No. 2020-01

IN THE
SUPREME COURT OF THE UNITED STATES

CAESAR HEALTH PLAN, INC.,

Petitioner,

v.

LIVIA CLEOPATRA,

Respondent.

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

BRIEF FOR RESPONDENT

Questions Presented for Review

I. Whether a health insurance company, as third-party payor, has standing under 18 U.S.C. § 1964(c) by showing misrepresentations made to physicians about the benefits of an off-label drug as treatment for a novel viral disease proximately caused their financial losses in underwriting the off-label prescription.

II. Whether a state board of health official issuing an emergency search of medical records from a health insurance company without precompliance review violates the Fourth Amendment, where such search was authorized by state statute enacted during a pandemic to combat a deadly virus. If so, whether the pre-existing law clearly establishes the official's conduct was unlawful under the circumstances and therefore prohibits the official from invoking qualified immunity for a civil rights claim under 42 U.S.C. § 1983.

Parties to the Proceeding

Caesar Health Plan, Inc.,

Petitioner,

Livia Cleopatra,

Respondent.

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Citations of the Opinions and Judgments Delivered in the Courts Below

The District Court for the District of Romulus denied Respondent Livia Cleopatra's 12(b)(6) motion to dismiss on both counts. The District Court first held Caesar had adequate standing to bring its RICO claim. The District Court also concluded the search of Caesar's property violated the Fourth Amendment and Livia Cleopatra cannot invoke qualified immunity as any reasonable official should have recognized the search was unlawful. The Court of Appeals for the Fourteenth Circuit reversed the District Court decision and granted Livia Cleopatra's 12(b)(6) motion on both counts. The Court of Appeals held Caesar failed to adequately prove the RICO violation was the proximate cause of the damages incurred. Additionally, the Court of Appeals found Cleopatra is entitled to qualified immunity based on the unprecedented nature of the pandemic and because of this, a constitutional analysis was unneeded. Caesar then petitioned the United States Supreme Court for a writ of certiorari on July 17th, and the petition was granted September 14, 2020.

Constitutional Provisions and Statutes Involved

U.S. Const. amend. IV . . . . . Appendix at 41

RCL § 18.8.891 (b, c) (2019) . . . . . Appendix at 41

18 U.S.C. § 1964 (2018). . . . . Appendix at 41,42

42 U.S.C. § 1983 (2018). . . . . Appendix at 42

Statement of the Case

In Fall 2019, a novel viral disease, Miasmic Syndrome, emerged in the nation of Alexandria. Record at 3. Within a matter of months, Miasmic Syndrome became a pandemic, spreading globally, infecting millions, and killing one in every one hundred citizens. R. at 3. As the Miasmic Syndrome pandemic continued, many dangerous treatments flooded the market. R. at 5. To protect its citizens, the Romulus legislature passed the Emergency Miasmic Syndrome Act ("EMSA"). R. at 5. The EMSA, in part, empowers the Romulus Board of Health ("the Board") to take swift and necessary action to protect the public welfare. R. at 6. Upon receiving reports of substandard care, the EMSA grants the commissioner of the Board, Livia Cleopatra ("the Commissioner") unilateral authority to issue emergency subpoenas to any entity in the state. R. at 6. The statute requires those subpoenaed "to provide any records or documents to the Board in its discretion requires in order to determine if a licensed hospital is providing substandard care for Miasmic Syndrome." R. at 11. The Commissioner is also the sole proprietor of Galen Research ("Galen"). R. at 3.

In response to this global health crisis, Galen jumped into action by offering its FDA-approved cancer treatment, Glukoriza, as an off-label method to combat Miasmic Syndrome. R. at 3. Galen conducted a clinical trial testing Glukoriza's effectiveness treating Miasmic Syndrome. R. at 3. The results showed Glukoriza cut the fatality rate of Miasmic Syndrome in half, and radically decreased the recovery time of Miasmic patients. R. at 3. As a result, Galen increased Glukoriza manufacturing but largely failed in persuading doctors to prescribe Glukoriza off-

label for Miasmic Syndrome. R. at 4. In late 2019, Julius-Caesar Health System ("Julius-Caesar"), an integrated payor-provider, agreed to make Glukoriza their preferred treatment for Miasmic Syndrome. R. at 4. Julius-Caesar is an exclusive partnership between the two distinct entities of Julius Medical Center ("Julius") and Caesar Health Plan ("the Health Insurance Company"). R. at 4. Julius is the largest healthcare provider in Romulus with almost all of its patients being members of the Health Insurance Company. R. at 4.

The Health Insurance Company agreed to cover Glukoriza only if the doctors at Julius determined its safety and efficacy for off-label use was appropriate based on the information provided to them by Galen. R. at 4-5. By early 2020, roughly 10,000 patients had received prescriptions for Glukoriza from Julius doctors, which the Health Insurance Company covered. R. at 5. Data from over 10,000 Julius patient records revealed upwards of 10 percent of patients who received Glukoriza off-label suffered substantial loss of kidney function. R. at 5. This data spurred Julius-Caesar to suspend its use and coverage of Glukoriza as a treatment for Miasmic Syndrome. R. at 5.

Soon after, the Board received reports which showed Miasmic Syndrome patients treated by Julius physicians had notably worse health outcomes than patients seen elsewhere in the state. R. at 6. In response to these reports the Board set out to investigate, but was bound by the EMSA to issue a subpoena which "is no broader than reasonably required." R. at 11. The Board later determined Julius

knowingly or negligently provided substandard care and actively caused harm to its Miasmic Syndrome patients. R. at 7.

In preparation for its execution, the Commissioner made her intentions surrounding the subpoena clear. In an email to the Deputy Inspector, she said: "I don't want them to have time to hide anything." R. at 14. Inspectors executed the emergency search on both Julius and the Health Insurance Company requiring them to provide "all insurance claims and medical records" in their possession "which are related to such services and/or patient population, and which are dated on or after May 1, 2019." R. at 13. The inspectors were not able to obtain documents from Julius, however they did retrieve data from the Insurance Company. R. at 6-7. The inspectors ended up collecting all records from the Health Insurance Company since the start of the pandemic because their staff was unable to tell which records involved Miasmic Syndrome care. R. at 7.

In Spring 2020, the Board by unanimous vote, suspended Julius's operating license. R. at 7. Later the same day, a whistleblower in Alexandria produced documents which disputed the validity of Galen's 2019 Glukoriza clinical trial. R. at 7. The documents revealed Galen researchers falsified data and did not follow up with patients to gauge possible side effects from Glukoriza. R. at 7. An investigation revealed some clinical trial participants presented signs of kidney damage after discharge from the trial. R. at 7. Galen employees, however, intentionally kept the Commissioner in the dark about the potentially dangerous side effects. R. at 7. Based on the new information, the Board voted to restore Julius's operating license upon

Julius' showing that one hundred percent of its patients who suffered excess kidney morbidity could be directly attributed to Glukoriza. R. at 8. In contrast to the previous unanimous decision to suspend Julius's operating license, only half of the Board agreed with the reinstatement of their license. R. at 8. Some who disagreed believed that Julius's physicians were reckless to prescribe Glukoriza with Ippomarathron and Gentiane. R. at 8, n.5.

