Team 214

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 THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

I. Under 18 U.S.C. § 1964(c), is the proximate cause element a civil RICO matter satisfied, and thus, standing conferred, where Cleopatra engages in a marketing campaign based on falsified medical data, Caesar relies on that data in agreeing to fully cover the expenses for Glukoriza, and suffered substantial loss in so relying?

II. Under 42 U.S.C. § 1983, is Cleopatra precluded from qualified immunity, and thus, subject to liability for a Fourth Amendment violation, when she ordered the warrantless search of medical records pursuant to statutory authority that did not authorize an opportunity for precompliance review, in contradiction of this Court's precedent?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Circuit Court Cases

Other Cases

Constitutional Provisions

Statutes

Other Authorities

OPINIONS BELOW

The memorandum in order of the United States District Court for the District of Romulus ("District Court") is unreported and set out in the record. (R. 13-27.) The opinion of the United States Court of Appeals for the Fourteenth Circuit ("Fourteenth Circuit") is also unreported and set out in the record. (R. 28-39.)

STATEMENT OF JURISDICTION

Pursuant to Rule 3.2 of the Seventy-First Annual National Moot Court Competition, a formal statement of jurisdiction is omitted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provision is relevant and set forth in Appendix A; U.S. Const. amend. IV. The following statutory provisions are relevant and set forth in Appendices B-F: 18 U.S.C. § 1962(c); 18 U.S.C. § 1962(d); 18 U.S.C. § 1964(c); 42 U.S.C. § 1983; RCL § 18.8.891(c).

STATEMENT OF THE CASE

A. Statement of Facts

A pandemic, dubbed "Miasmic Syndrome," swept across the globe in May of 2019. (R. 1.) Miasmic Syndrome was highly contagious and fatal in at least 1% of cases. Livia Cleopatra, Respondent ("Cleopatra"), is a resident of Romulus and the sole proprietor of Galen Research, a small American pharmaceutical company. (R. 1.) Cleopatra is also the commissioner of the Romulus Board of Health ("the Board"). (R. 1.) In September 2019, Cleopatra's company sponsored clinical trials of an FDA-approved cancer medication, Glukoriza, as an off-label treatment for Miasmic Syndrome. (R. 1.) The results of the trial claimed that Glukoriza cut the disease fatality rate by at least half and hastened patients' recovery time by an average of several days. (R. 1.) However, this data was falsified. (R. 5.) Glukoriza was available from Galen at a list price of $10,000. (R. 1.) Galen began a marketing scheme, where Galen targeted health care providers and health insurance companies in an attempt to sell Glukoriza as an off-label treatment for Miasmic Syndrome. (R. 1, 2.) Galen's marketing scheme relied heavily on the falsified trial data. (R. 2.)

Julius-Caesar operates as a close-coordinated integrated payor-provider. (R. 2.) In this system, almost all of Julius's patients are members of Caesar Health Plan, Inc., Petitioner ("Caesar"), and Caesar strongly recommends its members to receive all of their care at Julius. (R. 2.) In relying on Galen's falsified trial data, Julius agreed to educate its providers about Glukoriza as a Miasmic Syndrome treatment, and *in tandem*, Caesar agreed to fully cover the prescriptions. (R. 2, 3.) By February

2020, Caesar covered and paid for over 10,000 prescriptions for Glukoriza. (R. 3.) After determining that Glukoriza did not cure Miasmic Syndrome, but rather caused patients to suffer substantial side effects like loss of kidney function, Julius-Caesar jointly made the decision to stop prescribing Glukoriza for Miasmic Syndrome. (R. 3.)

In October 2019, the Romulus legislature passed the Emergency Miasmic Syndrome Act (EMSA), which authorizes the Board of Health (led by Cleopatra) to inspect and collect records from any *medical facility* upon issuance of an administrative subpoena for evidence that the facility was knowingly or negligently providing substandard care for Miasmic Syndrome. (R. 3.) (emphasis added). Cleopatra was granted the unilateral authority to authorize EMSA subpoenas. (R. 4.)

In March 2020, the Board received reports that Miasmic Syndrome patients at Julius had worse health outcomes than patients elsewhere. (R. 4.) Cleopatra issued subpoenas to both Julius and Caesar, which ordered both to submit to inspection and to immediately turn over copies of all medical records relevant to patients diagnosed with, tested for, or even suspected of carrying Miasmic Syndrome. (R. 4.) Cleopatra emailed the Deputy Inspector of the Board requesting the inspection team to execute the subpoena. (R. 12.) Further, Cleopatra explicitly instructed the Deputy Inspector to demand compliance and production on the spot as she did not want to give Caesar an opportunity hide evidence. (R. 12.)

On March 19, 2020, at 8AM, two groups of armed agents from the Board of Health arrived at Julius Medical Center and Caesar Health Plan's facilities carrying the subpoenas and demanding immediate compliance. (R. 4.) The agents who arrived

at Caesar's business threatened to have all staff who was present arrested for obstruction of justice if they did not immediately submit to the search. (R. 4.) Caesar's staff frantically attempted to comply but were unable to quickly tell which records were relevant to Cleopatra's subpoena. (R. 5.) As a response, Cleopatra's agents required Caesar to turn over data on all claims received from Julius since the start of the pandemic, and Caesar's attorneys arrived too late to contest the subpoena. (R. 5.) As a result, the Board walked away with a haul of patients' medical data. (R. 24.)

On March 30, 2020, the Board of Health voted to suspend Julius's operating license. (R. 5.) It was not until this day that a whistleblower came forward with documents proving severely falsified data in the results of the 2019 Glukoriza trial. (R. 5.) The report suggested that the trial falsified data and failed to follow up with patients to assess for delayed side effects. (R. 5.) Many patients showed signs of kidney damage but were discharged from the trial before the damage could be confirmed. (R. 5.) Ultimately, Cleopatra resigned after this scandal, and Julius's operating license was restored upon proof that 100% of their patients' excess kidney morbidity could be accounted for by patients on Glukoriza. (R. 6.)

