No. 2020-01

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2020

CAESAR HEALTH PLAN, INC.,

Petitioner,

v.

LIVIA CLEOPATRA,

Respondent.

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

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BRIEF FOR PETITIONER

Team 222

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

I. Is the proximate cause element of a civil RICO matter satisfied (and therefore, standing conferred) where Caesar Health Plan, as third-party payor, alleges that they would not have underwritten a prescription for Glukoriza as a treatment for Miasmic Syndrome if Galen had not misrepresented the safety risks to prescribers?

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

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STATEMENT OF THE CASE

I. STATEMENT OF FACTS

In May 2019, a new viral disease called "Miasmic Syndrome" was detected in the nation of Alexandria. R. at 1. Within months, Miasmic Syndrome swept across the nation, infecting millions and killing thousands. *Id.*

In September 2019, the results of a clinical trial were published that claimed a drug called Glukoriza could cut the disease's fatality rate in half and hasten patient's recovery. *Id.* Glukoriza was a pre-existing, FDA approved cancer medication created and sold by a small American pharmaceutical company called Galen Research (Galen). *Id.* In fact, Galen is such a small company that it is run as a sole proprietorship by a woman named Livia Cleopatra, who also happened to be the commissioner of the Romulus Board of Health. *Id.*

After the trial results were published, Galen began to massively expand its manufacturing capacity for Glukoriza and began to attempt to persuade physicians to prescribe Glukoriza to Miasmic patients by referencing the clinical trial results. R. at 2. Galen's efforts were successful. *Id.* In November 2019, Julius-Caesar Health System ("Julius"), the largest healthcare provider in the state of Romulus, agreed to make Glukoriza a preferred treatment for Miasmic Syndrome. *Id.* Julius-Caesar Health System has an integrated payor-provider arrangement with a health insurance company called Caesar Health Plan whereby nearly all of Julius' patients are members of Caesar Health Plan. *Id.* When physicians at Julius began to prescribe Glukoriza to treat Miasmic Syndrome, Caesar Health Plan naturally began to cover the treatments. R. at 2-3.

By February 2020, however, it began to become clear that Glukoriza had no significant effect in either curing or ameliorating Miasmic Syndrome. R. at 3. In fact, patients who had received Glukoriza were found to suffer substantial side-effects, including serious loss of kidney function in over 10% of patients. *Id*. Based on these findings, Julius-Caesar jointly removed Glukoriza from its list of recommended treatments for Miasmic Syndrome and Caesar Health Plan stopped covering the drug as a Miasmic Syndrome treatment. *Id.*

In October 2019, the Romulus legislature passed the Emergency Miasmic Syndrome Act in part to address dangerous drugs that were circulating the market as miracle cures for Miasmic Syndrome. *Id.* That legislation authorized the Romulus Board of Health's Commissioner, Livia Cleopatra, to issue subpoenas for the inspection of records held by any medical facility for evidence that they were knowingly or negligently providing substandard care for Miasmic Syndrome. *Id.*

In response to reports that Miasmic Syndrome patients at Julius Medical Center had substandard health outcomes, on March 13, 2020, Cleopatra sent an email to her Deputy Inspector, Marcus Brutus. R. at 3, 12. In that email, Cleopatra attached two subpoenas issued under the authority of RCL § 18.8.891. R. at 4. Cleopatra directed Brutus to execute the subpoenas at the compliance deadline without exception. R. at 12. Further, Cleopatra reiterated that she did not want Julius, nor Caesar Health Plan, to have time to hide anything and that she did not expect any backtalk from the public or those subjected to the subpoenas. *Id.*

On the morning of March 19, 2020, armed agents from the Board of Health demanded that Caesar Health Plan immediately comply with the subpoena. R. at 4.

The agents were only able to secure this compliance by threatening to have all Caesar Health Plan employees arrested for obstruction of justice if they did not immediately turn over all relevant documents and records. R. at 4. Because determining which records were relevant to the subpoena was a time-consuming process, the agents required Caesar to turn over the data on all claims received from Julius since the beginning of the pandemic. R. at 5. After the Board of Health reviewed this data, it suspended Julius's operating license on March 30, 2020. *Id.*

On March 30, 2020, a whistleblower also revealed documents that suggest that Galen had intentionally falsified the results of its Glukoriza clinical trial. *Id.* The documents suggest that Galen falsified data, intentionally chose to not follow up with patients to assess potential side effects, and knew, yet concealed, the fact that some patients had experienced kidney damage as a result of the Glukoriza treatments. *Id.*

In light of the growing scandal, Cleopatra resigned from her position as Commissioner of the Romulus Board of Health, on April 5, 2020. R. at 6. On April 14, 2020, the Board of Health restored Julius's operating license, but by then over 15,000 patients had already cancelled their membership in the Julius-Caesar integrated system during the license suspension. *Id.*

II. NATURE OF THE PROCEEDINGS

Under Romulus law, Livia Cleopatra must personally answer any lawsuit brought against Galen because Galen is a sole proprietorship. *Id.* Accordingly, on May 1, 2020, Caesar Health Plan filed a civil action against Livia Cleopatra in the federal district court for the District of Romulus alleging claims under the Racketeer Influenced and Corrupt Organization Act (RICO) and The Civil Rights Act of 1871.

