Team #216

Docket 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 PETITIONER

Attorneys for Petitioner: Team #216

QUESTIONS PRESENTED

I. Whether third-party payors have standing to sue pharmaceutical companies for misrepresenting a drug's known safety risk, when the third-party payor is paying for prescribed treatments that were underwritten because of the misrepresented information.

II. Whether a state government official who orders the warrantless search of medical records from a health insurance company violates the Fourth Amendment, where such search is conducted pursuant to a state statute that does not authorize pre-compliance review before a judicial entity. If so, is the official protected from liability under 42 U.S.C. §1983 by the doctrine of Qualified Immunity?

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STATEMENT OF JURISDICTION

Pursuant to Rule 3.2 of the (New York City Bar) 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 provision is relevant and set forth in Appendix B: 42 U.S.C. § 1983 (1996). The following statutory provision is relevant and set forth in Appendix C: 18 U.S.C.A. § 1964(c) (1964) . The following statutory provision is relevant and set forth in Appendix D: 18 U.S.C.A. § 1341 (2008). The following statutory provision is relevant and set forth in Appendix E: 18 U.S.C.A. § 1343 (2008).

STATEMENT OF THE CASE

A. Summary of the Facts

Galen Announces (Inaccurate?) Results of Clinical Trials (with the Alexandrian government?)

In May 2019, Miasmic Syndrome ("Miasmic"), a highly contagious viral disease fatal in at least 1% of the cases, spread globally, infecting millions and killing thousands within months. (R. at 1). Livia Cleopatra ("Cleopatra"), a resident of Romulus, is the sole proprietor of Galen Research ("Galen"), a small American pharmaceutical company headquartered in the State of Romulus. (R. at 1). In September 2019, Galen announced that it had sponsored clinical trials in Alexandria in concert with the Alexandrian government, testing whether its existing, FDA-approved cancer medication Glukoriza could be an effective treatment for Miasmic. (R. at 1). According to the trial results, Glukoriza cut the disease's fatality rate by at least half and hastened patients' recovery time by an average of several days. (R. at 1). Relying heavily on the Alexandria/Galen trial data, Galen's started a marketing campaign to persuade physicians and health insurance companies throughout the country to cover Glukoriza when prescribed as a treatment for Miasmic. (R. at 2). At the time of the announcement, Glukoriza was available from Galen in the United States at a list price of $10,000 per dose and since first marketed in 2014, Glukoriza achieved only limited market penetration with approximately a thousand doses sold a year. (R. at 1).

Caesar Agrees to Fully Cover Prescriptions for Glukoriza when ordered as a Treatment for Miasmic

In November 2019, Julius-Caesar Health System ("Julius-Caesar") agreed to make Glukoriza a preferred treatment for Miasmic. (R. at 3). Julius-Caesar, the largest healthcare provider in the state of Romulus, is a partnership between two legally separate entities, Julius Medical Center ("Julius"), and Caesar Health Plan, Inc. ("Caesar"), a health insurance company. (R. at 2). Julius-Caesar operates as an integrated payor-provider and Caesar's members are mostly Julius's patients. (R. at 2). Caesar agreed to fully cover prescriptions for Glukoriza when ordered as a treatment for Miasmic had it added to its approved formulary as a Miasmic treatment. (R. at 3). Julius and Caesar have separate leadership and board of directors. (R. at 2). By February 2020, over 10,000 prescriptions for Glukoriza had been covered and paid for by Caesar. (R. at 3).

Caesar Removes Glukoriza from its List of Recommended Treatments for Miasmic Syndrome when learns from its own research of the safety risks

While the Galen research indicated the possibility of some side effects from the administration of Glukoriza, it was not until Julius had conducted its own investigation that it uncovered the extent of the harm on its patients who received Glukoriza. (R. at 3). It was based on that discovery that Julius-Caesar made the decision to remove the "miracle drug" from its recommended treatments for Miasmic. (R. at 3). However, because Galen had not disclosed the severity of Glukoriza's side effects, there is no question that Galen had, at least partially, misrepresented the nature of this drug. (R. at 3). By February 2020, with over ten thousand of Glukoriza prescriptions filled, researchers at Julius were able to gather some data and establish

with reasonable certainty that Glukoriza had no significant effect in curing or ameliorating Miasmic. (R. at 3). Additionally, the researchers found that patients who received Glukoriza at the condensed administration schedule recommended by Galen for Miasmic suffered substantial side effects, far in excess of what Glukoriza caused when administered at its normal dosing schedule. (R.at 3). In particular, upwards of 10% of patients receiving the condensed Glukoriza protocol suffered serious loss of kidney function. (R. at 3).

Romulus Legislature Passes the Emergency Miasmic Syndrome Act (EMSA) in October 2019

Since Miasmic was identified, a wide array of counterfeit, adulterated, and otherwise dangerous drugs promising a miracle cure for the disease flooded the market. (R. at 3). In response, the Romulus legislature in October of 2019 passed the Emergency Miasmic Syndrome Act (EMSA).[1] (R. at 3). In part, EMSA authorizes the Board of Health ("the Board") 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. (R. at 3). While the Board is an 11-member body that generally requires a majority vote to act, EMSA granted the Commissioner the unilateral authority to authorize EMSA subpoenas. (R. at 4).

[1] *See* § 18.8.891 – Emergency Subpoenas in relation to Miasmic. (R. at 9).

Cleopatra issues subpoena under the EMSA to Caesar and Authorizes Unconstitutional Raid

In March 2020, Cleopatra issued subpoenas ordering Caesar Health Plan to immediately turn over copies of all medical records relevant to patients diagnosed with, tested for, or suspected of carrying Miasmic. (R. at 4).

A group of armed agents from the Board arrived at Caesar's facilities at 8AM on the morning of March 19, 2020, carrying the subpoena and demanding compliance. (R. at 4). The agents were only able to secure compliance with the subpoena by threatening 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). Caesar's staff were unable to tell which records were pertinent to Miasmic care quickly, so agents required Caesar to turn over data on *all* claims received from Julius since the start of the pandemic, including the medical data underlying each claim. (R. at 5). Caesar's attorney's did not arrive to contest the subpoena until after the staff had already unwillingly turned over the documents and records. (R. at 5). Based on this data, the Board determined that Julius had been providing substandard care to its Miasmic patients. (R. at 5). On March 30th, the Board suspended Julius's operating license. (R. at 5).

Glukoriza Trial Results Prove to have been Falsified and the Board Restores Julius's Operating License

The same day the Board suspended Julius's operating license (March 30, 2020), a whistleblower in Alexandria came forward with documents showing severe

discrepancies in the 2019 Glukoriza trial results. (R. at 5). The report indicated that the researchers conducting the trial had falsified data and failed to properly follow up with patients to assess for delayed side effects. (R. at 5). In particular, the documents suggested some patients had started to show signs of kidney damage, but were discharged from the trial before this could be confirmed. (R. at 5).

On April 14th, the Board voted 6-5 to restore Julius Medical Center's operating license, upon Julius's showing proof that 100% of their patients' excess kidney morbidity could be accounted for by patients on Glukoriza, which Julius no longer used as a treatment for Miasmic. (R. at 6). During Julius's license suspension, over 15,000 patients dropped their membership in the Julius-Caesar integrated system and enrolled with new providers and insurance companies. (R. at 6).

