TEAM 220

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 FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

**BRIEF FOR PETITIONER**

COUNSEL FOR PETITIONER
OCTOBER 16, 2020

## QUESTIONS PRESENTED

I. Whether the proximate cause element of a civil RICO matter is satisfied and standing conferred where Caesar Health Plan would not have underwritten prescriptions for Glukoriza as a treatment for Miasmic Syndrome if Galen had not misrepresented the drug's safety risks.

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 which does not authorize precompliance review before a neutral decision maker and if the official involved is protected by Qualified Immunity.

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## OPINIONS BELOW

The opinion of the United States District Court of Romulus is unreported and set forth in the Record. Opinion, R. at 13–27. The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported and set forth in the Record. Opinion, R. at 28–38; Concurrence at 39.

## JURISDICTION

Rule 3.2 of the Seventieth Annual National Moot Court Competition does not require a formal statement of jurisdiction.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional and statutory provisions. Relevant portions are included in the Appendix:

U.S. Const. amend. IV

U.S. Const. amend. XIV

18 U.S.C. § 1964(c)

42 U.S.C. § 1983

## STATEMENT OF THE CASE

### I. Factual Background

In May 2019, the highly contagious viral disease dubbed "Miasmic Syndrome" became a global pandemic. R. at 1. Found to be deadly in at least 1% of cases, Miasmic Syndrome infected millions, and killed thousands. R. at 1. By September 2019, Galen Research ("Galen"), a small American pharmaceutical

company headquartered in the state of Romulus and lead by Livia Cleopatra, a resident of Romulus and Galen's sole proprietor, announced its existing, FDA approved cancer medication, Glukoriza, was an effective treatment for Miasmic Syndrome. R. at 1. Galen claimed data from a clinical trial showed Glukoriza cut the disease's fatality rate by at least half and improved the patient's recovery time by several days, on average. R. at 1. This information was later shown to be fraudulent. R. at 5.

Glukoriza had a list price of $10,000 per dose, with an approved cancer dosage of one dose per month over six months. R. at 1. However, when used as treatment for Miasmic Syndrome, the recommended dosage jumped to four doses administered over a two-week period. R. at 1. Galen's marketing efforts had not had much success in sales of Glukoriza as a cancer treatment; it had been on the market since 2014 and Galen sold approximately a thousand doses each year. R. at 1. But as Galen announced the successful trial results for the drug it now touted as an effective tool in battling the deadly pandemic virus, it massively expanded its manufacturing capacity. R. at 2. Galen also started marketing campaigns directed at health insurance companies and physicians to persuade them to cover the exorbitant cost of each dose and prescribe Glukoriza as an off-label Miasmic Syndrome treatment. R. at 2. Galen's marketing plan relied heavily on the data from the drug manufacturer's clinical trial, proclaiming it a safe, effective treatment for the highly contagious virus. R. at 2.

While Galen had limited success convincing insurance companies or doctors to cover the costs or prescribe Glukoriza as a Miasmic Syndrome treatment, it scored a notable client in November 2019 with Julius-Caesar Health System ("Julius-Caesar"), which agreed to make Glukoriza a preferred treatment for Miasmic Syndrome. R. at 2. The formal partnership between two legally separate entities: Julius Medical Center ("Julius"), the largest healthcare provider in the state of Romulus, and Caesar Health Plan ("Caesar"), a health insurance company, operated as an integrated payor-provider. R. at 2. Almost all of Julius's patients are members of Caesar, and Caesar strongly encouraged all its members to receive all or most of their care at Julius by requiring authorization and clinical necessity for reimbursements outside the system. R. at 2. Julius agreed to educate its providers about the benefits of Glukoriza as a Miasmic Syndrome treatment, and Caesar agreed to fully cover the prescriptions of the drug written for Miasmic Syndrome. R. at 3.

Glukoriza's sales spiked. Within three months of the agreement, Caesar had covered and paid for a total of 10,000 prescriptions. R. at 3. Analyzing the outcome data, researchers at Julius established with reasonable certainty:

1. Glukoriza had no significant effect in curing or ameliorating Miasmic Syndrome; and
2. Patients who received Glukoriza in the higher doses recommended by Galen to treat Miasmic Syndrome suffered substantial side effects—upwards of 10% of patients suffered serious loss of kidney function. R. at 3.

Based on these findings, Julius-Caesar made the decision to remove Glukoriza from its list of recommended treatments for Miasmic Syndrome, Caesar removed the drug from its formulary and Julius recommended to its providers to stop prescribing it as a Miasmic Syndrome treatment. R. at 3.

In the midst of the Miasmic Syndrome pandemic, Romulus legislature passed the Emergency Miasmic Syndrome Act ("EMSA") in response to a flood of counterfeit, adulterated, and otherwise dangerous drugs promising a cure of Miasmic Syndrome in the market. R. at 3. EMSA authorized the Board of Health ("the Board") to inspect and collect records from any medical facility or any other party believed to hold evidence about these facilities upon issuance of an administrative subpoena. R. at 3. The subpoenas would cover medical evidence relating to the patients suspected of carrying, receiving treatment, or having diagnoses of Miasmic Syndrome. R. at 3. EMSA also gives the Board the power to impose monetary penalties, revoke operating licenses, or take other actions necessary in response to findings of substandard care. R. at 4. EMSA granted Commissioner of the Board, Cleopatra, the unilateral authority to authorize EMSA subpoenas. R. at 4.

In March 2020, the Board received reports stating Miasmic Syndrome patients at Julius had notably worse health outcomes than patients seen elsewhere in the state. R. at 4. Cleopatra, pursuant to EMSA, issued subpoenas ordering both Julius and Caesar to immediately turn over copies of all medical records relevant to

patients diagnosed with, tested for, or suspected of carrying Miasmic Syndrome. R. at 4.

Under Cleopatra's orders, armed agents from the Board carrying subpoenas arrived at Caesar's facility at 8 a.m. on March 19, 2020. R. at 4. The armed agents threatened to have all staff present arrested for obstruction of justice if they did not submit to the search. R. at 4. They demanded compliance and 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 attorneys were not present until after the staff had turned over the documents and records. R. at 5.

Reviewing the data gathered from Caesar, the Board found evidence that Miasmic Syndrome patients at Julius had a high rate of kidney failure. R. at 5. The Board determined that Julius was actively causing harm to the patients and had been providing substandard care to its Miasmic Syndrome patients. R. at 5. Cleopatra authored a report noting that Glukoriza was generally safe, but it had never been used with Ippomarathron and Gentiane, which were elements of Julius's protocol. R. at 5. On March 30, 2020, the Board then unanimously voted to suspend Julius's operating license. R. at 5.

