No. 2020-01

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

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 PETITIONERS

Attorneys for Petitioners

QUESTIONS PRESENTED

I. Did a third-party payor establish the proximate cause element of a civil RICO claim when it agreed to underwrite a drug after the manufacturer fraudulently misrepresented its risks to physicians and health insurance companies?

II. Does a state government official violate the Fourth Amendment when, pursuant to a state statute, she authorizes an administrative subpoena and fails to provide the target company an opportunity to obtain a neutral, precompliance review?

TABLE OF CONTENTS

Page

APPENDICES:

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES:

UNITED STATES CIRCUIT COURT CASES:

UNITED STATES DISTRICT COURT CASES:

STATE COURT CASES:

CONSTITUTION:

FEDERAL STATUTES:

STATE STATUTES

REGULATIONS:

LEGAL PERIODICALS:

OPINIONS BELOW

The opinion of the United States District Court for the District of Romulus is unreported but appears in the record at pages 13–27. The unreported opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 28–39.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

This case involves three statutory provisions. First, the federal civil RICO statute, which provides, in part, that "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue." 18 U.S.C. § 1964(c) (2012). Second, this case involves 42 U.S.C. § 1983, which provides that "[e]very person who, under color of [state law], . . . subjects, or causes to be subjected any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable." 42 U.S.C. § 1983 (2012). Third, this case involves a Romulus statute allowing the Board of Health to issue administrative subpoenas, provided that "[u]pon petition by . . . the target . . . the full Board shall review the subpoena." RCL § 18.8.891. It also provides that "[n]o entity that so petitions will be penalized for its refusal, during the pendency of its petition, to comply with a subpoena under this section." *Id.*

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

An extremely contagious and sometimes deadly disease, Miasmic Syndrome, originated in the country of Alexandria in May 2019. R. at 1. It quickly evolved into a global pandemic. *Id.* Galen Research, an American pharmaceutical company headquartered in the state of Romulus, made an FDA-approved cancer medication called Glukoriza. *Id.* Galen's sole proprietor is Livia Cleopatra, who also serves as the Romulus Board of Health Commissioner. *Id.* Amidst the pandemic, Galen coordinated with the Alexandrian government to evaluate Glukoriza's effectiveness as an off-label treatment for Miasmic Syndrome.[1] *Id.* Glukoriza was not widely prescribed before the pandemic. *Id.* It had been on the market for five years and sold approximately one thousand doses per year. *Id.* Each dose of Glukoriza costs $10,000. *Id.*

The Clinical Trial. Galen publicly boasted impressive results from its trial: it claimed that Glukoriza halved Miasmic Syndrome's usual 1% fatality rate and accelerated recovery times by one week. *Id.* Although Glukoriza was approved to treat cancer as a regimen of six doses over a six-month period, Galen advised a condensed schedule for Miasmic Syndrome patients of four doses over a two-week period. *Id.*

[1] The practice of prescribing a medication for a use other than the one the FDA approved it for is called an "off-label" prescription. R. at 1.

The Whistleblower. A whistleblower would later reveal that Galen's trial was rife with "severe discrepancies" and that the data was outright "falsified." R. at 5. The whistleblower produced a report with internal Galen emails and other documents showing that the trial's organizers hid the drug's health risks. *Id.* Galen researchers masked the Glukoriza's dangers by removing patients from the trial who showed signs of kidney damage and neglecting "to properly follow up with patients to assess for delayed side effects." *Id.*

The Marketing Campaign. After publicly announcing the results of its manipulated clinical trial, Galen ramped up Glukoriza manufacturing and launched an expansive campaign promoting off-label prescriptions of the drug. R. at 2. Galen marketed directly to health insurance companies about its effectiveness, hoping insurers would cover Glukoriza when used as a treatment for Miasmic Syndrome. *Id.* Similarly, Galen targeted physicians nationwide to encourage off-label Glukoriza prescriptions for Miasmic Syndrome. *Id.* Galen's marketing failed to persuade insurers or physicians, with one exception: Julius-Caesar Health System agreed to list Glukoriza as a preferred Miasmic Syndrome treatment. *Id.*

The Integrated Payor-Provider. Julius-Caesar Health System is an integrated payor-provider, meaning it offers health insurance coverage, through Caesar Health Plan ("Caesar Health"), and provides medical services directly, through Julius Medical Center ("Julius Medical"). R. at 2. The two have a symbiotic relationship: nearly all patients treated at Julius Medical have Caesar Health insurance, and Caesar Health "strongly encourages its members to receive all or

most of their care at Julius by requiring prior authorization and clinical necessity" to reimburse expenses from other providers. *Id.* As a health insurance company, Caesar Health is considered a "third-party payor" – an entity other than the patient that pays health care costs on the patient's behalf. Caesar Health and Julius Medical are a formal partnership, but each has its own board of directors and the two are legally independent entities. *Id.* When the partnership agreed to carry Glukoriza as a preferred treatment, Julius Medical agreed to educate its physicians about the advantages of using the drug to treat Miasmic Syndrome and Caesar Health agreed to underwrite the drug and "fully cover" its cost. R. at 2–3.

Glukoriza Coverage. Over a four-month period, Caesar Health paid for 10,000 Glukoriza prescriptions that were ordered and filled at Julius Medical. R. at 3. Julius Medical researchers, acting independently of Galen, discovered that not only did Glukoriza have "no significant effect in curing or ameliorating Miasmic Syndrome," but also that the aggressive dosing regimen Galen recommended carried "substantial side effects," with over 10% of patients treated with the drug experiencing "serious loss of kidney function." R. at 3. After reviewing Julius Medical's research in February 2020, Julius-Caesar Health System stopped recommending Glukoriza to treat Miasmic Syndrome, Julius Medical stopped prescribing it, and Caesar Health ended its coverage. *Id.*

Legislative Response. Fearing an influx of fraudulent or adulterated drugs to treat Miasmic Syndrome, the Romulus legislature enacted the Emergency Miasmic Syndrome Act (EMSA). *Id.* EMSA authorizes the Board of Health ("the Board") to

issue subpoenas for inspection and collection of records from health care facilities to find evidence of substandard care for Miasmic Syndrome patients. *Id.* The Board's commissioner, Livia Cleopatra, was granted unilateral authority to issue such subpoenas. R. at 4.[2]

The Subpoenas. In March 2020, after receiving reports that Julius Medical's Miasmic Syndrome patients were performing particularly poorly, Commissioner Cleopatra issued subpoenas to Julius Medical and Caesar Health. *Id.* The subpoena to Caesar Health demanded compliance with an inspection of its facilities and production of all medical records related to the treatment of any patients who were tested for, confirmed positive with, or suspected of having Miasmic Syndrome. *Id.* The subpoena was signed on March 13th with a compliance deadline of March 19th at 8:00 A.M. Appendix 2.

The Search. Two separate groups of armed agents arrived at Julius Medical and Caesar Health at exactly the compliance deadline, 8:00 A.M. on March 19th. R. at 4. When Julius Medical was served with its subpoena, the hospital's attorneys refused to comply with its terms until they could challenge the subpoena in court. *Id.* Caesar Health's attorneys were unable to arrive to challenge the subpoena until after the search took place. R. at 5. The armed agents gained access to Caesar Health's records by "threatening to have all staff present arrested" if they did not

[2] The Board was empowered to issue administrative subpoenas against "any other person or entity within the state" to produce records and documents in order to determine whether a medical provider was "providing substandard care for Miasmic Syndrome." RCL § 18.8.891 (b).

"immediately submit to the search." R. at 4. Caesar Health employees were unable to determine which records were relevant to the search in the time given, so the agents demanded all data on claims since the start of the pandemic. R. at 5.

