognize the limitations of deterrence." In re Neurontin Mktg. & Sales Pracs. Litig., 712 F.3d 21, 40–41 (2013). As an immediate victim of her harm, Caesar's recovery under a civil RICO will serve the purpose of deterring Commissioner's violative fraudulent conduct. Furthermore, Holmes policy concerns point to Caesar as a properly situated party to recover.

"Every person who, under color of any statute, ordinance, [or] regulation . . . of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983.

To prevail, Caesar must show that Commissioner's subpoena and search were unreasonable under the Fourth Amendment, and that this unreasonableness was clearly established under the law. Because of the per se unreasonable warrantless administrative nature of Commissioner's statutory subpoena and search, Commissioner must pass either of the Supreme Court's three-pong test set forth in Patel or Burger. She passes neither.

Further, Commissioner must show that none of the Supreme Court or Circuit precedent under the Fourth Amendment should have indicated to Commissioner that unreasonably applying her authority "under color [of] statute" with an overbroad subpoena and para-military search was unlawful, which she cannot do. And she must do so on a motion to dismiss where all facts and reasonable inferences should be construed in favor of Caesar.

In order to allow Caesar, whose rights were deprived under clearly established law, to receive the redress the Constitution and Congress intended for it to have under the Fourth Amendment and § 1983, Commissioner must be held liable for her actions, not only for justice to be served but also to shield future businesses and

workers "on the ground" from the a historical overreach of government officials acting in arbitrary, unilateral capacities.

Thus, the Fourteenth Circuit erred on RICO and § 1983, and this Court should deny Commissioner's Motion to Dismiss.

I. The Appellate Court Erred in Granting Commissioner's Motion to Dismiss Caesar's RICO Claim Because Caesar Has Suffered Direct Harm and Adequately Pleads an Immediate Victim of Her Fraudulent Scheme and Adequately Pled Proximate Cause as an Immediate Victim of Her Fraudulent Scheme, Further Evidenced by Holmes's Policy Concerns.

Due to its flexibility, the Court can manipulate proximate cause considering that the concept "does not lend itself to a black-letter rule" able to "dictate the result in every case." Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 654 (2007). In determining the bounds of proximate cause, courts focus on whether a victim's harm directly relates to the violative conduct. Anza, 547 U.S. at 451. Holmes' three policy factors also help guide a court's decision. Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 268–69 (1992). Yet as Holmes further instructs, proximate causation does not lend itself to "bright line rules." Bridge, 553 U.S. at 569.

Proximate cause "generically" serves to define the tools that eventually place limitations on an actor's liability. Holmes, 503 U.S. at 368. Proximate cause does not serve to insulate merciless profiteers by allowing them to hide behind those they deceived. Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co., 943 F.3d 1243, 1258–59 (9th Cir. 2019). Because pharmaceutical companies have no right to deploy fraudulent schemes concealing health risks to

procure in pursuit of financial gain, proximate causation does not allow for an escape hatch from the consequences of their actions. Painters, 943 F.3d at 1259.

Commissioner urges the Court to exploit proximate cause to absolve her from the liability of their fatal foul play. R. 14. This Court should instead hold her accountable for her actions by denying her Motion to Dismiss because Caesar's economic harm has a direct relation to her deadly scheme—furthered by Holmes' three policy concerns.

A. The Court should deny Commissioner's Motion to Dismiss because Caesar has suffered immediate harm with a direct relation to her fraudulent scheme.

The "central question" to determine whether an alleged RICO violation proximately caused an injury asks whether the victim suffered immediate or derivative harm. Anza, 547 U.S. at 461. When a direct relation exists between the victim's harm and the fraudulent conduct, the victim suffers immediate and proximately caused harm. Bridge, 553 U.S. at 658. Foreseeable and natural consequences of a fraudulent claim further bolster an understanding of immediate harm. Id.

Victims suffer direct and immediate harm when a defrauder's conduct gives rise to their injury. In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig., 804 F.3d 633, 642 (3d Cir. 2015). Primary and intended victims are the natural prey of fraudulent claims. Id. at 645 (holding medical coverage provider the intended victim of a pharmaceutical company's misrepresentations because the scheme intended to make its profit off the insurer as the purchaser). A victim is easily identifiable when

a fraudulent scheme's success relies on that victim's harm. Avandia, 804 F.3d at 645 (finding insurer as an easily identifiable victim when pharmaceutical company misrepresented the risk of a drug's cardiac arrests, because the insurer made the scheme profitable); Neurontin, 712 F.3d at 39–40 (finding insurance provider suffered direct harm when drug manufacturer's targeted marketing scheme induced pediatricians to increase off-label prescriptions of an ineffective drug, because the manufacturer knew the insurer would have to pay).

To show a direct relation, an injured party must show that it relied on *someone* in the causal chain who, in turn, relied on the fraudulent conduct. UFCW Loc. 1776 v. Eli Lilly & Co., 620 F.3d 121, 134–35 (2d Cir. 2010) (emphasis added) (finding no reliance when a fraudulent scheme directed its marketing solely towards physicians, and the insurer—who alleged economic harm for a drug with misleading effects on weight gain—continued to pay full price even after learning of side effects). Third-party *victims* suffer direct harm whether or not they are the direct recipient of the fraud. Bridge, 553 U.S. at 657–68. In Bridge, two related firms falsified statements defrauding a county's single-bid-per-parcel rule by arranging for secretive bids on the same tax liens, thereby both having a greater share of the bids than their competitors. Id. at 644. Despite the fraudulent bidders first having to defraud the county's system, this Court recognized the flow of harm through the county and to the competitors because the county did not suffer the same type of harm. Id. at 657–68.