B. Procedural History

Importantly, under Romulus law, Cleopatra, as sole proprietor, must personally answer any lawsuit brought against Galen Research. (R. 6.) Caesar filed a civil action against Cleopatra on May 1st, 2020, in the United States District Court for the District of Romulus. (R. 6.) Therein, Caesar alleged two causes of action

against Cleopatra: (1) a civil RICO action under 18 U.S.C. § 1964(c), and (2) a civil rights claim under 42 U.S.C. § 1983. (R. 6.)

Cleopatra filed a 12(b)(6) motion to dismiss both claims, alleging: (1) Caesar lacked standing to allege a RICO violation, and (2) The EMSA subpoena, and its method of execution were not in violation of any cognizable constitutional right. (R. 6, 7.) The district court denied the motion in its entirety on May 30, 2020. (R. 7.) Cleopatra appealed the denial to the Fourteenth Circuit Court of Appeals, which erroneously reversed the district court in its entirety. (R. 7.) Caesar then petitioned the United States Supreme Court for a writ of certiorari on July 17, 2020, which was granted on September 14, 2020. (R. 7.)

C. Standard of Review

When challenging a lower court's determination of questions of law, the Court must make an independent judgment on the facts of the case, and thus, review the case *de novo*. *See Bose Corp. v. Consumer Union*, 466 U.S. 485, 499 (1984). In reviewing a case *de novo*, this Court "makes an independent determination of the issues and does not give any special weight to the prior determination of the lower court." *United States v. Raddatz*, 447 U.S. 667, 690 (1980).

SUMMARY OF THE ARGUMENT

This Court should reverse the ruling of the Fourteenth Circuit Court of Appeals and reinstate the district court's denial of Cleopatra's motion to dismiss on both counts. Caesar sufficiently alleged proximate causation to establish standing, and Cleopatra violated Caesar's clearly established constitutional right to precompliance review under this Court's decision in *Patel*.

RICO Claim. The Fourteenth Circuit's holding that proximate causation was not sufficiently alleged by Caesar, due to the mere existence of prescribing physicians, was erroneous. At the heart of the proximate causation requirement under civil RICO statutes are notions of fairness, justice, foreseeability, and direct relationships between RICO violations and damages. *See Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008). To aid courts in analyzing proximate causation, this Court constructed a three-factored analysis: (1) whether it would be difficult to determine if the damages are attributable to the RICO violation, (2) whether imposing liability will result in duplicative recoveries, and (3) whether another plaintiff is in a better position to bring the lawsuit. *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Here, these factors weigh in favor of finding proximate causation.

In the instant matter, Cleopatra, as sole proprietor of Galen Research, engaged in a fraudulent marketing scheme for Glukoriza by using falsified medical trial data, which targeted health insurance companies, Caesar included. As a direct result of this marketing scheme, Caesar fully covered over 10,000 prescriptions of Glukoriza that it would not have covered had it known of the concealed, severe side effects of

the drug. In the American health care system, and at Julius-Caesar especially, it is foreseeable that in order for a drug manufacturer to increase profits, it will need a health insurance company, like Caesar, to underwrite the drugs they sell. Thus, Cleopatra's fraudulent marketing tactics directly led to the financial damages that Caesar is seeking.

Civil Rights Claim. Government officials are not entitled to qualified immunity if they violate a constitutional right that was clearly established at the time of the misconduct. This Court has established that unless an industry is "closely regulated," a government official must comply with each condition under *Patel* in order for the administrative subpoena to fall within the parameters of the Fourth Amendment. The medical industry is not among one of the four closely regulated industries established by this Court. But even if the medical industry was "closely regulated," Cleopatra fails to satisfy the *Burger* criteria because the subpoena is overly broad as to not provide a constitutionally adequate substitute for a warrant because it requests any and all records of every carrier, or suspect carrier, or Miasmic Syndrome.

This Court in *Patel* recognized that absent the opportunity for precompliance review, the administrative search is unconstitutional. Similar to *Patel*, the Romulus statute did not, on its face, authorize precompliance review, and Cleopatra overtly failed to provide it when ordering the execution of the subpoena. Additionally, this Court has noted that where a government interest lacks exigency, impracticability to comply with the traditional standards of the Fourth Amendment is not found. Furthering the Board's interest did not create an exigency as Cleopatra deliberately

instructed the Board to wait one week before issuing the subpoena. Contrary to this Court's precedent, Cleopatra manifestly failed to provide any opportunity for precompliance review by ordering the Board to demand compliance immediately upon service of the subpoena. When Cleopatra failed to provide the opportunity for precompliance review to Caesar in 2020, she violated Caesar's clearly established Fourth Amendment right established by this Court's 2015 decision in *Patel*.

ARGUMENT

I. CAESAR HAS STANDING BECAUSE CAESAR SUFFICIENTLY ALLEGED THE PROXIMATE CAUSATION ELEMENT AS REQUIRED UNDER THE CIVIL RICO STATUTE.

"RICO is to be read broadly," and "is to be liberally construed to effectuate its remedial purposes." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497-98 (1985) (internal quotations omitted). Although the Racketeer Influenced and Corrupt Organization Act ("RICO") was enacted in order to deter organized crime, in modern times the statute operates as "a tool for everyday fraud cases brought against respected and legitimate enterprises." *Id.* at 499 (internal quotations omitted).

Generally, in order to properly bring a RICO claim a party must: allege a violation as defined by 18 U.S.C. § 1962(c)-(d), and have standing as defined by 18 U.S.C. § 1964(c). In order to have standing for RICO purposes, "a civil RICO plaintiff must show: (1) that his alleged harm qualifies as injury to his business or property; and (2) that his harm was 'by reason of' the RICO violation, which requires the plaintiff to establish proximate causation." *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 972 (9th Cir. 2008) (quoting *Holmes*, 503 U.S. at 268); *see also Sedima*, 473 U.S. at 496. In *Holmes*, this Court explained that the language "by reason of" requires a RICO plaintiff to show both but-for and proximate cause in order to have standing. 503 U.S. at 268.

This Court should reverse the Fourteenth Circuit because Caesar has shown a direct relation between the alleged RICO violations and the loss of Caesar's business or property. Additionally, the Court's three factored-analysis provided in *Holmes* weighs in favor of finding proximate causation. As such, the Fourteenth Circuit's

determination that the presence of prescribing doctors severs proximate causation is incorrect. Thus, Cleopatra's argument that Caesar lacks standing has no merit.