Consequences for Julius-Caesar Health System. Despite acting quickly to end its use of Glukoriza after reviewing its own data, Julius-Caesar Health System experienced significant legal, reputational, and economic consequences for having approved the drug. Julius Medical's license was suspended by the Board of Health which issued a report finding that its Miasmic Syndrome protocol of off-label drugs, including Glukoriza, resulted in "substandard care" and were associated with "an unaccountably high rate of kidney failure." R. at 5. The report used information from the raid and was authored by Commissioner Cleopatra; it claimed that Glukoriza was "generally safe" but had not been tested in conjunction with other antibiotics in the Julius-Caesar Health System's protocol. *Id.* On April 14th, the Board of Health reinstated Julius Medical's operating license after it proved that 100% of kidney damage could be attributed to Glukoriza. R. at 6. While Julius Medical's license was suspended, 15,000 patients previously ended their membership with the Julius-Caesar Health System and found new insurers and healthcare providers. *Id.*

II. NATURE OF THE PROCEEDINGS

The District Court. Caesar Health filed suit against Cleopatra on May 1, 2020, with two causes of action: (1) a civil RICO claim under 18 U.S.C. § 1964(c) for inducing Caesar Health to underwrite Glukoriza by means of fraud, and (2) a civil

rights claim under 42 U.S.C. § 1983 for authorizing an unconstitutional search of its premises. R. at 6. For its civil RICO claim, Caesar Health sought all the payments it made to Galen for Glukoriza as damages. *Id.* Cleopatra filed a motion to dismiss both counts. Cleopatra argued that Caesar Health does not have standing to allege a RICO violation because the proximate cause requirement was not satisfied. *Id.* Cleopatra further argued that the subpoena did not violate the Fourth Amendment and that she is protected by qualified immunity. *Id.*

The District Court denied Cleopatra's motion in its entirety on May 30, 2020. R. at 7. It found that Caesar Health adequately alleged proximate cause under the civil RICO statute; the relationship between Galen's misrepresentations and Caesar Health's payments for Glukoriza was direct and it had "no reason to insulate Galen from its fate." R. at 17. The District Court also found that Caesar Health adequately pleaded that Cleopatra violated its Fourth Amendment rights in her official capacity as commissioner of the Board of Health. *Id.* The Court reasoned that when Cleopatra failed to give Caesar Health an opportunity for precompliance review of the administrative subpoena, she could be liable under 42 U.S.C. § 1983 because her actions constituted a violation of Caesar Health's clearly established rights. R. at 27.

The Court of Appeals. Cleopatra appealed the District Court's decision to the Court of Appeals for the Fourteenth Circuit. R. at 7. The Fourteenth Circuit reversed on both counts and granted Cleopatra's motion to dismiss. R. at 35, 38. In regards to Caesar Health's RICO claims, the Fourteenth Circuit found that Caesar

Health lacked standing because it had not satisfied the proximate cause element. R. at 30. The Fourteenth Circuit found that Galen did not directly cause Caesar Health's injuries because physicians used their own judgment to prescribe medications, taking into account information about trials, a patient's history, and representations made by drug manufacturers. R. at 32–33. The Fourteenth Circuit also reversed the District Court's decision on Caesar Health's civil rights claim. R. at 38. The Fourteenth Circuit, without first addressing whether the Fourth Amendment was violated, concluded that Cleopatra did not violate any clearly established law and was therefore entitled to a defense of qualified immunity.

Caesar Health petitioned this Court for a writ of certiorari on July 7, 2020. *Id.* That writ was granted on September 14, 2020. *Id.*

SUMMARY OF THE ARGUMENT

I.

This Court has articulated the proximate cause element of civil RICO using a variety of terms, including remoteness, foreseeability, and intricacy. The central rule this Court has carried through its precedent in *Holmes, Anza*, and *Bridge* is the importance of a direct relation between the RICO violation and the plaintiff's injury. *Holmes* offered three reasons for this requirement: it simplifies damages calculations, avoids multiple recoveries, and enables immediate victims to sue and deter future harmful conduct. Under each of these formulations of the proximate cause element, Caesar Health's claim should be upheld.

Caesar Health's damages—the money it paid for Respondent's drug—occurred as a direct result of Respondent's misrepresentations about Glukoriza's effectiveness. Respondent targeted Caesar Health, as part of Julius-Caesar Health System, with fraudulent clinical information. Those fraudulent misrepresentations drove Caesar Health to approve Glukoriza as a preferred and covered treatment for Miasmic Syndrome.

Caesar Health was an immediate victim of Respondent's fraudulent misrepresentations and can show a direct relationship between its economic injury and the underlying RICO violation: mail and wire fraud. Caesar Health, as a third-party payor, was the foreseeable, natural, and intended victim of Respondent's scheme to sell Glukoriza. When Caesar Health agreed to pay for the drug, Respondent's floundering cancer medication became a "successful" Miasmic

Syndrome treatment almost instantly. Now, Respondent tries to distance itself from Caesar Health, who paid over $100,000,000 for this faulty drug based on Respondent's representations. Respondent would have never profited from the scheme without Caesar Health. This Court should reverse the Fourteenth Circuit's judgment dismissing Caesar Health's RICO claim and find that the proximate cause element was met.

II.

Cleopatra is also liable under 42 U.S.C. § 1983 for violating Caesar Health's constitutional rights. The Board's enforcement of their administrative subpoena was constitutionally defective; it never gave Caesar Health an opportunity for precompliance review before a neutral party, as required by this Court in *City of Los Angeles v. Patel*, 576 U.S. 409 (2015). Instead, the Board intentionally gave Caesar Health no option but to comply immediately, requiring that they turn over their records or face arrest. R. at 4–5. No exceptions or exigent circumstances justified the Board's unconstitutional search because there was no immediate threat of the evidence being destroyed. Similarly, the argument that the medical industry is a "closely regulated" one exempt from Fourth Amendment protections fails because of the heightened privacy interests inherent in the medical field. Because this Court's precedent clearly established the right that the Board violated, no reasonable official could have believed that what they were doing was lawful, precluding a qualified immunity defense. This Court should reverse the Fourteenth Circuit's judgment dismissing Caesar Health's § 1983 claim.

ARGUMENT AND AUTHORITIES

Both of Caesar Health's claims were adequately pleaded before the district court and prematurely dismissed by the court of appeals. When reviewing a motion to dismiss, this Court assumes all pleadings are true as alleged and reviews legal determinations *de novo*. *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *Brown v. Budget Rent-A-Car Sys., Inc.*, 119 F.3d 922 (11th Cir. 1997).

I. CAESAR HEALTH'S INJURIES WERE PROXIMATELY CAUSED BY THE DRUG MANUFACTURER'S FRAUDULENT MISREPRESENTATIONS.

Through the civil RICO statute, Congress empowered "any person injured in his business or property by reason of" a RICO violation to file suit and recover damages. 18 U.S.C. § 1964(c). The phrase "by reason of" incorporates both but-for and proximate causation, as Congress "presumably carried the intention to adopt the judicial gloss that avoided a simple literal interpretation." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 267-68 (1992) (quotations omitted). In this case, Respondent concedes that Caesar Health alleged a sufficient injury and the record stipulates that "there is no question" that misrepresentation occurred. R. at 3 n.4, 31. The remaining issue is whether the Respondent proximately caused Caesar Health's injuries when it misrepresented the safety and efficacy of Glukoriza in order to induce insurers to cover the drug. R. at 2. This Court's precedent compels the conclusion that the proximate cause element was satisfied. "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal*

Steel Supply Co., 547 U.S. 451, 461 (2006). Caesar Health's injuries were the direct result of Respondent's actions because the Respondent's misrepresentations were both the conduct that constituted the RICO violation as well as the "conduct directly responsible" for Caesar Health's injury. *Hemi Grp. LLC v. City of New York,* 559 U.S. 1, 11 (2010) (plurality). Further, the three purposes for requiring a direct relation as explained in *Holmes*—to simplify damages calculations, avoid duplicative recoveries, and effectively deter harmful conduct—are served here. 503 U.S. at 269-70. Caesar Health was the most appropriate plaintiff to vindicate the law: it was directly injured as the intended victim and it can prove its damages attributable to Respondent without risking multiple recoveries.

