No. 17-50518

In the United States Court of Appeals for the Fifth Circuit

DOCTOR JOSEPH A. ZADEH; JANE DOE, PATIENT,
Plaintiffs-Appellants,

v.

MARI ROBINSON, IN HER INDIVIDUAL CAPACITY AND IN HER OFFICIAL CAPACITY; SHARON PEASE, IN HER INDIVIDUAL CAPACITY; KARA KIRBY, IN HER INDIVIDUAL CAPACITY,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
Civil Action No. 1:15-cv-598-RP

BRIEF FOR APPELLEES

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No. 17-50518

Dr. Joseph Zadeh; Jane Doe, Patient,
Plaintiffs-Appellants,

v.

Mari Robinson, in Her Individual Capacity and in Her Official Capacity; Sharon Pease, in Her Individual Capacity; Kara Kirby, in Her Individual Capacity,
Defendants-Appellees.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Statement Regarding Oral Argument

If this Court finds that oral argument would be helpful in resolving the issues in the case, Appellees request an opportunity to present oral argument.

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INTRODUCTION

In 2015, more than 2 million people in the United States "had a substance use disorder involving prescription pain relievers." Am. Soc. of Addiction Medicine, *Opioid Addiction 2016 Facts & Figures* (2016), https://www.asam.org/docs/default-source/advocacy/opioid-addiction-disease-facts-figures.pdf. And opioid addiction is driving the overdose epidemic, "with 20,101 overdose deaths related to prescription pain relievers" in 2015 alone. *Id.* These numbers have been increasing over the past two decades, with 2012 showing 259 million prescriptions written for opioids—more than enough for every American adult to have their own bottle. *Id.* Indeed, the White House just announced that more than 11 million people abused prescription opioids last year and declared "the opioid crisis a national public health emergency under federal law." The White House Office of the Press Secretary, *Remarks by President Trump on Combatting Drug Demand and the Opioid Crisis* (Oct. 26, 2017), https://www.whitehouse.gov/the-press-office/2017/10/26/remarks-president-trump-combatting-drug-demand-and-opioid-crisis.

Texas is not immune from this epidemic. In 2015, there were 1186 opioid-related deaths statewide. The Texas Tribune, *Amid opioid investigation, Texas and other states demand drug company documents* Sept. 19, 2017, https://www.texastribune.org/2017/09/19/amid-opioid-investigation-texas-and-other-states-demand-drug-company-d/. One tool the State has for addressing this crisis is the administrative subpoena and inspection power given to the Texas Medical Board (TMB or Board). With it, the Board can obtain patient records or even inspect the premises of pain management clinics (or those believed, under formal complaints filed with

the Board, to be pain management clinics) to ensure that proper procedures and regulations are being followed by those with the ability to prescribe controlled substances to the general population. And while these subpoenas are often accompanied by the ability to seek precompliance judicial review, that is not always a viable option if the subpoena power is to be effective in uncovering abuses of the prescription medication process. After all, if a medical record is easily altered during the time when precompliance review is sought, the subpoena's effectiveness in discovering abuses of the prescription process could be nullified.

The Board uses administrative subpoenas throughout the State on a regular basis. In a typical case, the TMB receives a complaint from a patient, a family member of a patient, another health care professional, or some other source, such as another agency. The Board then determines if the complaint is an alleged violation of the Medical Practice Act in order to establish jurisdiction over the complaint. The TMB may contact the complainant and the license holder (*i.e.*, the doctor) to determine if an investigation will proceed. If an investigation is opened, the Board will notify the licensee and ask for additional information from them, often via subpoena. As in this case, that may happen over a span of time with multiple subpoenas and requests for records. Also, as here, there are occasions when the Board may seek to use a subpoena *instanter* to capture any potential regulatory violation.

As the quintessential closely regulated profession, doctors practicing in Texas are on notice that such administrative searches may take place at any time. Every doctor in the State is licensed by the Board and must adhere to its rules for professional conduct in order to practice in Texas. And this is after an extended program

of standardized schooling and testing, followed by residency programs that further acquaint doctors with the regulations they must follow in practicing medicine, including those dealing with prescribing medications. The entire medical industry is licensed by state agencies that monitor the profession's conduct and practices to ensure the safety of all patients. And among the myriad medical regulations, some of the most comprehensive concern the prescription of controlled substances. For example, each prescription of a controlled substance issued by a Texas doctor is catalogued by the State with a record including the patient's name, the type of drug prescribed, and the amount prescribed. Tex. Health & Safety Code §§ 481.067, .074, .075.