On the same day, a whistleblower came forward with documents showing severe discrepancies in the results of the 2019 Glukoriza trial. R. at 5. The report suggested that researchers conducting the trial falsified data and failed to properly follow up with patients to assess for delayed side effects such. R. at 5. Specifically, the report suggested that some patients had started to show signs of kidney damage

but were discharged from the trial before it could be confirmed. R. at 5. Copies of internal Galen emails showed active attempts by Galen staff to hide falsifications from Cleopatra. R. at 5.

Soon after the reports were released Cleopatra resigned from her position as Commissioner of the Board. R. at 6. On April 14, 2020, the board voted to restore Julius's operating license, upon showing that 100 percent of their patients' excess kidney morbidity could be accounted for by patients on Glukoriza. R. at 6. While Julius's license was suspended, over 15,000 patients dropped their membership in the Julius-Caesar integrated system and enrolled with new providers and insurance companies. R. at 6.

## II. Procedural History

***United States District Court of Romulus.*** Caesar Health Plan, Inc. brought a civil action in the United States District Court of Romulus alleging two causes of action. First, Caesar brought a civil RICO claim against Livia Cleopatra in her capacity as sole proprietor of Galen Research under 18 U.S.C. § 1964(c) alleging Galen induced Caesar to underwrite Glukoriza as treatment for Miasmic Syndrome by means of fraud. Also, Caesar raised a 42 U.S.C. § 1983 civil rights claim against Cleopatra in her capacity as Commissioner of the Romulus Board of Health alleging Cleopatra authorized search of Caesar's premises that was unconstitutional under the Fourth and Fourteenth Amendment. Cleopatra responded by filing a 12(b)(6) motion to dismiss both counts. The district court correctly denied the motion in its entirety. District Court Opinion, R. at 13–27.

***Fourteenth Circuit Panel.*** Cleopatra filed a timely appeal to the Fourtenth Circuit Court of Appeals. The Fourteenth Circuit incorrectly reversed the district court and ordered the motion be granted in its entirety. Fourteenth Circuit Opinion, R. at 28-39. Caesar filed a petition for certiorari to the United States Supreme Court, and this Court granted the petition on September 14, 2020. R. at 7, 40.

## SUMMARY OF THE ARGUMENT

***Standing Question.*** The Fourteenth Circuit erred in its decision to reverse and remand the order of the United States District Court for the District of Romulus, denying standing to Caesar in a civil RICO claim against Respondent, Livia Cleopatra. Under 18 U.S.C. § 1964(c), a plaintiff must show injury to his business or property and that injury was "by reason of" the RICO violation. This Court has determined "by reason of" means that the defendant's violation must be the "but for" cause of the plaintiff's injury as well as the proximate cause, which requires that facts show a "direct relation between the injury asserted and the injurious conduct alleged." Caesar's economic injury flows directly from the fraudulent scheme of misinformation perpetrated by Galen, a sole proprietorship of Cleopatra.

The "direct relation" requirement has been explained by this Court to include whether the injury was "direct" and a "natural consequence" of the fraudulent scheme and that the central question to be answered is whether the alleged violation led directly to the plaintiff's injuries. Furthermore, this Court held the common law concept of foreseeability does not apply in RICO fraud cases; therefore,

a first party pleading of direct *reliance* is not mandatory, but also not dispositive. In the present case, Galen fraudulently marketed Glukoriza as a treatment for Miasmic Syndrome to both physicians and health insurance companies because it knew that insurance companies would have to pay for the drug. This was especially true since the protocol for Miasmic Syndrome treatment using the drug would otherwise cost a patient $40,000. Galen would also know that this exorbitant cost would likely mean that without the drug being included in an insurance company's formulary, a list of approved medications for specific treatments, the physicians were unlikely to prescribe it. Furthermore, due to the extreme and unprecedented nature of the situation and the highly contagious aspect of Miasmic Syndrome, the truncated timeline to add Glukoriza to the formulary list would mean Galen's marketing efforts would be the only data available on which to base that decision. Since this is a prescription drug the involvement of the prescribing physicians as intermediaries in this case was foreseeable and does not break the direct connection between Caesar and Galen—the only reason Galen could have perpetrated the fraud was to increase profits, and the only party in this situation who could do that was Caesar.

Additionally, this Court has stated the direct connection analysis could further be qualified by three policy related factors, which Caesar also satisfies. Caesar's economic injuries are directly attributable to the violation; it would not have added Glukoriza to its formulary as a Miasmic Syndrome treatment without the only data that would be available—Galen's misinformation of the drug's efficacy

and safety. There are also no risks of multiple recoveries here since Galen is the only party that paid for the medication. Finally, since those injuries are unique, there is no better party to bring suit in this case to deter Galen's injurious conduct.

***Fourth Amendment Claim.*** The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. The Fourteenth Amendment provides the same guarantee for the states. These protections extend to private commercial premises.

Generally, searches require a warrant to be valid under the Fourth Amendment. One exception to the warrant requirement, known as the administrative search exception, allows for statutes to authorize warrantless searches that don't necessarily violate the Fourth Amendment.

Within an ordinary or non-pervasively regulated industry, a warrantless search is only reasonable where special needs make the warrant and probable cause requirement impractical; the primary purpose of the search is distinguishable from the general interest of crime control; and the subject of the search is afforded an opportunity to obtain precompliance review before a neutral decision maker.

Within a pervasively regulated business, due to a lowered privacy expectation of the owner, a warrant may not be required where a substantial government interest forms the basis for a statute authorizing a warrantless search; the warrantless search is necessary to further this government interest; and the statute provides a constitutionally adequate substitute for a warrant in terms of the certainty and regularity of its application.

Livia Cleopatra, pursuant to the EMSA statute, ordered a warrantless search against Caesar Health Plan which did not afford Caesar an opportunity for precompliance review. Also, Caesar is not a pervasively regulated business, and even if it were the EMSA statute did not provide an adequate substitution for a warrant because the vague and one-sided language makes its application uncertain and irregular. For these reasons, the warrantless subpoena violates the Fourth Amendment.

Government officials are civilly liable for violations of federal statutory or constitutional rights under 42 U.S.C. § 1983. Government officials are entitled to immunity from civil suit under the doctrine of Qualified Immunity, except when they violate rules that are clearly established.

A rule is clearly established if every reasonable official would understand that its violation is unlawful. Under an alternative standard, rules are clearly established if they provide the official with a fair warning that its violation is unlawful.

Livia Cleopatra used her EMSA authority as Chairperson of the Board of Health to order a warrantless subpoena of Caesar Health Plan that did not provide an opportunity for neutral precompliance review. The requirement that warrantless subpoenas provide some opportunity for precompliance review is clearly established. Therefore, Qualified Immunity will not attach.

## ARGUMENT

### I. Galen's fraudulent marketing scheme directly caused Caesar's economic injuries and satisfies the proximate cause requirements mandated for civil RICO standing.