Courts do not recognize the flow of harm in derivative relationships. Anza, 547 U.S. at 458. In Anza, a steal company stopped paying its tax, and as a result, the

company could reduce its prices while maintaining its profit. Anza, at 455–56. This Court held the competing steal company's reduced market share had a derivative relationship to the fraud because the scheme first economically harmed the state before economically harming the steal company from the resulting price undercuts. Id. at 458. A derivative relationship also exists where the harm entirely relies "separate actions of separate parties." Hemi Grp., LLC v. City of New York, 559 U.S. 2, 3 (2010) (finding city's loss of millions of dollars separate from fraud when cigarette merchant failed to file customer information because the failure of the customers to pay their taxes, rather than the fraud, caused city's loss).

Furthermore, reliance usually must be shown by more than overly generalized proof. Sergeants Benevolent Ass'n. Health & Welfare Fund v. Sanofi-Aventis U.S. LLP, 806 F.3d 71, 92, 94 (2d Cir. 2015). Providing only a mere correlation falls under the umbrella of overly generalized proof. Id. (holding mere correlation between insurer's harm and fraudulent scheme when physicians' relied on misrepresentations of a drug that had only "marginally" increased dangers that only caused four deaths out of six million prescriptions, because a multitude of reasons could exist for a decreased number of prescriptions). Misrepresenting grave risks of a drug through a fraudulent scheme allows victims to plead with more than generalized proof.[6] Painters, 943 F.3d at 1259 (finding physicians showed more than generalized proof

[6] Sergeants, 806 at 95 (noting that the dangerousness of a drug will "speak for itself" when the tradeoff between the risk and the benefits of the prescription "simply would never be worth the risk," and in such case, no physician would ever prescribe the drug to treat a condition if the physician had been aware of the drug's true risks).

when "greatly" influenced by pharmaceutical's gross misrepresentation, because of drug's serious risk of bladder cancer).

Caesar suffered direct harm at the mercy of Commissioner's unjustifiable scheme, making Caesar the immediate victim of the RICO violation. Commissioner's fatal ploy had virtually no success until she defrauded Caesar, the insurer of nearly all the patients for the single largest healthcare provider in the state. R. 2. Only once Caesar and Julius both agreed to make Glukoriza its preferred treatment did the fatal ploy become profitable. R. 2, 3. Therefore, Commissioner's scheme gave rise to Caesar's injury because it could not have succeeded without Caesar, indistinguishably similar to Avandia where a pharmaceutical company's fraudulent misrepresentation of cardiac risks could not have profited unless the medical coverage provider paid for the drug.

Commissioner deceived Caesar by misrepresenting Glukoriza's fatal side effects and ability to miraculously cure Miasmic during a global pandemic. R. 1. Only cashing in on the fear of people could explain why Commissioner would lie about the miraculous effects of Glukoriza. Ultimately, Commissioner knew that she could not profit without insurers. Thus, the scheme to conceal Glukoriza's lethality did not simply do foreseeable harm—Commissioner primarily intended to profit by defrauding Caesar, just like the pharmaceutical company in Neurontin knew the insurer would be stuck paying for the drug.

Caesar relied on Commissioner's reprehensible misrepresentations, which intended to convince insurers this "miracle drug" would cure rather than kill their

patients. R. 3. To be sure, the second a Galen whistleblower revealed the risks of Glukoriza, Caesar decided to never again cover the horrid drug for Miasmic. Id. Caesar's actions indicate clear reliance on Commissioner's misrepresentations, completely dissimilar to the insurer in UFCW Local that continued to pay full price for a drug that caused weight gain, even after knowing this concealed side effect.

Even assuming Caesar had to rely on Commissioner first defrauding Julius, Julius still did not first suffer the same harm as Caesar. Caesar suffered an economic harm, whereas Julius suffered harm of a different nature. Julius only suffered reputational harm. Therefore, because Julius did not first suffer the same harm as Caesar, harm can flow through Julius to Caesar as it did in Bridge where the county did not suffer the same harm as the competing bidders.

Importantly, Caesar does not allege derivative harm. Caesar purchased Glukoriza due to its own reliance on Commissioner's fraudulent and misleading marketing scheme. Even though patients did suffer kidney failure, Caesar does not need to rely on patient harm to make its economic claim. R. 5. Had Caesar known this so-called "miracle drug" killed people instead of curing Miasmic, Caesar never would have agreed to fully cover such callous treatments. Thus, fraudulently advertising Glukoriza as a "miracle drug" directly to Caesar does not show reliance on the separate actions of separate parties, remarkably distinguishable from Hemi where the city's harm relied on citizen's not paying their taxes rather than a company not providing reports of its purchasers.

Caesar shows more than overly generalized proof. This "miracle drug" did not only fail to cure Miasmic as Commissioner's marketing claimed, ten percent of patients who took Glukoriza as a treatment for Miasmic did so with disastrous results. R. 3. Undoubtedly, many paid the ultimate price. Glukoriza did not just lead to weight gain like the drug in UFCW Local. And unlike the drug in Sergeants, Glukoriza had more than a "marginally" increased health risk of less than one in a million. Glukoriza cured nothing and caused kidney failure in ten percent of its patients, making Commissioner's fatal misrepresentations just as dangerous and influential as Painters where concealed risks caused bladder cancer. Glukoriza did not help patients suffering from Miasmic whatsoever and instead increased chances of serious health risks. As Sergeants noted, when the tradeoff simply would never be worth the risk, the dangerousness of a drug and reliance on its fraudulent misrepresentations speaks for itself.