Given the extensive regulatory regime of the medical practice, it is consistent with both the Fourth Amendment and Supreme Court precedent for periodic administrative searches of doctors' offices and records to take place without an opportunity for precompliance judicial review. *See New York v. Burger*, 482 U.S. 691, 702 (1987). The purpose of such regulatory inquiries is to gain information for licensing compliance, not to find evidence of criminal activity. Because it is outside the realm of criminal law, this is a case where "the warrant and probable-cause requirement [are] impracticable," *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989), and thus the subpoena *instanter* here was valid as a reasonable search under the Fourth Amendment.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented

1. Whether the TMB's administrative subpoena complied with the Fourth Amendment.

2. Whether the TMB's officers are entitled to qualified immunity.

Statement of the Case

I. Factual Background

Plaintiff Joseph Zadeh—a doctor specializing in internal medicine—owns and operates a medical office in Euless, Texas, and plaintiff Jane Doe is one of his patients. ROA.545. Dr. Zadeh is currently the subject of an administrative action by the TMB before the State Office of Administrative Hearings (SOAH) for alleged violations of the Texas Medical Practices Act and TMB rules related to his prescription of controlled substances and narcotic drugs to patients. ROA.545-46; *see also* ROA.549 (citing *In re: Complaint Against Joseph Hassan Zadeh, D.O.*, S.O.A.H. Dk. No. 503-15-2821.DO (Mar. 12, 2015)). He is also being investigated by the Drug Enforcement Agency (DEA) for alleged violations of the Controlled Substances Act. ROA.546; *see also United States v. Zadeh*, 820 F.3d 746, 749-52 (5th Cir. 2016).

On October 22, 2013, TMB investigators served an administrative subpoena for medical records located at Zadeh's office. ROA.546. The subpoena was signed by Mari Robinson—Executive Director of the TMB—and, as a "subpoena *instanter*," demanded immediate compliance. ROA.1392. Dr. Zadeh was out of the office and the subpoena was presented to his medical assistant. ROA.546. The assistant informed the investigators that Dr. Zadeh was returning from Florida and unavailable that day. ROA.1403. She asked the investigators to wait while she tried to find out

more about Dr. Zadeh's whereabouts and when he might return. ROA.1403. The assistant claimed that she wanted to consult with an attorney but was told that Dr. Zadeh would lose his license if she did not comply immediately. ROA.546. In response, she brought medical records to the conference room for the investigators to review and copy. ROA.546. She also alleged that the investigators made a physical search of the premises. ROA.546.

The investigators spent most of their time in either the waiting area of the office or the conference room. ROA.1403. At one point, one of the investigators, Sharon Pease, approached the assistant to discuss Dr. Zadeh's return and subsequently followed her into two exam rooms she had entered in order to use a shredder and access a computer. ROA.1403. While there, Pease asked if that was where controlled substances were kept, but the assistant replied that no controlled substances were kept at the office. ROA.1403. On one other occasion, Pease approached the assistant in a storage room—where she was pulling records requested in the subpoena—in order to ask if the investigators could use the office copy machine since they were having trouble with their portable scanner. ROA.1403.

Two DEA investigators accompanied the TMB officers in serving the subpoena and, "[w]hile the Medical Board investigators scanned and copied documents, the DEA agents conducted interviews with neighboring businesses and visited a local pharmacy, where they looked at Dr. Zadeh's prescriptions." *Zadeh*, 820 F.3d at 749. Zadeh's lawyer subsequently arrived and asked the investigators to leave, which they did. ROA.546.

II. Procedural Background

Appellants filed suit under 42 U.S.C. § 1983, alleging violations of the Fourth Amendment and requesting both monetary damages and declaratory relief. ROA.547. Appellees filed a motion to dismiss, making four arguments: (1) the plaintiffs did not have standing to raise the claim for declaratory relief; (2) the district court should abstain from hearing claims under the *Younger* abstention doctrine; (3) Mari Robinson had sovereign immunity when being sued in her official capacity; and (4) each of the Defendant-Appellees was entitled to qualified immunity. ROA.547.