Recovery criteria in a civil action under the Racketeer Influenced and Corrupt Organizations Act ("RICO") is defined under 18 U.S.C. § 1964(c). A plaintiff must show injury to his business or property and that injury was "by reason of" the RICO violation. *Holmes v. Sec. Inv'r Prot. Corp.,* 503 U.S. 258, 268 (1992). The Court in *Holmes* explained "by reason of" means the defendant's violation must be the "but for" cause of the plaintiff's injury as well as the proximate cause, which requires that facts show a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* This Court's decisions in later RICO proximate cause cases further defined this "direct relation" requirement. *Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 2 (2010) (stating that RICO's proximate cause requirement prevented claims based on indirect injury to plaintiffs; a link that is "too remote" is not sufficient); *Bridge v. Phoenix Bond & Indemnity*, 553 U.S. 639, 658 (2008) (explaining the injury was "direct" and a "natural consequence" of the [fraudulent] scheme); *Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451, 461 (2006) ("[W]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries."). Furthermore, the traditional proximate cause inquiry of foreseeability cannot alone satisfy the requirement—a foreseeable or even intended injury does not create proximate cause if the injury was not direct—but those issues

have been used as factors in the proximate cause analysis in several of this Court's holdings. *See Hemi*, 559 U.S. at 12 (noting that in *Holmes* and *Anza* the Court "never even mentioned the concept of foreseeability").

Moreover, the Court emphasized the need for a factual case-by-case analysis stating that due to "the infinite variety of claims that may arise" concerning proximate causation, it is "virtually impossible to announce a black-letter rule that will dictate the result in every case." *Holmes*, 503 U.S. at 272 n.20; *See also Bridge*, 553 U.S. 639, 654 (reinforcing "proximate cause is generally not amenable to bright-line rules"). To further define the boundaries, *Holmes* articulated three functional factors for proximate cause analysis to balance the direct connection claims with the interest of justice and administrability:

> First, 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. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiff's injured more remotely.

503 U.S. at 269–70 (internal citations omitted). While *Holmes* and the Supreme Court cases that followed outlined the defining features of a direct connection, the Circuit Courts have addressed the issue in cases more factually comparable to the present. The Fourteenth Circuit characterized the varying holdings in those courts

as a "circuit split." R. at 34. However, the analysis of facts within the rulings align with Caesar's showing of proximate cause.

### A. Galen targeted both insurance companies and physicians in its fraudulent marketing scheme and Caesar paid for prescriptions it otherwise would not have paid for without the fraud.

The Circuit Courts' holdings support the required direct connection between the harmful violation and the economic injury when drug manufacturers target the insurance companies or other third-party payors ("TPPs")[1] with fraudulent scheme and the insurance companies pay for drugs they would not have paid for otherwise. *See Painters and Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co. Ltd.*, 943 F.3d 1243, 1252 (9th Cir. 2019) (stating that because "Plaintiffs were immediate victims of Defendant's fraudulent scheme to conceal [the drug's] risk[s] . . . the alleged RICO violation . . . has a direct connection to Plaintiff's alleged harm."); *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21, 40 (1st Cir. 2013) (holding an insurance company did have proximate cause for the injury suffered by payment of off-label prescription drugs because the company was targeted by the manufacturer's fraudulent marketing campaign); *Avandia Mktg., Sales Practices & Product Liab. Litig.*, 804 F.3d 633, 645 (3rd Cir. 2015) (holding that TPP's injury was direct enough to satisfy proximate cause because the

[1] An institution or company that provides reimbursement to health care providers for services rendered to a third party (i.e., the patient). Medical Dictionary for the Health Professions and Nursing, 2012, https://medical-dictionary.thefreedictionary.com/third-party+payer.

fraudulent scheme could have been successful only if the TPP paid for the drug, and that was the injury for which they sought recovery).

The Second and Seventh Circuits have denied standing to insurance companies seeking to recover from civil RICO claims involving prescription drugs, but those cases are distinguished from the present in part because they involved marketing specifically to physicians, and not to the insurance company itself. *See Sidney Hillman Health Center of Rochester v. Abbott Lab.*, 873 F.3d 574, 578 (7th Cir. 2017) (holding that improper representations made to *physicians* do not support a RICO claim by [insurance companies](emphasis added)); *UFCW Local 1776 v. Eli Lilly and Co.*, 620 F.3d 121,134 (2nd Cir. 2010) (determining "the misrepresentations at issue were directed through mailings and otherwise at doctors" which was not enough to establish proximate cause). Importantly, the *UFCW* court went so far as to acknowledge that the only link that could show proximate causation in regard to drug price would be a fraudulent scheme directed to insurance companies, not to doctors. 620 F.3d at 134.

Here, the record explicitly states that Galen targeted physicians *and* health insurance companies in the fraudulent scheme to persuade both groups to prescribe and cover Glukoriza as a treatment for Miasmic Syndrome. R. at 2. Even though Galen knew the data it was reporting was wrong, the marketing campaign continued and Galen "scored" a "notable" client in Julius-Caesar, showing Galen's specific intent to harm the Health Care System. R. at 2–3, 5. Further, since the formal partnership of Julius-Caesar means Caesar pays for medications of patients

of the single largest healthcare provider in the state of Romulus, Caesar would be one of the insurance companies directly targeted by Galen. R. at 2. This meets criteria explained by the Circuit Courts in RICO proximate cause cases involving drug manufacturers and TPPs. These facts also show a connection that is straightforward and in no way too remote, satisfying the requirements for a direct connection articulated by this Court in *Bridge* and *Hemi*. Moreover, as mandated by *Anza*, the alleged violation—Galen's fraudulent marketing scheme that misrepresented Glukoriza's safety risks—led directly to Caesar's injuries—paying for medication it would not have underwritten otherwise.

1. ***Galen's targeted and intentional fraudulent marketing scheme established a direct connection to Caesar—the only entity that could pay for the drug and increase Galen's profits.***

For insurance companies, the act of paying for prescriptions requires the drug being added to the company's "formulary,"[2] which is a list of medications the doctors are authorized to prescribe that also include guidelines for appropriate prescribing protocols, including "off-label" prescriptions. *Painters*, 943 F.3d at 1255; *see also Avandia*, 804 F.3d at 634 ("Whether a TPP will cover the cost of a member's prescription, in whole or in part, depends on whether that drug is listed in the TPP's 'formulary.'").

The First Circuit explained the importance of formularies in the structure of the healthcare system in relation to insurance companies, drug manufacturers, and

[2] "The formularies are prepared by analyzing research regarding a drug's cost effectiveness, safety and efficacy." *Avandia*, 804 F.3d at 634.

physicians, noting in *Neurontin* the "dramatic increase in sales" of the drug in question after all restrictions were removed for its off-label use. 712 F.3d at 30. In that case the court determined the fraudulent information provided by the manufacturer about the drug's safety and efficacy directly affected the decision to add it to the formulary and, therefore, be paid for by the insurance company, contributing to a direct connection. *Id.* at 29.