A. There is a Direct Relationship Between the Drug Manufacturer's RICO Violation and the Injuries Caesar Health Sustained After Underwriting the Drug.

Proximate cause "is a flexible concept." *Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639, 654 (2008).[3] When applied correctly, proximate cause achieves "what justice demands" in any given case, by holding defendants accountable without triggering "endless litigation." *Holmes,* 503 U.S. at 266, 268. "Proximate cause for RICO purposes . . . should be evaluated in light of its common-law foundations; proximate cause thus requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Hemi Grp. LLC v*, 559 U.S. at 9 (plurality opinion)

[3] This is particularly true in the context of civil RICO, as this Court has said "RICO is to be read broadly." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985); *see also Diaz v. Gates,* 420 F.3d 897, 901 (9th Cir. 2005) ("The statute is broad, but that is the statute we have.").

(quoting *Holmes*, 503 U.S. at 268). This has been called the "direct-relation requirement." *Anza*, 547 U.S. at 654. As articulated by Judge Posner, "Once a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough." *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 758 (7th Cir. 2011) (finding proximate cause established on a civil RICO claim). Caesar Health met that burden.

The direct relationship is severed when there is a "disconnect between the asserted injury and the alleged fraud." *Id.* at 11. "A link that is too remote, purely contingent, or indirec[t] is insufficient." *Id.* at 9 (*quoting Holmes* 559 U.S. at 271, 274) (quotations omitted, alteration in original). Because Respondent directly targeted Caesar Health's partnership with Julius Medical, and coveted its coverage payments, Caesar Health pleaded more than "harm flowing merely from the misfortunes visited upon a third person by the defendant's acts." *Holmes*, 503 U.S. at 268.

Here, the direct-relation requirement is satisfied. First, Caesar Health was the primary victim of Respondent's conduct and its damages came from the same conduct that constituted the RICO violation.[4] Second, the argument that physician's, not Caesar Health's, were an intervening break in the causal chain because they relied on the manufacturer's misrepresentations is unsupported.

[4] The underlying RICO violation is mail and wire fraud, 18 U.S.C. §§ 1341, 1343, which Caesar Health alleged Respondent committed when it promoted its falsified trial results and misrepresented Glukoriza's safety and effectiveness. R. at 30.

Bridge, 553 U.S. at 656 ("Nothing on the face of the relevant statutory provisions imposes [a first-party reliance] requirement.").

1. The drug manufacturer directly targeted Caesar Health, as an underwriter of the drug, making it the intended and foreseeable victim of its fraud.

The Respondent "engaged in a marketing campaign directed at health insurance companies to persuade them to cover Glukoriza."[5] R. at 2. Respondent advertised to insurers, not just doctors, demonstrating that it "did not view the various arms of [the integrated payor-provider] as 'third and even fourth parties'; rather, it viewed the [integrated payor-provider] as a single entity to which [the manufacturer] could pitch [its drug] in order to create effects that would reach prescribing physicians." *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21, 38 n.13 (1st Cir. 2013) (quoting *Hemi*, 559 U.S. at 15) (citations omitted). Preventing third-party payors, especially as an integrated payor-provider, from filing suits like this one would mean that "drug manufacturers would be insulated from liability for their fraudulent marketing schemes, as they could continuously hide behind prescribing managers." *Painters & Allied Trades Dist. Council 82*

[5] Inexplicably, the Fourteenth Circuit made a factual finding that Galen did not make representations directly to Caesar Health. R. at 34 (stating that "the only misrepresentations were made (if they were made at all) to physicians at Julius Medical"). The record stipulates that after manipulating its trial data, Respondent marketed to insurers to win Julius-Caesar Health System's business. R. at 2–3. This misunderstanding seems to have been central to the Fourteenth Circuit's holding, as it went on to make the same argument Caesar Health makes in this brief, writing, "If, for example, Galen had made these representations to *Caesar* (thereby putting *Caesar* on notice of potential wrongdoing or, at the very least, the results of inadequate clinical testing), that *could* satisfy the proximate causation requirement." R. at 34 (italics in original).

Health Care Fund v. Takeda Pharm. Co. Ltd., 943 F.3d 1243, 1257 (9th Cir. 2019), *cert. denied*, 2020 WL 3038299 (June 8, 2020). It would contravene the purpose of civil RICO to hold that "prescribing physicians' . . . decisions constitute an intervening cause to sever the chain of proximate cause." *Id.*

This is not the "intricate, uncertain" causal chain this Court rejected in *Anza*, where a private company sued its competitor alleging that the competitor had failed to pay its taxes and charged below-market prices. 547 U.S. at 460. In that case, "the conduct directly causing the harm was distinct from the count giving rise to fraud." *Id.* (finding that economic competitor suits carry a risk that "if left unchecked could blur the line between RICO and the antitrust laws"). Calculating potential lost profits in *Anza* was difficult because it relied on proving a convoluted counter-factual of what sales the competitor would have made if the taxes were paid. *Id.* at 452. But Caesar Health's damages are much simpler: if Respondent had never held out Glukoriza as an effective off-label treatment for Miasmic Syndrome, Caesar Health never would have covered it. Additionally, unlike in *Anza* where the producer's sole obligation was to the state to pay taxes, Respondent owed an obligation to Caesar Health to accurately represent its drug's effectiveness. *Id.* at 480.

Caesar Health was the foreseeable victim, as drug manufacturers like Respondent "are well aware that [insurers] and individual patients pay for the drugs." *Painters,* 943 F.3d at 1257. When Respondent targeted Caesar Health with its marketing campaign, it knew that "because of the structure of the American

health care system," its "fraudulent marketing plan, meant to increase its revenues and profits became successful once" Caesar Health agreed to pay its prices. *In re Neurontin Mktg.*, 712 F.3d at 39. Because Respondent's intended victim was Caesar Health, the interests of justice support this claim because "the effect of that wrongful conduct was clear in foresight, not hindsight." *Id.*

There are three salient differences between the cases that the Fourteenth Circuit relied upon to deny standing and Caesar Health's position. First, the Respondent made fraudulent representations directly to insurers about the safety of its drug, not just to doctors or the public generally. R. at 2. In *UFCW Local 1776 v. Eli Lilly & Co.*, the Second Circuit found proximate lacking only because, "[c]rucially, the TPPs do not allege that *they* relied on [the manufacturer's] representations—the misrepresentations at issue were directed through mailings and otherwise at doctors." 620 F.3d 121, 134 (2d Cir. 2010) (italics in original).