Though holding that Dr. Zadeh had standing for declaratory relief—but plaintiff Doe did not—the district court found that *Younger v. Harris*, 401 U.S. 37 (1971), required abstention from ruling on those claims. ROA.547-50. Under *Younger*, federal courts abstain from interfering in certain "noncriminal judicial proceedings when important state interests are involved." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). The criteria for applying *Younger* to a claim for a declaratory judgment were previously set forth by this Court in *Perez v. Texas Medical Board*, 556 F. App'x 341, 342-43 (5th Cir. 2014) (per curiam), and the district court held that the relevant facts there were similar to the ones here. ROA.550. Because Dr. Zadeh was subject to an on-going administrative proceeding before the SOAH—a judicial proceeding for purposes of *Younger*—and had a right to appeal the outcome of the administrative proceeding, that proceeding "provide[d] him an adequate opportunity to raise the constitutional issues alleged in this case" and *Younger* abstention was appropriate. ROA.550. The district court also concluded

that, though the Eleventh Amendment barred claims for monetary damages against Robinson in her official capacity, she could be sued for declaratory relief. But since that would be covered by *Younger* abstention, too, the court declined to hear any claims against Robinson in her official capacity. ROA.550-51.

The district court then moved to the issue of qualified immunity. ROA551-69. The court first recognized the two-step approach endorsed in *Saucier v. Katz*, 533 U.S. 194 (2001). ROA.551. A court first asks whether the official '"violated a statutory or constitutional right,"' and then considers whether '"the right was 'clearly established' at the time of the challenged conduct."' *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). Though courts have the discretion to begin with either step, *see Pearson v. Callahan*, 555 U.S. 223, 236 (2009), the district court chose to begin with the first step. ROA.551.

Under step one, the district court found that a Fourth Amendment violation had taken place. ROA.561. The court first determined that the administrative subpoena constituted an administrative search that would normally require precompliance judicial review. ROA.552. The court recognized the more relaxed standard applied to "closely regulated" businesses, *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2454-55 (2015), but found that the "medical profession is not such an industry." ROA.554. Thus without the opportunity for precompliance review, the allegations (viewed in a light most favorable to the plaintiffs) suggested a Fourth Amendment violation. ROA.555.

The district court went on to reason that it would reach the same conclusion even if the medical profession was a closely regulated industry. ROA.555. That is because the Supreme Court's instruction in *New York v. Burger*, 482 U.S. at 702-03, requires even closely regulated businesses to have a "constitutionally adequate substitute for a warrant" under a regulatory scheme that would seek to use warrantless administrative searches. ROA.555. That means that the statutory authority for the administrative search must have a properly defined scope and it must limit the discretion of the inspecting officers. ROA.555.

The Board offered two statutes as potential authority for the administrative subpoena. First was a subpoena authority under Texas Occupations Code § 153.007 for records and documents. ROA.555-56. Such a subpoena would normally be enforced in a "reasonable time" (*i.e.*, two weeks), but could be enforced in a shorter time under its implementing regulation "if required by the urgency of the situation or the possibility that the records may be lost, damaged, or destroyed." 22 Tex. Admin. Code § 179.4(a). Second was an inspection authority under Texas Occupations Code § 168.052 that allows TMB officers to perform physical searches of pain management clinics (including records). ROA.558-59. These inspections are normally enforced in five business days, but may be done sooner if delay "would jeopardize an ongoing investigation." 22 Tex. Admin. Code § 195.3(b).

The district court held that neither source of statutory authority provided justification for a physical search of Dr. Zadeh's clinic. ROA.557, 561. The subpoena authority addressed things such as records and documents (or witness testimony), but did not provide for physical inspections. ROA.557. And while the inspection

authority did provide for physical searches of pain management clinics, Dr. Zadeh disputed that he owned such a clinic and the district court interpreted the statute not to allow for inspections of merely *suspected* pain management clinics. ROA.559. Thus while there might have been a reasonable justification for the subpoena *instanter* demanding records, the district court found no reasonable justification for a physical search of the premises, even if the medical profession were closely regulated. ROA.561. The court also found that both sources of authority for the Board's subpoena *instanter* failed to limit the discretion of the officers and thus failed to satisfy *Burger*. ROA.557-61.