A. Proximate causation exists because Caesar established a direct relation between the alleged RICO violations and the loss of Caesar's business or property.

In a civil RICO context, "[a]ny 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). Generally, proximate cause is a vague concept, and has been subject to frequent scrutiny by this Court. *See Fields v. Twitter, Inc.*, 881 F.3d 739, 747 (9th Cir. 2018). According to the Court in *Holmes*, the language in the RICO statute is broad and does not necessarily create a *per se* proximate cause requirement; however, the Court determined that such a requirement is consistent with Congress's intent in creating the RICO statute. *See Holmes*, 503 U.S. at 266, 268-69. In the present case, the financial harm that Caesar seeks to recover is a direct result of Cleopatra's fraudulent marketing campaign aimed at Caesar.

The Court has determined that proximate cause exists to show "ideas of what justice demands…" *Id.* at 268 (internal quotations omitted). Indeed, the common law concept of proximate causation focuses on justice and fairness. *Id.* Proximate causation shields a party from liability only if the "complained of harm flow[s] merely from the misfortunes visited upon a third person by the defendant's acts." *Id.* Ultimately, when one party's conduct directly causes harm to another party, the Court holds that proximate cause exists. *See Id.* When the conduct causing the harm is distinct from the RICO violations, however, the Court has held that proximate

cause does not exist. *See Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010); *see also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006).

In *Hemi*, the defendant fraudulently sold cigarettes and neglected to submit required sales reports to the State. 559 U.S. at 9. It was the State's responsibility to then submit the reports to the plaintiff, who would then pursue customers for payment. *Id.* Ultimately, the Court held that "[defendant]'s obligation was to file the…reports with the State, not the [plaintiff], and the [plaintiff]'s harm was directly caused by the customers, not [defendant]'s." *Id.* The Court concluded that the conduct that most directly caused the harm was the customers' failure to pay taxes, not defendant's failure to file reports correctly. *Id.* Consequently, no proximate cause existed. *Id.*

In *Anza*, the plaintiff sued the defendant for committing tax fraud and using the benefits to reduce the price of steel, which attracted more customers. *Anza*, 547 U.S. at 458. There, the Court determined that the harm that plaintiff suffered was actually caused by "a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State.)." *Id.* The Court held that the State was the immediate victim of the fraud, and the injuries suffered by the plaintiff were too attenuated from the fraudulent act. *Id.* Thus, there was no proximate cause. *Id.*

Distinguishing from *Hemi* and *Anza*, Caesar, here, has shown that it was directly harmed by Cleopatra's conduct, and that harm was foreseeable. Cleopatra, as sole proprietor of Galen, falsified medical trials for Glukoriza that were used in a fraudulent marketing campaign. (R. 5.) Cleopatra specifically "engaged in a

marketing campaign directed at health insurance companies to persuade them to cover Glukoriza when prescribed as a treatment for Miasmic Syndrome." (R. 2.) Caesar, relying on the misrepresentation, agreed to fully cover the cost of Glukoriza prescriptions at Julius-Caesar. (R. 3.) In this case, the alleged RICO violation—Cleopatra's fraudulent marketing directed at Caesar—directly caused the harm—Caesar paying for the off-label use of Glukoriza.

This Court found similarly in *Bridge* when it held proximate cause existed because of the direct relation between a RICO violation and the alleged harm. *See Bridge*, 553 U.S. at 658. In *Bridge*, the plaintiff suffered a financial loss after the defendant fraudulently lied to the county government's auction office, an independent decisionmaker akin to the prescribing doctors in the instant matter. *Id.* There, the Court determined that the fraud committed by the defendant directly injured the plaintiff, prohibiting the plaintiff from securing bids on valuable property liens. *Id.* In *Bridge*, the Court held that there was proximate cause even though the county was an intervening decision maker who relied on the fraud, which ultimately contributed to the economic injury to the plaintiff. *Id.* This Court unanimously reasoned:

> Respondents' alleged injury…was a foreseeable and natural consequence of petitioners' scheme…[a]nd here, unlike in *Holmes* and *Anza*, there are no independent factors that account for respondents' injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue. …[R]espondents and other losing bidders were the only parties injured by petitioners' misrepresentations.

Id.

The Court in *Bridge* stated that the "alleged injury—the loss of valuable liens—[was] the direct result of petitioners' fraud," because the flexibility of proximate cause "does not lend itself to a 'black-letter rule that will dictate the result in every case.'" *Id.* at 654 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 536 (1983)). However, the Court concluded that the plaintiff in *Bridge* showed that it was a "foreseeable and natural consequence of petitioners' scheme…that other bidders would obtain fewer liens." *Id.* at 658. While foreseeability is not dispositive in the RICO context, it is certainly part of the analysis. *See Couch v. Cate*, 379 F. App'x 560, 566 (9th Cir. 2010) (stating *Hemi* foreclosed proximate causation based only on foreseeability).

The instant case is analogous to *Bridge* because it is foreseeable that in the American health care system, and especially in the joint-system created by Julius-Caesar, drugs prescribed by Julius are specifically paid for by Caesar. At Julius-Caesar, decisions to prescribe drugs are made *in tandem* between Julius and Caesar. (R. 3.) It is then foreseeable that in order to increase Cleopatra's profit margin for Glukoriza, Caesar must pay for the drug. Thus, Caesar's substantial financial harm in this case is a direct, foreseeable, and a natural consequence of Cleopatra's fraudulent marketing scheme.

B. The *Holmes* factors weigh in favor of finding proximate causation because damages are easily calculable, there is no risk of multiple recoveries, and Caesar is in the best position to sue.

Pursuant to 18 U.S.C. § 1964(c), "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue[.]" Cleopatra does not dispute that Caesar has alleged an injury to its business or property. (R. 31.)

Rather, Cleopatra argues that Caesar has not proved that Cleopatra's alleged RICO violation was the proximate cause of Caesar losses. (R. 31.) However, after applying the three *Holmes* factors, Caesar's allegations sufficiently show proximate cause. *See Holmes*, 503 U.S. at 268.