B. Summary of the Proceedings

Caesar filed a civil action in the federal district court for the District of Columbia alleging a RICO action under 18 U.S.C. § 1964(c), seeking damages in the amount of all payments made by Caesar to Galen for Glukoriza, and a civil rights claim under 42 U.S.C. § 1983, seeking damages for reputational injury and lost premiums from members who have left the Julius-Caesar system following the suspension of Julius's license. (R. at 6,13). Caesar alleges that Cleopatra, as the sole proprietorship of Galen, induced Caesar to underwrite Glukoriza as a treatment for Misamic Syndrome by means of fraud. (R. at 6). Caesar also alleges that Cleopatra, in her capacity as Commissioner of the Romulus Board of Health, authorized an

unconstitutional search of Caesar's premises in violation of the Fourth and Fourteenth Amendment. (R. at 13).

Cleopatra moved for summary judgment which the District Court denied in its entirety on May 30, 2020. (R. at 7). Cleopatra filed a motion to dismiss both causes of action against her. (R. at 6). First, Cleopatra filed a motion to dismiss on the basis that Caesar Health Plan lacked standing to allege a RICO violation on the mere basis of its having reimbursed prescriptions for drugs manufactured by Galen. (R. at 7). Second, Cleopatra filed a motion to dismiss on the basis that the EMSA subpoena and its method of execution were not in violation of any cognizable constitutional right. (R. at 6). Moreover, Cleopatra filed a Motion to dismiss on the grounds of qualified immunity (R. at 7). Cleopatra argued that Caesar's constitutional rights were not violated and even if the conduct violated Caesar's constitutional rights, those rights were not "clearly established" at the time of the violation. (R. at 7). The District Court disagreed and found that Caesar's constitutional rights were violated and denied Cleopatra's motion to dismiss on both counts. (R. at 7). Cleopatra appealed the District Court's decision to the Fourteenth Circuit. (R. at 7).

On June 11th, Cleopatra appealed to the United States Court of Appeals for the Fourteenth Circuit (R. at 7). On July 3rd, the Fourteenth Circuit reversed the district court and ordered the motion granted in its entirety. (R. at 7). The Fourteenth Circuit held that Caesar did not have a civil RICO action under 18 U.S.C. § 1964(c). (R. at 30). In addition, the Fourteenth Circuit concluded that Cleopatra was entitled to qualified immunity, thus failing to address Caesar's Fourth Amendment rights.

(R. at 26). As such, the Fourteenth Circuit reversed the District Court's decision and remanded the case for further proceedings. (R. at 28). Caesar petitioned for a writ of certiorari on July 17th, which this Court granted on September 14th. (R. at 7, 40).

SUMMARY OF THE ARGUMENT

A "but for" and "proximate causation" are required as elements of a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). A plaintiff may recover if injured "by reason of" a RICO violation by simply showing that the defendant violated the RICO statute , the plaintiff was injured, and the defendant's violation was a "but for" cause of plaintiff's injury. The Fourteenth Circuit erred by holding that Cesar lacked standing as a third-party payor ("TPP") to allege a violation under Racketeer Influenced and Corrupt Organizations Act (RICO) when Caesar's injuries were caused because of Galen's misrepresentations that induced Caesar to pay for off-label prescription drugs manufactured by Galen. Galen's actions were the direct cause of Caesar's injuries as a TPP because Caesar relied on Galen's representation that Glukoriza could be used as an off-label treatment for Miasmic.

Fourth Amendment

Cleopatra violated Caesar's Fourth Amendment rights when she issued a subpoena that authorized a swarm of Board Agents from the Romulus Board of Health to execute an unconstitutional search of Caesar's premises and unconstitutional seizure of all medical records relevant to Miasmic. The Fourth Amendment exists to protect individuals from unreasonable searches and seizures. This fundamental right helps regulate how and when the government can search a location and seize people or property. Under the Fourth Amendment, in order to execute a reasonable search and seizure government officials must obtain a valid

search warrant. This Court has allowed exceptions to the warrant requirement, one being exigent circumstances. However, in the case at bar, exigent circumstances are not present.

Furthermore, there are a number of lower courts decisions that prohibit warrantless searches similar to that in this case on the basis that the target of a subpoena is not afforded the opportunity for pre-compliance review. However, there is a split in authority regarding cases involving warrantless administrative searches. care quickly, so agents required Caesar to turn over data on *all* claims received from Julius since the start of the pandemic, including the medical data underlying each claim. (R. at 5). Caesar's attorney's did not arrive to contest the subpoena until after the staff had (already unwillingly?) turned over the documents and records. (R. at 5). Based on this data, the Board determined that Julius had been providing substandard care to its Miasmic patients. (R. at 5). On March 30th, the Board suspended Julius's operating license. (R. at 5).

Qualified immunity is granted to governmental wrongdoers, shielding them from § 1983 liability when they violated a federal statutory or constitutional right unless a court finds that, at the time the wrongdoing was committed, the unlawfulness of their conduct was clearly established at the time and the constitutionality of the officer's conduct was beyond debate. For a civil claim of damages to succeed under 42 U.S.C. Section 1983, a plaintiff must prove that the government official did violate the plaintiff's constitutional rights and that those rights were clearly established. The "clearly established" standard requires that the

legal principle clearly prohibit the officer's conduct in the particular circumstances before him. Consequently, Qualified Immunity will generally apply in a case of first impression. Cleopatra violated Caesar's constitutional rights and the current case law clearly establishes that the actions taken by Cleopatra were unreasonable and violations of the Fourth Amendment.

Our qualified immunity jurisprudence is inconsistent with the intended meaning of the statute. The doctrine as it is currently adjudicated is a product of the Court's own choices. This instant case provides a prime example of the shortcomings and consequences of the doctrine as it stands. It leaves the Romulus Board of Health still uncertain whether EMSA subpoenas are constitutional. It leaves other Romulus institutions unsure whether or not to comply with or fight other EMSA subpoenas they may face in the future. It leaves Caesar uncompensated for its constitutional harms, and indeed uncertain whether it suffered any. And it fails to inform other government officers and entities how to behave in the future when other laws are applied to other situations. The Court should modify or eliminate the current form of qualified immunity should ensure continued fairness and justice among parties.

For these reasons Caesar respectfully requests that this Court reverse the Fourteenth Circuit's decision and rule that Caesar has satisfied the proximate cause element under a RICO violation and deny Cleopatra's motion for summary judgement for lack of standing. Additionally, Caesar respectfully asks this Court to rule that the laws proscribing the actions taken by Cleopatra were clearly established at the time

of the violation and thus she is not entitled to qualified immunity. Further, if Cleopatra is found to be shielded by qualified immunity, Caesar respectfully urges the Court to modify, or entirely upend the way in which it adjudicates claims of qualified immunity.

STANDARD OF REVIEW

In order to withstand a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A district court's grant of a Rule 12(b)(6) motion to dismiss is reviewed *de novo.Bain v. Cal. Teachers Ass'n*, 891 F.3d 1206, 1211 (9th Cir. 2018).

Additionally, whether an officer is entitled to qualified immunity is a question of law. Questions of law are reviewed de novo. *Pierce v. Underwood,* 487 U.S. 552, 558 (1988). Therefore, this Court should conduct a de novo review in this case.