Id.

Under its RICO claim, Caesar Health Plan alleges that Cleopatra, under her alter ego of Galen Research, induced Caesar Health Plan to cover Glukoriza as a Miasmic Syndrome treatment by means of fraud, and absent this fraud no payments for the drug as a Miasmic Syndrome treatment would have been made. *Id.* Caesar Health Plan seeks damages only for the amount of money paid to Galen for Glukoriza as a Miasmic Syndrome treatment. *Id.*

Under its Civil Rights Act claim, Caesar Health Plan alleges that Cleopatra, in her capacity as Commissioner of the Romulus Board of Health, authorized an unconstitutional search of its premises which is prohibited under the Fourth and Fourteenth Amendments. *Id.* Caesar Health Plan seeks damages for their reputational injury and lost premiums from members who have left the Julius-Caesar system following the suspension of Julius's license to operate. *Id.*

Cleopatra filed a 12(b)(6) motion to dismiss both claims for failing to state a claim. *Id.* In her motion, Cleopatra claimed that the RICO claim should be dismissed because Caesar Health Plan lacks standing to allege a RICO violation because it was a mere third-party payor. R. at 7. In her motion, Cleopatra also claimed that the Civil Rights Act claim should be dismissed because the subpoena and its method of execution did not violate any cognizable constitutional right. *Id.* In the alternative, Cleopatra also claimed that even if a constitutional right was violated, Caesar Health Plan's suit should be barred under the doctrine of qualified immunity because any such right was not clearly established at the time of the execution of the subpoena. *Id.*

The District Court denied Cleopatra's motion to dismiss in its entirety on May 30, 2020. *Id.* The District Court held that Caesar Health Plan had adequately pled the proximate cause element of its RICO claim, thereby giving Caesar Health Plan standing to bring a RICO claim. R. at 14. The District Court also held that Caesar Health Plan adequately pled its Civil Rights Act Claim because the subpoena violated Caesar Health Plan's Fourth Amendment rights. R. at 24. Therefore, the District Court found that Cleopatra's conduct was clearly established as unlawful and that she was not entitled to qualified immunity. R. at 26-27.

Cleopatra then appealed the District Court's decision to the Fourteenth Circuit Court of Appeals on June 11, 2020. R. at 7. On July 3, 2020, the Fourteenth Circuit granted Cleopatra's motion to dismiss both claims, finding that Caesar Health Plan had not adequately pled the proximate cause element of its RICO claim and that while the subpoena may have violated the Fourth Amendment, Cleopatra was nevertheless entitled to qualified immunity because the unlawfulness of her conduct was not clearly established. R. at 35, 38.

Caesar Health Plan petitioned the United States Supreme Court for a writ of certiorari on July 17, 2020 and this petition was granted on September 14, 2020. R. at 7.

SUMMARY OF ARGUMENT

The judgment of the Court of Appeals for the Fourteenth Circuit should be reversed because Caesar Health Plan adequately pled its RICO and Civil Rights Act claims against Livia Cleopatra.

Caesar Health Plan adequately pled its RICO claim because if the facts alleged are true, then proximate causation can be established under common-law principles without offending the policy concerns outlined in *Holmes*.

Caesar Health Plan adequately pled its claim under 42 U.S.C. § 1983 because if the alleged facts are proven, they show that Cleopatra's order violated Caesar Health Plan's clearly established rights under the Fourth Amendment. Therefore, Cleopatra is not protected from liability under the doctrine of qualified immunity. If this Court were to find that Caesar Health Plan's right was not clearly established at the time of the search, then this Court should consider amending the doctrine of qualified immunity because it no longer adequately protects constitutional rights.

Because Caesar Health Plan adequately pled its RICO and Civil Rights Act claims against Livia Cleopatra, the judgment of the Court of Appeals for the Fourteenth Circuit should be reversed.

ARGUMENT

A well-pled complaint must contain **"**a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. When reviewing a motion to dismiss for failure to state a claim, the Court must accept all factual allegations in the complaint as true. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,

551 U.S. 308, 322 (2007). A plaintiff successfully states a claim when the complaint alleges facts that, when assumed to be true, make it seem plausible that plaintiff is entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim can be sufficiently pled even when it seems unlikely that the facts alleged can actually be proven and when actual recovery on the merits is therefore improbable. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

The judgment of the Court of Appeals for the Fourteenth Circuit should be reversed because Caesar Health Plan adequately pled its RICO and Civil Rights Act claims against Livia Cleopatra.

I. CAESAR HEALTH PLAN PLAUSIBLY ALLEGED THE PROXIMATE CAUSE ELEMENT OF ITS RICO CLAIM.

The judgment of the Court of Appeals for the Fourteenth Circuit should be reversed because Caesar Health Plan adequately pled the proximate cause element of its RICO claim. The "direct relation" test for proximate causation is satisfied because if the facts Caesar Health Plan alleges are true, then proximate causation can be established under common-law principles without offending the policy concerns discussed in *Holmes*.

To recover under a civil RICO action, a plaintiff must be injured "by reason of" a RICO violation. 18 U.S.C. § 1964(c). This Court has interpreted this to mean that to recover under a RICO action a plaintiff must establish both "but for" causation and proximate causation. *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992).