The Health Insurance Company brought suit in the District of Romulus against the Commissioner alleging two causes of action. R. at 8. The first cause of action seeks damages against the Commissioner, as Galen's sole proprietor, under 18 U.S.C § 1964(c) for all payments made by the Health Insurance Company to cover Glukoriza as a treatment for Miasmic Syndrome. R. at 8. In the second, the Health Insurance Company under 42 U.S.C. § 1983, alleged the Commissioner authorized an unconstitutional search of their premises in violation of the Fourth Amendment. R. at 8.

The Commissioner immediately filed a 12(b)(6) motion to dismiss both causes of action which was denied in error by the District Court. R. at 9. The Commissioner appealed the District Court's erroneous decision to the Fourteenth Circuit which correctly reversed the District Court decision and granted Cleopatra's 12(b)(6) motion to dismiss in full. R. at 9. The Fourteenth Circuit also reversed the District Court's ruling and correctly found that the Commissioner was entitled to qualified immunity and thus not liable under the §1983 suit. The Supreme Court then granted certiorari to resolve the issue.

Summary of the Argument

When a deadly novel virus puts the public at risk, unity and innovation are required to save lives. Those, like Galen, who undertake massive endeavors to offer their expertise and thereby protect the public should be able to act without fear of legal liability. Without sufficient protection from legal liability, companies like Galen would wait for another to be the first mover for fear of endless litigation. The doctrine of proximate cause prevents this problem by protecting parties from legal liability where their actions may have harmed downstream parties. It is a judicial gatekeeping tool courts rely on to weed out meritless lawsuits.

The Health Insurance Company's 18 U.S.C. 1964(c) claim fails because Galen's misleading marketing of Glukoriza as a viable treatment for Miasmic Syndrome is not the proximate cause of the Health Insurance Company's decision to underwrite prescriptions for Glukoriza. The Health Insurance Company's theory of liability does not establish a direct relationship between Galen's conduct and the Health Insurance Company's injury for three reasons. First, the causal chain contains too many intervening factors to properly ascertain the Health Insurance Company's damages. Second, apportioning damages for the Health Insurance Company would be too complex and lead to multiple recoveries. Third, the Health Insurance Company is not the proper plaintiff to deter similar conduct.

The next issue concerns what public officials must do in a time of crisis. At any given time, those who serve the public may face a dangerous situation which allows them only a fleeting moment to make a judgement call. Those whose lives

hang in the balance in that very instant depend on those officials to do everything in their power to help, and the slightest hesitation could be deadly. The doctrine of Qualified Immunity allows those who serve the public to make reasonable mistakes when faced with critical decisions requiring an immediate response. The Commissioner encountered a grave situation that no one could have prepared her for, and which no law had ever conceptualized. She tried everything in her power to combat a health catastrophe that had already taken the lives of thousands across the globe. For her efforts, the Petitioner, an insurance company, filed a baseless claim in a last-ditch attempt to recoup losses stemming from their inadequate response to a pandemic the Commissioner did not cause.

The Commissioner is entitled to qualified immunity against the Health Insurance Company's claim because the execution was lawful, and the search did not violate any "clearly established" law. First, the search was not unreasonable under the Fourth Amendment because the circumstance was exigent. Miasmic Syndrome patients insured by the Petitioner were suffering worse outcomes than others in the state infected with the virus, and the Commissioner needed to take immediate action to save lives. On a separate ground, the emergency search was not unreasonable because, at the time, the Health Insurance Company was treated as a "closely regulated" industry based on the EMSA. Second, even if the search is deemed unlawful, the Commissioner is still shielded from liability because the pre-existing law as it pertains to the exigent circumstances and closely regulated industries in this particular scenario was still open for debate. Finally, in light of the legal gray

areas that failed to prescribe the appropriate actions in this specific situation, the Commissioner acted reasonably in issuing and executing the search.

Argument

I. The Appellate Court correctly held the Health Insurance Company lacks standing to sue under 18 U.S.C. § 1964(c) because Galen's misrepresentations did not proximately cause its injury.

The Health Insurance Company's fantastical attempt to hold Galen accountable for misrepresenting the safety risk of Glukoriza under §1964(c) fails to pass muster. The facts do not support the Health Insurance Company's claim that Galen's misrepresentations proximately caused its injury. To have standing to recover damages under 18 U.S.C. § 1964(c), a 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." Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969, 972 (9th Cir. 2008). To show harm is "by reason of" a RICO violation, a plaintiff must prove "the defendant's [RICO] violation not only was a 'but for' cause of his injury, but was the proximate cause as well." Holmes v. Sec. Investor Protection Corp., 503 U.S. 258, 268 (1992). An injury is proximately caused by another's conduct when the injury is "directly related" to that conduct. Id. Courts evaluate three policy considerations to determine if an injury is directly related to the alleged conduct: (1) whether independent, intervening factors make it difficult to ascertain damages caused by the defendant's conduct; (2) the apportionment of recoveries must not be so complicated it allows for overlapping recovery among potential plaintiffs; (3) whether more directly injured victims can better vindicate the law. Holmes, 503 U.S. at 269-70. "A link that is too remote, purely contingent, or indirect is insufficient." Hemi Group, L.L.C. v. City of New York N.Y., 559 U.S. 1, 9 (2010). Courts reliably

accord the first Holmes factor the most weight. Hemi, 559 U.S. at 9; Holmes, 503 U.S. at 271-72; Sidney Hillman Health Ctr. Of Rochester v. Abbott Lab, 873 F.3d 574, 578 (7th Cir. 2017).

Here, the Health Insurance Company's causal theory linking Galen's marketing to the Health Insurance Company's damages fails under Holmes for three reasons. First, various independent, intervening factors sit between Galen's misrepresentations and the Health Insurance Company's injury, which makes ascertaining their damages impossible. Second, apportioning damages for the Health Insurance Company will be complex and lead to double or triple recoveries. Lastly, there are more directly injured victims than the Health Insurance Company who can better vindicate the law.

A. Many independent, intervening factors show the Insurance Company's injuries do not directly result from Galen's conduct, making a damages calculation for the Health Insurance Company impossible.

The link between Galen's misrepresentations of Glukoriza and the Health Insurance Company's payments for Glukoriza is remarkably remote and contingent on many independent, intervening factors. This lengthy causal chain makes the Health Insurance Company's damages impossible to determine. "The less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors." Holmes, 503 U.S. at 269. Although no bright-line rule establishes whether an injury is too remote from the conduct to determine damages accurately, courts consistently ground

their decisions in three considerations: (1) the number of steps in the causal link; (2) whether misrepresentations about a drug were made to physicians; and (3) foreseeability. Holmes, 503 U.S. at 276; Painters and Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co. Ltd., 943 F.3d 1243 (9th Cir. 2019); UFCW Local 1776 v. Eli Lilly and Co., 620 F.3d 121 (2d Cir. 2010). Based on these considerations, the attenuated causal chain between Galen's misrepresentations and the Health Insurance Company's injury makes it impossible to establish its damages.