The Third District reached a similar conclusion in *Avandia* when it decided a direct connection was supported because the TPP seeking reimbursements for drug payouts only included the medication on its formulary *after* misrepresentations from the manufacturer. 804 F.3d at 644 (emphasis added) (noting the direct connection was further established because the conduct that caused the injuries was the same as the alleged conduct that was the basis of the RICO scheme, the economic injury to the TPP was independent of any physical injury suffered by the drug users, and there was no evidence that the physicians suffered any RICO injury from the fraudulent marketing).

The facts of the present case satisfy the same requirements the court considered in *Neurontin* and *Avandia*. Galen admits that as it released its drug trial results, it "massively" expanded its manufacturing capacity for Glukoriza and targeted insurance companies with its marketing campaign based on fraudulent trial information. R. at 2. This shows Galen's fraudulent marketing scheme was intended and expected to increase sales of Glukoriza and profits. Like the manufacturers in *Neurontin*, Galen knew the only way to increase sales would be to

target the groups paying for the medication (TPPs) and have Glukoriza added to formularies for physicians to prescribe it. This step would be especially imperative for Glukoriza, since it cost $10,000 per dose and the treatment protocol recommended for Miasmic Syndrome required four doses per patient, a total cost of $40,000. R. at 1, 3.

Furthermore, Caesar only added Glukoriza to its formulary as its preferred Miasmic Syndrome treatment *after* Galen started its marketing campaign; and by fully covering prescriptions written for that off-label use, sales of Glukoriza skyrocketed, similar to those in *Neurontin*. R. at 3. Glukoriza sales, which had held steady at approximately a thousand doses sold per year for each of the previous five years it had been on the market, spiked to ten thousand doses over the next three months, all paid for by Caesar. R. at 3. The consistently low sales numbers from the previous five years indicate that Caesar would have not otherwise paid for an increased amount of Glukoriza if not for Galen's fraudulent claims that it was an effective treatment for the highly contagious virus spreading across the globe. Further, facts show Galen knew about the medication's dangerous effects when used at the increased dosage recommended for Miasmic Syndrome, yet carried on with its misrepresentations. R. at 2, 5. This supports the inference that Galen's sole motivation was to increase profits. Moreover, its scheme was only successful because of Caesar's payments for Glukoriza.

From Caesar's perspective, there would have been no agreement without the fraudulent information. The misrepresentation of Glukoriza as a safe, effective

treatment induced Caesar to fully pay for the increased prescriptions. Furthermore, the truncated timeline in the Miasmic Syndrome outbreak, spread, and ensuing rush to find treatment would mean Galen's clinical trial data would have been the only information available on which to make the decision to add Glukoriza to the formulary as a Miasmic Syndrome treatment. R. at 1–3. This inference is further evidenced by the fact that Julius conducted its own analysis as soon as it had enough patient data, and after discovering the drug's lack of efficacy in treating the pandemic virus, along with its even more alarming potential to cause kidney damage, Julius recommended its physicians stop prescribing it. R. at 3. Simultaneously, Caesar removed the drug from its approved formulary as a Miasmic Syndrome treatment. R. at 3. This shows two things: Galen's fraudulent clinic trial data directly influenced Caesar's decision to add Glukoriza to the formulary, therefore confirming the fraudulent data did directly cause the harm; and it also indicates the internal process within Caesar. While Caesar did make a joint decision with Julius that Glukoriza should not be used to treat the illness, there is nothing to indicate a dependence on Julius in making that decision. Caesar was able to quickly and independently remove Glukoriza from its formulary as soon as it was aware of its dangers. This reinforces a direct connection that was not contingent upon multiple steps or intervening factors, which is mandated by this Court to show proximate cause.

### *2. Prescribing physicians do not constitute an intervening cause that severs the chain of proximate cause between Galen and Caesar.*

Discrepancies in rationale among the Circuit Courts focus on whether the independent actions of the physicians who write the prescriptions for the medications qualify as intervening causes, cutting off the chain of proximate cause between drug manufacturers and insurance companies. *See Painters*, 943 F.3d at 1257. This Court has defined an intervening cause as "a later cause of independent origin that was *not foreseeable*." *Exxon Co. v. Sofect*, 517 U.S. 830, 837 (1996) (emphasis added).

In *Painters*, the drug in question was a prescription medication, therefore a prescription from a physician was *required*. 943 F.3d at 1257. The court held that while those prescribing physicians were intermediaries between the fraudulent claims of drug safety and efficacy and the injury to insurance companies that paid for the drug, the physicians' involvement was completely foreseeable. *Id.* Therefore, the prescribing physicians did not qualify as an intervening cause to cut off the chain of proximate cause. *Id.*

Moreover, the First Circuit held that despite arguments that the economic injury to a TPP was too far removed because it "rest[ed] on the actions of independent actors—the prescribing doctors," the causal chain was "anything but attenuated" since payment's for the drug come from TPPs, not physicians. *Neurontin*, 712 F.3d at 34 (discussing the structure of America's health care system).

*Neurontin* also showed a formulary's significance extends to physicians and their treatment decisions. *Id.* at 29. In that case the TPP found *95 percent* of

prescriptions written by its physicians complied with formularies, meaning the doctors wrote prescriptions for the drugs that were covered. *Id.* (emphasis added). Importantly, in *Neurontin* the insurance company would pay for off-formulary prescriptions, and no prior authorization was required for any prescription, yet the physicians still complied with the formulary and its guidelines for appropriate prescribing. *Id.* This indicates a reliance by the physicians on the vetting process required for a drug to be added to a formulary as well as the "off-label" uses allowed. These facts also suggest a reversal in what otherwise could be a wrongfully assumed process: the insurance companies and the medications they choose to pay for can direct physicians' choices in writing prescriptions—either on or off-label—not the other way around.

In the present case, Glukoriza is a prescription drug and therefore must be prescribed by physicians. R. at 2. The facts of the present case align directly with those of *Painters* in that it is completely foreseeable that the physicians who prescribed Glukoriza would be intermediaries in Galen's fraudulent scheme to increase revenues. Indeed, Galen's actions show it was aware of the physicians' involvement since, along with marketing fraudulent safety and efficacy information about the drug to insurance companies who would be required to pay for Glukoriza, Galen also marketed it to physicians, encouraging them to write prescriptions for it. R at 2. As demonstrated in *Painters*, these facts show the physicians in the present case did act as intermediaries between the fraudulent claims of Glukoriza's benefit to patients as a treatment for Miasmic Syndrome and Caesar's payments for the

drug; however, the foreseeable actions of the prescribing physicians do not constitute an intervening cause to cut off the chain of proximate cause.