Proximate causation is a "flexible concept that does not lend itself to a black-

letter rule that will dictate the result in every case." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008). Rather, proximate causation reflects "ideas of what justice demands, or of what is administratively possible and convenient." *Id.* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton, *Law of Torts* § 41, (5th ed. 1984)). There is no question that some limit on the scope of liability for tortious conduct is necessary. Restatement (Third) of Torts § 29 cmt. a (Am. Law Inst. 2010). The only difficulty is in working out the framework to determine the limit. *Id.*

The framework to determine the limit of proximate causation in RICO claims is to ask whether there is "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. Three policy reasons for instituting this "direct relation" requirement were given by this Court in *Holmes* and each will be discussed in greater detail later in this brief. *See id.* at 269-70.

Proximate causation in RICO claims should "be evaluated in light of its common-law foundations." *Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 9 (2010). Indeed, when describing the new "direct relation" test it was instituting for RICO claims, this Court held that "among the many shapes [proximate causation] took at common law . . . was a demand for some direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268 (alteration in original) (citation omitted).

The "direct relation" test is therefore an attempt to paraphrase common-law principles rather than an attempt to supersede them. Common-law proximate cause

principles are therefore still extremely relevant to the "direct relation" inquiry. If a RICO plaintiff can establish proximate causation under common-law principles without offending the policy concerns of *Holmes*, the "direct relation" test should be satisfied.

Caesar Health Plan has sufficiently pled the proximate cause element of its RICO claim because if the facts alleged are true, proximate causation can be established under common-law principles without offending the policy concerns of *Holmes*.

A. Caesar Health Plan can establish proximate causation under common-law principles.

Caesar Health Plan's injury was foreseeable and the causal chain linking Galen's fraud to Caesar Health Plan's injury was not severed by any intervening cause. At common law, the scope of liability for intentional acts, such as fraud, is also generally greater than that for acts of mere negligence. Accordingly, under common-law principles, Caesar Health Plan can establish proximate causation.

1. Caesar Health Plan's injury was foreseeable.

The common law has often used a foreseeability test to determine whether proximate causation exists in a given case. Under the typical common-law foreseeability test, a defendant is liable only for the harms he foreseeably risked by his conduct and to the class of persons he put at risk by that conduct. Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, *The Law of Torts* § 198 (2d ed. 2011).

The harm in question here is Caesar Health Plan paying for Glukoriza treatments. The conduct in question is Galen intentionally misrepresenting

Glukoriza's potential side-effects to physicians.

Galen presumably made the misrepresentations because it wanted physicians to begin prescribing Glukoriza to Miasmic patients. Galen presumably wanted physicians to begin prescribing Glukoriza because it wanted to be paid for the treatments. Therefore, not only was it foreseeable that Galen's misrepresentations might cause Caesar Health Plan to begin paying for Glukoriza treatments, getting Caesar Health Plan to pay for the treatments was likely the *purpose* of making the misrepresentations in the first place.

Caesar Health Plan therefore belongs to the class of persons Galen *sought* to put at risk by its conduct and the harm Caesar Health Plan incurred was the very harm Galen *sought* to bring about. Therefore, under a common-law foreseeability test, proximate causation can be established and Galen held liable to Caesar Health Plan.

2. It is not an intervening cause that physicians prescribed Glukoriza.

At common law, even if proximate causation can be established under a foreseeability test, a court may still find that no proximate causation exists if there is an intervening cause that is significant enough to sever the causal chain between the defendant's conduct and the plaintiff's injury. *See Scheffer v. Washington City,* V.M. & G.S.R. Co., 105 U.S. 249 (1881).

According to the typical intervening cause test, when a first actor wrongly creates a risk of harm, but the immediate trigger of the harm is a second actor and this second actor causes a harm that is unforeseeable and outside the scope of the

risk originally created by the first actor, the second actor is said to be an intervening cause that relieves the first actor of liability. Dobbs, Hayden & Bublick, *supra*, § 204.

Here, it is arguably the case that the more immediate cause of Caesar Health Plan's injury was the act of physicians prescribing Glukoriza, rather than the actions of Galen. Even if this is true, however, it is still not enough to relieve Galen of liability because, as previously discussed, the harm that Caesar Health Plan sustained was perfectly foreseeable and was well within the scope of the risk originally created by Galen.

In *Bridge*, this Court also held that it is possible for proximate causation to exist in a RICO claim even when the alleged misrepresentations were only made to a third party and were never made directly to the plaintiffs. 553 U.S. at 657-59. In *Bridge*, when tie bids occurred during property tax lien auctions, one of the tie-bidders was selected by the county to receive the lien "on a rotational basis." *Id.* at 643. To prevent parties from colluding with each other to get a disproportionate number of the tie-breaker liens, the county enacted a single bidder rule that required participates in the auction to certify via a sworn affidavit that one's bid was only his own and that one was not an agent of another bidder. *Id.* Defendants allegedly violated this rule by submitting fraudulent affidavits via the mail. *Id.* at 644. Plaintiffs filed a RICO suit against the defendants claiming that this fraudulent conduct was a RICO violation that caused the plaintiffs to lose auctions that they otherwise would have won. *Id.*

Defendants claimed there was no proximate causation because the plaintiffs were not the direct recipients of the misrepresentations and when the county wrongly allowed the defendants to participate in the auctions, the county became an intervening cause that broke the causal chain. *Id.* at 648. This Court rejected that argument, however, holding that because the county didn't know the attestations were false, the county allowing the defendants to participate in the auctions was not an intervening cause. *Id.* at 658-59.