1. The Health Insurance Company's causal theory fails the "one step" test.

At least eight distinct steps separate Galen's misrepresentations and the Health Insurance Company's coverage payments for Glukoriza. The defendant's conduct must have caused the plaintiff's injury in just one "step." Holmes, 503 U.S. at 271. When only one step separates a plaintiff's injury from the defendant's conduct, that injury is the "sole cause" of the defendant's conduct. Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 459 (2006). If the causal theory extends beyond one step, however, the proximate cause analysis must end. Holmes, 503 U.S. at 271-72; Hemi, 559 U.S. at 9 (ending the causal theory analysis where Hemi Group sold cigarettes out-of-state to New York City residents and failed "to submit the required customer information to the State" which lead to the State's injury of uncollected cigarette taxes because more than one step separated Hemi Group's conduct from New York City's injury and thus was "far more attenuated than the one we rejected in Holmes); Sidney Hillman, 873 F.3d at 578 (ending its "causal chain" analysis where it was "longer than the one

Hemi Group deemed too long"); Anza, 547 U.S. at 459 (holding that "Ideal's lost sales could have resulted from *factors other than petitioner's alleged acts of fraud*") (emphasis added).

Here, the Health Insurance Company's causal theory fails the "one step" test because at least eight specific steps sit between Galen's misrepresentations of Glukoriza as a Miasmic Syndrome treatment and the Health Insurance Company's coverage payments for Glukoriza. At first glance, it is not difficult to see how attenuated the causal chain is between Galen's misrepresentations of Glukoriza and the Health Insurance Company's injury. Any reasonable assessment of the causal chain at question here reveals at least eight steps: (1) Galen marketing Glukoriza's off-label benefits to Julius; (2) the Health Insurance Company's decision to underwrite Glukoriza; (3) a physician's recommendation of Glukoriza to a Miasmic Syndrome patient; (4) a physician's choice to combine Glukoriza with Ippomarathron and Gentiane; (5) a patient consenting to take the drug cocktail; (6) a physician prescribing the drug cocktail; (7) a patient filling the prescription; (8) the Health Insurance Company paying for Glukoriza.

This Court in Hemi quickly disposed of the plaintiff's causal theory when it contained far more than one step (at least 6) between the defendant's conduct and the plaintiff's injury. Similarly, here, the causal chain goes beyond one step and contains at least eight. It is not merely a possibility the Health Insurance Company's injury "could have resulted from factors other than" Galen's conduct, as the Anza Court stated; instead, it is a *fact* the Health Insurance Company's injury resulted from other

factors. Only if the Health Insurance Company had paid for Glukoriza upfront would their injury be "one step" from Galen's misrepresentations. But the Health Insurance Company did not pay for Glukoriza up-front; the Health Insurance Company paid for Glukoriza only when Julius's physicians prescribed it. As listed above, a physician's decision to prescribe Glukoriza and the patient's decision to consume Glukoriza (among other factors) sit between Galen's misrepresentations and the Health Insurance Company's payments. The number of steps between Galen's conduct and the Health Insurance Company's injury far exceeds one step.

2. Galen did not mislead the Health Insurance Company about Glukoriza's benefits.

Misrepresentations about a drug's safety made only to physicians do not directly injure a third-party payor. Eli Lilly and Co., 620 F.3d at. 134. The most immediate and harmful effect of wrongful off-label promotion is on physicians' decision to prescribe a drug. Sidney Hillman, 873 F.3d at 578. A physician's conduct in prescribing medication turns on his or her independent medical judgement. Ironworkers Local Union No. 68 v. AstraZeneca Pharm. L.P., 585 F. Supp. 2d 1339 (M.D. Fla. 2008) (finding no direct relation where doctors used independent medical judgement in prescribing Seroquel because it became nearly impossible to determine whether the defendant's misrepresentation of Seroquel's safety, efficacy, and benefits directly caused the plaintiff's injuries); In re Yasmin and Yaz (Drospirenone) Mktg., Sales Practices and Prod. Liab. Litig., 2010 WL 3119499 (S.D. Ill. 2010) (holding that the third-party payor could not satisfy the direct relation requirement where

multiple intervening steps—including patient preference and independent medical judgement—separated the fraudulent drug marketing from the plaintiff's payment); United Food & Commercial Workers Cent. Penn. & Reg'l Health and Welfare Fund v. Amgen, Inc., 499 Fed. App'x. 225, 257 (9th Cir. 2010) (same). A third-party payor plaintiff's injury is more closely linked to a drug's marketing when a drug manufacturer makes misrepresentations to the third-party payor itself. Painters, 943 F.3d at 1258 (insurance company satisfied the direct relation requirement in part because the manufacturer misled patients, doctors, *and insurers* about the medications deadly side effects) (emphasis added).

The Health Insurance Company's injury hinges on Julius physicians exercising independent medical judgement in prescribing Glukoriza off-label. Before the Health Insurance Company must cover any costs related to a prescription for Glukoriza, a physician first had to determine whether Glukoriza was the appropriate drug to prescribe based on the information provided to them by Galen. As the Seventh Circuit correctly pointed out in Sidney Hillman, a drug manufacturer's marketing's immediate effect is on a physician's prescribing decisions. Here, Galen provided misleading information about Glukoriza to *Julius* on Glukoriza's benefits as a treatment for Miasmic Syndrome. Based on the information provided to them, physicians at Julius chose to prescribe Glukoriza off-label. Each doctor based their decision on years of education, experience in the medical field, and specific patient facts. This rationale—that a physician's judgement can act as an independent, intervening factor—was explicitly applied in Ironworkers, In re Yasmin, and

UFCW—three cases which involved fraudulent marketing of an off-label drug. Such reasoning makes sense. Without a prescription, the third-party payor would not have to cover costs related to a drug. This case is no different; the Health Insurance Company only covers Glukoriza if a physician prescribes it. Moreover, the court in Eli Lilly explicitly rejected a nearly identical causal theory to this case: a drug manufacturer misrepresents the effects of an off-label drug, physicians rely on the misrepresentations in prescribing the drug, and the insurer covers the cost.