ARGUMENT

This court required both proximate and but-for causation as the elements in interpreting the "by reason of" in the RICO statute. *Holmes v. Sec. Inv'r Prot. Corp.,* 503 U.S. 258 (1992). A "direct relation" requirement is based upon three practical factors. *Id.* at 271-74 (1992). Therefore, under *Holmes*, this Court established that a plaintiff is entitled to a claim that is plainly foreseeable under RICO unless (1) it is too difficult to ascertain the damages caused by the violation, (2) there is a risk of

multiple recoveries, and (3) the possibility that more "directly injured victims" can bring their own claims for RICO violation. *Id*. Furthermore, proximate causation may be established "by plausibly pleading that his business or property has been directly injured as a result of the defendants' § 1962 violation." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 641 (2008). However, this Court also held that the reason for proximate cause is to "limit a person's responsibility for the consequences of that person's own acts." *Holmes,* at 268.

I. THE FOURTEENTH CIRCUIT ERRED BY HOLDING THAT CAESAR LACKED STANDING AS A THIRD-PARTY PAYOR TO ALLEGE A RICO VIOLATION WHEN CAESAR'S INJURIES WERE CAUSED BECAUSE OF CLEOPATRA'S MISREPRESENTATIONS THAT INDUCED CAESAR TO PAY FOR PRESCRIPTION DRUGS MANUFACTURED BY GALEN

A private party right of action under RICO is described in 18 U.S.C.A. § 1964(c). *Bridge,* 553 U.S. 639, at 641. The RICO statute under section 1964 (c) provides that "[a]ny 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 […]." *Holmes,* 503 U.S. 258, 265(citing 18 U.S.C. § 1964(c)). Under section 1962(c), it is "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." 18 U.S.C.A. § 1962. Racketeering activity includes mail and wire fraud. 18

U.S.C. § 1341; 18 U.S.C §1343. This Court has established that "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985).

Congress modeled Section 1964(c) after § 4 of the Clayton Act, which was itself based on § 7 of the Sherman Act. *Associated Gen. Contractors of Cal., Inc. v. Carpenters,* 459 U.S. 519 (1983) (holding that "these sections have been interpreted to incorporate common-law principles of proximate causation"). In *Holmes* this Court held that "[a]lthough § 1964(c)'s language can be read to require only factual, "but for," causation, this construction is hardly compelled, and the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades this Court that RICO should not get such an expansive reading." *Holmes*, 503 U.S. 258, 258-59. Congress enacted § 1964(c) intending its words to mean the same as it did in previous court opinions. *Associated Gen. Contractors,* 459 U.S. 519, at 534.

Several circuit courts have recognized the direct relation and the factors in *Holmes* for proximate cause under RICO. *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co. Ltd.*, 943 F.3d 1243, 1248 (9th Cir. 2019). Although, until *Painters*, the Ninth Circuit had never applied it to decide whether TPPs and patients "can satisfy RICO's proximate cause" when suing "pharmaceutical companies for concealing an allegedly known safety risk about a drug." *Id.* at 1253.

However, the other circuit courts have decided similar factual scenarios with different results, "creating an apparent inter-circuit split." *Id.*

The First Circuit held that there was a direct relationship between a TPP and a drug manufacturer's misrepresentation. *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21 (1st Cir. 2013). In the case of *In re Neurotin*, a TPP, Kaiser, paid for prescriptions for an off-label induced by Pfizer's (the drug manufacturer) fraudulent misrepresentations, including a fraudulent marketing campaign. *In re Neurotin*, 712 F.3d 21*, 2*8-29. Comparably, in another case, the Third Circuit held that a TPP adequately pled proximate cause when it relied on the defendant's misrepresentation about the heart-related safety risks of a prescription drug. *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 804 F.3d 633 (3d Cir. 2015). Although the Third and Seventh Circuit have addressed this issue and held TPPs could not satisfy the proximate cause requirement, the factual scenarios were different from those addressed by the other courts and the one before this court today. *Painters,* at 1253-54. Furthermore, this Court established that proximate cause "requires some direct relation between the injury asserted and the injurious conduct alleged" and that "such directness of relationship is one of the essential elements of Clayton Act causation." *Holmes* at 258-59. *A* plaintiff can prove a violation under RICO by sufficiently establishing the element of causation, both actual and proximate. *Bridge at* 656–60. Both of these elements can be established in this case.

A. Caesar's injuries were plainly foreseeable because absent Galen's misrepresentation Caesar would not have paid Glukoriza prescriptions as a treatment for Miasmic Syndrome

A plaintiff is injured "by reason of" a RICO violation, and therefore may recover, simply on a showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a "but for" cause of plaintiff's injury. *Associated Gen. Contractors,* 459 U.S. 519, 529. Therefore, the plaintiff needs to show "that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). However, "RICO is not expanded to provide a federal cause of action and treble damages to every tort plaintiff." *Steele v. Hospital Corp. of Am.,* 36 F.3d 69, 70 (9th Cir.1994) (holding that "a showing of injury requires proof of a concrete financial loss and not mere injury to a valuable intangible property interest"). Thus, an action in tort law "is not regarded as a cause of an event if the particular event would have occurred without it." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984).

Furthermore, the Third Circuit held that "the injury to business or property element of section 1964(c) can be satisfied by allegations and proof of actual monetary loss, i.e., an out-of-pocket loss." *Maio v. Aetna, Inc.*, 221 F.3d 472 (3d Cir. 2000); see *Steele,* 36 F.3d at 70 (stating that plaintiffs have not suffered a financial loss under RICO if they have paid none of the allegedly excessive charges out of their own pockets); *see also Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir.1990) (holding

that plaintiffs suffered no damages under RICO when they did not incur any out-of-pocket expenses as a result of defendants' conduct).

In *In re Neurotin*, "but-for" causation was demonstrated when a TPP directly relied on the manufacturer's misrepresentation to prepare formularies, which, in turn, influenced doctors' prescribing decisions. *In re Neurontin* at 40. Caesar had entered Glukoriza on its approved formulary as a Miasmic treatment. (R. at 3). In a period of three months, Caesar fully paid for over ten thousand prescriptions for Glukoriza that were ordered for the treatment of Miasmic after Galen announced the trial results. (R. at 2, 3). Glukoriza had a list price of $10,000 per dose. and had an approved dosage of one use per month over six months. (R. at 1). However, as an off-label treatment for Glukoriza, the recommended treatment dosage was four doses administered over a two-week period. *Id*. As such, but for Galen's misrepresentation that Glukoriza could be used as an effective treatment of Miasmic, Caesar would not have suffered the financial loss of covering ten thousand prescriptions for $10,000 per dose. (R. at 1, 3). Therefore, this Court should find that Caesar's injuries were foreseeable to Galen.

B. There Is Enough Proximate Cause Because Galen's Actions Were The Direct Cause Of The Injuries That Occurred To Caesar, As A TPP, When Caesar Paid For Glukoriza As A Treatment For Miasmic Syndrome Relying On The Information Galen Misrepresented.