This Court explained that first-party reliance on a misrepresentation is not "an indispensable requisite of proximate causation." *Id*. at 659. Instead, a RICO plaintiff just must "establish at least third-party reliance in order to prove causation." *Id*. Because the defendants made misrepresentations to the County and the County then relied on them causing plaintiff harm, proximate causation could be established and defendants could be held liable to plaintiffs. *Id*. at 654-661.

Like the county in *Bridge*, the physicians here didn't know and couldn't have known that Galen's representations were false. Like in *Bridge*, Galen made misrepresentations to the physicians and the physicians then relied on them causing Caesar Health Plan harm. Therefore, just as in *Bridge*, the causal chain is not broken here and proximate causation can be established.

Because the actions of physicians were not an intervening cause that broke the causal chain between Galen's RICO violation and Caesar Health Plan's injury, Caesar Health Plan can establish proximate causation under both the foreseeability and intervening cause tests.

3. The scope of liability for intentional and reckless acts is greater than the scope of liability for acts of mere negligence.

Even though proximate causation can be established here via the common-law foreseeability and intervening cause tests, which are typically used when assessing liability for acts of negligence, because the wrongful conduct alleged here is willful, rather than merely negligent, the existence of proximate causation here is even more compelling.

The common law holds that an "actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently." Restatement (Third) of Torts § 33. And even more expansively that "[o]ne who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances." Restatement (Second) of Torts § 870 (Am. Law Inst. 1979).

Here it is alleged that Galen intentionally misled physicians about the risks of Glukoriza, in the hope that Caesar Health Plan would begin paying Galen for Glukoriza treatments as a result. Under the principles of the Second Restatement, this may amount to tortious conduct that would make Galen liable to Caesar Health Plan in and of itself. *See id*. However, given that Galen's conduct was allegedly willful rather than merely negligent, at the very least, the scope of liability for Galen's actions should be greater than usual.

Because proximate causation can be found here even under the normal foreseeability and intervening cause tests that typically apply to acts of negligence,

the fact that Galen allegedly acted intentionally, rather than merely negligently, makes the existence of proximate causation here even more compelling.

B. Finding proximate causation here would not offend the policy concerns of Holmes.

As previously mentioned, in *Holmes* this Court gave three policy reasons why proximate causation should be limited in civil RICO actions. 503 U.S. at 268. None of the policy concerns, however, would be offended by a finding of proximate causation here.

The first *Holmes* policy concern is that "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." *Id.* Here, however, the only damages Caesar Health Plan seeks is for the amount of money it paid Galen for Glukoriza Miasmic Syndrome treatments. R. at 6. This is a fixed and easily ascertained dollar amount. If it is true, as Caesar Health Plan alleges, that it would not have paid anything to Galen for Glukoriza Miasmic Syndrome treatments, absent Galen's RICO violation, then there is no difficulty here in ascertaining the damages attributable to the alleged violation. Therefore, finding proximate causation here would therefore not offend the first policy concern of *Holmes*.

The second *Holmes* policy concern is that "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs . . . to obviate the risk of multiple recoveries." 503 U.S. at 268. Again, however, Caesar Health Plan is only seeking damages for the amount it paid Galen for Miasmic Syndrome Glukoriza treatments. Galen's misconduct may have injured

multiple parties, including patients, physicians and third-party payors like Caesar Health Plan; however, each parties' potential damages are quite distinct from each other's. The economic damages Caesar Health Plan is seeking relief for here are distinct from the economic and pain and suffering damages an injured patient may be entitled to and is distinct from any damages a physician may be entitled to.

The only chance of an overlap of damages here is if a patient were to seek recovery for the full price of a Glukoriza treatment, rather than for only the amount the patient paid out-of-pocket. Should this arise, however, the patient can simply be barred from recovering more than he paid out-of-pocket. This hardly seems to involve any "complicated rules" regarding apportionment of damages. A finding of proximate causation here would therefore also not offend the second policy concern of *Holmes*.

Finally, the third *Holmes* policy concern is that allowing indirectly affected plaintiffs to recover may not be necessary to further the public's interest in deterring injurious conduct because more directly affected plaintiffs will be able to recover. *Id.* Here, however, Caesar Health Plan is a directly affected plaintiff. Regarding the harm that Caesar Health Plan is seeking relief for – the amount it paid Galen for the Miasmic Syndrome Glukoriza treatments – no one is a more direct victim than Caesar Health Plan. If a party directly injures another, it cannot avoid liability simply because its conduct also directly injured others. Because Caesar Health Plan is a directly affected plaintiff, the third *Holmes* policy concern would also not be offended by a finding of proximate causation here.

In conclusion, if the facts alleged by Caesar Health Plan are true, then proximate causation can be established under well-settled common-law principles without offending the policy concerns outlined in *Holmes*. The "direct relation" test is thereby satisfied, and Caesar Health Plan has therefore adequately pled the proximate cause element of its RICO claim. The judgment of the Fourteenth Circuit Court of Appeals should therefore be reversed.