Under step two of the qualified immunity analysis, the district court looked to see whether the constitutional right—defined with a '"high degree of particularity"'—would have been clearly established at the time of the violation. ROA.561 (quoting *Morgan*, 659 F.3d at 372). While precompliance review is common in the administrative search context, closely regulated businesses do not follow that rule. ROA.562. The district court then examined *Beck v. Texas State Board of Dental Examiners*, 204 F.3d 629 (5th Cir. 2000)—a case with similar facts in which this Court treated the dental profession as a closely regulated industry and concluded, under *Burger*, that the dentist had no right to precompliance judicial review. ROA.563. There, the "on demand inspections" in the Texas Controlled Substances Act "provided the dentist with sufficient notice that his office would be subject to periodic warrantless searches." ROA.566. Though believing the result in *Beck* was "in tension with the third prong of *Burger*," the district court held that "Defendants rea-

sonably could have believed that a search conducted pursuant to a purely discretionary inspection scheme was legal." ROA.566. The court denied qualified immunity, however, for any physical search and inspection of the office and files, viewing such action as falling outside the TMB's statutory authority altogether. ROA.564-65.[1]

On summary judgment, the district court addressed the "tiny sliver" of allegations remaining. ROA.1396. The court began by addressing the potential direct and supervisory liability for Robinson. ROA.1398-1402. Robinson was not present during the service of the subpoena and did not actually sign it; thus she could not be directly liable for anything. ROA.1399. The court also held she was not liable in a supervisory capacity either. ROA.1402. Though the Board had a policy encouraging officers to "tour" offices when conducting onsite investigations, there was also a rule that investigators were to leave if someone did not cooperate with them. ROA.1400. Additionally, Robinson did not show "deliberate indifference" in overseeing her subordinates, specifically with respect to delegating authority for others to sign her name on subpoenas. ROA.1400-01.

Ultimately, the court recognized that—even looking at the facts in a light most favorable to the plaintiffs—no physical search of the premises took place. ROA.1404 ("Plaintiff's allegation that Defendants conducted a thorough search and inspection of his office and records finds no support in the record. . . . Even if Defendant Pease's

[1] The district court granted qualified immunity on privacy claims and due process claims since plaintiffs were unable to point to controlling authority that defined the contours of those rights with any degree of particularity in this context. ROA.568.

minor excursions out of the waiting area and conference room did constitute a search of Plaintiff's office beyond what was necessary to serve the subpoena, there is no evidence that she acted in an objectively unreasonable manner; rather, the evidence makes clear she intended only to communicate with Plaintiff's assistant about matters relevant to the subpoena."). Because the officers had not exceeded what the district court previously determined was the limit of what they could have reasonably believed to be their statutory authority for a subpoena *instanter*, this Court's holding in *Beck* provided them with qualified immunity. ROA.1405.

The district court also addressed Plaintiffs' argument that the subpoena was merely a pretext for the DEA's criminal investigation. ROA.1405. During discovery, Defendants had produced an email from a DEA investigator to the Board that stated '"I'm at a point in the criminal case that I need to interview Dr. Zadeh and review his patient files. Would it be possible for an investigator with the TMB to accompany me?"' ROA.1405. Noting the overlap between administrative searches and law enforcement actions in *Beck* and *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), the district court concluded that the subpoena at issue here was not pretextual. ROA.1405-06. Plaintiffs' argument was also "undercut by the fact that the DEA issued its own subpoena" for many of the same records requested by the TMB. ROA.1407. And in any event, the officers would have been entitled to qualified immunity on this claim as well given the holding in *Beck*. ROA.1407.

After the grant of summary judgment, Appellants filed Rule 59 motion to alter or amend the judgment. ROA.1409. The district court addressed the arguments for

reconsideration briefly "[o]ut of an abundance of caution," but "denie[d] Plaintiffs' motion for the reasons stated in its previous order." ROA.1438.

Summary of the Argument

The Supreme Court has held that "[s]earch regimes where no warrant is ever required may be reasonable where 'special needs . . . make the warrant and probable-cause requirement impracticable' and where the 'primary purpose' of the searches is '[d]istinguishable from the general interest in crime control.'" *Patel*, 135 S. Ct. at 2452 (quoting *Skinner*, 489 U.S. at 619; and *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)) (internal citation and quotation marks omitted) (ellipsis in original). The TMB's subpoena power for copies of patient lists and medical records is just such a regime. The Board uses the subpoena to obtain copies of records at doctor offices which can be later evaluated to determine possible violations with respect to prescribing controlled substances (including opioids) and proof of doctor abuse of license privileges. Violations can be cause for disciplinary action by the Board, including possible medical licensure revocation. These administrative subpoenas are necessary to evaluate compliance with TMB guidelines that were enacted in the best interests of patients across the State and must occasionally be enforced immediately. The administrative subpoena at issue here is and has been standard in the medical field—one of the most heavily regulated areas of public life—and is vital to preventing pain medication addiction and overdose deaths.