A plaintiff needs to show that the RICO predicate offense "not only was a 'but for' cause of his injury but was the proximate cause as well." *Hemi Grp., LLC v. City*

of N.Y.C., 559 U.S. (2010) (quoting *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992)). In *St. Luke's*, the Third Circuit held that a plaintiff bringing a civil RICO claim must additionally state an injury to business or property and "that a RICO predicate offense 'not only was a 'but for' cause of injury but was the proximate cause as well.'" *St. Luke's Health Network, Inc. v. Lancaster Gen. Hosp.*, 967 F.3d 295, 300 (3d Cir. 2020) (citing *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9, 130 S.Ct. 983, 175 L.Ed.2d 943 (2010)) (citing *Holmes*, 503 U.S. 258, 268). "[T]he proximate-cause requirement generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014). In *Holmes*, the Court established that a "direct relation" requirement is based upon three practical factors. *Holmes* at 271-74. First, "indirect injuries make it difficult 'to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors.' " *In re Avandia Mktg.*, 804 F.3d 633, 642 (quoting *Holmes*, 503 U.S. at 269). Second, "indirect injuries risk double recovery so the "courts would have to adopt complicated rules apportioning damages to guard against this risk." *Id.* "Third, directly injured victims can be counted on and are best positioned to "vindicate the law as private attorneys general," so there is no need to extend civil RICO's private right of action to those whose injuries are more remote." *St. Luke's Health Network at* 300 (quoting *Holmes*, 503 U.S. at 269–70).

This Court has applied the *Holmes* factors, along with its direct relation requirement, in each of its decisions addressing proximate cause for civil RICO claims. *Painters,* 943 F.3d 1243, 1249. Additionally, *Holmes* makes it clear that both the directness concern and the three functional factors are part of the proximate cause inquiry. *Holmes,* 503 U.S. 258, 271-74. Thus, "proximate cause" "requires some direct relation between the injury asserted and the injurious conduct alleged." *Holmes,* at 259.

Similarly to the case at bar, in *In re Neurotin*, a TPP, Kaiser, composed of two separate corporations: the Kaiser Foundation Health Plan, and Kaiser Foundation Hospitals, included an off-label drug, Nuerotin, in its formulary, "a list of medications its treating physicians were authorized to prescribe." *In re Neurotin*, at 21, 28. A jury awarded Kaiser damages for the injuries, and the manufacturer was denied a motion for a new trial and appealed the decision. *Id.* at 27. The manufacturer claimed that Kaiser could not meet the proximate cause requirement as a matter of law. *Id.* at 34. However, the First Circuit rejected that argument and held that "Kaiser has met both the direct relationship and functional tests articulated in Holmes and its progeny." *Id.* at 38.

1. Caesar suffered damages that can be directly attributed to Galen's failure to warn of Glukoriza safety risks as a treatment for Miasmic Syndrome

The first factor from *Holmes* is used to determine whether "it would be too difficult to ascertain what damages are attributable to Defendants' alleged RICO

violation, as opposed to factors other than, and independent of, Defendants' alleged misrepresentations." *Holmes*, 503 U.S. at 269. The Ninth Circuit held that "it is often easier to ascertain the damages that flow from actual, affirmative conduct, than to speculate what damages arose from a party's failure to act." *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957 (9th Cir. 1999).

In *Painters*, the plaintiff, Painters Fund, was a TPP of health and welfare benefits to covered members and their families and claimed that the damages they suffered were proximately caused by the defendant's, the drug manufacturer, RICO violation. *Painters* at 1247. The manufacturer refused to change warning labels on diabetes drugs, and it did not inform the consumers that the drug caused an increased risk of bladder cancer after several studies were conducted, and the FDA released a public warning about the safety risks of the drug. *Id.* at 1246, 47. Additionally, in *Painters*, patients purchased the drug, physicians prescribed the drug, and TPPs agreed to pay for the drug for their members, all relying on the manufacturer's representations, either "by act or omission." *Id*. at 1247. Painters Fund "relies on each member to submit claims for prescription medications that are medically reasonable and necessary for treatment," with the expectation that patients and their prescribing physicians will "make informed decisions about which drugs will be prescribed and, in turn, submitted to [Painters Fund] for reimbursement." *Id.* In

Painters, the court found that it was not so difficult for Plaintiffs to prove that their damages were attributable to the defendants' misrepresentations, therefore, they should not be denied an opportunity to do so. *Id.* at 1251.

Similarly, in *In re Avandia, a* defendant misrepresented significant heart-related safety risks associated with the drug Avandia. *In re Avandia*, 804 F.3d 633. Plaintiff relied on the misrepresentations and included the drug on their formularies. *Id.* at 633. The district court held that "[t]he conduct that allegedly caused plaintiffs' injuries is the same conduct forming the basis of the RICO scheme alleged in the complaint. *Id.* at 644.

Following the holdings of the *Painters* and *In re Avandia* courts, Caesar was directly affected by Galen's misrepresentations about the safety risk of Glukoriza. As in *In re Avandia*, where the misrepresentation was what caused the plaintiffs to add the drug on their formularies, Galen's misrepresentation is what caused Caesar to have Glukoriza added to their approved formulary. *In re Avandia* at 644; (R. at 3). Caesar alleged injury, the payment for all the prescriptions for Glukoriza that were filled at Julius, were a direct result of Galen not disclosing the severity of Glukoriza's side effects. (R. at 3). Once research was done by Julius, and the risk associated with Glukoriza as an off-label was found, Caesar immediately removed the drug from its approved formulary. *Id.* Therefore, stopping the payment for the drug as a treatment for Miasmic. *Id.* Given the fact that payments were only submitted while Glukoriza

was part of Caesar's approved formulary, the financial loss Caesar suffered was directly attributed to Gale's misrepresentation.

2. The damages suffered by Caesar do not overlap with other injured persons and there is no risk of duplicative recoveries.

The second factor in *Holmes looks at* "the risk of multiple recoveries by plaintiffs at different levels of injury from the defendants' acts." *Holmes* at 269. There is no risk of duplicative recovery when the plaintiff is "both the natural and foreseeable victim of the fraud and the intended victim of the fraud." *In re Neurontin Mktg.,* at 37.

Here, like in *Bridge and Painters*, there is no concern of "duplicative recoveries by plaintiffs removed at different levels of injury from the violation." *Bridge*, at 658. In *Painters*, each individual plaintiff who paid out money for Actos prescriptions sought recovery for those payments that were not reimbursed by a TPP. *Painters,* at 1251–52. Similar to *Painter*, where the plaintiff's damages did not overlap, Caesar is seeking to recover damages in the amount of all the payments made to Galen for Glukoriza as a treatment for Miasmic. *Id*; (R. at 6).

Caesar operated in a partnership with Julius, forming the largest healthcare provider in the state of Romulus. (R. at 2). Most of Julius's patients were members of Caesar. *Id*. Additionally, Caesar requires prior authorization and clinical necessity before reimbursing members for care received outside Julius. *Id*. Julius

made Glukoriza its preferred Miasmic treatment during the pandemic. (R at 2). However, Caesar was the one paying fully for each prescription ordered for Julius members. (R. at 3). *In re Avandia*, the plaintiffs were the best situated to sue under RICO because the alleged injury "is an economic injury independent of any physical injury suffered by Avandia's users and prescribing physicians did not suffer RICO injury from the defendant's marketing of Avandia". I*d.* at 644. Therefore, this Court should find that Caesar is best situated to sue because it's economic injuries are independent from any injury suffered by others.