In *Holmes*, the Court defined proximate cause as "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* The Court further explained that the proximate causation analysis focuses on the imposition of liability that is fair and practical. *Id.* at 272 n. 20. To aid courts in the RICO proximate cause analysis, this Court established three factors. *Id.* at 269. First, courts determine whether allowing a case to proceed makes it difficult to apportion damages. *Id.* Second, courts analyze whether allowing RICO liability would "force courts to adopt complicated rules apportioning damages…to obviate the risk of multiple recoveries." *Id.* Third, courts consider whether there are other plaintiffs injured more directly, and thus, in a better position to sue. *Id.* at 269-70; *see Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 873 (9th Cir. 2010) ("In analyzing proximate causation, one consideration is whether a better suited plaintiff would have an incentive to sue.").

With regard to the first *Holmes* factor, it is not difficult to calculate the damages attributable to the alleged RICO violation in this case. Here, Caesar covered and paid for over 10,000 prescriptions for Glukoriza by February 2020. (R. 3.) Glukoriza was available from Galen in the United States at a list price of $10,000 per dose, and Galen recommended four doses administered over a two-week period when

used as a treatment for Miasmic Syndrome. (R. 1.) This means that for every Glukoriza prescription written to treat Miasmic Syndrome at Julius-Caesar, Caesar paid approximately $40,000. In total, Caesar covered and paid for over 10,000 prescriptions for Glukoriza (priced at $40,000 for each prescription), which cost Caesar over $400 million. (R. 1-3.) Further, these damages are directly attributable to the alleged RICO violation because Caesar only agreed to fully cover Glukoriza prescriptions after Caesar was targeted by Cleopatra's fraudulent marketing campaign. (R. 2-3, 5.)

The second *Holmes* factor analyzes whether establishing proximate causation would "force courts to adopt complicated rules…to obviate the risk of multiple recoveries." *Holmes*, 503 U.S. at 269. The Fourteenth Circuit mistakenly determined that Cleopatra would be "required to pay (1) the patient for its direct misrepresentation; (2) the physicians, for prescribing the medication based on this misrepresentation; and (3) the third-party payor, who paid for the physician to prescribe the misrepresented medication to the patient." (R. 35.) However, in this case, there is no risk of multiple recoveries from the alleged RICO violation because Caesar was the sole party that fully covered the cost of Glukoriza. (R. 3.) This is especially true considering Caesar only "seeks damages in the amount of all payments made by Caesar to Cleopatra for Glukoriza as a Miasmic Syndrome treatment." (R. 6.) Since Caesar is the only party who paid for Glukoriza, it is impossible that any other party would be able to recover the damages sought in this case.

Finally, the third *Holmes* factor focuses on whether other plaintiffs exist that are in a better position to sue. *See Holmes*, 503 U.S. at 269-70; *see Rezner*, 630 F.3d at 873 ("In analyzing proximate causation, one consideration is whether a better suited plaintiff would have an incentive to sue."). In this case, Caesar, and Caesar alone, covered the entire cost for Glukoriza prescriptions issued at Julius-Caesar. (R. 3.) Thus, there is no party other than Caesar who could "vindicate the law" and hold Cleopatra accountable for the excess expenditures for Glukoriza.

Accordingly, the *Holmes* factors weigh in favor of this Court finding that proximate cause existed; and thus, the Fourteenth Circuit was erroneous in holding to the contrary.

C. The mere existence of prescribing physicians does not sever the chain of proximate causation because Caesar is the direct victim as the third-party payor.

Despite overwhelming support that Caesar was directly injured "by reason of" Cleopatra's alleged RICO violation, the Fourteenth Circuit incorrectly determined that Caesar could not recover from Cleopatra because the decisions of prescribing physicians sever proximate causation. (R. 33.) However, that reasoning neglects the very basis for undergoing proximate causation analysis. Proximate causation analysis allows courts to determine the most direct victim of fraud, and intervening decisionmakers—like prescribing physicians—who rely on fraud do not sever proximate cause. *Bridge*, 553 U.S. at 658.

Importantly, this Court in *Bridge* provided an illustrative example of why the acts of intervening decision makers, like prescribing doctors, do not sever the chain of proximate causation if they were not the victims of the fraudulent act. *Id.* Though

not in the medical context, this Court's reasoning has been relied on by many circuit courts in holding specifically that prescribing doctors do not sever the chain of proximate causation when third-party payors are injured by a RICO violation. *In re Neurontin Mktg. & Sales Practices Litig. ("Neurontin I")*, 712 F.3d 21, 29 (1st Cir. 2013); *In re Neurontin Mktg. & Sales Practices Litig. ("Neurontin II")*, 712 F.3d 51, 58 (1st Cir. 2013); *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 804 F.3d 633, 636 (3d Cir. 2015).

In *Neurontin I* and *Neurontin II*, third-party payors filed suit against a drug manufacturer, appellant, alleging that the manufacturer engaged in a fraudulent campaign promoting Neurontin to health care workers for off-label use. *Neurontin I*, 712 F.3d at 29; *Neurontin II*, 712 F.3d at 58. There, third-party payors paid for more Neurontin based on appellant's fraudulent marketing campaign. *Neurontin I*, 712 F.3d at 29. Appellant maintained that the presence of prescribing physician, the "decision makers," created "too many steps in the causal chain between its misrepresentations and [the third-party payor]'s alleged injury to meet the proximate cause 'direct relation' requirement as a matter of law." *Neurontin I*, 712 F.3d at 38.

Ultimately, the First Circuit held that "the causal chain in this case is anything but attenuated," and reasoned that the most direct victim of a drug manufacturer's fraudulent marketing scheme, is the third-party payor. *Id.* (citing *Bridge*, 553 U.S. at 657-58). The court concluded that even when physicians use their specialized judgment in prescribing drugs to patients, "[appellant]'s scheme relied on the expectation that physicians would base their prescribing decisions in part on

[appellant]'s fraudulent marketing." *Id.* Thus, "the fact that some physicians may have considered factors other than appellant's detailing materials in making their prescribing decisions *does not add such attenuation to the causal chain as to eliminate proximate cause*." *Id.* (emphasis added).