II. CAESAR HEALTH PLAN'S ALLEGATIONS SHOW THAT CLEOPATRA'S ORDER VIOLATED THE FOURTH AMENDMENT AND THAT CLEOPATRA IS NOT ENTITLED TO QUALIFIED IMMUNITY.

The judgment of the Fourteenth Circuit Court of Appeals should also be reversed because if Caesar Health Plan's allegations are proven, then Cleopatra's order to enforce the administrative subpoena clearly violated Caesar Health Plan's Fourth Amendment right to be free from unreasonable and warrantless searches. Under this Court's doctrine of qualified immunity, claimants must first show that "the government official [] violated a federal statutory or constitutional right" to potentially hold that official liable under 42 U.S.C. § 1983. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (citation and internal quotations omitted).

Cleopatra's order to enforce the subpoena offered Caesar Health Plan no opportunity to obtain precompliance review. This violated this Court's clearly established administrative search doctrine which prohibits government officials from leaving a business owner with the choices of being arrested or immediately complying with a warrantless search.

Even if this Court were to find health insurance companies are part of a

closely regulated industry, Cleopatra's order also violates this Court's clearly established closely regulated industry doctrine. Warrantless searches are not necessary to further the regulatory scheme and the searches authorized by the regulatory scheme provide no constitutionally adequate substitute for a warrant in either the scope or regularity of their application.

A. The search did not satisfy the administrative search doctrine because Caesar Health Plan had no opportunity for precompliance review.

The administrative search ordered by Cleopatra under the authority given by RCL § 18.8.891 violated the Fourth Amendment because Caesar Health Plan was given no opportunity for precompliance review. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," by requiring a warrant supported by probable cause, which must also "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "The basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court of San Francisco*, 367 U.S. 523, 528 (1967).

In applying the Fourth Amendment, the primary governing principle is that "except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant." *Camara*, 367 U.S. at 528-529 (citations omitted). This Court has further held that the presumptive unreasonableness of warrantless searches applies to commercial property as well as personal residences:

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

See v. Seattle, 387 U.S. 541, 543 (1967). The Fourth Amendment also requires certain limitations on administrative agency subpoenas of corporate records. *See*, 387 U.S. at 544-545. In addition to limitation of scope, relevant purpose, and specific directives for compliance, administrative subpoenas must also offer "the subpoenaed party [an opportunity for] judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *Id.*

These principles from *Camara* and *See* evolved into what this Court has begun to call the administrative search doctrine. Thereunder, a potential exception to the warrant requirement for "administrative search[es]" may exist where the searches serve special needs other than the need to conduct criminal investigations and those special needs make the warrant and probable cause requirements impracticable. *City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015) (quoting *Camara*, 367 U.S. at 534). Even where a distinguishable special need is recognized, the search must offer an opportunity for precompliance review: "absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded and opportunity to obtain precompliance review before a neutral decisionmaker." 576 U.S. at 420 (citations omitted).

In *Patel* this Court held that a city ordinance lacking an opportunity for hotel

operators to seek precompliance review prior to inspection was facially invalid and unconstitutional because it "create[d] an intolerable risk that searches authorized by [the ordinance] will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests." 576 U.S. at 421. Therein, a group of motel operators successfully brought a facial challenge against a city ordinance which required hotel operators to keep certain guest records. *Patel*, 576 U.S. at 412-414. The ordinance was found to be unconstitutional for its provision which required hotel operators to make their records available for police inspection or be guilty of a misdemeanor for failure to do so. *Id.* The Court explained their conclusion by reiterating that business owners cannot be given a choice between compliance or being arrested. *Patel*, 576 U.S. at 421. The Court also emphasized the hotel operator's proposition that searches authorized by the ordinance and conducted pursuant to an administrative subpoena could provide a sufficient opportunity for precompliance review before "a *neutral* decisionmaker, including an administrative law judge." *Patel*, 576 U.S. at 422 (emphasis added).

Here, the subpoenas issued by Cleopatra offered Caesar Health Plan no opportunity for judicial review before Caesar Health Plan employees would suffer penalties for not complying. R. at 4. The Board of Health's armed agents were only able to secure compliance after they threatened to have all of Caesar Health Plan's present staff arrested for obstruction of justice if they did not submit to the search. R. at 4. The actions taken by the agents run directly afoul of the requirement of precompliance judicial review, which was clearly established in *Patel*. Moreover, the

agents failed to inform Caesar Health Plan employees that RCL § 18.8.891(e) afforded Caesar Health Plan the opportunity to petition the subpoena before the Board of Health. R. at 9. Additionally, the subpoena itself contained no mention of this important function of the Emergency Miasmic Syndrome Act. R. at 11. Cleopatra also ignored this important function in her directives to Deputy Inspector Brutus. R. at 12.