Perhaps most importantly, Painters does not apply here. The drug manufacturer in Painters directed its marketing at the insurer and the physicians. Unlike this case, Galen directed its marketing at Julius, which then educated its physicians on the benefits of Glukoriza. In fact, the question before this Court concedes this point: The Health Insurance Company would not have underwritten Glukoriza "if Galen had not misrepresented the safety risks to *prescribers*." R. at 40 (emphasis added). This point is highlighted by the Health Insurance Company and Julius's legally separate relationship. Julius's leadership—separate from the Health Insurance Company's leadership—educated its physicians on Glukoriza's benefits. The Health Insurance Company relied on each Julius physician to make a sound medical judgement about their patients' care. The Fourteenth Circuit correctly relied on this factual distinction in overturning the District Court's ruling and in its rejection of Painters. Opinion of the Fourteenth Circuit, R. at 33-35. Thus, the Health Insurance Company did not rely on Galen's misrepresentations; Julius relied on the misrepresentations. The Health Insurance Company trusted the physicians

to make sound medical judgements. These considerations make ascertaining the Health Insurance Company's damages unrealistic.

3. It is irrelevant whether the Health Insurance Company's injury was foreseeable or intended.

Whether it was foreseeable that Galen's misrepresentations could harm the Health Insurance Company or Galen intended to harm the Health Insurance Company is not part of a civil RICO proximate cause analysis. "The concepts of direct relationship and foreseeability are…two of the many shapes [proximate cause] took at common law." Holmes, 503 U.S. at 268. "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led *directly* to the plaintiff's injury." Anza, 547 U.S. at 461 (emphasis added); Hemi, 559 U.S. at 12 (holding Supreme Court precedent has never relied on foreseeability in a direct relation analysis, citing Anza as support); but see Painters, 943 F.3d at 1258 ("it was perfectly foreseeable" the pharmaceutical company's concealment of on-label side effects would injure the plaintiffs because they were immediate victims of the misrepresentations); Sidney Hillman, 873 F.3d at 576 (holding physicians and patients are more immediate victims of misrepresentations of off-label side effects than third-party payors).

Additionally, "A RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming the [defendant intended to harm the plaintiff]." Anza, 547 U.S. at 460; In re Yasmin, 2010 WL 3119499 at 8 (holding plaintiff's argument "goes astray" by relying on the pharmaceutical company's motive because

"it does not provide a basis for subjecting liability for remote injuries, citing Anza as precedent).

This Court's precedent has never given weight to whether the Health Insurance Company's injury was foreseeable or intended. Additionally, this Court has reaffirmed its rejection of foreseeability as part of a civil RICO proximate cause analysis twice over since Holmes. Like in Hemi where it was foreseeable Hemi Group's conduct would lead to the State's loss of tax revenue, it was foreseeable that the Health Insurance Company could be harmed by covering prescription for Glukoriza. Whether that harm is foreseeable, however, is immaterial. The purpose of proximate cause is to shield parties from downstream plaintiffs. If proximate cause analysis here includes foreseeability, this Court would be ignoring decades of settled jurisprudence. Simply because it is foreseeable that the Health Insurance Company would pay for Glukoriza if a physician prescribed it is not enough to find proximate cause. If that were so, this Court would transform the gatekeeping judicial tool into a "Welcome" sign to downstream plaintiffs. Moreover, the possibility of a drug adversely affecting patients because of unknown side effects is always present. Even the most rigorous testing standard may not detect every foreseeable harm a drug might pose to a patient. For that reason, a proximate cause analysis which incorporates foreseeability in this context, is neither tenable, nor is it realistic.

Moreover, the Ninth Circuit in Painters is again distinguishable from here. In Painters, Takeda actively mislead the prescribers *and insurer* about the risk of potentially deadly side effects of an *on-label* drug. Here, Glukoriza is an on-label drug

for cancer treatment but an off-label drug for Miasmic Syndrome treatment. Under those facts, the Ninth Circuit's reasoning—that the third-party payors were the immediate victims—makes sense because third-party payors have no reason to expect drug manufacturers will misrepresent effects of an on-label drug to them. But such reasoning cannot be applied here. Instead, like in Sidney Hillman where the drug manufacturer misled prescribers about the effects of an off-label drug, here, Galen misrepresented Glukoriza's benefits to Julius's physicians. The immediate victims here, like in Sidney Hillman, were the patients and physicians, not the third-party payor like in Painters.

Lastly, Galen's motive to mislead physicians is not relevant. As the court in In re Yasmin noted, relying on a defendant's motive "goes astray" of this Court's precedent. Simply showing that a civil RICO defendant intended to harm another party gets this Court nowhere. Galen's possible motive does not answer whether its conduct directly injured the Health Insurance Company because one can intend to harm another either directly or indirectly.

B. The apportionment of damages for the Health Insurance Company is too complex and will lead to multiple recoveries.

The Health Insurance Company's causal theory does not satisfy the first Holmes factor and thus necessarily fails the second Holmes factor because it will be impossible to apportion recoveries sufficiently, and the risk of double or triple recoveries is too high. A "highly complex damages assessment…strongly weighs against a finding that Plaintiffs were directly injured by Defendant's alleged

fraudulent conduct." Ironworkers, 585 F. Supp. 2d at 1345. "[R]ecognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury . . ." Holmes 503 U.S. at 269; Ironworkers, 585 F. Supp. 2d at 1345 (concluding apportioning damages for the plaintiff was too complex when the plaintiff was harmed by the defendant's allegedly fraudulent marketing scheme of Seroquel because adopting "complicated apportionment rules" would burden the court in trying to "fairly compensate victims"); Intl. Broth. Of Teamsters, Local 734 Health and Welfare Tr. Fund v. Philip Morris, Inc., 196 F.3d 818, 825-26 (7th Cir. 1999) (holding that plaintiff's proximate cause theory "flunks Holmes" in part because the injury was so remote that "damages [would be] wickedly hard to calculate).

The likelihood that one physically injured by a defendant's conduct will bring a civil RICO suit is irrelevant. Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, Inc., 171 F.3d 912, 933 (3rd Cir. 1999) (holding the union welfare fund which sued Philip Morris to recover smoking-related costs failed the second Holmes factor because some smokers may not bring a private civil RICO suit, but those the company has not fully reimbursed for out-of-pocket expenses related to the company's conduct may still bring a civil RICO claim); Teamsters, 196 F.3d at 825 (same).

An attempt to apportion damages would be wildly complex and lead to double or triple recoveries from other plaintiffs. As the Fourteenth Circuit correctly pointed out, this Court would have to accept a determination of the amount of damages each injured party could recover while avoiding the fact that the damages for the Health

Insurance Company, Julius physicians, and the patients overlap. Opinion of the Fourteenth Circuit, R. at 35. If this Court accepted such a complex undertaking, it would require lower courts to embark on endless quests to determine who the misrepresentations injured and at what level. Here, for example, the vast catalogs of information relating to each patient and the bases for each treating physician's decision to prescribe Glukoriza by itself, to combine it with other drugs, or not to prescribe it at all each play a compounding role in determining damages for the injured parties. Notably, the Ironworkers and Teamsters courts avoided this problem entirely by finding that apportioning damages becomes unrealistic when the causal chain is too attenuated. This case presents the same question: How could a court apportion recoveries when each decision to prescribe Glukoriza involved independent, intervening factors and other parties' interests are at play? It simply cannot resolve the issue without formulating a complex system that would significantly burden the courts.