Second, the Fourteenth Circuit mistakenly relied on circuit court decisions that analyzed causation in the context of more complex claims. For instance, the proposed class of insurers in *UFCW Local 1776* had a more convoluted damages theory based on manufacturers charging an inflated price, whereas Caesar Health's damages theory is simple: regardless of cost, the prescriptions would not have been covered without Respondent's misrepresentations. *Id.* at 136; R. at 7. The Second Circuit suggested that a claim like Caesar Health's—where a single insurer sues to recover payments it made to drug manufacturers for fraudulently marketed drugs—could be more successful. *Id.* (finding that "it is not clear that the theory is not

viable with respect to individual claims by some [insurers] or other purchasers"). Another case the Fourteenth Circuit relied on denied standing where the plaintiff "did not identify statements or representations made by [the drug manufacturer] that were literally false or misleading at the time they were made." *United Food & Commercial Workers Cent. Pennsylvania & Reg'l Health & Welfare Fund v. Amgen, Inc.,* 400 F. App'x 255, 257 (9th Cir. 2010). Additionally, several cases holding against insurers did so in the context of class certification where "the individualized nature of the reliance inquiry can make it difficult to prove causation using generalized proof." *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis United States LLP*, 806 F.3d 71, 89 (2d Cir. 2015). Those issues do not present an obstacle here, as the Second Circuit distinguished the case of a single insurer from a class action, saying "it may be possible for a plaintiff to established its own claim (as opposed to the claims of each class member) using aggregate statistical proof—i.e. without having to show the individual reliance of thousands of prescribing doctors." *Id.* at 97.

Third, Caesar Health's claim is stronger than other insurers who are not part of an integrated payor-provider like Julius-Caesar Health System. *See, e.g. UFCW Local 1776,* 620 F.3d at 121 (denying standing where misrepresentations were made to doctors but not the stand-alone third-party payor); *cf. Painters,* 943 F.3d at 1257 (finding Kaiser, an integrated payor-provider, satisfied the proximate cause element for its civil RICO for a drug manufacturer's misrepresentations).

2. Prescribing physicians did not break the direct relationship between the drug manufacturer and Caesar Health's injuries.

Respondent argues that physicians who prescribed the drug severed the direct relationship between Respondent and Caesar Health's injury. In *Bridge v. Phoenix Bond & Indemnity Co.*, this Court confronted and explicitly rejected the proposition that a RICO plaintiff must be the party that directly relied on misrepresentations. 553 U.S. at 656 (recognizing a "long line of cases in which courts have permitted a plaintiff directly injured by a fraudulent misrepresentation to recover even though it was a third party, and not the plaintiff, who relied on the defendant's misrepresentation").

This Court has rejected civil RICO claims where the plaintiff's "theory of liability rests on the independent actions of third and even fourth parties." *Hemi*, 559 U.S. at 15. But doctors do not act independently from the health systems in which they work. Because of Julius-Caesar Health System's structure as an integrated payor-provider, doctors at Julius Medical were directly influenced by Caesar Health's decision to cover Glukoriza. The partnership operates "in tandem" in deciding what drugs to cover and once it decided to cover Glukoriza it also educated physicians about the drug and paid reimbursements.[6]

[6] The record divulges the close connection between Caesar Health and Julius Medical Center in terms of prescription decisions: "In agreeing to make Glukoriza its preferred Miasmic Syndrome treatment, Julius agreed to educate its providers about the benefits of Glukoriza as a Miasmic Syndrome treatment, and in tandem, Caesar agreed to fully cover prescriptions for Glukoriza when ordered as a treatment for Miasmic Syndrome." R. at 2–3.

The Fourteenth Circuit found that physicians' decision to prescribe Glukoriza broke the causal chain between Respondent and Caesar Health. R. at 34. This Court has made clear that there is no first-party reliance requirement for a civil RICO claim, Caesar Health needed to show "only that plaintiff's loss must be a foreseeable result of *someone's* reliance on the misrepresentation." *Bridge*, 553 U.S. at 656. (emphasis in original) (citing 3 Restatement (Second) of Torts § 548A (1976)); *see also Sidney Hillman Health Ctr. of Rochester v. Abbott Labs,* 873 F.3d 574, 576 (7th Cir. 2017) (noting that even without direct reliance "a RICO recovery is possible when a wrong against A directly injures B"). Doctors' individual reliance on information Respondent propagated about Glukoriza does not undo the direct relation between Respondent and Caesar Health's injury, as "there is no general common-law principle holding that a fraudulent misrepresentation can cause legal injury only to those who rely on it." *Bridge*, 553 U.S. at 656. Stated another way, "RICO's text provides no basis for imposing a first-party reliance requirement," so Caesar Health can recover for misrepresentations made to it as well as those made to prescribing physicians. *Id.* at 660. And beyond the statute's text, the Supreme Court has "repeatedly refused to adopt narrowing constructions," finding that RICO "provides a right of action to '[a]ny person' injured by the violation, suggesting a breadth of coverage not easily reconciled with an implicit requirement that the plaintiff show reliance in addition to injury in his business or property." *Id.* at 649. Additionally, whether the representations were made to Caesar Health or doctors,

all information promoting Glukoriza as a Miasmic Syndrome treatment came from Respondent and they are responsible.

It is significant that Caesar Health's partnership, Julius-Caesar Health System, acted swiftly to end off-label use of Glukoriza as soon as Julius Medical's researchers concluded it was ineffective. R. at 3. Courts have rejected a RICO claim for fraudulent misrepresentation where "after the side effects of [the drug] became publicly known . . . most [insurers] continued to pay the full price." *UFCW Local 1776,* 630 F.3d at 134. It would be reasonable "to infer solely from a precipitous drop-off in sales that any prescription for the drug was necessarily written in reliance on the defendant's concealment of the drug's risks." *Sergeants*, 806 F.3d at 92 (finding no proximate cause where there was no evidence of such a drop-off).

B. The Functional Factors Articulated in *Holmes* Support a Finding of Proximate Cause.

As described in *Holmes,* the phrase "any person injured in his business or property *by reason of* a violation" in the civil RICO statute is meant to "label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." 503 U.S. at 268. In *Holmes,* this Court gave three rationales for why a proximate cause requirement should be read into the statute. First, the farther removed an injury is from the defendant's RICO violation, the more difficult it is to discern how much of the plaintiff's total damages can be attributed to the defendant's RICO violation. *Id.* at 269. Second, when less direct victims are allowed to bring suit there is a risk of multiple recoveries. *Id.* Third, there is no need to allow more indirect victims to sue when directly injured parties

can deter future violations through their own suits. *Id.* at 270. None of these justifications apply in this case.

1. Caesar Health's damages are easily calculated and attributable entirely to the drug manufacturer's RICO violation.

The first reason given in *Holmes* for the direct relation requirement relates to the trial court's ability to identify what damages were caused by the underlying RICO offense: "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." 503 U.S. at 269.

This factor is more relevant in cases where there are "numerous alternative causes that might be the actual source or sources" of the injury. *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 983 (9th Cir. 2008). Here, the only source spreading information that Glukoriza was safe and effective for this purpose was the Respondent. That makes this case even stronger than other medical misrepresentation RICO claims because before it was promoted for Miasmic Syndrome, Glukoriza had been a relatively obscure drug, making it unlikely that physicians would have independently decided to use it for this novel purpose. *Cf. Sidney Hillman,* 873 F.3d at 577 (finding proximate cause was not met for a drug that had been on the market for a decade and doctors may have already been prescribing for the off-label use).

Respondent has argued that doctors' decision-making process in prescribing Glukoriza constitutes an "independent factor" under the first *Holmes* factor and

severs the causal chain. Based on Respondents' misleading data, Julius-Caesar Health System "agreed to educate its providers about the benefits of Glukoriza as a Miasmic Syndrome treatment." R. at 2. While it is true that "prescribing physicians serve as *intermediaries* between Defendants' fraudulent omission . . . and Plaintiffs' payments for [the drug], prescribing physicians do not constitute an *intervening* cause to cut off the chain of proximate cause." *Painters*, 943 F.3d at 1257 (italics in original). Although physicians have some independence, their role is not an "independent factor" under *Holmes* because Glukoriza "was a *prescription* drug, it was *required* to be prescribed by physicians," so "it was perfectly foreseeable that physicians who *prescribed* [the drug] would play a causative role in Defendants' alleged scheme to increase [the drug's] revenues." *Id.* (italics in original) (quotations and citations omitted). Even if doctors are a third party, they are not an "independent" or unexpected in the normal course of drug marketing. As "here, it is sufficient to satisfy RICO's proximate cause requirement that [the integrated payor-provider] alleged that prescribing physicians (also third parties, but not intervening causes) relied on Defendants misrepresentations and omissions." *Painters*, 943 F.3d at 1260.