Cleopatra's order and the agents' execution of a warrantless search are justified neither by consent nor exigent circumstances. Caesar Health Plan's employees' acquiescence to the search did not equate to consent, in the constitutional sense. *See United States v. Biswell*, 406 U.S. 311, 315 (1972) (opining that consent does not establish the lawfulness of a search, but rather a lawful authorization of the officials' actions may). There is also no Court-recognized exigent circumstance which could justify Cleopatra's order and the agent's enforcement of the subpoena. *See Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (citations omitted). Cleopatra seems to suggest that she was concerned about the destruction of evidence by Caesar Health Plan. R. at 12. However, this Court has repeatedly held that "ambiguous conduct cannot form the basis for a belief of the officers that . . . destruction of evidence is being attempted." *Ker v. California*, 374 U.S. 23, 57 (1963) (citation omitted). Moreover, the agents could "not rely on the need to prevent destruction of evidence [if] that exigency was 'created' or 'manufactured' by the[ir] [own] conduct . . . ." *Kentucky v. King*, 563 U.S. 452, 461 (2011) (citation omitted).

Furthermore, in *See* this Court observed that administrative agency subpoenas must be limited in scope, as well as purpose, and must also contain specific directives for compliance. 387 U.S. at 544-45. RCL § 18.8.891(c) clearly states that the scope of each subpoena issued "shall be no broader than is reasonably required to determine whether a Hospital is providing substandard care for Miasmic Syndrome." R. at 9. However, the subpoena served on Caesar Health Plan placed no limits on the scope of the documents requested other than they be "related to the diagnosis and/or treatment of Miasmic Syndrome, or [r]elated to patients who are suspected of carrying Miasmic Syndrome." R. at 11. Moreover, under directions from Cleopatra the "agents required Caesar to turn over data on all claims received from Julius since the start of the pandemic, including the medical data underlying each claim." R. at 5, 24. Not only did the search exceed the statutory limits on scope imposed by RCL § 18.8.891(c), it also exceeded the search's permissible purpose. R. at 9. It is irrelevant whether the subpoena itself contained specific directives for compliance because the agents did not allow Caesar Health Plan employees any time to distinguish which records were related to Miasmic Syndrome care. R. at 5.

The subpoena issued by Cleopatra and enforced by her agents satisfied none of the clearly established requirements of this Court's administrative search doctrine. Caesar Health Plan had no opportunity for precompliance review, consent was not voluntarily given, and no exigent circumstances applied. Furthermore, the subpoena was enforced in such a way that the scope of the search was unlimited. As

such, Cleopatra's order to enforce the subpoena violated Caesar Health Plan's right to be free from unreasonable and warrantless searches.

B. The regulatory scheme does not satisfy the closely regulated industry doctrine.

Even if this Court does find that Caesar Health Plan is subject to a comprehensive regulatory scheme over a closely regulated industry, warrantless inspections are not necessary to further that regulatory scheme. Additionally, the searches under that regulatory scheme provide no constitutionally adequate substitute for a warrant.

"An owner or operator of a business [] has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable." *New York v. Burger*, 482 U.S. 691, 699 (1987) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). This expectation of privacy exists "with respect to administrative inspections designed to enforce regulatory statutes." *Burger*, 482 U.S. at 699 (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-313 (1978)). However, this Court has recognized that certain closely regulated industries have an extensive history of government oversight which makes unreasonable any expectation of privacy held by owners or operators of such businesses. *Marshall*, 436 U.S. at 313. However, this Court has been cautious to extend this rule to industries other than the four which have been recognized as having no reasonable expectation of privacy. *Patel*, 576 U.S. at 424. Furthermore, this Court has refused to extend this rule to hotels because "nothing inherent in [their operation] poses a clear and significant risk to the public welfare[]", "unlike liquor sales . . . , firearms dealing . .

. , mining . . . , or running an automobile junkyard . . . ." *Id.* (citations omitted).

Even in the context of those four closely regulated industries, "warrantless inspection[s] . . . will be deemed to be reasonable only so long as three criteria are met." *Burger*, 482 U.S. at 702. "First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made." *Id.* (citations omitted). "Second, the warrantless inspections must be *necessary* to further the regulatory scheme." *Id.* (citation omitted) (emphasis added). And third, "the statute's inspection program, in terms of the *certainty and regularity* of its application, must provide a constitutionally adequate substitute for a warrant." *Burger*, 482 U.S. at 703 (citation omitted) (emphasis added).

1. Warrantless inspections are not necessary to further the regulatory scheme.

In *Marshall v. Barlow's, Inc.* the Court found that a provision of the Occupational Safety and Health Act of 1970 permitting warrantless inspections was unconstitutional because requiring a warrant would not "impose serious burdens on the inspection system or the courts, [would not] prevent inspections necessary to enforce the statute, [and would not] make them less effective." 436 U.S. at 316. The challenge to this provision commenced after an electrical and plumbing installation business owner refused to allow an inspector to enter the nonpublic area of his business. *Id.* at 309-310. The Court reasoned that "[t]he authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers . . . . A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable . . . and is pursuant to an

administrative plan containing specific neutral criteria." *Id.* at 323. Further, the Court limited that holding to the inspection provisions of that statute while noting that the "reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute." *Id.* at 321.

In *Donovan v. Dewey* the Court held in part that "the warrantless inspections required by the Mine Safety and Health Act [did] not offend the Fourth Amendment." 452 U.S. 594, 602 (1980). There, a president of a mining company refused to allow an inspection to continue without a search warrant. *Id.* at 597. The Court reasoned that because "Congress expressly recognized that a warrant requirement could significantly frustrate effective enforcement of the Act[,]" it was proper to defer to such legislative determination. *Id.* at 603.