B. The three Holmes factors indicate that Commissioner's deadly scheme has a direct relation to Caesar's harm because the Court will have no difficulty ascertaining damages, no risk of overlapping recoveries exists, and no party stands in a better position to hold Commissioner accountable.

The Holmes factors utilize three primary policy concerns to aid in the determination of how direct a relationship between conduct and harm is. Holmes, 503 U.S. at 268–69. Holmes provides for a practical three-factored assessment to whether the victim stands in proximate relation to the harm. Id. Applying the Holmes analysis, courts consider whether: (1) the court would have difficulty ascertaining

damages, (2) a risk of overlapping recoveries exists, and (3) another party stands in a better position to hold the RICO violator accountable. Holmes, 503 U.S. at 268–69.

First, a pleading can allege reasonable methods for ascertaining damages even while providing multiple theories of calculation.[7] Avandia, 804 F.3d at 644 (finding damages ascertainable despite leaving calculation "a question for another day" when an insurer provided two separate methods for determining damages from drug manufacturer's fraudulent conduct). However, difficulty ascertaining damages will likely exist if calculating becomes too speculative. Sidney Hillman Health Ctr. v. Abbott Lab'ys., 873 F.3d 574, 577 (7th Cir. 2017) (finding difficulty in calculating damages when harmful off-label effects of a prescription drug could not be disentangled from non-harmful on-label prescriptions).

Second in the Holmes analysis, courts consider the risk of overlapping recoveries. Holmes, 503 U.S. at 629. Complaints focusing on financial damages separate from individuals pursuing personal injury claims greatly diminishes the likelihood of overlapping damages. Painters, 943 F.3d at 1251–52 (quelling fears of overlapping recoveries when medical coverage provider's complaint focused only on recovery for its own financial damage). Merely because one immediate victim exists does not preclude other immediate victims from recovering.[8] Neurontin, 712 F.3d at 37 (finding physicians did not create overlapping recoveries with an insurer despite

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[7] Difficulty proving damages should not be misinterpreted for difficulty in ascertaining damages. Avandia, 804 F.3d at 644 (declaring difficulty ascertaining increases in prescriptions or price attributable to a fraudulent pharmaceutical scheme can raise issues of proof "rather than demonstrating a lack of proximate cause").

[8] Anza, 547 U.S. at 465 ("The mere fact that New York is a direct victim of petitioners' RICO violation does not preclude Ideal's claim that it too is a direct victim.").

both relying on a pharmaceutical company misrepresenting drug's risk of increased suicidality because physicians did not pay for prescriptions).

Finally, courts will ask whether there are more directly injured victims to hold the defendant liable. Holmes, 503 U.S. at 629. Even though a scheme might defraud another first, a directly harmed victim has legitimate and appropriate standing to hold fraudulent actors liable.[9] Bridge, 553 U.S. at 658 (holding bidders at a tax lien auction the appropriate victims of a fraudulent scheme even though the scheme first sought to defraud the county). Courts will find that a theoretically harmed party a less appropriate victim. Empire Merchs., LLC v. Reliable Churchill LLLP, 902 F.3d 132, 144 (2d Cir. 2018) (finding State of New York a more appropriate victim when a liquor smuggling operation caused competing liquor distributors to undercut prices because New York had lost the revenue of untaxed liquor, had every incentive to sue, and the considerable ease of calculating lost tax revenue in comparison to the completely speculative loss).

All three factors of Holmes indicate that Caesar falls within the scope of proximate cause. The Court will not have difficulty ascertaining damages. Caesar has concrete means for ascertaining damages: the difference between the amount of Glukoriza Caesar purchased on-label and as a treatment Miasmic. R. 6. By not asking the Court to choose between one of two different methods of ascertaining damages, Caesar poses a much simpler method of calculating its remedy than the pleading of

[9] Criminals who try to escape the consequences of their actions through the use of proximate cause have received little sympathy. Painters, 943 F.3d at 1252 (lambasting drug manufactures for attempting to insulate themselves from the consequences of their actions by continuously hiding behind prescribing physicians).

the insurer in Avandia whose two separate methods for determining damages left the calculation "a question for another day."

Glukoriza only had a "limited market" of one thousand doses per year prior to the malicious scheme to use it as a treatment for Miasmic. R. 1. An on-label prescription of Glukoriza profited Commissioner $60,000,000 annually for the entire United States. R. 1, 2. In comparison, the deadly off-label prescriptions required four doses over only a two-week span, meaning that Caesar alone covered 10,000 prescriptions for the deadly off-label prescription of Glukoriza, resulting in a profit of $400,000,000 over just three months. R. 3. By subtracting on-label from off-label costs, the Court can easily ascertain that Commissioner's fraud cost Caesar no less than $340,000,000 for "fully covering" the costs of Glukoriza for Miasmic. Id. Thus, Caesar does not plead speculative damages, differing from Sidney where the court had difficulty disentangling the costs of harmful and beneficial prescriptions.

A risk of overlapping recoveries does not exist. While individual patients suffered physical harm, Caesar pled only its own economic harm, which greatly diminishes the likelihood of overlapping damages in the same way as the coverage provider in Painters that quelled fears of overlapping damages by excluding personal injury claims of patients. Damages suffered by patients, Julius, and Caesar do not overlap because these damages stem from various harms. Patients may recover for physical harm; physicians may recover for the harm to their reputation; and Caesar may recover for the economic harm suffered as a result of a drug manufacture's fraudulent scheme to profit off its payments. Because Caesar "fully" covered the

prescriptions of Glukoriza, no other victims risk overlapping recoveries for this specific economic harm, mirroring Neurontin where overlapping economic recoveries did not exist when insurer suffered economic harm and physicians did not pay for prescriptions.