2. There is no risk of multiple recoveries because underwriting health insurance companies like Caesar Health have a unique economic injury.

The second reason given in *Holmes* for limiting proximate cause does not apply here because Caesar Health is not an "indirectly injured" party that "would force courts to adopt complicated rules apportioning damages among plaintiffs at

different levels . . . to obviate the risk of multiple recoveries." 503 U.S. at 269. The exact amount of Caesar Health's damages is easily calculated and could not be credibly claimed by any other plaintiff. *Id.* Patients economic injuries do not overlap with Caesar Health's, as Caesar Health agreed to "fully cover" Glukoriza's $10,000 per dose price tag. R. at 3. There is no clear path towards multiple recoveries in this case, as patients could not claim the amount paid by Caesar Health as their own damages, Caesar Health could not claim patients' personal injuries, and doctors could not claim any portion of the drug's cost. *Painters*, 943 F.3d at 1251.

Patients' possible personal injury claims for kidney damage are distinct, not duplicative. Although "individual patients and [insurers] both suffered economic injuries from a drug manufacturer's fraudulent scheme," that "does not mean that one group of plaintiffs should be favored to recover over the other so long as they both suffered the same economic injuries from the drug manufacturer's same misconduct." *Id.* at 1258-59. "The injury alleged by the [insurer] is an economic injury independent of any physical injury suffered by" Glukoriza users. *In re Avandia Mktg. Litig.*, 804 F.3d 633, 644 (3d Cir. 2015). Additionally, those personal injury claims would not vindicate the RICO violation at hand. *Couch v. Cate*, 379 F. App'x 560, 566 (9th Cir. 2010) (rejecting proximate cause and holding that the alleged claims were "personal injuries that are not cognizable under RICO").

3. Adequately deterring drug manufacturers can only be achieved through suits from third-party payors.

Finally, the third *Holmes* factor favors standing because there are no "more directly injured victims we can count on to hold Defendants liable." *Painters*, 943

F.3d at 1252 (citing *Holmes*, 503 U.S. at 269-70). The "general interest in deterring injurious conduct" is served by Caesar Health's suit, because Caesar Health is in the position to recoup payments it was fraudulently induced to make and "vindicate the law as private attorneys general." *Holmes*, 503 U.S. at 269-70. As this Court framed in *Bridge*, "[t]he gravamen of the offense is the scheme to defraud." 553 U.S. at 647. The scheme here involved targeting physicians and health insurance companies to extract payments for drug reimbursements. It does not follow that Caesar Health, which was both the scheme's target and the key player that made the operation profitable, would not be able to sue Respondent to recoup its costs. Without being forced to pay the third-party payor's damages—which constitute the lion's share of Respondent's total enrichment—Respondent will not be deterred from similar conduct in the future.

Although Respondent argues that other parties, including physicians, could file suit and adequately deter future misconduct, physicians' damages would be miniscule compared to Caesar Health's. Prescribing physicians bear no direct economic consequence for prescribing bad drugs. Their only claim would be for an amorphous reputational injury in the eyes of patients who they prescribed the drug; "they are not out of pocket for the price of the drug and thus do not suffer the same economic loss as do individual patients and [insurers]." *Painters*, 943 F.3d at 1259. Physicians' damages would be too small to create a substantial deterrent and would not vindicate Respondent's RICO violation. As the Third Circuit held, "as far as we

can tell, prescribing physicians did not suffer RICO injury" from manufacturer's misrepresentations. *In re Avandia Mktg. Litig.*, 804 F.3d at 644.

Patients' suits alone could not deter fraud because their economic damages only cover a small portion of the drug's price. Suits for the cost of the drug and the personal injuries caused by the drug deter two different types of conduct: one for inducing sales of a drug with misrepresented effectiveness, another for producing a drug that made patients ill. These independent harms each merit their own recoveries, so Caesar Health's suit should progress.

As the First Circuit found, "accepting [the drug manufacturer's] argument on proximate cause as a matter of law would effectively preclude [insurers] from bringing suit under RICO as the primary victims of fraudulent off-label drug marketing, and from recovering for their economic injuries." *In re Neurontin*, 712 F.3d at 38 n.12. Accordingly, it is not "in the service of either justice or accountability" to immunize drug manufacturer's like Respondent from these claims because of the "high costs imposed by fraud in our health care system." *Id.* If it were true that RICO defendants who physically injured one plaintiff and economically injured another could only be held responsible for the personal injury claim and not the economic fraud, they would not be adequately deterred. The need for deterrence has rarely been stronger than during this Miasmic Syndrome pandemic, as the medical field relies on the integrity of drug manufacturers and is highly vulnerable to fraudulent representations. R. at 3 (noting a "wide array of counterfeit,

adulterated and otherwise dangerous drugs promising a miracle cure flooded the market").

II. THE STATE BOARD'S FAILURE TO PROVIDE CAESAR HEALTH WITH AN OPPORTUNITY FOR PRECOMPLIANCE REVIEW OF THE ADMINISTRATIVE SUBPOENA VIOLATED THE FOURTH AMENDMENT, SUBJECTING THE BOARD'S COMMISSIONER TO LIABILITY UNDER 42 U.S.C. §1983.

State government officials are liable for civil damages under 42 U.S.C. § 1983 when "a plaintiff [shows] (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).[7] For a constitutional right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Here, Respondent, acting in her official capacity as commissioner of the state Board of Health, violated Caesar Health's right to obtain precompliance review of the administrative subpoena before a neutral decision-maker. No exigent circumstances justified this intrusion. The

[7] Prior to 1982, this Court assessed whether the conduct was carried out in good faith. It has since been rejected because determining an official's subjective state of mind required onerous jury trials, resulting in a largely unworkable rule. *See* Note, *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1266-67 (2010).

contours of this right are clearly established—and were clearly violated in this case—foreclosing a defense of qualified immunity.

A. The Board of Health Violated Caesar Health's Fourth Amendment Rights by Creating and Serving a Constitutionally Defective Administrative Subpoena.

The Fourth Amendment protects the right "against unreasonable searches and seizures." U.S. Const. amend. IV. This Court has repeatedly held that "searches outside the judicial process, without prior approval by a judge or magistrate judge, are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *City of Los Angeles v. Patel*, 576 U.S. 409, 410 (2015) (quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009) and *Katz v. United States*, 389 U.S. 347, 357 (1967) (internal quotes omitted)).

Administrative subpoenas are an exception to the general rule that warrants must be approved by a court before they are executed. *Id.* They are, however, still governed by special rules to protect the rights of private parties. *Id.* Respondent's subpoena did not comply with those rules protecting Caesar Health from a warrantless search. This Court, in *Patel*, outlined a three-part test for warrantless searches, requiring: (1) special necessity, (2) a purpose for the search distinct from general crime control, and (3) that "the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker" unless another exception applies. *Id.* (citing *See v. City of Seattle*, 387 U.S. 541, 545 (1967) and *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984)). Respondent's subpoena failed the third prong of the *Patel* test, as no such opportunity for precompliance review was given.

Caesar Health employees were threatened with arrest if they did not comply with the subpoena on the spot. R. at 4. This is a fatal defect for Respondent's search. The subpoenaed party must be able to "obtain judicial review of the reasonableness of the demand *prior* to suffering penalties for refusing to comply." *See*, 387 U.S. at 545 (emphasis added). If the target of an administrative search is not afforded an opportunity for precompliance review, and no other exception applies, that search violates the Fourth Amendment. *Patel*, 576 U.S. at 410.