Additionally, if this Court holds a complex apportionment of damages is acceptable, Galen stands to pay three different parties: (1) the patients; (2) the physicians; and (3) the Health Insurance Company. Opinion of the Fourteenth Circuit, R. at 35. The court in Steamfitters astutely noted that injured patients might well pursue their own claims against the defendant. Here, it is not only the Health Insurance Company that suffered a loss – Julius physicians lost patients who may never return. Of course, there are also patients who suffered medically and financially from out-of-pocket payments for medical treatment. Ultimately, the

likelihood that another party may bring a claim is not the issue. A simple possibility that another party may bring a claim is what should concern this Court.

C. The Health Insurance Company is not the proper plaintiff and does not deter Galen's conduct.

The notion that the Health Insurance Company, a large corporation, is the proper plaintiff to bring suit and thus deter the conduct Galen engaged in is—at best—comical. A third-party payor may lose money when it covers an off-label drug, but other parties lose significantly more. The Health Insurance Company's success in this suit would cruelly deprive the proper plaintiffs—patients and physicians—of the chance to deter Galen's conduct. A proper plaintiff is one who is "more directly injured" than other potential plaintiffs. Painters 943 F.3d at 1252. Patients are more directly injured by a drug manufacturer's marketing scheme than third-party payors. Sidney Hillman, 873 F.3d at 576. (holding that third-party payors fail the third Holmes factor because "[t]he patients' health and financial costs come first in line temporally" and covering the "remainder of the expense" does not make third-party payors the "initial losers" of a "promotional scheme").

Additionally, the Court "can count on" more directly injured victims "to hold Defendants liable." Painters 943 F.3d at 1252. "[I]mmediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims." Anza, 547 U.S. at 460 (finding that the steel manufacturers could not satisfy the third Holmes factor because it "would be relatively straightforward" for the Court to

adjudicate the State's claim); Sidney Hillman, 873. F.3d at 578. (concluding "public prosecution" deters undercover off-label promotion of a drug).

Here, the Health Insurance Company fails the third Homes factor because it is not the proper plaintiff to bring suit against Galen and will not deter similar conduct. Like the third-party payor in Sidney Hillman, the Health Insurance Company is not the "initial loser"; the patients are the ones who lose the most, and the various costs they make should be the primary consideration. In fact, the money the Health Insurance Company "lost" belonged to the patients who pay the Health Insurance Company for coverage. It makes sense, then, that patients who suffered financially and medically are more directly injured victims. According to the Painters court, courts can rely on more directly injured victims to hold defendants liable.

Moreover, patients' claims, like the State's claims in Anza, would be more straightforward to adjudicate. If a patient directly links their excess kidney morbidity to Glukoriza, a court's analysis becomes much less complex and will better deter conduct Galen engaged in. The Health Insurance Company, on the other hand, because they are not the proper plaintiff to bring suit will not.

Ultimately, the Health Insurance Company's claim falls flat. A § 1964(c) proximate cause analysis is not a post hoc ergo propter hoc analysis. It requires a direct relationship between the conduct and injury, and that relationship is not present here.

II. The Appellate Court correctly found the Health Commissioner is entitled to qualified immunity because not only was the emergency search lawful, but also the Commissioner acted reasonably in light of pre-existing law.

The execution of the emergency subpoena did not violate the Fourth Amendment of the Constitution, and even if it had, the Commissioner is entitled to qualified immunity. As a matter of public policy, the doctrine of Qualified Immunity is essential for government officials to use their best judgement in unpredictable situations without being terrified that any mistake could lead to their financial ruin. Anderson v. Creighton, 483 U.S. 635,638 (1987) (warning "fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties"); Pierson v. Ray, 386 U.S. 547,554 (1967) (qualified immunity allows officials to use "principled decision making . . .[absent] . . . intimidation . . .[or] fear of consequences). Under the doctrine, a state official is precluded from liability in a 42 U.S.C. § 1983 civil suit "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time." D.C. v. Wesby, 138 S. Ct. 577,589 (2018). Notably, the courts no longer have to discuss the first prong of the qualified immunity analysis, regarding the constitutional violation of a right.[1] However, the courts have full discretion in deciding if the entire analysis is "worthwhile in particular cases" because it can be valuable in developing precedent for novel issues. Pearson v. Callahan, 555 U.S. 223,236,242 (2009). Moreover, in some cases, it may be challenging to determine

[1] In Pearson v. Callahan, 555 U.S. 223 (2009), the courts overruled the requirement previously established in Saucier v. Katz, 533 U.S. 194, 202 (2001) because considering such "difficult questions" often have no effect on the outcome of the case, and waste "scarce judicial resources."

whether the law clearly establishes a right absent first finding what precisely the right is. Pearson v. Callahan, 555 U.S. at 236, 242.

Here, the discussion of constitutionality is "worthwhile," given the unprecedented, ongoing pandemic and the potential for similar crises to arise in the future. Besides, the discussion about the subpoena's constitutionality helps illuminate just how unclear the law is in this particular circumstance. Although the Commissioner need not establish both (1) the constitutionality of the emergency subpoena and (2) that her conduct was not "clearly established" as unlawful at the time, both grounds are satisfied all the same. Here, the Commissioner's conduct in issuing the emergency subpoena did not violate any "clearly established" right, notwithstanding the fact that its execution was entirely lawful in the first place. Accordingly, this Court should affirm the Fourteenth Circuit's ruling that the Commissioner is entitled to qualified immunity.

A. The emergency search was reasonable under the Fourth Amendment not only because it arose from exigent circumstances, but also because the Health Insurance Company qualified as a "closely regulated" business, and the statute authorizing the search satisfied the Burger requirements.

The Fourth Amendment to the Constitution is a broad and abstract right that provides protection "...against unreasonable searches and seizures." U.S. Const. amend. IV. Typically, the courts have found that warrantless searches are presumed unreasonable. Brigham City, Utah v. Stuart, 547 U.S. 398,403 (2006). Yet "because the ultimate touchstone of the Fourth Amendment is reasonableness, the warrant requirement is subject to certain exceptions." Id. The Commissioner's

use of the emergency subpoena power fell under multiple exceptions to the general rule prohibiting warrantless searches. First, the government's interest in combatting a health crisis exacerbated by unsafe counterfeit drugs created an exigent circumstance. Second, the emergency search was still permissible absent precompliance review because the Health Insurance Company was a "closely regulated" industry. Last, the statute authorizing the search provided a constitutionally adequate substitute for a warrant required and satisfied all requirements under the Burger rule.

1. The emergency subpoena's execution was not unreasonable because the gravity of the underlying offense established an exigent circumstance.