No party stands in a better position to hold Commissioner responsible for her misleading scheme. The only entity available to recover based off economic harm is Caesar. R. 40. Therefore, Caesar, the only insurance company to cover the drug for Miasmic, stands in the best position to hold Commissioner responsible just as the bidders in Bridge, the only party to suffer economic harm. Caesar does not plead theoretical damages. Only Caesar paid for Glukoriza, and only Caesar has incentive to sue for these damages. Thus, Caesar has the ability to hold Commissioner accountable, completely dissimilar to Empire where the State of New York substituted for competing liquor company because the state also suffered economic harm and had incentive to sue.

II. The Appellate Court Erred in Granting Commissioner's Motion to Dismiss Caesar's § 1983 Claim Because Commissioner's Plainly Incompetent Search and Subpoena Are Objectively Unreasonable under the Fourth Amendment and Do Not Grant Her Qualified Immunity.

The Fourth Amendment safeguards "[t]he right of the people to be secure . . . against unreasonable searches and seizures," and requires that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. Historically, this Court has repeatedly held that "searches conducted outside the judicial process . . . are *per se unreasonable* . . . subject only to a few . . . exceptions." City of Los Angeles v. Patel, 576 U.S. 409, 419–20, 44–26 (2015).

In 1871, Congress designed 42 U.S.C. § 1983 strict liability statute, under whose authority Caesar seeks relief, to impose liability on officials who violated the Constitution to deter officials from using the "badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief . . . ." Wyatt v. Cole, 504 U.S. 158, 161 (1992) (citing Carey v. Piphus, 435 U.S. 247, 254–57 (1978)). To this plain text, this Court added the doctrine of Qualified Immunity, which should not provide an aegis shield to Commissioner.

A. Commissioner and her armed agents' subpoena and surprise search of Caesar's premises violated Caesar's constitutional right to precompliance review before a neutral decisionmaker and do not provide a constitutionally adequate substitute for a warrant.

Pre-Patel and over half a century ago, this Court capped a line of "pervasively regulated industry" cases with a decision that allowed government intrusion over only four industries: liquor, firearms, mining, and auto junking—a view this Court has not changed to this day and should not today. Patel, 576 U.S. at 419, 424–26. Burger's exception only permits warrantless administrative searches where: (1) a substantial government interest informs the regulatory scheme by which the inspection was made, (2) the warrantless inspection must be absolutely necessary to further the regulatory scheme, and (3) certainty and regularity in the inspection program provides a "constitutionally adequate substitute for a warrant." New York v. Burger, 482 U.S. 691, 701–03 (1987). Burger requires this certainty and regularity to ensure searches give proper notice in a context stringently limited by time, place, and scope. Id. This Court effectively drew a line to protect businesses like Caesar not traditionally subject to warrantless administrative searches, not put on notice to

expect such searches by statutory or regular inspections, and not otherwise suffering from a reduced expectation of privacy and security. Burger, 482 U.S. at 701, 702.

Just five years ago, Patel held that statutory warrantless administrative searches need to demonstrate that: (1) "special needs" make a warrant and probable cause impracticable, (2) the primary purpose of the search is "distinguishable from the general interest in crime control," and (3) "the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." Patel, 576 U.S. at 420.[10] Patel governs Caesar's situation because this Court has only applied Burger to four specific industries. Id.

1. *Commissioner's subpoena and search violated Caesar's constitutional opportunity for precompliance review, and even if it did, the EMSA's statutory review would be constitutionally meaningless before the biased Board.*

In a warrantless administrative search requires a valid statute and subpoena. Id. at 426–27 (finding state statute invalid where its inspection scheme permitted a hotel owner to be arrested on the spot for noncompliance, without recourse to an administrative court, because it created an intolerable risk that searches authorized by it would exceed statutory limits). An administrative agency subpoena must be sufficiently limited in scope, relevant in purpose, and specific in directive. Morgan v. Chapman, 969 F.3d 238, 242–43 (5th Cir. 2020) (finding Fourth Amendment claim would not be futile where a team of law enforcement officers and medical board investigators coordinated extensively prior to descending upon a medical clinic with

[10] The purpose of precompliance review is to alter the dynamic between the searching officer and front desk staff to reduce the risk that warrantless administrative searches merely harass business owners or result in illegal, overbroad subpoenas. Patel, 576 U.S. at 420–21, 423.

an unusual show of force, rifling through private patient files, and seizing confidential patient medical records not listed in the subpoena). Subpoenas that demand immediate compliance before court review are unconstitutional. See v. City of Seattle, 387 U.S. 541, 545 (1967) (finding administrative entry upon a commercial premise to peruse financial records cannot result in an official's unreviewed discretion, and the subpoenaed party must obtain judicial review prior to suffering penalties for refusing to comply).

Further, broad statutory safeguards cannot substitute for individualized review. Camara v. Mun. Ct. of San Francisco, 387 U.S. 523, 533 (1967). In Camara, a municipal health and housing board conducted mandatory, routine inspection procedures on housing premises in the city. Id. Under the regulatory scheme, when an inspecting official demanded entry, the occupant had no way of knowing whether enforcement of the municipal code involved required inspection of the premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspecting official was acting under proper authorization. Id. Only by refusing entry and risking a criminal conviction could the occupant challenge the inspector's decision to search. Id. This Court held that occupants had a constitutional right for these questions to be reviewed by a neutral magistrate and refused to carve out exceptions to the Fourth Amendment, reasoning businesses cannot be forced to choose between unreasonable and unwarranted search and

seizure at the threat of arrest.[11]

A group of armed agents descended upon Caesar's at the break of dawn demanding compliance with a week-old subpoena commanding admission into Caesar's premises for inspection. R. 11. Without any statutory authority, Commissioner's militia threatened to arrest all present staff on the spot if they did not immediately allow these armed agents to rifle through private patient healthcare data. R. 4–5. The agents ran off with a cache of over a year's worth of medical data, regardless of its relation to Miasmic. R. 4–5.