3. Galen should be held liable to Caesar for its because it's injurious conduct in misrepresenting the severity of Glukoriza's side effects

Holding Galen liable for Caesar's injuries "advances the interest in deterring injurious conduct, without including others who did not suffer direct out-of-pocket losses." *Painters* at 1252. The third factor in *Holmes,* considers whether holding Defendants liable can be justified by the "general interest of deterring injurious conduct or whether there are more directly injured victims we can count on to hold Defendants liable." *Holmes* at 269–70. In *Painter*, plaintiffs alleged that Actos increased the risk of developing bladder cancer, nonetheless, to increase profits, defendants intentionally misled the FDA, prescribing physicians, consumers, and TPPs. *Painters* at 1246. Similarly, envisioning a profit increase, Galen massively expanded its manufacturing capacity for Glukoriza, despite knowing the severity of the drug's side effects. (R. at 2, 3).

Additionally, in Painters, the Ninth circuit held that the Defendants defrauded both patients and TPPs, when they paid for a drug "which would not have been purchased if suitably described. *Painters* at 11252. Similar to *Painters*, Caesar, as a TPP, suffered a direct economic injury because it paid for ten thousand prescriptions for off-label Glukoriza that would not have been prescribed had Galen not misrepresented the medication's safety risk. *Id.*; (R. at 2,6).

Caesar paid for the prescription of Glukoriza based on Galen's marketing campaign relying heavily on the Alexandria/Galen trial that the medication, as an off-label, cut the Miasmic fatality by at least half and hastened patient's recovery time by an average of several days, therefore being defrauded by Galen's fraud. (R. at 2). Others may have been affected by Galen's alleged fraud, for instance, Julius, or the prescribing physicians who prescribed Glukoriza for their patients. (R. at 6). However, Julius damages were not directly related to Galen's misrepresentations as it resulted from the Board reviewing the data found at Cesar and voting to suspend Julius's operating license. (R. at 5, 6). Furthermore, the prescribing physicians did not suffer an economic injury, as they were not the ones paying for the Glukoriza they prescribed. *Painters*, at 1252; (R. at 3).

B. Even if this Court finds that Caesar indirectly relied on Cleopatra's misrepresentation, Caesar's reliance is still enough and not too attenuated to satisfy the RICO's proximate cause requirement

In *Bridge,* this Court unanimously held that a first-party reliance requirement cannot be derived from § 1964(c). *Bridge*, 553 U.S. 639. Direct reliance by a third-party on the defendant's misrepresentations is sufficient to satisfy RICO's proximate

cause. *Id*. at 647. The most important in an inquiry for proximate causation under RICO is the existence of a "direct relationship between the alleged RICO violation and the plaintiffs' alleged injury." *Id*. Here, as the District Court noted, Caesar's injuries, all the payments made to Galen for the prescriptions of Glukoriza, were the direct result of Galen's fraud to induce TPPs into paying for Glukoriza as a treatment for the disease. (R. at 17).

In Painters, the 9th Circuit held that "[a]ll that is required of Painters Fund at is to allege that someone in the chain of causation relied on Defendants' alleged misrepresentations and omissions." *Painters* at 1260. Even if this Court finds that there is no first-party reliance, Caesar would still allege that Julius relied on Galen's misrepresentations and omissions, and Caesar, as "someone in the chain of causation" also relied on the same misrepresentations and omissions. (R. at 2, 3).

Several other circuit courts have engaged "in necessary line-drawing to limit the permissible scope of recovery when an alleged injury involves a potentially complex chain of causation with many intervening events." *Employer Teamsters-Local Nos. 175/505 Health & Welfare Tr. Fund v. Bristol Myers Squibb Co*., 969 F. Supp. 2d 463, 474 (S.D.W. Va. 2013). The Second Circuit held that the causal chain is too long to satisfy the Supreme Court's requirements when there are too many independent decisions, or too many layers, between promotion and payment. *See Sergeants Benevolent Association Health and Welfare Fund v. Sanofi-Aventis U.S.*

LLP, 806 F.3d 71 (2d Cir. 2015) (holding that "health benefit plans failed to demonstrate that manufacturer's alleged misrepresentations regarding safety of drug caused an injury to the plans"); *see also UFCW Local 1776 v. Eli Lilly & Co*., 620 F.3d 121 (2d Cir. 2010) (holding that, "any reliance by doctors on manufacturer's misrepresentations as to efficacy and side effects of drug was not proximate cause of alleged excess price that TPPs ultimately paid for each prescription"). The Ninth and the Eleventh Circuit agreed. *See United Food & Commercial Workers Health & Welfare Fund v. Amgen, Inc.*, 400 Fed.Appx. 255 (9th Cir. 2010) ("complaint proffered an attenuated causal chain that involved at least four independent links); and *Southeast Laborers Health & Welfare Fund v. Bayer Corp.*, 444 Fed.Appx. 401 (11th Cir. 2011). See also *Ironworkers Local Union 68 v. AstraZeneca Pharmaceuticals, LP*, 634 F.3d 1352, 1370 (11th Cir. 2011) (Martin, J., concurring) (agreeing with the Second Circuit). Finally, the First Circuit agrees with the Third Circuit about the consequences of misrepresentations directly to payors but disagrees with "the other four circuits about the possibility of Payors' recovery for misrepresentations made to physicians." I*n re Neurontin Marketing & Sales Practices Litigation*, 712 F.3d 21 (1st Cir. 2013) (finding sufficient reliance between TPP and manufacturer's misrepresentations).

In *UFCW Local 1776*, plaintiffs were unions and insurers acting as TPPs in position to negotiate the price of a prescription drug. *UFCW Local,* 620 F.3d 121.

Plaintiffs filed a claim against the manufacturer asserting a (RICO) violation alleging that the manufacturer misrepresented the drug's efficacy and safety. *Id*. The Second Circuit found that when plaintiffs are the only ones able to negotiate the drug's price, "the manufacturer's alleged misrepresentations as to efficacy and side effects of drug, as predicate offense under RICO, was too attenuated to have required direct causal connection to alleged excess price that TPPs ultimately paid for each prescription." *Id*. at 136. However, the Fourteenth Circuit erred in comparing the case at bar to *UFCW* because Caesar did not negotiate the price of Glukoriza, as it had a list price per dose already established. (R. at 1).

Finally, Galen directed its fraudulent marketing campaign to Julius-Caesar, the largest healthcare provider in the state of Romulus, and not only at Julius, or Julius's physicians. (R. at 16). Galen's fraudulent marketing plan was meant to increase its revenues and profits. (R. at 2,3). The plan only became successful when Galen received the payments for all the additional prescriptions it induced after the trial results. (R. at 3). Galen took advantage of a global pandemic and recommended, based on the clinical trials, Glukoriza to be administered in a condensed form. (R. at 1, 3). In the three years that Glukoriza was marketed it had achieved only a limited market penetration, with approximately a thousand doses sold every year. (R. at 1). However, after misrepresenting that Glukoriza was effective in the treatment of Mismic Syndrome, Galen received payment from Caesar for over ten thousand

prescriptions in a matter of months. (R. at 2). Caesar being the payor for the prescriptions submitted by Julius, the proximate causation linking Galen's misconduct to Caesar's injuries is not dependent on attenuated casual chain involving any other links. *In re Neurontin Mktg. at* 39. Furthermore, allowing manufacturers, as they harm thousands of individuals, to hide behind the assumption that TPPs would not rely on their representation of effectiveness or safety, is not in the public's best interest.