One of the few exceptions to the general preclusion of warrantless searches arises under exigent circumstances. Welsh v. Wisconsin, 466 U.S. 740,750 (1984) (noting that the government can "overcome the presumption of unreasonableness" if they "demonstrate exigent circumstances"); City of Los Angeles, Calif. v. Patel, 576 U.S. 409, 410 (2015) (explaining that "when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus is…not [on] those that could proceed irrespective of whether they are authorized by the statute, e.g., where exigent circumstances . . .exist"). When deciding whether an exigent circumstance existed, courts primarily assess the "gravity of the underlying offense." Welsh, 466 U.S. at 750,753. Historically, courts have found an officer's reasonable belief that a suspect may destroy evidence or lives are at stake may justify the finding of an exigent circumstance. Kentucky v. King, 563 U.S. 452,455 (2011) (noting that "it is well

established that exigent circumstances include[es] the need to prevent the destruction of evidence"); United States v. Ball, 90 F.3d 260, 263 (8th Cir. 1996) (asserting the exigency "exception justifies immediate police action without obtaining a warrant if lives are threatened...or evidence is about to be destroyed"). That said, an "extremely minor" offense will not constitute an exigent circumstance. Welsh, 466 U.S. at 750,753 (warrantless arrest for minor traffic offense after the driver made it home did not create an exigent circumstance).

The immense gravity of the underlying offense required the Commissioner to issue an emergency subpoena not only to prevent the destruction of evidence but, more importantly, to save countless lives. At first glance, the District Court's heavy reliance on Patel would seem proper given that the issue presented here concerns administrative searches (those authorized by a statute rather than a warrant), and thus the universally applied standard would be the obvious choice of law. Opinion of the District Court of Romulus, R. at 21. Ironically, the application completely disregarded the elephant in the room, a stunningly obvious fact that removed the current issue far from Patel's purview—a global pandemic. The emergency subpoena, albeit an administrative search, could have proceeded without the EMSA because it arose from exigent circumstances, thus not Patel's focus. These facts forced the Commissioner's hand:

1. The disease was highly contagious, rapidly spreading across the world and infecting millions.
2. 1 in every 100 people infected died from the virus, and thousands had already died.

3. The Health Insurance Company was in an exclusive partnership with Julius, the leading medical provider in Romulus, financially backing the treatment they adopted.

4. The Board, tasked with regulating Miasmic Syndrome treatment, received multiple reports that many of the infected patients receiving treatment at Julius had tremendously worse medical outcomes than any other provider in the state—suffering a severe loss of kidney function on top of the deadly virus.

The rise of "miracle cures" with dangerous side effects and substandard care was so urgent the state enacted the EMSA in a desperate attempt to save lives. The ratification of the EMSA does not make the situation any less exigent; rather, it speaks to how dire the circumstances were. The reports exposing the horrific outcomes of patients receiving care from the largest medical provider, who exclusively partnered with the Health Insurance Company, only magnified the state's disarray. The statute aside, the Commissioner had a duty to act immediately as this Court made clear in Ball, when lives are "threatened," an official need not wait for a warrant because the consequences of forgoing such immediate action eclipse ordinary privacy concerns. The reports painted a dark picture. Lives were not merely "threatened," some had already died, some were needlessly suffering, and with such a rapidly spreading disease, the Commissioner knew many more would surely meet their end. This crisis was a far cry from the "extremely minor" traffic violation in Welsh.

Additionally, the Commissioner was also reasonably concerned about the entities destroying evidence, illustrated by her ominous email where she said, "I don't want them to have time to hide anything." R. at 14. Both King and Ball assert

that the potential for evidence removal constitutes an exigent circumstance. The Commissioner was not irrational for fearing that a company that may face extraordinary liability for its active role in harming thousands of customers may succumb to pressure by destroying evidence. It seems that the Commissioner's fears were not entirely off base either because the Health Insurance Company was not exactly forthcoming with their documents. As a rule, that never contemplated such a catastrophic event sweeping the world, one need not stretch the imagination to see how dangerous and unreasonable it would be here to apply Patel here, given the extraordinary circumstance.

As a rule that never contemplated such a catastrophic event sweeping the world, one need not stretch the imagination to see how dangerous and unreasonable it was for the District Court to apply Patel here, given the extraordinary circumstance. However, this Court need not be convinced that a deadly global pandemic suffices as an exigent circumstance, as it would be impossible to locate precedent concluding as much. The District Court's reliance on Patel was concerning in more ways than one.

2. The Health Insurance Company was a "closely regulated" industry.

Even without the exigent circumstances, the search was still lawful because the Health Insurance Company falls under the "closely regulated" industry exception, hence yet another reason why Patel does not apply here. Courts find that administrative searches reasonable so long as they allow an opportunity for

precompliance review. Patel, 576 U.S. at 420 (finding administrative search unreasonable where hotel owners were subject to criminal liability for "failure to turn over" customer records and transactions because the search did not afford the owners an "opportunity for precompliance review). However, the Patel standard does not apply to administrative searches executed on "closely regulated" industries, which are those that inherently pose a "clear and significant risk to the public welfare." Patel, 576 U.S. at 424 (relaxed standard for "closely regulated" businesses does not include the requirement for precompliance review); Ultimately, there are not a plethora of industries that fall into the "pervasively regulated" category, as the exception is triggered by "relatively unique circumstances." Marshall v. Barlow's, Inc., 436 U.S. 307,313 (1978).

The relaxed Burger standard centers on balancing compelling government interests and general privacy protections. Burger, 482 U.S. at 692 (junkyards are "closely regulated" and subject to warrantless inspections because the "owner's privacy interests" are weaker and "government interests... in regulating" junkyards are "concomitantly heightened"); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633 (1989) (finding railroad industry is "closely regulated" thus mandated drug tests on railroad workers are lawful because the compelling government interest outweighs privacy concerns). Although the courts consider the industries' history with pervasive regulation, novelty to warrantless searches is not a dispositive factor if the "threat to privacy are not of impressive dimensions" compared to the urgency of the government interest the regulatory scheme seeks to

advance). United States v. Biswell, 406 U.S. 311, 315, 317 (1972) (upholding administrative search on firearm shop despite the "regulation of the interstate traffic in firearms" not being "deeply rooted" in history because the "close scrutiny" of firearm traffic is "undeniably of central importance...to prevent violent crime").

The Health Insurance Company falls under the "closely regulated" industry exception posited in Burger because the government's interest in public safety outweighs the Health Insurance Company's privacy concerns, and thus the emergency subpoena was lawful. Although the Patel court hesitated over expanding the Burger rule, there is no reason to believe Patel established an all-out ban against developing the standard. The District Court's attempt to equate the Health Insurance Company, who financially backed any experimental treatment its partner pushed, to the band of motel owners in Patel, who police expected to monitor petty drug dealers and prostitution, was wholly inadequate. In Patel, the court reasoned that hotels did not fall under the "closely regulated" industry exception because they do not inherently pose a "clear and significant risk to the public welfare." Unlike the hotels in Patel, which merely had the potential to house petty criminals, the Health Insurance Company had the potential to exacerbate a global health crisis, a potential they no doubt exceeded. The Health Insurance Company, in its capacity to inflame the global health crisis, not only inherently, but actively posed a "clear and significant risk to the public welfare."