Commissioner's subpoena deliberately failed to mention the avenue of review to the biased Board. R. 9. Additionally, an email between Commissioner and her enforcer clearly indicates Commissioner's intent to surprise execute the subpoena at Caesar's premises on the compliance deadline. R. 4, 9, 11–12.[12] Not only does the EMSA nowhere else permit criminal sanction, its one allowance is only permitted *after* the entity being searched without a warrant has been given the opportunity for precompliance review through petition to the full Board. Caesar's opportunity never came to fruition.

Patel's concern for exceeding limits rings true here. As if it were Patel all over again, the EMSA's regulatory scheme creates the exact same intolerable risk of

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[11] This Court further opined that administrative searches are significant intrusions upon the interests protected by the Fourth Amendment because they are *per se unreasonable*, that is authorized and conducted without a warrant procedure and therefore lacking the traditional safeguards that the Constitution guarantees, including judicial review. Camara, 387 U.S. at 533.

[12] Commissioner's intention to catch Caesar off-guard so Caesar could not "hide anything" finds itself in further contradiction with her own statutory authorization because the EMSA specifically provides for evidence preservation in § 18.891(e)—the only place in the EMSA that provides for the possibility of criminal punishment. R. 9, 12, 21.

exceeding a set of already questionable statutory limits for search and seizure. As recently warned in Morgan, where law enforcement officers descended upon a medical clinic with unusual force, unreviewed discretion, and rifled through private medical files, Commissioner's subpoena and search are just as much of far-flung fantasy from the Fourth Amendment's framework. Also, Commissioner's subpoena allowed her armed agents to confiscate a treasure trove of HIPAA-protected and subpoenaed patient medical records unlimited in scope, just as the officers in Morgan took medical records not listed in the subpoena.

On their own, Commissioner's arbitrary actions implicate the clearly established dangers of unreviewed discretion found unconstitutional by this Court from See to Patel. The fact that the armed agents' actions occurred without any opportunity for statutory precompliance review before the Board renders the subpoena and search unconstitutional just as in See where city imposed penalties on warehouse owner without judicial review.

Where the regulatory scheme authorized in Camara actually required regular inspections, here the warrantless administrative search is hardly part of a routine scheme, a traditional requirement of administrative searches. Even more so than in Camara, Caesar has no way of knowing whether the EMSA required such a search (it did not), what the lawful limits of Commissioner's power to search were (unbounded), and whether Commissioner's armed agents acted (still unclear), without its front desk staff risking criminal convictions. In Camara's clearly established law, Caesar simply cannot be forced to choose between unreasonable and

unwarranted searches at the threat of arrest. Contradicting one's authorizing statute in issuing and executing subpoenas is objectively unreasonable at best, if not plainly incompetent.

Patel also requires that precompliance review be before a *neutral* decisionmaker. Here, the EMSA likely do not meet that bar of neutrality because a plethora of political and pandemic pressures tower over the situation, keeping the Board and its interests from providing anything resembling a neutral decision-making role unlike how See required judicial review before a district court, and Camara envisioned a neutral magistrate. The fact that Commissioner wrote her own search report for the Board is hardly surprising given that the Board did not question Commissioner's refusal to recuse herself at the outset of events due to her substantial pharmaceutical holdings, not to mention her political appointment by the governor of the State of Romulus under whose law the EMSA and the Board operates.[13] Nobody serves as a check on the Board.

2. Caesar is not a pervasively regulated business, and even if it was, the EMSA's regulatory scheme did not provide any notice, certainty, or specificity to serve as a constitutionally adequate substitute for a warrant.

If this Court elects to ignore Patel and extend Burger for the first time in thirty years, Commissioner still runs afoul of the Constitution. To past Burger's muster,

[13] Taking judicial notice of the fact that the very drug causing the substandard medical care in question was sold to Caesar by Commissioner's own pharmaceutical company, a sale that filled her coffers to the tune of $400 million, would not be imprudent. R. 1–3. Perhaps Commissioner of a Board of Health should be expected to do her statutory and constitutional homework or show some level of competence before acting arbitrarily in an abuse of her subpoena authority by dispatching armed agents on a para-military raid that ends up implicating her own fraudulent pharmaceutical dealings.

first an industry must be deemed historically or pervasively regulated, with a reduced expectation of privacy. Patel, 576 U.S. at 424–26 (finding hotels not pervasively regulated where modern hotel registries contain sensitive information, such as driver's licenses and credit card numbers lacking historic analog, because it would swallow Burger's rule whole). In categorizing the medical industry under Burger, circuit courts focus on the history of warrantless searches and heightened expectation of privacy, demanding more than extensive regulation, licensing requirements, or a theoretical risk to the public welfare. Zadeh v. Robinson, 928 F.3d 457, 465–66 (5th Cir. 2019) (finding the medical profession not covered under Burger despite close oversight and federal HIPAA regulations govern and exempt health boards from privacy requirements, reasoning that it strains credibility to suggest doctors and patients give up privacy interest); Tucson Woman's Clinic v. Eden, 379 F.3d 531, 537, 550 (9th Cir. 2004) (finding abortion clinics not covered under Burger despite passage of recent legislation).