The *Painters* court points out its holding that prescribing physicians were not intervening causes also supports the policy concerns of this Court in relation to proximate cause jurisprudence in civil RICO claims. 943 F.3d at 1257–58. *Holmes* explained that while proximate cause does exist to limit liability for consequences of that person's own bad acts, it also must "reflect[ ] what justice demands." 503 U.S. at 268. This sentiment was reflected upon in *Painters* which stated finding that the foreseeable actions of prescribing physicians severs the chain of proximate cause would go against the principle of justice in civil RICO claims established by *Holmes*, insulating drug manufacturers from legitimate liability for their bad acts. 943 F.3d at 1258. *Painters* emphasized drug manufacturers should not be permitted to use physicians and patients as a shield since the potential injuries of those groups are distinct from those of the insurance companies paying for the medication. *Id.*

In the present case, as in *Painters*, Caesar only seeks to hold Galen responsible for the distinctive economic damages of paying for unnecessary and potentially harmful prescriptions—money that would not have been spent if not for Galen's fraud.

Although the Fourteenth Circuit pointed to *UFCW Local* as its primary authority in determining physicians sever the direct line of proximate causation, that case is distinguished from the present case when using the factually specific analysis mandated by this Court in *Holmes*. First, the fraudulent marketing in that

case was directed only at the physicians and did not include the TPPs who were asking for standing. *UFCW Local,* 620 F.3d at 134. That court also noted that the drug manufacturer's fraudulent promotion of the prescription drug was not the only source of information that influenced physicians to prescribe it. Neither of those factors are indicated in the present case. Furthermore, the court in *UFCW Local* discussed that doctors usually do not take a drug's price into consideration or even know the price of the drugs they prescribe, stating this is particularly true in the highly individualized treatment of mental disorders, where drugs and doses may have to be changed frequently in order to find the most therapeutic treatment for a patient. 620 F.3d at 126–27. Again, this situation is completely distinguished from the present case because Glukoriza's use as a Miasmic Syndrome treatment was in no way individualized. It appears to be the first drug on the market shown, according to Galen's fraudulent scheme, to be effective in fighting an illness sweeping throughout the world. As the only treatment in what undoubtedly would be a globally publicized event, everyone, including physicians, would likely be aware of its extreme price, and the necessity to have it added to Caesar's formulary to approve payment for this off-label use.

***3. Caesar as an individual company is not required to have relied on Galen's fraudulent marketing to prove the direct connection required between the harm and the fraudulent scheme.***

While the facts of the present case do show a direct connection between Galen's fraudulent misrepresentations of Glukoriza's safety and efficacy as a Miasmic Syndrome treatment and Caesar's injury in paying for those prescriptions,

a specific pleading of reliance is not required. The Court in *Bridge* stated that it is not necessary for the victim to prove it directly relied on the misrepresentations in order for the misrepresentations to directly injure them. 553 U.S. at 642. The Court stated that nothing in the text of the RICO statute[3] gives an indication of a first-party reliance requirement. *Id.* at 660. This finding was reinforced by the Third Circuit in *Avandia* which stated, "if there is a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury . . . a RICO plaintiff who did not directly rely on a defendant's misrepresentation can still establish proximate causation." 804 F.3d at 643. The *Painters*' court further explained the application of reliance in RICO proximate cause jurisprudence explaining that the only requirement is that *someone* in the chain of events did rely on the misrepresentation that caused the plaintiff's harm stating, "[L]ogically, a plaintiff cannot even establish but-for causation if no one relied on the defendant's alleged misrepresentation." 943 F.3d at 1259–60 ("[I]t is sufficient to satisfy RICO's proximate cause requirement . . . that prescribing physicians (also third parties, but not intervening causes) relied on [d]efendants' misrepresentations and omissions."

Here, as analyzed above, Galen's fraudulent marketing directly caused Caesar's economic injury, meeting all the criteria necessary to establishing a direct connection under controlling Supreme Court cases. Therefore, according to *Bridge*, specific pleading of reliance by Caesar is not required to show proximate cause.

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[3] In the *Bridge* opinion the Court stated, "We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe."

While the facts in this case do show reliance of Caesar on the fraudulent marketing information provided by Galen, they also show reliance by Julius through its physicians. Galen fraudulently represented the efficacy and safety of Glukoriza to both physicians and insurance companies. R. at 2. Furthermore, only two months separated Galen's announcement of the fraudulent trial results and Julius-Caesar's agreement to make the drug its preferred Miasmic Syndrome treatment. R. at 1–2. This quick response in efforts to save patients' lives not only meant that Galen's information would be the only data available on which to rely on, but also meant that reliance on that data, either through the Julius's physicians or Caesar would have *had* to occur. Otherwise, the drug would have never been added to Caesar's formulary as a treatment for Miasmic Syndrome. Therefore, since *someone* in the chain relied on the only information available—Galen's marketing of its fraudulent trial data—proximate cause is established.

### B. Caesar's claim of proximate cause is further supported by the interests in justice and administrability outlined in the *Holmes* factor test.

The *Holmes* Court established that both the direct connection and three functional factors should be considered in proximate cause analysis. 503 U.S. at 271–74. Those policy concerns focused on (1) the ability to determine damages attributable to the harm, (2) the possibility of multiple recoveries, and (3) determining if this is the best party to bring a suit to deter injurious conduct. *Id.* The factors filter the direct connection to balance judicial concerns of justice and

administrability. *Id.* at 272 n.20. All three weigh in Caesar's favor of proximate cause and therefore, standing.

Looking at the first factor, the direct connection analysis above shows evidence that Caesar suffered an economic loss because it paid for members' Glukoriza prescriptions, an injury for which it would not have otherwise incurred without Galen's fraudulent marketing and deception regarding the safety and efficacy of the drug in treating Miasmic Syndrome. Further, due to the immediate need for treatment options for Miasmic Syndrome, Galen's information would have been the only information available for Caesar to consider when adding the drug to its formulary. This is supported by Julius's follow up testing once enough patients were available to gather independent data. Further, the prescriptions specifically written as a treatment for Miasmic Syndrome would be easy to separate from those written for Glukoriza to treat cancer, in part due to dosing requirements and differentiation of cost. The fact that the damages would be simple and straightforward to calculate also emphasizes a direct connection between Galen's fraud and Caesar's injury.

Furthermore, there is no risk of multiple recoveries because Caesar is the only company asserting these specific damages—Caesar paid directly for the medication. Even if other parties came forward to plead a claim, their injuries would not be the same as those suffered by Caesar; thus, the second *Holmes* factor is satisfied.

In analyzing the final *Holmes* factor, the court in *Painters* considered if there were more directly injured victims who might come forward to hold the defendants liable, therefore better satisfying the broader policy concerns of "deterring injurious conduct." 943 F.3d at 1252. But the court came to the conclusion that the TPPs who paid for the drug *are* "the most direct victims of economic injury." *Id.* Moreover, the court explained that even if both patients and TPPs were injured by a drug manufacturer's fraudulent scheme that "does not mean that one group of plaintiffs should be favored to recover over the other . . ." *Id.* at 1258. Finally, holding the drug manufacturer liable "advances the interest in deterring injurious conduct, without including others who did not suffer direct out-of-pocket losses. The present case is similar. There is no indication on the record that physicians suffered any injury due to Galen's RICO scheme, and patients did not suffer an economic injury because Caesar paid for the drug. There is no indication that there was time to add the medication cost to patients through raising co-pays or premiums, since the events in question evolved over only a two-month time frame. R. at 1–2. Therefore Caesar, the company that paid for the drug, would be the party in the best position to sue.