Additionally, the stubborn approach to expanding the Burger rule for the Health Insurance Company because the industry did not have a well-established

history with pervasive regulation logically falls flat. The pervasive regulation of an insurance company that spearheads a response to a global health crisis is not "deeply rooted" in history because there has never been a global pandemic of this magnitude. This case fits with the "relatively unique circumstances" posited by Marshall. Much like the licensed firearm dealers in Biswell, who did not have an extensive history of pervasive regulations but did play a central role in contributing to violent crime, here, all entities involved in the treatment for Miasmic Syndrome, including the Health Insurance Company, was "undeniably of central importance" to the government's interest in preventing casualties, and required "close scrutiny."

Furthermore, the Insurance Companies' privacy concerns in protecting medical documents seem insignificant compared to invasive toxicology testing for all railroad workers, the Skinner court allowed. Many would argue that the government's interest in combatting an ongoing pandemic is greater than reducing the mere possibility of a train wreck. Moreover, when considered against the government's regulatory scheme's necessity, the Health Insurance Company's privacy concerns do not outweigh the state's interest in protecting its citizens from severe illness or death.

3. The emergency search was reasonable because the statute authorizing it satisfied the requirements under the Burger rule.

The criteria set for administrative searches of "closely regulated" industries concern the statute authorizing the search, and not necessarily the search itself. United States v. Maldonado, 356 F.3d 130, 136 (1st Cir. 2004) (noting

"the Burger criteria are applied generally to a statutory scheme, not to a given set of facts arising under that scheme."); Biswell, 406 U.S. at 315 (lawfulness of regulatory inspection depends on "the authority of a valid statute). There are three requirements that the authorizing statute must meet under the Burger ruling to avoid a constitutional violation in these exceptional cases: (1) "[T]here must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made," (2) "the warrantless inspections must be 'necessary' to further [the] regulatory scheme," and (3) "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." Burger, 482 U.S. at 702,703 (1987). A sufficient substitute for a warrant must "inform a business operator that regular inspections will be made, and also sets forth the scope of the inspection, notifying him as to how to comply with the statute and as to who is authorized to conduct an inspection." Donovan v. Dewey, 452 U.S. 594, 603 (1981) (the statute placed limits on the inspecting officers and was so well defined that the mine operator "could not help but be aware" that regular inspections would occur); Biswell, 406 U.S. at 316 (gun dealer was "not left to wonder about the purposes of the inspector or the limits of his task"). The District Court conceded on the first two criteria; however, they erred in finding that the last requirement was not satisfied. Opinion of the District Court of Romulus, R. at 22-23. The EMSA was an adequate substitute for a warrant because it (1) provided ample notification that the Health Insurance Company was

well within its reach, and (2) it had a defined scope that limited the discretion of the investigating officials.

To start, the statute provided that it may "authorize an administrative subpoena to any...entity within the state" for records needed to determine whether a medical facility is "providing substandard care for Miasmic Syndrome." §18.8.891. The District Court's conclusion that the Health Insurance Company "had no reason to know how far the scope of the Board's authority" ran was in error because the plain text of the statute provided ample reason for the Health Insurance Company to know they were well within its reach. Opinion of the District Court of Romulus, R. at 26. There are only a few entities within the state that would have access to any of the records or documents pertaining to the treatment of Miasmic Syndrome patients. Thus, the notion that the Health Insurance Company—in exclusive partnership with the leading provider for Miasmic Syndrome treatment within Romulus—had no reason to believe they were on the short list of entities which the EMSA applied to, does not pass the smell test. The Health Insurance Company had every reason to believe that a statute focused on all aspects of the Miasmic Syndrome response applied to them, because they were instrumental in the entire process.

Second, the statute's scope was properly defined and limited the investigating officials' discretion. To suggest that the ESMA is unlimited in scope is complete hyperbole because it only promulgates the search of documents and records relevant to patients diagnosed with, tested for, or suspected of carrying Miasmic Syndrome. It did not apply to every insurance company or medical facility—just those involved

with the response to Miasmic Syndrome. The EMSA has a more expansive scope than other statutes for "closely regulated" industries because those industries do not require a broad reach. The dangers that mine operators, railroad workers, gun dealers, and alcohol distributors pose are more understood than the dangers posed by entities involved with Miasmic Syndrome treatment. The disease presented the entire world with so many unknowns, and had the EMSA been meager, it would have served no purpose. The state could not risk the scope being so limited that live-saving information slipped through the cracks of legislation.

Lastly, the Burger criteria only apply to the statute and not the particular search in question, and thus the District Court's concern about the investigators who "walked off with a haul of data" is simply a red herring. Opinion of the District Court of Romulus, R. at 26. This "illustration" provided by the District Court is not only a distraction from the criteria in Burger, but it is also misleading. Opinion of the District Court of Romulus, R. at 26. The investigators only requested documents within the specified time frame because the Health Insurance Company failed to establish a system that kept track of and separate the insureds that had the disease from those who did not. More to the point, the search was still within the scope of the statute because there were still many unknowns surrounding the novel virus. For this reason, the inspectors could have suspected any patient who sought treatment from the beginning of the pandemic to that point of having the disease. Rather than potentially leaving out countless patients, the officials used their discretion to retrieve all records that could reasonably be connected to the disease.

B. The Commissioner's execution of the emergency subpoena was reasonable and did not violate a clearly established law.

Even if the first prong under Wesby had not been established, the Commissioner is still precluded from liability as she can undoubtedly satisfy the second prong. The second prong in determining whether a government official may invoke qualified immunity relies "on 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); Ashcroft v. al-Kidd, 563 U.S. 731,743 (2011) (asserting that "qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions"). In other words, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law. " Malley v. Briggs, 475 U.S. 335, 341 (1986). An official's challenged conduct is protected through qualified immunity unless at the time he or she acted, controlling authority or a "robust consensus of persuasive authority" irrefutably deemed such actions unlawful, thus in violation of a "clearly established right." Ashcroft, 563 U.S. at 741-42 (reasoning "we do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate"); Anderson, 483 U.S. at 636 (concluding that qualified immunity depends on whether "a reasonable officer could have believed...warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed."); Wilson v. Layne, 526 U.S. 603,608,615 (1999) (finding qualified immunity where "no court had held at the time of the search that media

presence during a police entry into a residence constituted such a violation" reasoning the "constitutional question presented was by no means open and shut").