If the Court decides to break from its four traditionally defined pervasive industries, the EMSA's statutory scheme must provide a constitutionally valid substitute for a warrant. Burger. A constitutionally valid substitute (1) must constitutionally the search is made pursuant to the EMSA and has a properly defined scope, and (2) must limit the discretion of the inspecting officers. Burger, 482 U.S. at 694–95, 703, 711 (finding state statute adequate where it notified junkyard owners they would be searched, who the inspecting official was, and limited search to reasonable hours and premises, reasoning statute required uniform application). But

see Zadeh, 928 F.3d at 456 (finding statutory scheme compelling production of medical records of licensees purely discretionary, without identifiable limit on who was subject to the statute because statute lacked notice). Further, under Burger an injured party may challenge both the constitutionality of the Act holding place for a warrant, as well as the conduct of government officials applying it. Patel, 576 U.S. at 424–26 (finding statute invalid); LeSueur-Richmond Slate Corp. v. Fehrer, 666 F.3d 261, 263–65, 268–69 (4th Cir. 2012) (finding regulatory scheme valid substitute for warrant where a state Mine Safety Act clearly indicated mine owner's property was subject to search by a mineral inspector who conducted over twenty-five previous inspections of the mines based on anonymous tips, reasoning that either statute or conduct gave rise to constitutional violation).

Only *one* circuit has extended Burger to cover health-related industries such as a clinical pain management center. United States v. Gonsalves, 435 F.3d 64, 66–68 (1st Cir. 2006) (emphasis added) (finding half-century old state statute a valid substitute where health board received an anonymous complaint regarding fraud, illegal sales of drugs to a pharmacy, and administration of diluted vaccines at a doctor's medical office; then formally interviewed the complainant, issued an administrative subpoena to provide twelve specific patient records at a future date, conducted an on-premise inspection that searched and seized only misbranded and adulterated drugs, reasoning office had no expectation of privacy, declining to extend Burger to the practice of medicine in general, and emphasizing the search and appeal

only concerned prescription narcotics—not patient records—which required the use of random inspection and surprise to make the scheme effective).

Under this Court's clearly established precedent, neither the medical profession as a whole, nor health insurance in particular, involve liquor, firearms, mining, or junkyards, the historically understood categories of pervasive regulation cemented by Burger and finalized by Patel. Certainly Caesar as an insurance company does not forfeit its expectation of privacy where Zadeh resisted classifying medical profession under Burger because these business have not been subjected to traditionally regularized and randomized warrantless administrative searches. Caesar is still not a pervasively regulated industry despite the EMSA's recent passage where Eden did not find recent legislation controlling and excluded abortion clinics as pervasively regulated.

Perhaps more importantly, Caesar was not ever actually pervasively regulated by the EMSA itself. Zadeh recognizes that modern times and pervasive regulation under Burger require more than close oversight or the licensing procedures all-too-common in any business; rather they require an entrenched history of warrantless inspection, entirely absent from Romulus' brand-new EMSA statute. R. at 3. Eden further recognizes that the medical profession's heightened expectation of privacy in the unique relationship between doctor and patient outweighs general public health or welfare concerns, in exactly the kind of unbounded searches of unredacted medical records found here. While Zadeh permitted without deciding the pervasively regulated designation of a pain management center, and Gonsalves adopted such a

position only under the very narrow circumstances of a doctor illegally selling narcotics, Caesar does not provide any doctor-patient medical services, prescribe or maintain a supply of any controlled substances as in Gonsalves or otherwise operate in any manner resembling a hospital or medical facility as defined in the EMSA. As in Zadeh and Eden, only the bureaucratic administration of private medical records and data, protected by HIPPA, are at issue. While a recent statutory scheme like that in Eden permits Commissioner and Board to broadly subpoena medical records or documents, a brand-new scheme cannot uproot the longstanding historical regulation required by Burger and noted in Patel. Any attempt to do so would eliminate the narrow Burger exception and swallow this Court's own rule.

Even if the Court elects to define Caesar as a pervasively regulated business, neither the EMSA nor Commissioner's subpoena are a constitutionally adequate substitute for a warrant because the brand-new EMSA did not put Caesar on notice, provide any limits on the Board or Commissioner's discretion, or properly define the time, place, or scope of search for non-hospitals. First, the word "insurance" does not appear in the EMSA. R. 8–9. Only buried somewhere in Chapter 18 of the Romulus Consolidated Law does the EMSA allow Commissioner to subpoena "any other person or entity in the State," which might as easily put Romulus' farmers or bankers on notice if it serves as sufficient notice for a health insurance company. R. at 9. This notice is hardly the direct statutory application found for junkyard dealers in Burger itself or, more recently, LeSueur's *Mine Act* that subjected *mines* to random searches by a *mine* inspector who had already entered the *mines* twenty-five times in the past

six months. (emphasis added). Caesar could not possibly have known it would be subject to any kind of inspection just as Zadeh failed to put medical record licensees on notice because of statute's unidentifiable limits. A Romulus hospital might have reasonably been put on notice—the word "hospital" appears in the EMSA twenty-four times and the EMSA provided for such random, regular inspections of hospitals—but construing a brand-new statute to constitute notice against a private entity not specified in the statute's own terms is a stretch to say the least.