Similarly, in *Avandia*, a prominent drug manufacturer, appellant, promoted a drug, Avandia, without addressing the cardiovascular risks associated with the drug. *Avandia*, 804 F.3d at 636. Just like in the *Neurontin* cases, third-party payors sued appellant under civil RICO statutes alleging that the RICO violation induced the third-party payors into buying more Avandia, which would not have happened absent the fraudulent marketing. *Id.* Appellant asserted that the presence of prescribing physicians destroys the chain of proximate causation since it is the doctors who make the ultimate decisions to rely on appellant's marketing practices. *Id.* at 645. Holding in line with the First Circuit, the Third Circuit rejected appellant's argument. *Id.* The court explained that drug manufacturers are "well aware that [third-party payor]s cover the cost of their drug." *Id.* Further, the court found that the fraudulent scheme "could have been successful only if plaintiffs paid for Avandia, and this is the very injury that plaintiffs seek recovery for." *Id.*

The district court was correct in adopting the approach undertaken by the Ninth Circuit in *Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharm. Co.*, 943 F.3d 1243, 1248 (9th Cir. 2019). Just like in *Neurontin* and *Avandia*, the Ninth Circuit found that the "decisions of prescribing physicians and pharmacy benefit managers" do not "constitute [an] intervening cause[ ] that [would]

sever the chain of proximate cause between the drug manufacturer and [the third-party payor]." *Id.* at 1257. The court further reasoned it is foreseeable that "physicians would not be the ones paying for the drugs they prescribed." *Id.*

Importantly, the court in *Painters* noted a public policy concern that fairness and justice would be undercut by shielding drug manufacturers from liability if the courts were to hold that the mere existence of prescribing physicians severs the chain of proximate causation in the American healthcare system. *See Id.* at 1258. Today, this concern is of grave importance amidst a global pandemic and opioid crisis which leaves patients, health care providers, and insurance companies especially vulnerable to drug manufacturers' fraudulent marketing schemes.

In the present case, prescribing doctors are intervening decisionmakers, but they are not the victims of the fraud committed by Cleopatra. Prescribing doctors of Julius-Caesar did not suffer any economic harm, and thus were not actually victims of Cleopatra's fraudulent marketing scheme. The Fourteenth Circuit abandoned the appropriate proximate cause focus, which is finding the most direct victim of an alleged fraudulent act or omission. In the American health care context, it is typically the insurance companies that cover the costs for prescriptions. In the instant matter, Caesar was solely responsible for covering the entire cost of Glukoriza prescriptions issued at Julius-Caesar, a responsibility that was induced by fraudulent marketing practices. Thus, just like the third-party payors in *Neurontin*, *Avandia*, and *Painters*, Caesar is the direct victim of Cleopatra's fraudulent misrepresentation even though prescribing doctors exist.

Accordingly, this Court should find that Caesar has sufficiently shown proximate cause because Caesar was injured directly by Cleopatra's RICO violation, the *Holmes* factors weigh in favor of proximate cause; and thus, the Fourteenth Circuit's contrary decision should be overturned.

II. CLEOPATRA IS NOT PROTECTED FROM LIABILITY BY THE DOCTRINE OF QUALIFIED IMMUNITY BECAUSE SHE VIOLATED CAESAR'S CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHT.

Citizens of the United States are empowered by 42 U.S.C. § 1983 to sue public officials who violate their legal rights and privileges that are secured to them by the Constitution. *See* 42 U.S.C. § 1983. Under the doctrine of qualified immunity, relief in a civil rights action for monetary damages is barred unless: (1) the government officer violated a federal statutory or constitutional right, and (2) the unlawfulness of the official's conduct was "clearly established" at the time. *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018); *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

In applying the foregoing analysis, this Court should reverse the ruling of the Fourteenth Circuit and find that Cleopatra violated Caesar's Fourth Amendment right and is not entitled to qualified immunity.

A. Cleopatra's warrantless search violated the Fourth Amendment because the execution of the administrative subpoena issued pursuant to statutory authority violated *Patel.*

The Fourth Amendment to the Constitution guarantees the right to privacy against unreasonable searches and seizures. *See* U.S. Const. amend. IV. Warrantless searches are *per se* unreasonable, subject only to a few well-delineated exceptions specifically established throughout this Court's jurisprudence. *City of Los Angeles v. Patel*, 576 U.S. 409, 419 (2015); *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *Katz v.*

United States, 389 U.S. 347, 357 (1967). Searches of commercial premises, like homes, implicate the Fourth Amendment, and this Court's jurisprudence ensures that warrantless administrative searches of commercial premises are narrowly drawn in accordance with the right to privacy. *See generally*, *Patel*, 576 U.S. at 419; *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978).

In the landmark decision of *Patel*, this Court established that in order for a warrantless search conducted pursuant to statutory authority to be reasonable, the government official has the burden to meet three criteria. 567 U.S. at 420. First, "the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *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)). Second, "special needs must make the warrant requirement impracticable." *Id.* (quoting *Skinner v. Railway Labor Exec.'s Ass'n*, 489 U.S. 602, 619 (1989) (internal quotations omitted)). Third, the "primary purpose of the searches" must be "distinguishable from the general interest in crime control." *Id.* (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)).

Patel is controlling here, instead of *Burger*, because *Burger* introduces an exception to the precompliance review requirement of *Patel* solely for industries that are "closely regulated." *See New York v. Burger*, 482 U.S. 691, 703 (1987). Although the medical profession is extensively regulated and has licensure requirements, satisfying the *Burger* doctrine requires more. *See Zadeh v. Robinson*, 928 F.3d 457,

465 (5th Cir. 2019) (holding that the medical industry, as a whole, is not "closely regulated").

Admittedly, the Romulus statute is aimed at protecting public health, (R. 8.), which is distinct from a general purpose of investigating crime. However, under the *Patel* rule, Cleopatra has the burden of establishing each of the three criteria in order for the warrantless search to be constitutional under the Fourth Amendment. Here, Cleopatra has not met that burden.