Galen's fraudulent marketing scheme directly caused Caesar's economic injuries, meeting the criteria set forth by this Court for a direct connection, and it also triggers none of the three policy concerns the Holmes factors were designed to prevent. Therefore, Caesar satisfies the proximate cause requirements and should be allowed civil RICO standing.

## II. Cleopatra violated Caesar's Fourth Amendment rights when she ordered the warrantless search of medical records from the non-pervasively regulated business without providing an opportunity for precompliance review before a neutral decision maker; that required review was established law at the time of the injury, therefore Qualified Immunity cannot shield Cleopatra from liability.

The Fourth Amendment proscribes the Government from violating persons' rights to be secure in their persons, houses, papers and effects, against unreasonable search and seizures. U.S. Const. amend. IV. These rights are extended to state governments through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). This Court also held that the prohibition against unreasonable searches extends to private commercial premises. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978). Generally, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

One exception to the general warrant requirement is the administrative search doctrine, under which a statute authorizing a warrantless search does not necessarily violate the Fourth Amendment. *City of L.A. v. Patel*, 576 U.S. 409, 420 (2015). This Court in *City of L.A. v. Patel* outlined the boundaries of this doctrine, explaining that within an ordinary or non-pervasively regulated industry, a warrantless search carried out by an administrative subpoena is reasonable only where it serves (1) special needs (2) besides conducting a criminal investigation (3)

where the subject of the search is given an opportunity to obtain precompliance review before a neutral decision maker. *Id.* A special circumstance within the administrative search doctrine was outlined in *New York v. Burger*: within a pervasively regulated business "where the privacy interests of the owner are weakened and the government interest in regulating . . . business[ ] are . . . heightened," a warrant may not be required where (1) there is a substantial government interest that forms the basis of the regulation that authorized the search; (2) the warrantless search is necessary to further this government interest; and (3) the statute's inspection program must provide a constitutionally adequate substitute for a warrant in terms of the certainty and regularity of its application. 482 U.S. 691, 702–03 (1987). In the present case, Caesar operates within a non-pervasively regulated industry, therefore the *Patel* factors are controlling. The facts show the *Patel* factors were not satisfied, therefore, the search ordered by Cleopatra in her capacity as Commissioner of the Romulus Board of Health violated Caesar's Fourth Amendment rights.

Under 42 U.S.C. § 1983, government officials who violate federal statutory or Constitutional rights are liable to the injured party for civil damages. However, the doctrine of Qualified Immunity provides those officials immunity from that liability if the violated right was not clearly established by precedent at the time of the violation. *D.C. v. Wesby*, 138 S. Ct. 577, 589 (2018). In the present case, the requirement to provide precompliance review before a neutral decisionmaker was clearly established when Cleopatra ordered the warrantless search of medical

records at Caesar's facility. Therefore, Qualified Immunity will not shield Cleopatra from liability under § 1983.

The Patel factors were not met, making the search a violation of Caesar's Fourth Amendment rights and Cleopatra is not shielded by qualified immunity; therefore, this Court should hold Cleopatra liable for violating Caesar's rights under the Fourth Amendment.

### A. The warrantless search ordered by Cleopatra was not reasonable under the Fourth Amendment because it did not afford Caesar an opportunity for precompliance review before a neutral decision maker which is required by *Patel*.

A warrantless search is reasonable under the Fourth Amendment only if (1) "special needs" "make the warrant and probable cause requirement impracticable;" (2) the "primary purpose of the searches" are "distinguishable from the general interest in crime control;" and (3) "the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decision maker." *Patel*, 576 U.S. at 420 (2015). In the present case, the first and second *Patel* factors are met given that the search was conducted pursuant to a statute designed not for the purpose of general criminal investigation, but to ensure public health and safety regulations. R. at 20. Consequently, only the third factor is in dispute. Here Cleopatra's subpoena and ensuing search did not afford Caesar the opportunity for precompliance review from a neutral decision maker; therefore, it is unreasonable under the Fourth Amendment and Caesar's Fourth Amendment rights were violated.

Under the *Patel* factors, a businessperson must be afforded an opportunity to have a neutral decision maker review a government agent's demands before either complying with the subpoena or being subject to penalties for failing to comply. *See* 576 U.S. at 421 (holding a statute authorizing warrantless searches unconstitutional for failing to provide an option for precompliance review because a hotel owner's only two options were to either comply with the government's demands or face penalties for failure to comply). "This Court has held that business owners cannot reasonably be put to this kind of choice." *Id.* (citing *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 533 (1967). The Sixth Circuit further defined the contours of this rule by explaining precompliance review by a neutral decision maker is sufficient if the subject of the search is afforded a hearing where both parties have the right to be heard and are represented in front of a third-party reviewer. *See Benjamin v. Stemple*, 915 F.3d 1066, 1070 (6th Cir. 2019) (holding the city's hearing process satisfied *Patel*'s precompliance requirement because the hearing guaranteed fairness since the hearing officer was not employed by the city and both parties had the right to testify, call witnesses, introduce physical evidence, conduct cross-examination, and have representation).

In the present case, Galen's administrative scheme and subpoena did not afford Caesar an opportunity for the precompliance review mandated by *Patel*. The subpoena served on Caesar commanded Caesar's employees to immediately comply with the search or be arrested for obstruction of justice and subject to penalties imposed by respondent. R. at 4, 11. These demands were presented with no mention

of a right to a precompliance review, therefore violating the criteria set forth in *Patel*. R. at 4–5.

Unlike *Benjamin*, where the review process was held in front of a hearing officer who was not employed by the same entity conducting the search, Caesar was not even given notification of the possibility of a review process. But even if a process had been mentioned by the armed agents serving the subpoenas, the only process granted in the statute is a review by the same board that issued the subpoena and authorized the search. R. at 9. Also, unlike *Benjamin*, where the process guaranteed fairness because each party was given the opportunity to testify, call witnesses, introduce evidence, conduct cross examination, and have representation, no such right is ever mentioned in the Romulus statute; the statute's language is one-sided only allowing for the Board to review the subpoena they authorized in the first place. R. at 9. Because the *Benjamin* court held the administrative scheme met the *Patel* requirement of precompliance review and was therefore constitutional, the dissimilarities to our case require the opposite result.