1. The administrative subpoena was defective because it did not offer a genuine opportunity for precompliance review before a judicial entity.

The subpoena failed the third prong of the *Patel* test because the authorizing statute only allows for precompliance review before a *partial* body—the Board itself—and even that review was made impossible by Respondent's design. There was no mention of precompliance review in the subpoena. Appendix 2. The subpoena only described two options for Caesar Health employees: immediate compliance or "illegal interference," which the armed agents made clear would result in arrest. R. at 21.

The authorizing statute describes an avenue for precompliance review, but it is nevertheless constitutionally deficient because it fails to provide a neutral decision maker to oversee that review. Romulus law allows the subpoena's target to petition for a full Board review of the subpoena before complying. RCL § 18.8.891(e). The Board, as the actual source of the subpoena, is not a "neutral decisionmaker" as required by this Court. *See United States v. U.S. Dist. Court for the E. Dist. of Mich., S. Div.*, 407 U.S. 297 (1972) (holding that executive officers in charge of

surveillance were not neutral decision-makers); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971). Further, because the Board would issue and review the subpoena, it violated the principle that those charged with duties "should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." *U.S. Dist. Court for the E. Dist. of Mich., S. Div.*, 407 U.S. at 317. Even if the Board could lawfully review its own subpoena, Respondent's status as commissioner of the board prevented impartiality. As sole proprietor of Galen, Respondent had an obvious financial interest in the outcome of the search. R. at 1.

Assuming the statute offered sufficient precompliance review, the method of service prevented that review from actually taking place. Respondent signed the subpoena on March 13th, with an enforcement deadline of March 19th at 8:00 A.M. Appendix 2. Armed agents arrived at Caesar Health and served the subpoena at *exactly* 8:00 A.M. on March 19th, demanding medical records. R. at 4. Although similar efforts to access documents at Julius Medical were rebuffed by hospital attorneys, the agents at Caesar Health "threaten[ed] to have all staff arrested for obstruction of justice" if the employees did not "immediately" submit to the search. *Id.* Demanding immediate compliance necessarily means there is no opportunity for precompliance review. *Zadeh v. Robinson*, 928 F.3d 457, 464 (5th Cir. 2019). The agents did not allow Caesar Health employees to sort through and find relevant documents, instead requiring them to turn over all documents related to claims received since the start of the pandemic. R. at 5.

This is the very same danger this Court warned of in *Patel*. Without an opportunity for precompliance review, the law "creates an intolerable risk that searches authorized by it will exceed statutory limits . . . ." *Patel*, 576 U.S. at 421. By waiting until the last possible second to serve the subpoena, Respondent ensured that Caesar Health employees had no opportunity to sift through the piles of medical records to determine which were relevant. The agents forced Caesar Health employees to turn over all patient information acquired since the beginning of the pandemic. R. at 5. This functionally made the subpoena's scope unlawfully broad. *See Bunker Ltd. P'ship v. United States*, 1985 WL 6037 (D. Idaho 1985) (holding that blanket searches of all documents may be justified in a criminal context but not in an administrative investigation).

Respondent's communications with her agents demonstrated her intention to enforce the subpoena at all costs, including denying the opportunity for review. In her email to Deputy Inspector Brutus, she instructed him to arrive "at the compliance deadline" and to "get what we're entitled to on the spot." Appendix 3. Intending to "set a precedent" for future searches, Respondent instructed Brutus not to entertain any challenges to compliance. *Id.*

Not only were Caesar Health's employees subjected to Respondent's artificially rushed timeline, the employees were threatened with immediate arrest. This threat was illegal. *See United States v. Sec. Bank & Tr.*, 473 F.2d 638, 641 (5th Cir. 1973) (holding that it is inconsistent with due process to allow an agency to compel obedience to a subpoena by threatening imprisonment). An administrative body's

demand for inspection "may not be made and enforced by the inspector in the field." *See*, 387 U.S. at 544-45. Respondent instructed Brutus to do exactly that.

In *Patel*, this Court found that exact form of search violative of the Fourth Amendment because one cannot be reasonably forced to choose whether to give access to records or risk being "arrest[ed] on the spot." 576 U.S. at 421 (holding that requiring immediate compliance violates the business's right to precompliance review of an administrative subpoena) (citing *Camara v. Mun. Court of City and Cty. of San Francisco*, 387 U.S. 523 (1967)). Caesar Health employees were presented with the same impossible choice: face immediate arrest or comply with the subpoena.

2. The closely regulated industry exception does not apply because Caesar Health has a heightened privacy interest.

Although this Court recognizes an exception for closely regulated industries, that exception is applied in only a small handful of "special need" scenarios to accommodate unique, non-law-enforcement-initiated situations in which the warrant requirement is impracticable. *See Griffin v. Wisconsin*, 483 U.S. 868 (1987). To qualify as a closely regulated industry, the industry must be governed by a pervasive regulatory scheme, making administrative searches a necessary part of that scheme. *New York v. Burger*, 482 U.S. 691, 703 (1967). Administrative searches must be conducted at certain regular intervals. *Id.*

This Court has recognized "the clear import of our cases is that the closely regulated industry . . . is the exception." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). The exception applies only to certain industries that "have such a

history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise." *Id.* In the medical context, the entities' "stock" is private and sensitive medical records of patients who entrust medical providers to safeguard their information.

This Court has only upheld this exception in cases dealing with four industries: liquor (*Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970)), firearms (*United States v. Biswell*, 406 U.S. 311, 316 (1972)), junkyards and auto parts (*Burger*, 482 U.S. at 691), and mines (*Donovan v. Dewey*, 452 U.S. 594 (1981)). In each of these industries, complying with frequent administrative searches is a "burden" of the trade—by choosing to engage in a highly regulated industry, businesses reasonably expect more government scrutiny and, consequently, a diminished privacy interest.

Extending this exception to the medical industry—which is charged with maintaining patients' sensitive medical records—does not comport with the exception's longstanding rationale. *See* Note, *Rethinking Closely Regulated Industries*, 129 HARV. L. REV. 797 (2016) (arguing that because both doctors and patients have a strong privacy interest in medical records, it would be improper to broaden the carefully limited scope of closely regulated industries). This Court also presumes that patients have a strong expectation of privacy. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011). Intrusions upon that privacy interest may deter patients from seeking out and receiving critical medical care. *See Ferguson v. City*

of Charleston, 532 U.S. 67 (2001). With or without a global pandemic, extending the exception to the medical industry would be unjustifiable.

It is one thing for a law to compel entities to maintain certain records, but quite another for the law to allow the government unchecked access to those records. This Court has never condoned the latter, and indeed, has required the government to comply with "legal process" before it accesses records. *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 52 (1974). A hallmark of that legal process is the requirement for an opportunity for precompliance review. Respondent coerced Caesar Health's cooperation with the subpoena, only offering a constitutionally defective opportunity for precompliance review. That violated Caesar's Fourth Amendment rights.

Even if the medical field were not defined by a sacrosanct privacy interest, the medical profession in Romulus would not count as a closely regulated industry under the *Burger* test. The industry must be pervasively regulated, and that regulatory scheme must be furthered by the inspections. *Burger*, 482 U.S. at 703. Although the authorizing statute lays out the purpose behind the inspections, these searches were neither certain nor regular in application. RCL § 18.8.891(b). Accordingly, the effect of the search was to "deny[] a constitutionally adequate substitute for a warrant." *Id.*

3. No exigent circumstances existed to justify this violation of Caesar Health's Fourth Amendment Rights.

There is no absolute test for exigency, but the governmental body issuing the subpoena bears the burden of proving the existence of exigent circumstances.