The pre-existing law regarding the "clearly established right" cannot be overly broad and must be detailed enough to make apparent that the challenged conduct was unreasonable, given the facts in that particular instance. Ziglar v. Abbasi, 137 S. Ct. 1843,1866 (2017) (concluding that the analysis for qualified immunity in the context of the Fourth Amendment is very fact-specific because it is an "abstract right," and challenging for an official discern in every "precise situation encounter."); Plumhoff v. Rickard, 572 U.S. 765,779 (2014) ("courts are not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced."); Anderson, 483 U.S. at 640 (stating, "it should not be surprising . . .the right the official is alleged to have violated must have been clearly established in a more particularized and . . .relevant sense").

Even when a facially similar and controlling circuit precedent suggests an official's conduct is unreasonable, qualified immunity may still apply if a "reasonable. . .officer could miss the connection between the situation confronting. . ." them and the controlling authority. Kisela v. Hughes, 138 S. Ct. 1148, 1152-54 (2018) (finding qualified immunity where controlling precedent considered it unreasonable for police to shoot an emotionally disturbed, "screaming" man with beanbag bullets, but in the present case, the police shot a "calm-looking" but the emotionally disturbed woman holding a kitchen knife with actual bullets reasoning that the differences between the

referenced case and the case before them "leap from the page" and thus, the officer had no "fair notice that her conduct was unlawful"). Moreover, an official's unlawful conduct is not clearly established when there is no explicit case law forbidding it, and analogous case law permitting the challenged conduct exists. Zadeh v. Robinson, 928 F.3d 457,483, 495-500 (5th Cir. 2019).

In Zadeh, under a state statute, the Texas Medical Board executed an administrative subpoena on a medical office that prescribed controlled substances absent an opportunity of precompliance review. Id. The medical office's lead physician sued the board members for failure to offer an opportunity for precompliance review, and he also challenged the statute for its lack of limitation on the investigator's discretion. Id. The board's conduct relied on a prior controlling precedent that left open the plausibility that the medical office in which they searched could be a "closely regulated" industry. Id. at 483, 494. The court in Zadeh concluded both the investigators and health board executive were entitled to qualified immunity because although the case they relied on was distinguishable from their present circumstance, there was no "legal principle" clearly forbidding the official's actions in the "particular circumstances" facing them. Id. In dicta, the court even noted that although the medical industry as a whole is not a pervasively regulated industry, "it is possible that a subset, such as those who prescribe controlled substances" could be. Id. at 483, 491. The court added that the defendants reasonably could have believed that the administrative subpoena "provided a constitutionally adequate substitute

for a warrant," as the court had never required there to be a "clear limit on whom officials select for an administrative search." Zadeh, 928 F.3d at 483, 494.

The Commissioner is entitled to qualified immunity because she acted reasonably given an unprecedented health crisis, which no pre-existing law prescribed conduct for. To start, any reasonable official leading a state's response to a deadly global pandemic would have believed that reports showing disproportionate outcomes—kidney failure and death—from the leading medical provider constituted an exigent circumstance. No case law exists to suggest otherwise.

Next, any reasonable official leading a state's response to a deadly global pandemic not only could have, but would have believed that any entities substantially involved with treatment for a disease infecting millions of people posed a huge risk to public welfare if left unregulated, and thus qualified as a "closely regulated industry." The broad right established in Patel cannot confirm the Commissioner's conduct was unlawful because the situation confronting her was extraordinary and no case has considered it before. This Court in Kisela determined a prior precedent forbidding officers from shooting an emotionally disturbed, yelling man with beanbag bullets did not apply to officers shooting a calm-looking and emotionally disturbed woman holding a knife with real bullets. In the same way, this Court should not hold a prior precedent forbidding administrative subpoenas without precompliance review on hotel operators applies to an emergency subpoena executed on a health insurance company that financially backed a dangerous drug. In both instances, the differences "leap from the page." Even in a much similar case, Zadeh, which established that the

medical industry as a whole did not qualify under the "closely regulated" industries list, it still did not help provide a clearly established law because there are substantial differences in the distribution of controlled substances and the distribution of the alleged cure to a global pandemic. In fact, the court in Zadeh did not even forbid the entire medical industry from being considered "closely regulated," it left the possibility for a small "subset" of the medical industry might fit that label in the future. Moreover, it certainly did not forbid a health insurance company with strong ties to a medical provider from being a "closely regulated industry," as the courts are unlikely to show the privacy concerns held by an insurance company the same amount of deference as the privacy concerns held by a medical provider. Consequentially, a reasonable official under the circumstances may have thought the Burger exception applied to a "subset" of the insurance industry at large that was instrumental in the treatment of the contagious syndrome. No case law exists to suggest otherwise.

Additionally, any reasonable official leading a state's response to a deadly global pandemic could have believed a state law, along with the execution of the search it permitted, was indeed lawful. It was reasonable for the Commissioner to rely on the state statute authorizing the emergency subpoena power. The entire purpose of qualified immunity is for circumstances like this, where an official must act bravely to protect the public without fear of litigation. Second-guessing the constitutionality of the state statute was not her duty and could have cost more lives. No case law exists to suggest otherwise.

Further, a reasonable official leading a state's response to a deadly global pandemic could have also believed the EMSA was properly defined. Inasmuch as, its explicit language narrowed its scope to only entities involved with the treatment of Miasmic Syndrome patients. They could have believed that the statute limited the investigator's discretion by only permitting documents in connection to the Miasmic Syndrome. No case law exists to suggest otherwise.

Lastly, a reasonable official leading a state's response to a deadly global pandemic could have believed that setting a time frame to isolate potential Miasmic cases was lawful and did not exceed the scope of the emergency subpoena. Given the Health Insurance Company's lack of organization, along with all the unknowns surrounding the catastrophic situation, a reasonable official would have requested documents from the start of the pandemic to the subpoena's execution. Although it is unlikely that all the records held from the start of the pandemic were solely from insureds who had the disease, a reasonable official would have covered all bases when trying to combat a deadly pandemic. There is *no* case law that suggests otherwise under the same circumstances.

All in all, even if the Commissioner's conduct were unconstitutional, she acted as any reasonable official would have under such dire circumstances and is entitled to qualified immunity.

Conclusion

Galen's conduct did not proximately cause the Health Insurance Company's injury and therefore lacks standing to sue under § 1964(c). Additionally, the Commissioner is entitled to qualified immunity because the emergency search was not unlawful, and she acted reasonably taking into account the pre-existing law. For the foregoing reasons, Respondents respectfully request that the Supreme Court affirm the decision of the Fourteenth Circuit.

Appendices

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.

R.C.L. § 18.8.891(b, c)

(b) The Commissioner of the Board may authorize an administrative subpoena to any other person or entity within the State, which may require that person to provide any records or documents to the Board as the Board may in its discretion require in order to determine if a licensed Hospital is providing substandard care for Miasmic Syndrome.

(c) A subpoena issued under this section shall be no broader than is reasonably required to determine whether a Hospital is providing substandard care for Miasmic Syndrome.

18 U.S.C. § 1964 (c)

Any person injured in his business or property by reason of violation of 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.

42 U.S.C. § 1983

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.