Like the dental profession, the medical profession is a closely regulated industry. *See Beck* 204 F.3d at 638 (treating "the regulation and monitoring of the use of con-

trolled substances" as a "substantial state interest" capable of regulation by "administrative or regulatory searches" without warrants under *Burger*). In fact, the medical field's greater use of controlled substances and even broader prescribing power requires it to be more closely regulated than the dental field. Because the subpoena at issue here was issued pursuant to the TMB's statutory authority—authority that is more cabined than the authority approved of in *Beck*—it was a proper exercise of the Board's investigative power to obtain copies of certain records that would show whether the plaintiff violated the terms of his medical licensure by the State of Texas. The district court erred in holding that the administrative subpoena *instanter* violated the Fourth Amendment.

But even if some element of the *Burger* scheme were absent here—which it was not—the investigators' actions were not unreasonable under then-governing law. This Court's precedent in *Beck* rightly treats doctors, specifically ones that provide controlled substances to patients, as a closely regulated business. That fact, combined with the pervasive regulatory scheme and administration of that scheme that has long taken place in Texas, would cause a reasonable investigator to assume the administrative search at issue here was consistent with *Beck*, and thus the Fourth Amendment's general prohibition on warrantless searches. At the least, it would eviscerate this Court's qualified immunity jurisprudence to hold an investigator liable for doing something previously sanctioned under *Beck* without an intervening decision that clearly established otherwise. For a plaintiff to overcome a defendant's right to qualified immunity, the plaintiff must show both a violation of a clearly es-

tablished constitutional right and that the official's conduct was not objectively reasonable. *Davis v. McKinney,* 518 F.3d 304, 317 (5th Cir. 2008). Appellants here can show neither.

The judgment should be affirmed.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, applying the same standard as the district court in the first instance. *Burge v. Parish of St. Tammany*, 187 F.3d 452, 464 (5th Cir. 1999). Summary judgment is appropriate where the moving party establishes "there is no genuine dispute as to any material fact" and that it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

"The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal." *Morgan*, 659 F.3d at 370. "A qualified immunity defense alters the usual summary judgment burden of proof." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). "Once an official pleads the defense, the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." *Id.*

ARGUMENT

I. The Administrative Subpoena at Issue Did Not Violate the Fourth Amendment.

Instead of warrants, administrative subpoenas provide the basis for the "search" of documents or facilities in the regulatory context outside of crime control situations. *Patel*, 135 S. Ct. at 2452. The administrative subpoena at issue here was issued and carried out pursuant to the TMB's authority to obtain records from Texas medical offices. Tex. Occ. Code § 153.007(a); *see also id.* § 153.001(3) (providing the Board with authority to adopt rules necessary to "regulate the practice of medicine in [Texas]"). Though no physical search took place in this case, the Board has that authority, too, in order to monitor and inspect for potential prescription abuse by doctors operating pain management clinics—whether *de jure* or *de facto*. *Id.* § 168.052 (authorizing inspections of pain management clinics); *id.* § 168.053 (authorizing investigation of complaints for any physician who "owns or operates a clinic in the same manner" as a pain management clinic, whether or not designated as a pain management clinic).

While a business may have the opportunity for review by a neutral judge prior to complying with an administrative subpoena, that is not true in every case. The Supreme Court has provided an exception for closely regulated businesses. *See Burger,* 482 U.S. at 702. Because the medical profession—especially doctors dealing with controlled substances—are among the most closely regulated of all businesses, there was adequate notice that the records here could be subpoenaed and no need for pre-compliance judicial review. *See Beck*, 204 F.3d at 638-39 (applying *Burger*). The

valid subpoena was issued according to statute and served consistent with Supreme Court precedent outlining the use of administrative subpoenas. Thus there was no Fourth Amendment violation in the Board's issuance and service of the administrative subpoena at issue.