United States v. Anderson, 154 F.3d 1225, 1233 (10th Cir. 1998). This is a high bar. *Camara*, 387 U.S. at 539 (explaining that for most inspections, "there is no compelling urgency to inspect at a particular time"). Relevant factors to be considered include: evidence of probable cause, likelihood that evidence will be destroyed, the search's scope, and the role of police in creating exigency. *Id.* (citing *United States v. Carr*, 939 F.2D 1442, 1448 (10th Cir. 1991)). The record does not support a finding of exigency in this case.

The core of any Fourth Amendment analysis is reasonableness. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1185 (2016). There is nothing reasonable about the proposition that Caesar Health employees were likely to destroy any evidence. Indeed, medical entities face heightened record-keeping requirements. *See also Phillips v. Covenant Clinic*, 625 N.W.2d 714 (Iowa 2000) (detailing the heightened adverse presumption against medical providers in cases where records are intentionally destroyed).

This subpoena also failed to limit itself in scope to prevent the destruction of evidence. Respondent had no reason to suspect records were in danger of being destroyed, yet still cast a wide net to get "all records" related to the diagnosis and treatment of Miasmic Syndrome patients as well as those "suspected of carrying" the disease. Appendix 2. Respondent also manufactured panic and confusion by serving the subpoena at the enforcement deadline, ensuring that no one could actually sort the relevant documents from the irrelevant. *See e.g. Kentucky v. King*, 563 U.S. 452 (2011) (finding that police-created exigency is impermissible when the

investigator creates exigency and violates Fourth Amendment principles). This manufactured urgency effectively widened the scope of the subpoena even further, forcing the disclosure of more sensitive information than would have been necessary under a lawful subpoena.[8] This precedent, if upheld, would seriously erode individuals' medical privacy interests.

No exigency existed here. The Fourteenth Circuit has conflated urgency with exigency. A desire to take documents at this moment does not give rise to exigency, particularly where the inspecting party sits on a signed subpoena for a week before serving it.

B. Qualified Immunity Does Not Shield the Board of Health from Liability Because the Commissioner Violated a Clearly Established Constitutional Right.

The Fourteenth Court erroneously concluded that Respondent did not violate any of Caesar Health's clearly established rights. Because this Court has carefully defined both the right to obtain precompliance review of an administrative subpoena and the lack of any applicable exception, Respondent's attempt to seek refuge in the doctrine of qualified immunity fails as a matter of law.

[8] Although RCL § 18.8.891(b) allows for subpoenas to investigate whether a hospital is providing "substandard care for Miasmic Syndrome," this subpoena demanded copies of *all* medical records relevant to patients "diagnosed with, tested for, or suspected of carrying Miasmic Syndrome." R. at 4. The private medical information of patients who were merely tested for or suspected of having Miasmic Syndrome is not relevant to Julius Medical's standard of care for Miasmic Syndrome patients.

1. The right to obtain precompliance review of an administrative subpoena is clearly established.

In *Patel*, this Court placed beyond debate the already-established notion that "the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." 576 U.S. at 420. One week passed between Respondent's issuance of the subpoena and the execution of the search. The Board's failure to use that week to provide an opportunity for precompliance review of the administrative subpoena was not a mere oversight; it was a willful violation of rights established by Supreme Court precedent.

For a right to be "clearly established," the law at the time of the official's conduct must have been "sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *al-Kidd*, 563 U.S. at 731 (internal quotations omitted). This standard requires that the legal principle have "a sufficiently clear foundation in then-existing precedent," making the principle "settled law." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal citations omitted). Because *Patel* was decided five years prior to this search, any reasonable official should have been aware of its holding, under which the official's conduct was unconstitutional.

The rule that agencies must provide parties an opportunity to obtain precompliance review of an administrative subpoena is longstanding and unambiguous. As early as 1967, this Court recognized employers' right to a neutral review of an administrative subpoena when it held that administrative subpoenas "may not be made and enforced by the inspector in the field, and the subpoenaed

party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *See*, 387 U.S. at 544–45. That right was expanded in 1984, when this Court held that employers have the right to "question the reasonableness of the [administrative] subpoena . . . by raising objections in an action in district court." *Lone Steer, Inc.*, 464 U.S. at 415. In these cases, both concerning the ability of agencies to issue administrative subpoenas, this Court expressly balanced the rights of business owners against the agencies' investigative goals and preserved private parties' ability to challenge administrative subpoenas. Together, these cases alone made it "clear at the time that prior to compliance, [private parties are] entitled to an opportunity to obtain review of [an] administrative subpoena before a neutral decisionmaker." *Zadeh*, 928 F.3d at 464 (affirming that the *Patel* rule is clearly established for the purpose of qualified immunity). By contrast, Board officials in this case not only denied Caesar Health the opportunity to challenge its subpoena in court, but also threatened arrest for noncompliance. R. at 4–5.

More recently, this Court's decision in *Patel* articulated that, absent a well-delineated exception, "in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." 576 U.S. at 409. Applying that right, the Court concluded that the administrative enforcement of a subpoena was unconstitutional where the underlying statute provided the opportunity for neutral review, but the private company's employees were faced with the choice between

compliance and arrest, making it impossible to exercise that opportunity for review. *Id.*

The Board's conduct in this case so directly contravenes *Patel* that "every reasonable official would understand that what he is doing is unlawful." *Wesby*, 138 S. Ct. at 589. Respondent's agents demanded immediate delivery of the records and threatened arrest to all who failed to comply. This almost precisely mimics *Patel*, where the search of hotel registers was found unconstitutional because the official threatened that those who did not comply would "be arrested on the spot." 576 U.S. at 421. Although RCL § 18.8.891(e) grants *statutory* rights to appeal a subpoena, the *Patel* decision established that abiding by those statutory rights is not constitutionally sufficient for two reasons: (1) the statutory right means little when agents threaten arrest for noncompliance, and (2) review must before a "neutral decisionmaker." *Id.* at 420. Both reasons rang true here, when armed officers "threaten[ed] to have all staff present arrested for obstruction of justice if they did not immediately submit to the search and turn over all relevant documents and records." R. at 4. If Caesar Health employees somehow managed to avoid arrest and exercise their statutory right to seek review, the same Board that authorized the subpoena would be in charge of determining the propriety of its own conduct. *Id.*

In order to be sufficiently specific, a right must be asserted "not as a broad general proposition," but in a "particularized sense so that the contours of the right are clear to a reasonable official." *Reichele v. Howards*, 566 U.S. 658, 665 (2012) (internal citations and quotations omitted). That principle, however, does not

require that the right be narrowed to the specific circumstances before the Court.[9] Instead, the level of specificity required is only that a prior case articulated the specific right in question. *See id.* at 665 (finding that the right to be free from a retaliatory arrest was sufficiently articulated). Here, the rule clearly establishing the right to precompliance review of an administrative subpoena before a neutral decisionmaker is likewise sufficiently specific.

2. It is clearly established that the medical industry is not a closely regulated industry, and that exigency does not justify the constitutional violation.

The contours of the exception for "closely regulated industries" are clearly established and do not include medical providers. When an industry is pervasively regulated such that public interest in regulation overrides industry participants' private interest, "a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment." *Burger*, 482 U.S. at 702. That exception, however, has been limited, such that "[o]ver the past 45 years, the Court has identified only four industries that have such a history of government oversight that no reasonable expectation of privacy could exist . . . ." *Patel*, 576 U.S. at 424. This Court has circumscribed the list of qualifying industries—liquor sales, firearms sales, mining, and auto junking—and has not expanded this exception in decades.