Because Respondent's conduct in carrying out the search left Caesar with only two options, to either comply with its demands or face harsh punishment, it follows that Caesar was not afforded a right to precompliance review by a neutral decision maker. Also, even if Caesar was aware of an ability to review the subpoena, the process set out in the statute is far from a review by a neutral decision maker because the review is conducted by the Board that issued the subpoena and language providing Caesar the opportunity to be heard is absent in the statute.

Therefore, this Court should hold that the third *Patel* factor is not met, and the warrantless search conducted by Cleopatra violated Caesar's Fourth Amendment rights.

### B. The warrantless search conducted by Cleopatra was not reasonable under the Fourth Amendment because Caesar is not operating in a pervasively regulated industry. Even if Caesar was subject to the *Burger* exception given to pervasively regulated industries, the respondent's administrative scheme does not pass the *Burger* requirements.

If a search occurs on a commercial premise that operates within a pervasively regulated industry, then a warrant might not be required. *Burger*, 482 U.S. at 702. The Court first must determine whether the business subject to the search is pervasively regulated, if determined in the affirmative the Court then applies a three-prong test to determine if the warrantless search was reasonable. *See id.* Warrantless searches authorized by statute of pervasively regulated businesses are reasonable only when (1) the basis of the regulatory scheme is formed on the basis of a substantial government interest; (2) the warrantless inspection is necessary to advance this interest; and (3) "[t]he statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant." *Id.* at 702–03 (quoting *Donovan v. Dewey*, 452 U.S. 594, 603 (1980) (internal quotations omitted)). Factors one and two are met in the present case because the statute authorizing the warrantless search is to advance the administration's interest in protecting public health in safety. R. at 20. Thus, the third *Burger* factor is the only one requiring analysis. Because Caesar, a health insurance company, is not a pervasively regulated business the *Burger* exception is

not applicable, and the warrantless search is unreasonable and a violation of Caesar's Fourth Amendment rights. For the sake of the argument, even if the *Burger* exception applied, the warrantless search would not satisfy the third factor of the test and therefore it is unreasonable and a violation of Caesar's Fourth Amendment rights.

### *1. Caesar Health Plan, a health insurance company, is not a pervasively regulated business, therefore, the Burger exception does not apply, and the search violated Caesar's Fourth Amendment rights.*

It is important to preface this analysis by noting the pervasively regulated industry is an exception, not the rule. *Marshall*, 436 U.S. at 313. This Court has found only four industries had such a history of government oversight or a "long tradition of close government supervision" to allow them to fall into this narrow exception—the medical industry not being one of them. *Burger*, 482 U.S. at 700 (quoting *Marshall*, 436 U.S. at 313). It follows that the Court considers the historical pattern of governmental oversight in determining whether an industry is pervasively regulated. *See id.* It is not enough for a business to merely be involved in interstate commerce and subject to certain federal regulations for it to be considered a pervasively regulated business. *Marshall*, 436 U.S. at 313–14 (holding employment facilities within Occupational Safety and Health Administration's ("OSHA") jurisdiction are not pervasively regulated businesses only because they are active in interstate commerce and subject to certain federal employment and labor regulations). The "medical industry as a whole" is not a closely regulated

industry for the purposes of *Burger*. *Zadeh v. Robinson*, 928 F.3d 457 (5th Cir. 2019) cert denied, No. 19-676, 2020 U.S. Lexis 3170, at *1 (June 15, 2020).

The holding in *Zadeh* compels this Court to find in the present case that Caesar, as a health insurance company and integral part of the medical industry, is not a pervasively regulated industry. The reasoning in *Marshall* supports this conclusion because although Caesar is undoubtedly subject to certain government regulations that is not enough to rise to the level of government oversight that would make them fall within the pervasively regulated exception.

Because Caesar is not a pervasively regulated business, the *Burger* exception does not apply. Therefore, this Court should find the warrantless search conducted by respondent violated Caesar's Fourth Amendment rights.

***2. Even if Caesar is a pervasively regulated business, the search ordered by Cleopatra does not meet the third Burger factor because the authorizing statute did not provide a constitutionally adequate substitute for a warrant.***

According to the third *Burger* factor, a statute authorizing a warrantless search must provide a constitutionally adequate substitute for a warrant in terms of the certainty and regularity of its application. *Burger*, 482 U.S. at 703. This is provided for when the statute (1) advises the owner of the commercial premise that the search is being made with a properly defined scope and pursuant to the law; and (2) it limits the discretion of the inspecting officers. *Id.* (citing *Marshall*, 436 U.S. at 323). The first requirement is met when the statute is "sufficiently comprehensive and defined [so] the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Id.*

(quoting *Donovan*, 452 U.S. at 600). The second requirement is established when the statute is "carefully limited in time, place, and scope." *Id.* (quoting *U.S. v. Biswell*, 406 U.S. 311, 315 (1972). However, the Romulus statute did not advise business owners like Caesar that searches are made with a properly defined scope and pursuant to the law, nor does it limit the discretion of the of the inspecting offer, and therefore, is unreasonable under the *Burger* exception and in violation of the Fourth Amendment.

A statute provides a constitutionally adequate substitute for a warrant when business owners are informed that searches are performed pursuant to statutory authority, are aware of how to comply with the statute, and the "time, place, and scope of the inspection is limited." *Id.* at 711 (quoting *Biswell*, 406 U.S. at 315) (internal quotations omitted). In *Burger*, the statute informed the business owner that inspections would be made on a regular basis. *Id.* The business owner had knowledge the inspections of their property were not discretionary acts of the government, but pursuant to a statue. *Id.* The statute at issue allowed for inspection only of vehicle dismantling and related industries; only during regular business hours; and specifically, only of the records, as well as vehicle parts of vehicles which are on the premises and subject to the record keeping requirements of the statute. *Id.* at 711–12. The *Burger* Court held because the business owner was aware that specifically narrow searches that could only occur during regular business hours would be made on a regular basis and pursuant to the statute, the statute provided a constitutionally adequate substitute for a warrant satisfying the

third factor making it reasonable under the pervasively regulated business exception to the warrant requirement of the Fourth Amendment. *Id.* at 712.

In the present case, the Romulus statute authorizing warrantless searches does not provide a constitutionally adequate substitute for a warrant unlike the statute in *Burger*. Unlike *Burger*, where the statute informed the business owner that inspections would be made on a regular basis and pursuant to a statute and not the government's discretion, the statute in the present case provides a subpoena can be issued "at random" or at the Board's discretion of reasonable suspicion that a hospital is providing substandard care for Miasmic syndrome. R. at 9. Also, unlike *Burger*, where the statute specified searches would only be performed on vehicle dismantling and related businesses, the statute in the present case gives the Board the right to issue a subpoena on any licensed hospital or "any other person or entity within the state." R. at 9. Also unlike *Burger*, where the statute specified searches could only be performed during regular business hours, the statute in the present case has no mention of when the subpoena can be administered, in fact, it was served on Caesar at 8am which is an hour earlier than the regular 9 a.m. – 5 p.m. business hours. R. at 4, 9. Also, unlike *Burger*, where the statute specifically authorized only specific pieces of evidence were subject to search, the statute in the present case allowed for the inspecting agents to collect data on "all claims received from Julius since the start of the pandemic, including medical data underlying each claim." R. at 5. Therefore, since the *Burger* Court held the statute provided a constitutionally adequate substitute for a warrant because it made the business

owner aware that their specific business was subject to a non-discretionary search of specific records and evidence during specifically delineated hours, the dissimilarities to the present case require the opposite result.