A. The Board Has Statutory Authority to Issue Administrative Subpoenas for Records and Inspections.

The "search" at issue in this case involved a request for records from the plaintiff. Such commonplace requests are done frequently under Texas's regulatory scheme, and always without a warrant since they are not directed at criminal investigations. There are two sources of authority for these searches in the Texas Occupations Code. The first deals with subpoenas for records, books, and documents. *See* Tex. Occ. Code § 153.007. The second is broader in scope, involving the physical inspection of pain management clinics—including documents—and facilities suspected of being pain management clinics. *See id.* § 168.052.

Pursuant to its subpoena authority in § 153.007 of the Texas Occupations Code, the TMB issues thousands of subpoenas for records each year. ROA.1400. This sometimes entails obtaining patient log information from doctors' offices to compare against the treatments and drugs being obtained by those patients. As the Board has noted, somewhere between twenty and forty of these subpoenas are issued each year as *instanter* subpoenas which must be complied with immediately. This is done when the normal time for compliance—fourteen calendar days—must be bypassed due to "the urgency of the situation or the possibility that the records may be lost, damaged, or destroyed." 22 Tex. Admin. Code § 179.4(a). Appellants argue (at 28-29) that

this regulation should not confer authority for *instanter* subpoenas, but such a reading would conflict with the plain language of the regulation and the statute authorizing the Board to adopt rules necessary to "perform its duties," "regulate the practice of medicine in this state," and "enforce this subtitle, [including § 153.007]." Tex. Occ. Code § 153.001(2)-(4).[2] The Board is free, based on the formal complaint received concerning one of its licensees, to make a determination on the expediency of the situation. As the record shows, this authority has not been abused as *instanter* subpoenas comprise a mere fraction of all the administrative subpoenas issued.

Beyond its administrative subpoena authority, the Board also has statutory authority to physically inspect pain management clinics, including their documents. *Id.* § 168.052. And while the implementing regulations normally provide pain management clinics with five business days' notice before such an inspection, the Board may conduct an on-site inspection sooner if "it would jeopardize an ongoing investigation" to wait. 22 Tex. Admin. Code § 195.3(b). Appellants argue (at 11-12) that Dr. Zadeh did not run a "pain management clinic"—at least according to the statutory definition that requires facilities prescribing a majority of patients certain controlled substances such as opioids to register as such. Tex. Occ. Code § 168.001. Nevertheless, the statute also provides authority for the Board to investigate "a physician who owns or operates a clinic in the same manner as other complaints under this

[2] This statutory provision also undermines Appellants' claim (at 40-41) that the Board is not owed any deference in interpreting its own statutes. The Legislature specifically provided the TMB with that authority and its regulations are consistent with its statutory mandates.

subtitle." *Id.* § 168.053. In other words, there is a common-sense provision that the Board should not have to merely take doctors at their word when they claim to be exempt from pain management clinic regulations.

Plaintiffs offered the district court several reasons why this inspection authority should not be extended to the subpoena in this case. First, in addition to disputing that Zadeh ran a pain management clinic, they pointed to the Board's prior instructions that the clinic was exempt from the definition of a pain management clinic. ROA.560. Second, they argued that the limited number of records sought by the TMB would not prove one way or the other whether the facility was actually a pain management clinic. ROA.560.[3]

The first argument fails since the Board's previous instructions were made prior to the complaint at issue in this case that indicated Zadeh was, in fact, operating a suspected "pill mill." ROA.927-28. As soon as a medical office begins treating more than half of its patients with prescription painkillers, it meets the statutory definition of a pain management clinic and is subject to the statute regulating such clinics unless otherwise exempt. Either way, the Board has both the authority and the duty to confirm a facility's status in this regard. Tex. Occ. Code § 168.053.

The second argument fails because the records sought that day were simply part of a larger set meant to paint an accurate picture of Zadeh's practice—at least

[3] These points are raised on appeal (at 42-44) as part of the evidence for pretext, an argument address here in Part I.C.2.

enough of a picture to know if further investigation into the complaint was warranted. *See* ROA.928 (noting reasons for selecting certain records for review such as (1) patients who traveled long distance for prescriptions, (2) patients obtaining large quantities of controlled substances, and (3) patients coming from the same addresses). Additionally, the Board issued other subpoenas and requests around the same time as the subpoena at issue here. *See, e.g.,* ROA.1028. From the information gleaned from the entire investigation—not just one day's materials—the Board was able to conduct a full 30-day audit and determine that a majority of patients seen by Zadeh received a prescription for opioids or other related drugs. ROA.708. And even on the day in question, the Board obtained more than just sixteen records; it also received copies of the patient log-in sheets that contributed to the 30-day audit. ROA. 916, 994.