1. Cleopatra violated Patel because Caesar was not afforded an opportunity for precompliance review.

The first prong of *Patel* requires that the subject of the search be afforded an opportunity for precompliance review before a neutral decisionmaker. 567 U.S. at 420. Absent the opportunity for precompliance review, a warrantless administrative search is unreasonable. *Id.* Here, Cleopatra did not provide an opportunity for precompliance review, which is inherently unreasonable.

The petitioner in *Patel* argued that affording business owners any opportunity for precompliance review would undermine the scheme's efficacy by giving operators the chance to falsify records. *Id.* at 427. This Court patently rejected that argument holding that "absent an opportunity for precompliance review, the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits or be used as a pretext to harass [the business owner]." *Id.* at 421; *see also Barlow's Inc.*, 436 U.S. at 320; *Lone Steer*, 464 U.S. at 411. This Court further concluded that the ordinance was unconstitutional on its face because it did not allow for hotel operators

to engage in precompliance review by questioning the reasonableness of the subpoena. *Patel*, 567 U.S. at 419.

In accordance with the holding in *Patel*, not only was Cleopatra's conduct unconstitutional, but also the Romulus statute on its face violated the Fourth Amendment. The statute fails to afford the subjects of the subpoenas with an opportunity for precompliance review. (R. 8, 9.) Further, the Board would not have been onerously burdened by complying with this requirement because actual review need not occur, the business owner must merely be afforded the opportunity. *See Id.* at 421 (noting the opportunity for precompliance review can be provided without imposing onerous burdens on government officials).

Further, this Court consistently recognizes that an opportunity for the subpoenaed party to contest the subpoenas must be provided for an administrative search *before* penalties are imposed. *Id.*; *see also Lone Steer*, 464 U.S. at 415 (noting that an administrative search may proceed only where the subpoenaed party is sufficiently protected by the opportunity to "question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it"); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 533 (1967). Here, contrary to this Court's precedent, the Board threatened to impose criminal penalties on Caesar, and its employees, if they did not immediately submit to the inspection and comply with the subpoena request. (R. 4.)

Moreover, the Fifth Circuit Court of Appeals, in *Zadeh*, held that the medical profession as a whole is not "closely regulated" because the medical industry does not

have an entrenched history of warrantless searches. 928 F.3d at 465. As such, when executing an administrative subpoena, the official must provide an opportunity for precompliance review. *Id.* at 465-68 (holding the administrative search violated the Fourth Amendment because no opportunity for precompliance review was provided).

In the instant case, not only is the Romulus statute facially invalid, but also Cleopatra's exercise of that statutory authority was unconstitutional because the Board failed to provide Caesar with the opportunity for precompliance review. (R. 4.) The email thread between Cleopatra and Mr. Brutus reflects that Cleopatra had the subpoenas prepared on March 13, 2020. (R. 12.) However, she waited a full business week to execute the subpoena on March 19, 2020. (R. 4.) In fact, the Board showed up at 8AM, an hour before the traditional 9AM opening of business, and demanded immediate compliance. (R. 4.) During that week before issuing the subpoena, Cleopatra had ample time to provide Caesar with an opportunity for precompliance review. (R. 26.) Cleopatra had a full business week to provide Caesar with the opportunity for precompliance review as required under *Patel*. There was no meaningful opportunity for Caesar to obtain precompliance review even though Cleopatra had a week to comply with this requirement.

Since the Board did not provide the opportunity for precompliance review and threatened to have all of Caesar's employees arrested if they did not immediately submit to and comply with the inspection, (R. 4.) Cleopatra fails to satisfy the first prong of the *Patel* rule. Under Cleopatra's burden imposed by *Patel*, if she fails even one criterion, she violated the Fourth Amendment. As such, Cleopatra's conduct did

not fall within the purview of the administrative search exception to the warrant requirement.

2. Cleopatra violated Patel because special needs did not make the warrant and probable cause requirement impracticable.

Patel's second prong requires special needs to make the warrant and probable cause requirement impracticable. 567 U.S. at 420. In other words, special needs must justify a departure from the standard warrant and probable cause requirement for searches. *Skinner*, 489 U.S. at 620. The principal inquiry in determining whether special needs renders the warrant and probable cause requirement impracticable is to balance the individual's privacy expectations against the government's interests. *See e.g.*, *Nat'l Treasury Employees Union, et al. v. Von Raab*, 489 U.S. 656, 665-66 (1989) (holding the interest in safeguarding the public by drug testing employees required to carry firearms outweighs the employees' expectation of privacy); *Skinner*, 489 U.S. at 620 (holding the interest in assuring safety of the nation's railroads outweighs the privacy interests of railroad employees for drug and alcohol screening).

This Court has recognized that justification for the absence of a warrant or probable cause is at its strongest when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Skinner*, 489 U.S. at 623 (quoting *Camara*, 387 U.S. at 533). The circumstances in the instant case are distinguishable from *Skinner* and *Von Raab*. This Court in *Skinner* and *Von Raab*, determined that where a search is routine and automatic, probable cause is not required because such a search does not involve a government official's discretionary determination in choosing who to drug test because any prospective employee for that

position is required to submit to a drug test. *See Id.* at 620-23; *Von Raab*, 489 U.S. at 665-66. In those cases, if the government employers were required to establish probable cause, the Court held that would frustrate the governmental purpose because those who were drug tested were not chosen by discretion. *See Skinner*, 489 U.S. at 620-23; *Von Raab*, 489 U.S. at 665-66.

Contrarily, the Romulus statute expressly states that the Board may use its discretion to determine which hospitals to inspect and which records to request. (R. 9.) Additionally, Cleopatra demonstrated no support that the interest of protecting public health is ameliorated by broad and discretionary issuance of subpoenas with vaguely specified search boundaries. Ultimately, in *Skinner* and *Von Raab*, the employees put themselves in a position of diminished expectation of their privacy in their drug sample by applying for promotions; whereas, here, Caesar, nor its patients, put themselves in a position to diminish their reasonable expectation of privacy in their medical records.