This Court should find the Romulus statute did not meet the third *Burger* requirement that the statute must provide a constitutionally adequate substitution for a warrant because it allowed for the Board to search any person or entity within the state at random, it allowed for the Board to recover evidence on all claims and not just the ones specific to Miasmic syndrome, and it did not provide guidance on how and when the Board could conduct the search. Since the statute does not meet the third *Burger* requirement, the warrantless search conducted by the respondent was unreasonable and a violation of Caesar's Fourth Amendment rights.

### C. Cleopatra is not entitled to qualified immunity from suit under 42 U.S.C. § 1983 because she violated Caesar's clearly established Fourth Amendment rights.

Government officials who violate federal statutory or constitutional rights are civilly liable under 42 U.S.C. § 1983. Government officials are entitled to qualified immunity under two conditions: (1) the official violated a federal statutory or constitutional right; and (2) the right was not "clearly established" at the time of the violation. *Wesby,* 138 S. Ct. at 589.

Courts formerly tackled each prong in order. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). After *Pearson v. Callahan*, however, courts are now permitted to conduct the "clearly established" inquiry before determining whether the plaintiff's rights were even violated. 555 U.S. 223, 236 (2009).

Consequently, the Fourteenth Circuit neglected to discuss the merits of Caesar's case because it erroneously held that Caesar's Fourth Amendment rights were not clearly established. R. at 39.

### *1. The Fourteenth Circuit's overly fact-specific analysis of Patel overestimated how factually similar established law must be to defeat Qualified Immunity.*

A law that is "clearly established" must have precedent that places the legality of the official's conduct "beyond debate." *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011). This precedent might be a single controlling authority, or it might be a "consensus of cases of persuasive authority." *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

As the doctrine of Qualified Immunity has developed, this Court has admittedly demanded more and more factual similarities between cases and the precedent that clearly establishes the law.[4]

One notable example is how *Anderson v. Creighton* explained that a "clearly established" law should cause "a reasonable official" to understand that his conduct was illegal. 483 U.S. 635, 640 (1987). Later, *Ashcroft v. al-Kidd*, without comment, intensified that standard to require that "every reasonable official" would understand that their conduct was illegal. 563 U.S. at 741.

[4] Blum, Karen; Chemerinsky, Erwin; and Schwartz, Martin A. (2013) "Qualified Immunity Developments: Not Much Hope Left for Plaintiffs," Touro Law Review: Vol. 29 : No. 3 , Article 9. p 22

This increasing burden is supposedly to protect "all but the incompetent and those who knowingly violate the law" from liability under § 1983. *Wesby*, 138 S. Ct. at 589.

Unfortunately, this burden might also prevent deserving plaintiffs from recovering under § 1983.[5] Plaintiffs in relatively novel situations might struggle to find precedent similar enough to "clearly establish" their statutory or constitutional harm. Meanwhile, qualified immunity might shield an official regardless of whether a plaintiff's rights have been flagrantly violated. *Zadeh*, 928 F.3d at 479.

In *Hope v. Pelzer*, on the other hand, this Court held that a law can still be clearly established when precedent gives government officials "fair warning" that their conduct is unlawful. 536 U.S. 730, 741 (2002). Government officials can be put on notice "even under novel factual circumstances." *Id*. This more lenient "fair warning" standard may seem to be at odds with the level of specificity that is reiterated in the controlling case, *D.C. v. Wesby*, but even *Wesby* indicates that an acceptable precedent for establishing the law does not *necessarily* need to be "directly on point." 138 S. Ct. at 590.

This Court should consider affirming *Hope*'s more flexible fair warning standard as a path forward for § 1983 plaintiffs who have suffered constitutional wrongs, but face being denied remedy because of superficial factual distinctions with otherwise clearly established precedent.

[5] 132 Harv. L. Rev. 2042

### *2. Cleopatra had fair warning that the Fourth Amendment required providing an opportunity for precompliance review of warrantless administrative subpoenas.*

In *City of Los Angeles, Calif. v. Patel*, this Court held that the subject of a warrantless search "must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." 576 U.S. at 420

In *See v. City of Seattle*, this Court held that when an administrative agency issues a warrantless subpoena, the "subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." 387 U.S. 541, 545 (1967).

In *Donovan v. Lone Steer, Inc.*, this Court held that the Secretary of Labor was permitted to issue a warrantless administrative subpoena, but the official must protect the subpoenaed party by "allowing him to question the reasonableness of the subpoena . . . ." 464 U.S. 408, 415 (1984). Additionally, the subpoenaed party must be allowed to "question the subpoena before suffering any penalties for refusing to comply with it." *Id.*

In the present case, Cleopatra ordered a warrantless administrative subpoena of Caesar Health Plan's facility. The subpoena did not provide Caesar Health Plan with an opportunity for neutral precompliance review. R. at 11.

Furthermore, Cleopatra instructed armed men to arrive at Caesar Health Plan's facility just before the deadline for compliance arrived. R. at 4. The men insinuated that there would be legal repercussions if Caesar did not immediate

comply. The men seized medical records that fell outside of the scope of the subpoena. R. at 5.

This Court's consistant stance on warrantless administrative subpoenas has or should have given Cleopatra fair warning that her egregious conduct was violating Caesar Health Plan's clearly established Fourth Amendment rights. Therefore, Cleopatra is not entitled to Qualified Immunity.

## CONCLUSION

This Court should reverse and remand the Fourteenth Circuit's decision because Caesar has proper standing for a civil RICO case, Cleopatra violated Caesar's Fourth Amendment rights, and Cleopatra is not shielded by Qualified Immunity. Caesar has standing for a civil RICO case because Galen's fraudulent representations were the proximate cause of Caesar's injury. Further, the warrantless search ordered by Cleopatra did not afford Caesar the opportunity for precompliance review before a neutral decisionmaker therefore violating Caesar's Fourth Amendment rights. Moreover, Cleopatra is not protected by Qualified Immunity in the present case because it was clearly established at the time of the search that her actions were a violation of the Fourth Amendment. For the foregoing reason, this Court should reverse and remand.

# APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. IV

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

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U.S. Const. Amend. XIV

> "**Section 1.**
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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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."

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18 U.S.C. § 1964

**"(a)** The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

**(b)** The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

**(c)** Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

**(d)** A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States."