The district court ultimately concluded that the records request was acceptable, but that any physical inspection of the premises would have been *ultra vires*. ROA.560-61. The court erred, however, by looking only to § 168.052—holding that the language there addressed only pain management clinics and not "alleged" pain management clinics. There was no consideration of § 168.053's broader scope, including physicians who operate clinics as actual pain management clinics. If the district court were correct, this would, of course, undermine the ability of the Board to

actually monitor pain management clinics that did not bother to register as such. Such a conclusion is not supported by the language of the statute.[4]

The district court, based on its belief that a physical search was beyond the TMB's authority, initially denied the State's motion to dismiss based on qualified immunity for consideration of that question. On summary judgment, however, the district court recognized that—even looking at the facts in a light most favorable to the plaintiffs—no physical search of the premises took place. ROA.1404. Thus the Board needed only to rely on the subpoena authority of Tex. Occ. Code § 153.007 in this case. Alternatively, though, the Board has authority under § 168.052 and either statute may be enforced *instanter* according to the regulations of the TMB.[5]

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[4] The Texas legislature, in an effort to crystalize its intent for the regulation of *suspected* pain management clinics, recently amended the statutory language of § 168.052 to make this point explicit. Tex. Occ. Code § 168.052(b) (revised 2017).

[5] Appellants' argument (at 37-39) that the trial court erred in its application of *Younger* abstention (to claims for declaratory relief against the State's authority to issue the subpoena) fails for two primary reasons. First, it neglects even to address the authority relied on by the district court in *Perez v. Texas Medical Board*. *See* ROA.549-50. Instead, Appellants misread the Texas statutory scheme and rely solely on conclusory allegations. Second, the smoking gun (at 38-39) of Appellees' previous representation that this "lawsuit does not involve the merits of the underlying TMB investigation that led to the pending state administrative proceedings" provides no support for the plaintiffs. ROA.208-09. It is, of course, true that the present lawsuit—focusing on the Fourth Amendment—does not address the *merits* of the pending administrative action—*i.e.*, whether or not Dr. Zadeh has violated the pain management regulations. That is of no moment since Zadeh could still raise the same argument in those proceedings as here—that Texas lacks the statutory authority for the search. In the other case, it would simply be a way to avoid the merits of the pending administrative action.

B. The Administrative Subpoena Did Not Require Precompliance Review.

While precompliance review of administrative subpoenas is available in many situations, *see, e.g.*, *Patel*, 135 S. Ct. at 2453, it is not necessary with closely regulated industries where the Supreme Court's test set forth in *Burger* to guard against unreasonable searches is met. *See* 482 U.S. at 702-03. This is especially true when there is a clear and significant risk to public welfare at stake. *See id.* at 709. The subpoena *instanter* in this case did not warrant precompliance review because the medical profession is closely regulated and there was an adequate substitute for the Fourth Amendment's warrant requirement in the form of the statutory authority providing for and cabining the Board's reasonable actions.[6]

1. The medical profession is closely regulated.

To begin, the medical profession should be recognized as a closely regulated business. This reality is seen most clearly in the multitude of regulations ordering every part of both medical training and practice. Indeed, there may be no other field more regulated than medicine. And rightly so. The potential for mistake, abuse, and misuse carry enormous consequences in this area of life and death, and those uneducated in medicine (*i.e.*, patients) are uniquely unqualified to protect themselves in

[6] Much of appellants' brief, including claims (at 35-36) concerning *See v. City of Seattle,* 387 U.S. 541 (1967) and *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984) only begs the question at issue: whether TMB officials were justified in executing the administrative subpoena without the opportunity for precompliance review. *See* and *Lone Steer* are only relevant if one assumes both that precompliance review was necessary and that there were no indications otherwise in the law (such as *Beck*).

this arena. Beyond that, the reasons offered by both the Supreme Court and this Court for the close regulation of a business indicate that it is proper to include the medical profession in the group of businesses that are considered closely regulated for administrative-subpoena and warrantless-search purposes.