There is no evidence in the record, or in the Emergency Miasmic Syndrome Act, that warrants could not have been obtained without overly burdening the court system. Rather, there is evidence that the courts would have been underwhelmed with warrant requests from the Romulus Board of Health's Commissioner. Cleopatra did not issue the first subpoenas under RCL § 18.8.891 until seven months after she was given the authority to do so. R. at 3, 12. There is also no evidence in the record that getting a warrant would have prevented the inspections necessary to enforce the Emergency Miasmic Syndrome Act. Given that the Romulus legislature noticed the availability of dangerous drugs, R. at 3, and that the Romulus Board of Health had received reports that Julius Medical Center's Miasmic Syndrome patients "had notably worse health outcomes than patients seen

elsewhere in the state[,]" R. at 4, it is very likely that getting a warrant would not have prevented Cleopatra's efforts to enforce the Emergency Miasmic Syndrome Act. Similarly, there is no evidence in the record that getting a warrant would even make such inspections less effective.

Unlike the Mine Safety and Health Act upheld in *Donovan v. Dewey*, the Emergency Miasmic Syndrome Act contains no express recognition that "a warrant requirement could significantly frustrate effective enforcement . . . ." 452 U.S. at 603. The Emergency Miasmic Syndrome Act is much more comparable to the lack of specific criteria, the lack of independent review for reasonableness, and the presence of unrestrained administrative discretion in the Occupational and Safety Health Act of 1970. *See Marshall v. Barlow's, Inc.*, 436 U.S. at 321. Warrantless inspections are not necessary to enforce the regulatory scheme under the Emergency Miasmic Syndrome Act.

2. The uncertain and irregular application of searches under the regulatory scheme are not constitutionally adequate substitutes for a warrant.

The Court also held in *Donovan v. Dewey* that the Mine Safety and Health Act's inspection program provided constitutionally adequate substitutes for a warrant, "in terms of the certainty and regularity of its application." 452 U.S. at 603. The Court reasoned that the statute is specifically tailored to address the "notorious history of serious accidents and unhealthful working conditions." *Id.* As to regularity, the Court pointed out that "the Act requires inspection of all mines and specifically defines the frequency of inspection." *Id.* at 603-04. As to certainty,

the Court observed that "the standards with which a mine operator is required to comply are all specifically set forth in the Act . . . ." *Id.* Moreover, the Court observed that the statute also "provides a specific mechanism for accommodating any special privacy concerns that a specific mine operator might have[]" – a prohibition on forcible entries and a requirement that "the Secretary [of Labor], when refused entry onto a mining facility, to file a civil action in federal court to obtain an injunction against future refusals." *Id.* at 604-05 (citation omitted). The Court reasoned that cumulatively, these provisions did not leave the mine operator "left to wonder about the purposes of the inspector or the limits of his task." *Id.* at 604 (quoting *United States v. Biswell*, 406 U.S. 311, 316 (1972)).

Health insurance companies like Caesar Health Plan cannot be certain about the standard for the enforcement of administrative subpoenas under the Emergency Miasmic Syndrome Act. First, there is no history of searches like the mine operators should have reasonably expected under the Mine Safety and Health Act. *See Donovan v. Dewey*, 452 U.S. at 603. Second, the Emergency Miasmic Syndrome Act does not require inspection of all health insurance companies, or licensed hospitals, unlike the Mine Safety and Health Act's requirement that all mines be inspected. *Id.* at 603-04. The Emergency Miasmic Syndrome Act provided no level of certainty to Caesar Health Plan or other health insurance companies.

Caesar Health Plan could not be certain about the regularity of searches under the Emergency Miasmic Syndrome Act either. The only hint as to when these searches might occur is linked to the Board of Health's discretion in determining "if

a licensed [h]ospital is providing substandard care for Miasmic Syndrome." R. at 9. Subpoenas can also be issued to hospitals at random under RCL § 18.8.891. R. at 9. Given that Cleopatra did not issue any subpoenas under RCL § 18.8.891 until seven months after the legislations' enactment, it would be unreasonable to hold that Caesar Health Plan should have expected a regularly-enforced search regime under the Emergency Miasmic Syndrome Act. R. at 3, 12.

Furthermore, RCL § 18.8.891 is not tailored to any specific history of abuse present in health insurance companies, nor does the Emergency Miasmic Syndrome Act note any such history of abuses. While RCL § 18.8.891(d)-(e) may contain something akin to a prohibition on forcible entries like the Mine Safety and Health Act, *Donovan v. Dewey*, 452 U.S. at 604-05, Cleopatra's order and the agents' subsequent enforcement plainly ignored the processes set out by the Romulus legislature for the situation where "an entity fails to comply with a subpoena." R. at 9. For these reasons, RCL § 18.8.891 contains no constitutionally adequate substitutes for a warrant. And as a result, Caesar Health Plan was "left to wonder about the purposes of the inspector[s] or the limits of [their] task." *Donovan v. Dewey*, 452 U.S. at 604 (quoting *United States v. Biswell*, 406 U.S. 311, 316 (1972)). Therefore, Cleopatra's order to enforce the administrative subpoenas issued under the regulatory scheme violated requirements of the clearly established closely regulated industry doctrine. Accordingly, Cleopatra's actions violated Caesar Health Plan's right to be free from warrantless searches under the Fourth Amendment.