II. THE FOURTEENTH CIRCUIT ERRED BY HOLDING THAT THE EMSA SUBPOENA AND ITS METHOD OF EXECUTION DID NOT CLEARLY VIOLATE CAESAR'S FOURTH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES, AND THAT THE DOCTRINE OF QUALIFIED IMMUNITY SHIELDS CLEOPATRA FROM LIABILITY.

Fourth Amendment

A. Caesar's Fourth Amendment Rights Were Violated Because The EMSA Statute Was Facially Unconstitutional Since It Failed To Provide Caesar With The Opportunity For Pre-Compliance Review And Because The Statute And The Subpoena Were Overbroad

1. Caesar's Fourth Amendment Rights Were Violated Because The EMSA Statute Failed to Give Caesar The Opportunity For Pre-Compliance Review.

The Fourth Amendment to the United States Constitution provides:

"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." U.S. CONST. amend. IV.

The Fourth Amendment protects the right of privacy against unreasonable searches and seizures by the government. A violation of a person's Fourth Amendment right occurs when government officials, without a warrant, invades a person's reasonable expectation of privacy. The permissibility of any governmental search is judged by balancing its intrusion on the individual's Fourth Amendment interests against the governmental interests. *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979) Furthermore, This Court has repeatedly held that governmental searches conducted without a warrant approved by a judge are per se unreasonable . . . *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2452 (2015), quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009) and *Katz v. United States*, 389 U.S. 347, 357 (1967). This rule also applies to commercial premises. *Id.* (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312, (1978), and protects business owners' reasonable expectations of privacy in their commercial property, *New York v. Burger*, 482 U.S. 691, 699, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987) (citing *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring)).

However, the law has provided a few exceptions to the warrant requirement. (*See New York v. Burger*, 482 U.S. 691 (1987) (recognizing the exception to the warrant requirement for searches conducted pursuant to a state authorizing statute for the administrative inspection of pervasively regulated industries).

For many years the *Burger* analysis was the standard for determining whether a warrantless search authorized by statute was a violation of the Fourth Amendment. Under *Burger*, a warrantless search was considered constitutional if it met the following requirements: (1) there be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made(2) the warrantless inspection must be necessary to further the regulatory scheme (3) the statutes inspection program, in terms of the certainty and regularity of its application must provide a constitutionally adequate substitute for a warrant.

This Court expanded on the *Burger* analysis in *Patel.* In *Patel*, an ordinance required hotel operators to record, maintain, and make available for inspection by the police certain information about guests. *City of Los Angeles* v. *Patel*, 135 S.Ct. 2443, 2452 (2015). This Court held that the ordinance in *Patel* was facially invalid under the Fourth Amendment because the ordinance did not provide opportunity for pre-compliance review. *Id.* In a recent district court case, an ordinance required booking services to turn over information regarding each listing. The court held that the ordinance was facially invalid because there was no mechanism for pre-compliance review. *See Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 2019 U.S. Dist. LEXIS 755.

The *Patel* rule consists of the following factors: (1) circumstances exist where there is a special need, beyond the normal need for law enforcement, which makes the warrant and probable cause requirement impracticable (2) the primary purpose of the searches must be distinguishable from the general interest in crime control (3)

the subject of the search must be afforded an opportunity to obtain pre-compliance review before a neutral decision maker. I*d.*

To determine the constitutionality of the warrantless administrative search in this case, it is necessary to apply *Patel*. The first *Patel* factor requires that circumstances exist where there is aecial need, beyond the normal need for law enforcement, which makes the warrant and probable cause requirement impracticable. *Patel*, 135 S. Ct. at 2452 (quoting *Skinner*, 489 U.S. at 619). The facts indicate that the Miasmic had spread globally into a pandemic. (R. at 1). The Board received a report that Julius Medical Center had worse health outcomes than other Miasmic patients seen elsewhere in the state. (R. at 4) In response to the report, Cleopatra issued the subpoena authorizing the board agents to perform the search"(R. at 5). Based on these facts it is evident that the agents from the Board of Health performed the inspection with the primary purpose of promoting the health and safety of its citizens and not to enforce criminal penalties. Furthermore, it would be ineffective to require a warrant and probable cause requirement for the Board to perform the inspection because it would interfere with the Board's obligation in ensuring the health and safety of citizens. Therefore, in the instant case, a subpoena may be allowed.

The second *Patel* factor requires that the primary purpose of the search must be distinguishable from the general interest of crime control. In the case at bar, the Board is responsible for regulating Hospitals by ensuring that licensed hospitals are in compliance with all relevant standards in the medical field. The facts show that

the Board had reason to believe that Caesar likely possessed information about Julius Medical Center and its patients because Caesar formed a partnership with Julius medical center. (R. 2). Furthermore, in the subpoena, Cleopatra stated the purpose of the administrative search was " for the purpose of conducting an inspection and search for information relevant to potential negligent or substandard care for Miasmic." (R. 11). Thus, it is clear that the Boards primary purpose of the search was to collect information about whether Julius Medical Center was in compliance.

The third *Patel* factor requires that the target of the subpoena be given the opportunity for pre-compliance. In this case, the Board's subpoena failed to satisfy this requirement. The morning of March 18, a swarm of armed agents from the Romulus Board of Health served the subpoena on Caesar. The agents demanded the staff to immediately comply with the subpoena or the staff would be thrown in jail for obstruction of justice. If pre-compliance review is not afforded, an intolerable risk exists that searches will exceed statutory limit or be used to create a pretext for harassment. *Id.* at 2452-53. In *Halpern*, the court ruled that it was a violation of the Fourth Amendment because property owners were faced with the choice of consenting to warrantless inspections or facing criminal and financial penalties. *Halpern 2012, LLC v. City of Ctr. Line*, 404 F. Supp. 3d 1109, 1118 (E.D. Mich. 2019).

This case mirrors *Patel*. In *Patel*, the Court prohibited warrantless on-the-spot searches of hotel registers, because "a hotel owner who refuses to give an officer access to his or her registry can be arrested on the spot. The Court has held that business owners cannot reasonably be put to this kind of choice." *Patel*, 123 S.Ct. at 2452

(citing *Camara*, 387 U.S. at 533). Furthermore, the subpoena was legally authorized under PCL § 18.8.891 which contains a section about the opportunity for pre-compliance review.

PCL § 18.8.891(e) provides that:

> 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.

However, this provision of the statute is essentially useless. PCL § 18.8.891(e) is exceptionally misleading because it insinuates that the target of a subpoena has the opportunity for a recourse through a neutral decision maker. But this is untrue. Cleopatra was the Commissioner of the Board of Health who issued the subpoena. The Board is the entity that executed the subpoena. The Board arrived at Caesar's premises unannounced. The Board demanded Caesar's staff to turn over all documents and the Board threatened Caesar's staff with jail time. There is an obvious conflict. For one, the board is interested in obtaining as much information from Caesar about Julius's compliance with medical standards. Furthermore, the Board would be reviewing conduct performed by its own agents when the Board is the entity that authorized the agents to perform the conduct. In actuality, Caesar would not be afforded a true pre-compliance review since the review would be conducted by the Board rather than a neutral decision maker.

Even if PCL § 18.8.891(e) were to be considered an avenue of pre-compliance review, Cleopatra failed to mention it in the subpoena. Instead, the text of the

subpoena stated an ultimatum; either comply with the immediate subpoena or suffer serious consequences for illegal interference. (R. 21). Additionally, the subpoena stated the following: "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. (R. 12). This demonstrates that Cleopatra deliberately ordered the Board to arrive the day of the compliance deadline to prevent Caesar from taking any corrective actions and to prevent Caesar from having the opportunity for pre-compliance review.