To contrast, Gonsalves reluctantly permitted a half-century old law to provide notice for a search at a doctor's office who illegally sold narcotics and administered diluted vaccines because the statute established clear limits. The doctor had already been subject to seizure of drug samples for testing, and the search was preceded by prior interrogations, warrants, and a wholly separate and polite subpoena for twelve private patient records, all safeguards conspicuously absent here. Moreover, the officials in Gonsalves did not even seize the private patient records in their search, only the illegally sold narcotics subject to previous inspection. The situation could not be more different where Caesar only keeps insurance files, not illegal narcotics like in Gonsalves. Caesar might easily have complied with a reasonable document request at a future date like the business in Gonsalves, especially if Caesar had been given a constitutionally valid substitute for a warrant.

B. Commissioner is not entitled to Qualified Immunity because her subpoena and search violated clearly established Fourth Amendment rules prohibiting objectively unreasonable actions and incompetence.

Qualified Immunity smacks of unqualified impunity. Zadeh, 928 F.3d at 479. By letting government officials duck consequences for bad behavior, the doctrine risks eclipsing the hard-won remedy enacted by Congress at 42 U.S.C. § 1983. Taylor v. Hartley, No. 18-cv-4811, 2020 WL 5646118 (Sept. 22, S.D. Tex. 2020). The long-prevailing rule discrediting immunity held that officials may not ignore the Constitution with impunity, even where a statute or executive authorized an unconstitutional act. Butz v. Economou, 438 U.S. 478, 489–90 (1978) (citing Chief Justice Marshall's opinion in Little v. Barreme, 2 Cranch 170, 2 L.Ed. 243 (1804)). Yet despite the deep history of constitutional remedies for violated legal rights and the clear congressional language of 42 U.S.C. § 1983, this Court opened a door for officials who commit constitutional or statutory violations to raise the defense of "good faith and probable cause" to defeat civil liability. Pierson v. Ray, 386 U.S. 547, 557 (1967). From here, this Court elaborated its doctrine of Qualified Immunity, trying to balance two interests, "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from . . . liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231 (2009).

Qualified Immunity requires two steps: (1) finding an official violated a statutory or constitutional right, and that (2) the right must be clearly established at the time the official acted. Id. at 232. This Court no longer requires courts to address

the two-step process in chronological order. Pearson, 555 U.S. at 227. By not requiring courts to address a constitutional violation first, this Court created a self-revolving door—refusing to require courts to establish constitutional rights but insisting that these same rights be clearly established for injured parties prevail—that promotes constitutional stagnation and prevents the development of constitutional precedent. Id. at 232–36.

Qualified Immunity under the Fourth Amendment focuses on the "objective legal reasonableness" of an official's action assessed by the particular circumstances at hand—here, whether a reasonably competent official could have believed a *per se unreasonable* warrantless administrative search was lawful—but it *does not require* the very action in question to have previously been held unlawful or a previous search conducted in identical circumstances. Anderson v. Creighton, 483 U.S. 635, 640 (1987) (emphasis added); Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (emphasis added); Mitchell v. Forsyth, 472 U.S. 511, 535 (1985).

Accordingly, the Qualified Immunity standard does not require the "rigid gloss" of a "case directly on point" and allows that "novel factual circumstances" can violate clearly established law if an official is "plainly incompetent" or knowingly violates the law. District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (citing Ashcroft, 563 U.S. at 741; Hope v. Pelzer, 536 US 730, 739 (2002); Malley v. Briggs, 475 U.S. 335, 341, 344–46 (1986).

A reasonably competent official in Commissioner's position would have recognized that over fifty years of this Court's clearly established law for warrantless

administrative searches requires precompliance review before a neutral decisionmaker. Patel, 576 U.S. at 420 (holding statute and search unconstitutional in 2015 § 1983 claim by commercial plaintiff); See, 387 U.S. at 544–45 (finding it "now settled" in 1967 that inspecting or taking documents not contemplated by statute with a warrantless administrative search and subpoena, without review, is unreasonable under the Fourth Amendment).

A reasonably competent official in Commissioner's position would have recognized that over thirty years of this Court's clearly established law for pervasively regulated businesses does not cover the medical industry as a whole or Caesar in particular. Burger, 482 U.S. at 701 (holding warrantless administrative searches must have a constitutionally valid substitute for a warrant in 1987). But see Zadeh, 928 F.3d at 466 (finding medical profession as a whole not pervasively regulated under Burger, reasoning HIPAA created a heightened expectation of privacy for health records).

A reasonably competent official in Commissioner's position would have recognized that she could not exceed her discretion under the EMSA. Colonnade Catering Corp. v. United States, 397. U.S. 72, 77 (1970) (finding warrantless administrative inspection unconstitutional under authorizing statute that gave no rules for inspection, but inspectors' search exceeded statutory discretion under Fourth Amendment's restrictive reasonableness rules by using unnecessary force to search without business owner's consent).

A reasonably competent official in Commissioner's position would have recognized that conducting a run-of-the-mill administrative inspection as though it were a criminal raid, using an illegal subpoena and excessively executed search in contradiction to statutory authority, violates clearly established Fourth Amendment rights. Bruce v. Beary, 498 F.3d 1232, 1239–40, 1243, 1249–50 (11th Cir. 2007) (holding officers not entitled to Qualified Immunity where they arrived with guns drawn when they could politely ask for certain documents, excessive intrusion evidenced in raid was in marked contrast to other warrantless administrative inspections of private business, and Burger clearly established warrantless administrative searches could not exceed the limited scope governed by the Fourth Amendment's reasonableness requirement).