C. Qualified immunity should not be available because the unlawfulness of Cleopatra's conduct was clearly established at the time of the search.

Cleopatra is not entitled to qualified immunity because her conduct was clearly established as unlawful at the time of the search. This Court's doctrine of qualified immunity under 42 U.S.C. § 1983 offers government officials insulation from liability unless two conditions are met. First, "the government official must "have violated a federal statutory or constitutional right". *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (citation and internal quotations omitted). Cleopatra's conduct has been shown to have violated Caesar Health Plan's right to be free from unreasonable and warrantless searches under the Fourth Amendment and this Court's administrative search and closely regulated industry doctrines.

Second, "the unlawfulness of [the official's] conduct [must have been] clearly established at the time." *Id.* This Court has explained that "[i]t is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Wesby*, 138 S. Ct. at 590 (citation omitted). While this clearly established standard does "require[] that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him," it does not necessarily require the precedential cases to be directly on point. *Wesby*, 138 S. Ct. at 590 (citations omitted). When measuring an official's actions and the circumstances before them against the rules set by the applicable precedent, this Court has held that "[a] rule is too general if the unlawfulness of the officer's conduct does not follow immediately from the conclusion that the rule was firmly

established." *Wesby*, 138 S. Ct. at 590 (internal quotations and citation omitted). This Court has further clarified that "[o]f course, there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Websy*, 138 S. Ct. at 590 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)).

The right of owners of commercial premises to be free from warrantless searches and seizures was clearly established at the time of Cleopatra's order to execute the subpoena. *See generally City of Los Angeles v. Patel*, 576 U.S. 409 (2015); *see also New York v. Burger*, 482 U.S. 691 (1981). The rules set forth in this Court's jurisprudence are not mere suggestions, but rather they are concrete requirements which leave no ambiguity as to their necessity. Under the administrative search doctrine, an opportunity for precompliance review must be offered for the search to be constitutional. Under the closely regulated industry doctrine, warrantless inspections must be necessary to further the regulatory scheme and that scheme must provide constitutionally adequate substitutes in both the certainty and regularity of searches. The circumstances before Cleopatra in this situation are neither significantly, nor constitutionally, different from the regimes which this Court has analyzed in developing its jurisprudence under these two doctrines. The government interest in regulating health insurance companies, or the medical profession generally, is less relevant because Cleopatra's order to enforce the administrative subpoenas clearly violated the administrative search and closely regulated industry doctrines. R. at 12.

Therefore, Cleopatra should not be protected from liability under 42 U.S.C. § 1983 by the doctrine of qualified immunity because Caesar Health Plan has alleged sufficient facts to make out a violation of the Fourth Amendment. If the Court finds that this right was not clearly established, then the Court should consider amending the doctrine of qualified immunity because it has devolved in a way that no longer adequately protects constitutional rights nor adheres to the text of 42 U.S.C. § 1983.

1. If this Court finds that Cleopatra's actions did not violate a clearly established right, then this Court should consider amending the doctrine of qualified immunity.

Congress enacted what is now codified, as amended, at 42 U.S.C. § 1983 to respond to a deep history of racial abuses in the Southern States. *Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from denial of certiorari) (quoting *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983)). The language of 42 U.S.C. § 1983 "[p]ut in simpler terms, [] [gives] individuals a right to sue state officers for damages to remedy certain violations of their constitutional rights." *Baxter*, 140 S. Ct. at 1862 (Thomas, J., dissenting from denial of certiorari). It was not until the 1950s that this Court began to question whether the common law contemporary with the law's enactment in 1871 "would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983." *Baxter*, 140 S. Ct. at 1863 (Thomas, J., dissenting from denial of certiorari) (citation and internal quotations omitted). "Th[is] Court [] extended a qualified defense of good faith and probable cause to police officers sued for unconstitutional arrest and detention[]" in 1967. *Baxter*, 140 S. Ct at 1863 (Thomas, J., dissenting from denial of certiorari) (citing

Pierson v. Ray, 386 U.S. 547, 557 (1967)). In *Harlow v. Fitzgerald*, this Court eliminated the subjective analysis of good faith from the qualified immunity question, somewhat as a cost-saving decision. 457 U.S. 800 (1982). Moreover, this Court extended that holding to 42 U.S.C. § 1983 without considering the statutory text because "it would be untenable to draw a distinction for purposes of immunity law." *Harlow*, 457 U.S. at 818 (citation and internal quotations omitted). This Court adopted, and has continued to apply, this objective test based on the primary justification that it achieves a balance between competing values about litigation costs and efficiency. *Harlow*, 457 U.S. at 816.

It is unclear why these objective considerations should prevail over the interests of citizens in recovering against a government official who violates their constitutional rights. If any defense should be available to such a government official, it should be within the common law good-faith defense. *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from denial of certiorari). This Court should reconsider its doctrine of qualified immunity if it finds that Cleopatra's unlawful conduct was not clearly established at the time of the subpoena's execution.

CONCLUSION

Because Caesar Health Plan sufficiently pled its RICO and Civil Rights Act claims against Cleopatra, the judgment of the Fourteenth Circuit should be reversed.

Respectfully submitted,

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ATTORNEY FOR
PETITIONER