2. Caesar's Fourth Amendment Rights Were Violated Because The EMSA Statute and the Subpoena Were Overbroad.

Before *Patel*, *Burger* was at the forefront in determining whether a warrantless administrative search was constitutional. The first step in the *Burger* analysis is deciding whether a particular industry is pervasively regulated.[1] If a particular industry is pervasively regulated, a warrantless inspection of commercial premises may be reasonable within the meaning of the Fourth Amendment." *Burger* at 48. An industry is pervasively regulated when the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened. *Id.*

However, it is important to take into account that this is only one facet of the *Burger* analysis. Even if a particular industry is pervasively regulated, the *Burger* analysis contains three additional requirements that must be met: (1) there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made, (2) the warrantless inspections must be necessary to

further the regulatory scheme, (3) the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. 482 U.S. at 702-703 (internal quotes omitted).

In this case, the first two *Burger* factors are satisfied because they are equivalent to the following *Patel* factors: 1) special needs must make the warrant and probable-cause requirement impracticable; and, 2) that the primary purpose of the searches must be distinguishable from the general interest in crime control. In comparison, if a warrantless search is prohibited under *Patel* because the target of the subpoena was not afforded the opportunity for pre-compliance review, the search may be allowed under the *Burger* analysis if there is a "constitutionally adequate substitute for the warrant requirement. A constitutionally adequate substitute for the warrant exists when an administrative search's authorizing statute advises the owner of the commercial premises that the search is being made pursuant to the law, the statute has a properly defined scope, and the statute limits the discretion of the inspecting officers. In other words, the statute must be comprehensive enough that the owner of the premises is aware that his property is subject to periodic inspections to fulfill a specific purpose. (citing *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)) A constitutionally inadequate substitute for a warrant exist where a statute authorizing warrantless searches has a reach so broad that it would allow a warrantless search against almost anyone rather than a single industry. *See Marshall*, 436 U.S. at 321.

In the case at bar, the relevant statute authorizes searches by the Board of Health, to regulate hospitals and not insurance companies. The statute overreaches when it states that 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." This provision essentially authorizes the Board to administer a subpoena to anyone, thus making the statute too broad. This is distinguishable from a case in the sixth circuit court of appeals (holding that a statute was a constitutional substitute for a warrant because it only applied to licensed precious metals dealers who have chosen to enter the closely regulated industry and because the statute carefully limited the scope of the warrantless searches to only a narrow subset of information.) *Liberty Coins, LLC v. Goodman*, 880 F.3d 274, 288 (6th Cir. 2018).

Additionally, because the instant search was conducted against an insurance company and not a hospital, the insurance company had no reason to know when a search may be conducted or how far the scope of the Board's authority runs since the statute was not tailored for insurance companies. In *Burger*, the New York law passed muster because the law explained that inspections would occur on a regular basis and only during regular business hours. *Burger*, 482 U.S. at 694 n.1, 711. This case is distinguishable from *Burger* because the statute provided far less detail as to when inspections will occur and how they will be executed. The relevant statute authorizes

nearly unlimited searches, as long as they "require[d] in order to determine if a licensed Hospital is providing substandard care for Miasmic" (PCL § 18.8.891(b)). This provides little information regarding the scope of the search and sets a dangerous precedent that statutes can authorize limitless searches. Furthermore, the instant subpoena took full advantage of the statute's broad authority by demanding the immediate turnover of all related medical documents related to care at Julius Medical Center., (R. 11). The Board left Caesar's premises with a haul of data that actually exceeded the search authorized under the subpoena.

Moreover, Caesar's Fourth Amendment rights were violated because Caesar did not consent to the search and because no exigent circumstances existed that would give rise to a warrantless administrative search. Absent consent, exigent circumstances must exist in order for an administrative search to be constitutional, *See City v Los Angeles, California v. Pate*l, 576 U.S. 135, S. Ct. 2443.

B. Cleopatra Is Not Entitled To Qualified Immunity Because Those Rights Were "Clearly Established" At The Time Of The Violation

Respondent, Cleopatra, violated Caesar's Fourth Amendment rights, and no exception applies. The law was clearly established at the time of the violation and a reasonable person in Cleopatra's position would have or should have known her behavior was unconstitutional. Thus, the state officials are not immune. As the Court explained in *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018), qualified immunity is a Court-made proviso to § 1983 that relief is barred:

> unless (1) [the Defendant government officer] violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was "clearly established at the time." *Reichle v. Howards*, 566 U.S. 658, 664, (2012). "Clearly established" means that, at the time of the officer's conduct, the law was "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." al-Kidd, 566 U.S. at 741. This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

This Court may therefore not grant relief and must grant the Defendant's motion to dismiss unless the Court concludes that the Defendant's actions alleged by the Plaintiff (if proven) would constitute a violation of the Plaintiff's legal or constitutional rights under color of state law, and that such action was so clearly in violation of the Plaintiff's constitutional or legal rights that the Defendant was either "plainly incompetent," or in knowing violation of the law. "The 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. *Wesby*, 138 S.Ct. at 589. Consequently, qualified immunity will generally apply in a case of first impression.

Qualified Immunity

The EMSA subpoena violated Caesar's Fourth Amendment rights. The next question is whether this court would be compelled to dismiss this case through the Doctrine of qualified immunity. Qualified Immunity presents a mighty aegis shield over the heads of governmental wrongdoers, shielding them from § 1983 liability when they "violated a federal statutory or constitutional right" unless a court finds

that, at the time the wrongdoing was committed, "the unlawfulness of their conduct was 'clearly established at the time'" and "the constitutionality of the officer's conduct [was] 'beyond debate'" *Wesby,* 138 S.Ct. 577 at 589. In other words, a plaintiff may receive no recompense against a person who merely violates their constitutional rights: only "the plainly incompetent or those who knowingly violate the law" may be held responsible. *Id*. Or, as another federal judge described the binding precedent we work under, "qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior— no matter how palpably unreasonable— as long as they were the *first* to behave badly." Zadeh v. Robinson, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., *dissenting*).

The court in *Zadeh* held that the Board's use of its subpoena authority to gain immediate access to medical records violated the Fourth Amendment. The *Zadeh* panel still afforded Board officials qualified immunity protection, however, since the search's illegality had not yet been clearly established at the time of the search. *Zadeh v. Robinson*, 902 F.3d 483 (5th Cir. 2019). In the instant case, the illegality of administrative searches had been clearly established at the time of Caesar's search.

1. At The Time Of The Violation, The Law Was Clear

As described earlier in this opinion, the first *Wesby* factor is satisfied because the subpoena issuance did in fact, violate Caesar's rights under the Fourth Amendment. Thus, the second factor comes into play—was this right "clearly established" at the time of the violation? To overcome the qualified immunity defense,

the plaintiff must allege a violation of a constitutional right and show the right was clearly established in the specific context of the case. See *Pearson v. Callahan*, 555 U.S. 223 (2009). In the instant case, as of March 13th, 2020, this right was "clearly established".