[9] *See, e.g., Randall v. Scott*, 610 F.3d 701, 715 (11th Cir. 2010) (finding that, if the conditions are not sufficiently distinguishable, the prior case can function as clearly establish law for qualified immunity).

Specific precedent that the medical industry is not a "closely regulated industry" is not required for purposes of qualified immunity. Instead, all that is needed is a body of law such that "the contours of the right are sufficiently clear" so that every "reasonable official would have understood that what he is doing violates that right." *Ashcroft*, 563 U.S. at 741. The contours of closely regulated industries are already set out and have not changed.

Even absent clear authority on what constitutes a "closely regulated industry," an official authorizing an administrative subpoena could not reasonably believe that a custodian of patient medical records has the "weakened privacy interests" necessary for the exception to apply. *Burger*, 482 U.S. at 702. Special statutes protecting patient information, such as HIPAA, exist precisely because patient records have heightened privacy interests and require additional safeguarding. *See* 45 C.F.R. §§ 160, 162, 164.[10] For an official to analogize the medical industry's privacy interests to those of liquor sales and auto junking would not be an exercise in reason. Even if this Court recognized for the first time in this case that medical providers were a closely regulated industry, the Fourteenth

[10] Even under the searching standards of the Freedom of Information Act, medical records maintain heightened privacy interests. *See, e.g.*, *U.S. Dept. of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982) (asserting a heightened privacy interest for the FOIA); *Henson v. Dept. of Health and Human Servs.*, 892 F.3d 868 (7th Cir. 2018) (finding that medical information has a heightened privacy interest); *Mingo v. U.S. Dept. of Justice*, 793 F. Supp. 2d 447, 456 (D.D.C. 2011) (finding a privacy interest in medical records of inmates and staff).

Circuit's logic—requiring a case denying the exception for any given industry before proving a right was clearly established—would require this Court to individually create precedent on every industry.

The Fourteenth Circuit's conclusion that qualified immunity applies because the contours of the "pervasively regulated industry" exception are not clearly established would carve out the entire protection of the rule asserted in *Patel*. Because only four industries have been expressly held to constitute pervasively regulated industries, the Fourteenth Circuit's conclusion would allow defendants to hide behind qualified immunity when they violate the constitutional rights of businesses through administrative subpoenas. Requiring this Court to expressly hold that each new industry is not a pervasively regulated industry would be contrary to both the precedent of this Court and the purpose of qualified immunity.

3. This case does not present an issue of first impression.

The Fourteenth Circuit leaned heavily on its erroneous characterization of this case as one of first impression. R. at 24. The law has already established both that a constitutional right was violated in this case and that no exception applies. Although the Fourteenth Circuit was correct in asserting that "this particular confluence of fact and law" has never "appeared before this court," that does not preclude the law on the issue from being clearly established. R. at 26; *see also Ashcroft*, 563 U.S. at 741 ("We do not require a case directly on point . . . ."). Instead, it is sufficient that the specific right of entities to obtain precompliance review of an administrative subpoena has been clearly established. That right was

clearly violated in this case when the Petitioner was confronted with the same choice that was found to be illegal in *Patel*—comply or face arrest. R. at 4–5. The fact that this rule has never been applied during a pandemic or to a medical provider is a distinction without a difference because the constitutional right to an opportunity for precompliance review applies equally across contexts.

Although a specific case is not required, this Court's precedent has already found the Board's conduct unlawful. This Court has repeatedly held that the exact conduct in question need not have been previously held unlawful. *See Anderson*, 483 U.S. at 640 ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful."); *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985) ("We do not intend to suggest that an official is always immune from liability or suit . . . merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances.").

When enforcing an administrative subpoena, denying the opportunity for precompliance review by a neutral decision-maker and threatening on-the-spot arrests to coerce compliance is illegal. 576 U.S. at 421-22. Those exact facts are once again before the Court. The Board's officers executed an administrative subpoena with no opportunity for precompliance review and threatened arrest for all who did not comply. This Court should uphold that principle and reverse the Fourteenth Circuit's judgment.

CONCLUSION

Caesar Health should be able to recover all money paid to Respondent for Glukoriza treatments under civil RICO. Respondent capitalized on fear and uncertainty to fraudulently market its expensive, poorly selling drug as an effective treatment for Miasmic Syndrome. The scheme relied on falsifying trial results to convince Caesar Health to cover the drug, which was ineffective for its stated purpose and in many cases actively harmful. When Respondent's scheme was revealed, it claimed that, despite marketing to Caesar Health and collecting its payments for Glukoriza, that Caesar Health's claims were too remote and that the proximate cause element of civil RICO was not satisfied.

There is a direct relation between Caesar Health's injuries and Respondent's RICO violation. Caesar Health alleged a causal chain with just three links: Respondent targeted health insurance companies with falsified data, Caesar Health acted on those representations and agreed to underwrite Glukoriza as "its preferred Miasmic Syndrome treatment," and Caesar Health paid for prescriptions of Respondent's drug. R. at 2. Like Caesar Health, physicians relied on Respondent's fraudulent data. Physicians were foreseeable intermediaries that unwittingly facilitated the scheme, but were not independent actors capable of severing proximate cause. Further, the three reasons given in *Holmes* to limit proximate cause all favor Caesar Health's suit progressing.

For Caesar Health's § 1983 action, the administrative subpoena was unconstitutional because Romulus law only allowed for precompliance review by an interested party. The Board was not a neutral decision-maker, both because it was the issuer of the subpoena and because of the commissioner's financial stake in the search. Respondent compounded this issue by ensuring that even deficient review would be impossible by serving the subpoena at the deadline. No circumstances existed to justify this course of action. This subpoena violated Caesar Health's Fourth Amendment rights. The right violated by Respondent was clearly established by the precedent of this Court. No reasonable official could have believed that what Respondent did was legal so she was not protected by the doctrine of qualified immunity.

This Court should reverse the Fourteenth Circuit on both counts and allow Caesar Health's suit to continue.

Respectfully submitted,

_____

ATTORNEYS FOR PETITIONER

Team 210

No. 2020-01

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

CAESAR HEALTH PLAN, INC.
Petitioner,

v.

Livia CLEOPATRA
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourteenth Circuit

APPENDIX

Attorneys for Petitioners

APPENDICES:

APPENDIX 1

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV:

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

FEDERAL STATUTORY PROVISIONS

Section 1964(c) of the U.S.C.: Civil remedies

c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter 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. 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.

Section 1983 of the U.S.C.: Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATE STATUTORY PROVISIONS

Section 18.8.891 of the RCL: 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 Commission 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; and

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

APPENDIX 2

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 3

Header:

From: lcleopatra@health.romulus.gov (Livia Cleopatra, Commissioner [HEALTH])
To: mbrutus@health.romulus.gov (Marcus Brutus, Deputy Inspector [HEALTH])
Date: March 13, 2020, 7:38 PM
Subject: Caesar Subpoena

Body:

DI Brutus,

See attached EMSA subpoena issued today against Caesar Health Plan, in regard to the Julius situation. Please review. A similar subpoena has been prepared against Julius.

I want you to take a team and execute this at Caesar's premises. Show up at the compliance deadline and get what we're entitled to on the spot. I don't want them to have time to hide anything.

DI Antony is executing the subpoena at Julius simultaneously. We're not leaving anything to chance here. This is the first time we've used this authority and the public might be resistant, so set a precedent that these subpoenas are serious business, and we don't expect any backtalk. The state gave us power and we're using it.

- LC

Header:

From: mbrutus@health.romulus.gov (Marcus Brutus, Deputy Inspector [HEALTH])
To: lcleopatra@health.romulus.gov (Livia Cleopatra, Commissioner [HEALTH])
Date: March 13, 2020, 9:41 PM
Subject: Re: Caesar Subpoena

Body:

Received.

- Brutus