A reasonably competent official in Commissioner's position would have recognized the unconstitutionality of the timing, place and scope of an unwarranted search on Caesar. Established law from 1967 in See to merely five years ago in Patel clearly indicates it is "now settled" that warrantless administrative searches require precompliance review before a neutral decisionmaker, particularly in a § 1983 claim by plaintiffs like Caesar, where the inspection of commercial premises and the taking of private medical records without review is not contemplated by statute. Any reasonably competent official worth her salt in Commissioner's position would have done her constitutional and statutory homework. Nor would an objectively reasonable official in Commissioner's position thought Caesar constituted a pervasively regulated industry. Health insurance providers do not fall within the traditional

categories of Burger's domain, Zadeh and HIPAA establish that health records deserve a heightened expectation of privacy, and the EMSA statutory scheme did not provide Caesar a constitutionally valid substitute for a warrant. Where the inspection scheme in Colonnade gave no rules for inspections, the EMSA *did not even allow* the admittance and inspection that Commissioner's subpoena required of Caesar, further exceeding discretion while using the same force to unconstitutionally coerce consent. Any reasonably competent official in Commissioner's position would have *at least* issued a subpoena that followed the law that authorized it without the guns drawn and excessive intrusion that negated Qualified Immunity in Bruce. Here, exactly as in Bruce, the Fourth Amendment requires more than the unbridled discretion of an administrative official conducting an unpermitted run-of-the-mill inspection on a private business without any limited scope as if it were a para-military raid.

1. *Commissioner cannot overcome the higher burden Qualified Immunity faces on a motion to dismiss.*

A party endeavoring to defeat a lawsuit by a motion to dismiss for failure to state a claim faces a "higher burden" than a party proceeding on a motion for summary judgment. Behrens v. Pelletier, 516 U.S. 299, 309 (1996). This Court must accept as true the plausible factual allegations in the record, viewing these facts in the light most favorable to Caesar. Ashcroft, 563 U.S. at 734. This Court's Qualified Immunity cases in 42 U.S.C. § 1983 actions under the Fourth Amendment further illustrate the necessity of drawing inferences in favor of Caesar, especially if the Court decides the case on the clearly-established prong of the test. Tolan v. Cotton, 572 U.S. 650, 656–57 (2014) (holding even on summary judgement where the plaintiff

can no longer rest on the pleadings, the Court should acknowledge the key evidence of the non-moving party and define the "clearly established" right at issue on the basis of the "specific context of the case"). Thus, Commissioner's Qualified Immunity defense faces a higher burden on a motion to dismiss than it would on summary judgement and the significant hurdle of showing Caesar can prove no set of plausible facts in support of its claim that would entitle relief. McKenna v. Wright, 386 F.3d 432, 434–36 (2d Cir. 2004) (dismissing appeal as a matter of law, arguing the injured party is entitled to all reasonable inferences from the facts alleged, not only those that support the claim, but also those that defeat the immunity defense).

Commissioner cannot overcome the higher burden required to prevail on a motion to dismiss. The Fourteenth Circuit failed to acknowledge how Commissioner flagrantly violated her statutory authority by issuing an illegal subpoena to Caesar that commanded armed agents be admitted to a non-hospital for an inspection without notice or reasonable scope, using unjustified legal threats without providing a constitutional opportunity for neutral, precompliance review to coerce and seize unsubpoeaned private medical data. Under Tolan, the Fourteenth Circuit should have acknowledged the key evidence in Caesar's favor and used it to determine Caesar's rights in that specific context. If Commissioner thought the EMSA's statutory section authorizing a petition by the target of such a search was enough to meet Patel's precompliance standard or if Commissioner or her armed agents thought that Patel's consent or exigent circumstances exceptions applied, these facts are not in the record, nor are they reasonable inferences in favor of Caesar, the non-moving,

injured party. Likewise, whether or not Commissioner believed Caesar was a pervasively regulated business under Burger, or that the EMSA's regulatory provisions somehow created a constitutionally valid substitute for a warrant, these facts are not in the record, nor are they are reasonable inferences in favor of Caesar, the non-moving, injured party.

Instead, a huge body of federal civil procedure law and the decisions of this Court require drawing these inferences in favor of Caesar: the lack of any real opportunity for neutral, precompliance review, the myth of consent or true exigency, the heightened expectation of privacy for health insurance records, the failure of the EMSA to provide anything resembling statutory notice to a health insurance provider, and the *per se unreasonable* warrantless administrative search that abundantly failed to justify itself under the reasonable rules of the Fourth Amendment. If the Court decides Commissioner's motion to dismiss on the "clearly-established" prong of Qualified Immunity, Tolan requires these facts and inferences be drawn in favor of Caesar in a 42 U.S.C. § 1983 Fourth Amendment claim, Congress' 1871 strict liability statute, established in the context of Chief Justice Marshall's long-established rule against immunity. As recognized in McKenna, Commissioner and her armed agents have a significant hurdle proving Caesar did not plead a of plausible facts by which Commissioner is not entitled to Qualified Immunity. Commissioner simply cannot surpass the high burden of her own Qualified Immunity defense on a motion to dismiss. This Court should not permit Commissioner's objectively unreasonable incompetence protect her now.

CONCLUSION

For the aforementioned reasons this Court should reverse the Fourteenth Circuit's decision and conclude: (1) Commissioner's fraudulent scheme is the proximate cause of Caesar's injury, (2) Commissioner violated the Fourth Amendment by issuing a warrantless search upon Caesar, and (3) Commissioner cannot escape liability under the Qualified Immunity doctrine.

Appendix I

Romulus Consolidated Law (RCL)

Chapter 18 – Health Care and Public Health

Subchapter 18.8 – Board of Health

§ 18.8.891 Emergency Subpoenas in Relation to Miasmic Syndrome

a) The Commissioner of the Board may authorize an administrative subpoena to a Syndromensed 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.