It is dispositive that *Patel* was decided in 2015, the EMSA was enacted in 2019, and the instant subpoena was written and executed in 2020. *Patel* stated unambiguously, "for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain pre-compliance review before a neutral decisionmaker." *Patel,* 135 S.Ct. at 2452. Such an opportunity was not offered here. Although recourse to the full Board *may* have technically been available under PCL §18.8.891(e)[2], and it is doubtful that such recourse would have even been sufficient, Cleopatra wrote and enforced the instant subpoena in a manner that Caesar could not have known about that recourse. Thus, Caesar was not given the opportunity to petition the Board and, therefore, not afforded an opportunity for independent review.

Similarly, as in *Patel*, Caesar's employees were given a choice between compliance and jail. This choice is not a reasonable one. The Court has held, "broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty." *Camara v.*

[2] Upon petition...the full Board shall review the subpoena and may amend or quash it, if the Board agrees to do so by majority vote. R. at 11.

Mun. Court of City and Cty. of S.F., 87 S.Ct. 1727, 1733 (1967). The concession that would have satisfied the *Patel* hotels is the very same concession that would have rendered the *Patel* search legal: The opportunity for independent review. *Patel* was not vague, nor did it impose any draconian rule against government officials. "In most contexts, business owners can be afforded at least an *opportunity* to contest an administrative search's property without unduly compromising the government's ability to achieve its regulatory aims." *Patel*, 135 S.Ct. at 2454. The "availability of pre-compliance review" "alters the dynamic" between the official and the subject to be searched, and "reduces the risk that officers will use these administrative searches as a pretext to harass business owners." *Id*. at 2454.

Warrantless searches could still reasonably be conducted without pre-compliance review in the event of exigent circumstances. In the instance case, if Cleopatra believed that the EMSA subpoena was inherently exigent because they are necessary to combat an ongoing pandemic, then why did she not execute the subpoena immediately or afford Caesar timely notice? It is alleged that a week went by between Cleopatra becoming aware of allegations against Caesar and her decision to write out a subpoena, and another week went by between her issuance of the subpoena and the Board's agents' execution of a search. Cleopatra explicitly instructed her agents not to execute the subpoena until the following week. That week could have been spent seeking a warrant, or the Board could have notified Caesar of the subpoena a week in advance and given them a chance to seek review. Evidently, Cleopatra did not want to provide Caesar advance notice or an opportunity to seek pre-compliance

review. Cleopatra chose to execute the subpoena as a surprise not because she had to, but because she *wanted* to. The exigency exception does not apply here.

As it is clearly established, to be constitutional, the subject of an administrative search must, among other things, be afforded an opportunity for pre-compliance review before a neutral decisionmaker, Cleopatra, is not entitled to qualified immunity on the constitutional claims.

2. A Reasonable Official Like Cleopatra, Would Have or Should Have Known That Her Behavior Was Violating Caesar's Fourth Amendment Rights

Any government official familiar with *Patel* would have recognized that a warrantless search, conducted without exigency, consent, or recourse to independent third-party review, was a violation of the United States Constitution. All government officials had five years to educate themselves on the fact that the United States Constitution prohibited such searches, between *Patel's* decision in 2015 and the instant search in 2020. The five years between *Patel* and the issuance of the instant subpoena provided a clear and indisputable warning against taking such action, "sufficiently clear that every reasonable official would understand that what [she] is doing is unlawful," *Wesby*, 138 S.Ct. at 589. Cleopatra either declined to educate herself so or did so educate herself and proceeded to ignore the lesson. Regardless, qualified immunity is an objective test. A reasonable, law-abiding person in

Cleopatra's shoes would not have authorized this unconstitutional raid. Cleopatra did. Qualified immunity will not shield her from the consequences.

A. The Qualified Immunity Doctrine as a Defense to § 1983 Violations Should Be Modified or Overruled Because its Legal Justifications Cannot Sustain Its Modern Applications

Before the enactment of Section 1983 in 1871, Constitutional rights were not litigated as freestanding damage claims but through the framework of common-law torts.[3] Section 1983 eliminated the dependence on a common-law based framework by creating a direct cause of action against state officials for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[4]

In 1967, the Supreme Court transformed the application of qualified immunity in defense to Section 1983, ruling that the defense of good faith and probable cause, which may be available to police officers in the common-law action for false arrest and imprisonment, is available to them in an action under Section 1983. See *Pierson v. Ray*, 386 U.S. 547 (1967). Almost twenty years later, the Court transformed the application of qualified immunity even further into an objective analysis of "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Since its modern understanding, the Court has not always referenced this common-law background.

[3] William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. 45, 52 (2018)
[4] *See* 42 U.S.C. § 1983 (2012)

However, recent decisions have suggested that it remains essential to the legitimacy of the doctrine.[5]

In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the statute's historical inquiry. Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983, we instead grant immunity to any officer whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1871 (2017) (Thomas, J., *concurring*).

Our qualified immunity jurisprudence is inconsistent with the intended meaning of the statute, "treatment of qualified immunity under 42 U.S.C. § 1983 had not purported to be faithful to the common-law immunities that existed when § 1983 was enacted." See *Crawford-El v. Britton*, 523 U.S. 574, 611-12 (1998) (Scalia, J., *dissenting*) Clearly something has gone wrong, "as a legal matter, in the Court's immunity doctrine…it is so far removed from ordinary principles of legal interpretation."[6] In an appropriate case, we should reconsider our qualified immunity jurisprudence. See *Ziglar*, 137 S.Ct. at 1872.

[5] William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. 45, 53 (2018).
[6] *Id*. at 77.

The immunity doctrine is a product of the Court's own choices, and not ordinary posited law.[7] Consequently, it is possible that the Court could put forward an entirely new legal argument for qualified immunity.[8] As stated by Cicero in the Circuit Court opinion, "it is within the power of the Supreme Court to modify, or entirely upend, how we adjudicate claims of Qualified Immunity." (R. at 27).

The Circuit Court panel was not required to adjudicate whether Caesar's Fourth Amendment rights were or were not violated because such cases may be disposed of on a finding that the law was not "clearly established," without any requirement that the court decide what the law is. *Pearson v. Callahan*, 555 U.S. 223, 227 (2009). This instant case provides a prime example of the shortcomings and consequences of the doctrine as it stands. It leaves the Romulus Board of Health still uncertain whether EMSA subpoenas are constitutional. (R. at 39). It leaves other Romulus institutions unsure whether or not to comply with or fight other EMSA subpoenas they may face in the future. (R. at 39). It leaves Caesar uncompensated for its constitutional harms, and indeed uncertain whether it suffered any. (R. at 39). And it fails to inform other government officers and entities how to behave in the future when other laws are applied to other situations. (R. at 39). Ultimately, it fails to do all the things a federal Court of Appeals decision should do and that failure is a natural result of the regime of qualified immunity we currently labor under. (R. at 39).

[7] *Id.* at 78.
[8] *Id.* at 78.

The Court should modify or eliminate the current form of qualified immunity should ensure continued fairness and justice among parties.

CONCLUSION

For the foregoing reasons, Caesar respectfully requests that this Court reverse the judgment of the Fourteenth Circuit and enter judgment in its favor.

Respectfully Submitted

Team #216

Attorneys for Petitioner

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

42 U.S.C.A. § 1983 (2012):

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.

APPENDIX C

18 U.S.C.A. § 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.

APPENDIX D

18 U.S.C.A. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or imititated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

APPENDIX E

18 U.S.C § 1343. Fraud by wire, radio, or television.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.