Further, this Court articulated that "where the privacy interests implicated by a search were minimal," a search may be reasonable absent probable cause. *Skinner*, 489 U.S. at 624. It has been noted that "[b]y their very nature, records of medical…treatment are inherently private, if not wholly privileged." *Fischer v. City of Portland*, No. CV 02-1728, 2003 WL 23537981, at *4 (D. Or. Aug. 22, 2003). Many circuit courts have recognized the magnitude of the right to privacy in medical records. *See e.g., Big Ridge, Inc. v. Fed. Mine Safety & Health Com'n*, 715 F.3d 631, 648 (7th Cir. 2013); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d

Cir. 1980); *Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2006); *Doe v. Broderick*, 225 F.3d 440, 451 (4th Cir. 2000); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004).

Importantly, "[f]ederal regulations do not exempt the Board from the privacy requirements of the Health Insurance Portability and Accountability Act." *Zadeh*, 928 F.3d at 466. Given the reasonable expectation of privacy that individuals, society, and courts attach to medical records, a *per se* rule that a search and seizure of medical records entirely free of Fourth Amendment scrutiny for purposes of determining whether a medical office is providing the standard of care is impermissible.

In the instance case, the government interest is to ensure hospitals are providing sufficient standard of care for patients diagnosed with, and suspected of carrying, Miasmic Syndrome. (R. 4.) Although the warrantless search was conducted in response to negative findings surrounding Glukoriza, (R. 4.), this is not a justification for hurdling the sanctity of privacy interests in medical records. Instead of requesting the records of solely those individuals that were recommended Glukoriza, the Board, through its discretion, requested *all* records for *every* patient merely suspected of carrying Miasmic Syndrome since the beginning of the pandemic. (R. 4, 11.) In fact, the Board, led by Cleopatra, acted outside the broad scope of the subpoena and pressured the product of all medical records and data from all patients seen during the pandemic. (R. 5.) The privacy interests implicated here were not minimal to justify the absence of the traditional Fourth Amendment requirements.

Moreover, this Court has consistently held that exigent circumstances create an impracticability to obtain a warrant. *See Patel*, 567 U.S. at 414. However, no time exigency existed in this case. As the district court pointed out in its opinion, Cleopatra explicitly instructed the Board to wait one week before issuing the subpoena. (R. 26) Cleopatra could have spent that week procuring a warrant. (R. 26.)

Although there is an identifiable special need—protecting public health—this need did not, under these circumstances, create an impracticability to comply with Fourth Amendment standards. Consequently, Cleopatra fails to satisfy the second prong of the *Patel* rule.

3. Assuming arguendo this Court determines the medical industry is closely regulated, Cleopatra's subpoena was not a constitutionally adequate substitute for a warrant under Burger.

For an industry to be deemed "closely regulated," it must 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.* at 424 (quoting *Barlow*, 436 U.S. at 313); *see Burger*, 482 U.S. 691 (1987). Essentially, where industries are subject to close and regular inspection and regulation, consent to warrantless inspections is presumed. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970). Medical industry is not subject to such close and regular inspection.

This Court has specifically identified merely four industries where the history of close regulation over that industry is pervasive enough to override a reasonable expectation of privacy. *See e.g.*, *Colonnade*, 397 U.S. 72 (1970) (liquor license); *United States v. Biswell*, 406 U.S. 311 (1972) (gun dealer); *Burger*, 482 U.S. 691 (1987) (automobile junkyard business); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining

industry). The medical industry is not deemed "closely regulated" for purposes of applying the exception to precompliance review under the *Burger* rule. *See Zadeh*, 928 F.3d at 465.

But, even if the medical industry was "closely regulated" as to bring it within the exception, Cleopatra fails to meet the third condition of the *Burger* test—the statutory or regulatory scheme must provide a "constitutionally adequate substitute for a warrant." *See Burger*, 482 U.S. at 703. In order to satisfy this requirement, the statute must perform the two basic functions of a warrant: "it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Zadeh*, 928 F.3d at 467 (citing *Burger*, 482 U.S. at 703); *see also Biswell*, 406 U.S. at 315 (noting the discretion of inspectors must be "carefully limited in time, place, and scope").

Here, two major regulatory flaws exist in the Romulus statute. First, it does not limit how the hospitals are chosen for inspection. (R. 9.) Instead, it authorizes the issuance of administrative subpoenas "to any licensed hospital." (R. 9.) This is precisely the type of regulatory flaw the *Zadeh* court determined fails the *Burger* test. *See Zadeh*, 928 F.3d at 468 (holding that the regulation's lack of limits on how the clinics are chosen for inspection fails *Burger*); *see also Biswell*, 406 U.S. at 315. Additionally, the Romulus statute authorizes searches of *hospitals*, not insurance companies. (R. 24.)

Second, it expressly proscribes the Board with broad discretion in determining what records to request, which overtly fails to place sufficient constraints on the discretion of the inspecting officers. (R. 9.); *see Zadeh*, 928 F.3d at 467 (holding the insufficient limits on the Board's discretion fails to satisfy *Burger*). In fact, the Board obtained medical data that far exceeded the search boundaries under the statute. (R. 24.) Here, the subpoena broadly requested all medical records relevant to patients diagnosed with, tested for, or suspected of carrying Miasmic Syndrome. (R. 4.) In the execution of the subpoena, the Board lacked constraint because they went beyond the scope of the broad subpoena and walked away with all medical records of all patients regardless of what they were seen for at Julius-Caesar. (R. 4.)

Moreover, RCL § 18.8.891(c) places limits on the Board by prohibiting the issuance of subpoenas that are broader than reasonably required to determine whether a hospital is providing substandard care for Miasmic Syndrome. (R. 9.) Nevertheless, the language of the subpoena requesting all records related patients suspected of carrying Miasmic Syndrome is a catch-all approach in direct contradiction of the restriction placed on the Board under RCL § 18.8.891(c). (R. 4, 9, 11, 24.)

As such, *Patel* controls here because the medical industry is not "closely regulated" so as to invoke the exception to the precompliance review requirement. But even if the medical industry were "closely regulated," Cleopatra fails to satisfy the *Burger* criteria.

Under *Patel*, Cleopatra fails to satisfy the first and second prongs. Accordingly, Cleopatra violated Caesar's Fourth Amendment right against unreasonable searches of Caesar's commercial premises.

B. Cleopatra is not entitled to qualified immunity because at the time of her conduct it was clearly established that a business owner must be afforded an opportunity for precompliance review.

"Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle*, 566 U.S. at 664. "Clearly established" means that, at the time of the government official's conduct, the law's contours were "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful. *Wesby*, 138 S.Ct. at 589 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Here, a reasonable official would understand that Cleopatra's conduct was unlawful.

For a legal principle to meet the "clearly established" standard, it must be dictated by "controlling authority [or] a robust consensus of cases of persuasive authority." *Id.* at 589-90 (quoting *al-Kidd*, 563 U.S. at 741-41) (internal quotations omitted). Although a clearly established law shall not be defined with a high level of generality, *Id.*, "[this Court does] not require a case directly on point" to defeat qualified immunity. *al-Kidd*, 563 U.S. at 741. Qualified immunity is an objective test determined by whether a reasonable official knew, or should have known, that the conduct would violate a constitutional right. *See generally*, *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

"Qualified immunity balances two important 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). Requiring virtually identical facts in existing precedent risks skewing this balance by promoting government interests while undermining the protection of constitutional rights. *Civil Rights Litigation—Qualified Immunity—Fifth Circuit Holds Medical Board Investigators are Protected by Qualified Immunity in Warrantless Search of Records*, 132 HARV. L. REV. 2042, 2048 (2019). Where a legal principle, such as the unreasonableness of warrantless searches, is well established but a situation lacks factually identical precedent, concerns such as, *inter alia*, overdeterrence are not legitimate reasons to eschew the protection of constitutional rights. *Id.*

It is consistently recognized throughout this Court's jurisprudence, and many circuit courts', that where a government official, acting under the authority of statute, issues an administrative subpoena to a business entity, the business owner must be provided an opportunity for precompliance review to question the reasonableness of the subpoena; and, a deviation of this duty renders the search unconstitutional under the Fourth Amendment. *Patel*, 576 U.S. at 418; *see also See*, 387 U.S. at 545 ("[T]he subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply"); *Lone Steer*, 464 U.S. at 415 ("[A]lthough our cases make it clear that [a government official] may issue an administrative subpoena without a warrant, they nonetheless provide protection for

the subpoenaed [party] by allowing him to question the reasonableness of the subpoena"); *Zadeh*, 928 F.3d at 464 (holding that "a requirement of precompliance review in…administrative searches had been clearly established by Supreme Court precedent prior to the search here."); *Cotropia v. Chapman*, 721 F. App'x 354, 358 (5th Cir. 2018) ("[I]n order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review.").

Following logically, at the time Cleopatra ordered the execution of the subpoena in 2020, the precompliance review precedent was sufficiently clear. (R. 4, 12.); *see e.g.*, *See*, 387 U.S. 451 (decided in 1967); *Lone Steer*, 464 U.S. 408 (decided in 1984); *Patel*, 576 U.S. 409 (decided in 2015); *Cotropia*, 721 Fed.Appx. 354 (decided in 2018); *Zadeh*, 928 F.3d 457 (decided in 2019). Thus, Cleopatra had fair warning of the precompliance review requirement. However, no such opportunity was provided to Caesar. (R. 4, 12.)

This Court's opinion in *Patel* squarely governs the facts here. In *Patel*, the petitioner issued a subpoena pursuant to statute, which granted the authority to inspect hotel records without a warrant. 567 U.S. at 413. The holding in *Patel* expressly requires that the government official provide the opportunity for precompliance review, and an absence of this opportunity renders the subpoena unconstitutional. *Id.* at 419. Regardless of the most precise facts of the case, such as whether the subpoena was issued to a hotel or a medical facility, this rule is clearly established when officials exercise statutory authority to issue administrative

subpoenas to business entities. *Id.* There is a sufficiently close congruence of facts between this case and *Patel* to establish that Cleopatra's conduct was unlawful.

Here, Cleopatra issued a subpoena pursuant to statutory authority, but manifestly failed to provide the opportunity for precompliance review to Caesar before ordering the Board to demand compliance. (R. 4, 12.) Rather, Caesar's employees were given the choice between immediate compliance and jail. (R. 25.) In fact, this Court "held that business owners cannot reasonably be put to this kind of choice." *Id.* at 421.

Further, the instant case is indistinguishable from *Zadeh* because, in that case, the state medical board executed an administrative subpoena to a physician's office and searched the office for patients' medical records. 928 F.3d at 462. Upon execution of the subpoena, the board demanded immediate compliance with the subpoena and promised disciplinary action if the assistant did not so comply. *Id.* The Fifth Circuit concluded there was a violation of the physician's constitutional rights because it was clearly established at the time of the search, in 2013, that government officials "violate the Constitution when they search without providing an opportunity for precompliance review." *Id.* at 468. The Fifth Circuit further articulated that not all reasonable officers would have known that the statute was unconstitutional, *until that opinion*. *Id.* at 470 (emphasis added).

As such, the precedent which requires precompliance review is so well-settled among this Court, and many circuit courts, that the unlawfulness of Cleopatra's

conduct was sufficiently clear at the time she issued the subpoena in 2020. Therefore, Cleopatra is not qualifiedly immune from civil damages under Caesar's § 1983 claim.

Accordingly, the Board's execution of Cleopatra's administrative subpoena and orders failed to comply with the clearly established precompliance review requirement to bring it within the purview of the warrant exception; thus, this Court should reverse the Fourteenth Circuit's ruling and hold that Cleopatra violated Caesar's clearly established Fourth Amendment right.

CONCLUSION

Caesar has sufficiently alleged proximate cause, and thus, has standing to sue under the civil RICO statute. Additionally, Cleopatra violated Caesar's Fourth Amendment right to precompliance review, which was clearly established at the time, and thus, is not entitled to qualified immunity.

For the foregoing reasons, Caesar respectfully requests this Court to reverse the Fourteenth Circuit's decision and reinstate the trial court's order denying the motion to dismiss in favor of Caesar.

APPENDICES

APPENDIX A

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.

APPENDIX B

18 U.S.C. § 1962(c)

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

APPENDIX C

18 U.S.C. § 1962(d)

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

APPENDIX D

18 U.S.C. § 1964(c)

(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.

APPENDIX E

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory of 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.

APPENDIX F

RCL § 18.8.891(c)

(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.