The Supreme Court's most recent decision addressing the administrative search doctrine, *Patel*, 135 S. Ct. 2443, illustrates why the medical industry is a closely regulated industry. There, the Court found that the hotel industry is not a closely regulated industry for purposes of *Burger*. *Id.* at 2455. But in distinguishing *Burger*, the Court relied on the fact that, unlike the industries already found to be closely regulated, "nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare." *Id.* at 2454. This lack of significant risk in the hotel industry was borne out by the lack of special regulation specific to the hotel industry, which, ultimately, meant that hotel owners would not be "on notice that their property will be subject to periodic inspections undertaken for specific purposes." *Id.* at 2455 (internal quotation marks omitted). Simply put, an industry is not "closely" or "pervasively" regulated if it is no more regulated than any other industry. This clarification that the *Burger* test should be applied with an eye to relative regulation between industries only underscores the importance of its application to the medical industry. The regulation of the medical industry, especially because it involves the distribution of controlled substances, is comparable to that of the alcohol and firearm industries. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311, 311-12 (1972).

Many life-saving and quality-of-life-improving procedures and substances that doctors deal in every day can be dangerous or deadly if misused. As demonstrated by the opioid epidemic alone, the medical profession has and can provide access to substances that pose "a clear and significant risk to the public welfare" when misused. *Patel*, 135 S. Ct. 2454. Thus, the medical profession is, and historically has been, regulated to a much greater extent than almost any other profession.

It is undisputed that physicians are subject to voluminous regulations, both in their practice and in their medical training prior to practice. For example, doctors who wish to prescribe controlled substances are required to apply for registration with the Federal Drug Enforcement Agency. Tex. Health & Safety Code § 481.061. Relatedly, the controlled substance prescriptions filled by pharmacies are tracked by the Texas Board of Pharmacy and may be accessed and reviewed by the Texas Medical Board, the Texas Board of Nursing, the DEA, and other law enforcement agencies. *Id.* §§ 481.067, .075, .076. As seen in this case, the TMB requires physicians who prescribe opioids (or related drugs) to more than 50 percent of their patients to apply and register with the Board as a pain management clinic. Tex. Occ. Code § 168.101; 22 Tex. Admin. Code § 195.2. These clinics are subject to periodic inspections by the Board, Tex. Occ. Code § 168.052; 22 Tex. Admin. Code § 195.3, and physicians who are subject to Board discipline involving nontherapeutic prescribing are not eligible to register and operate a pain management clinic. 22 Tex. Admin. Code § 195.2(b).

The Legislature also recently explicitly provided the Board authority to inspect clinics which it suspects should be registered as pain management clinics. Tex. Occ.

Code § 168.052(b) (revised 2017). Physicians are required to ensure that physicians working at pain management clinics maintain minimum Continuing Medical Education hours, and are required to physically remain on site 33 percent of the time and to personally review 33 percent of the patient files where employees (mid-levels) or contractors (physicians) have seen patients. Tex. Occ. Code § 168.201(c); 22 Tex. Admin. Code § 195.4(e)-(g). Additionally, physicians who delegate prescribing authority of controlled substances to mid-level providers must enter into prescriptive authority agreements that meet certain requirements. Tex. Occ. Code § 157.002; 22 Tex. Admin. Code § 193.6-10. And physicians prescribing for the treatment of chronic pain must meet detailed treatment guidelines. 22 Tex. Admin. Code § 170.3. These are just a few of the regulations to which the medical profession is subject—specifically some that deal with regulations on controlled substances—and are more than sufficient to establish the medical field as a "closely regulated" business.[7]

This conclusion is supported by this Court's precedent that both highlights types of businesses considered "closely regulated" and provides instructive rationales for doing so. This Court has found a wide variety of industries to be closely regulated for purposes of *Burger*, most of which are subject to far less regulation than is the medical industry. *See DeRamus v. City of Alexandria*, 675 F. App'x 408 (5th

[7] A further example of the comprehensive regulatory scheme is seen in the Board's mandate to promulgate and enforce rules related to the use of anesthesia by doctors in an outpatient setting. Tex. Occ. Code § 162.105. These rules—with which doctors must comply—include specific training and protocols for the use of anesthesia, 22 Tex. Admin. Code § 192.2, registration requirements, *id.* § 192.4, and allowance of inspections similar to those for pain management clinics, *id.* § 192.5.

Cir. 2017) (per curiam) (pawn brokering industry); *Anderton v. Tex. Parks & Wildlife Dep't*, 605 F. App'x 339 (5th Cir. 2015) (per curiam) (deer breeding); *Ellis v. Miss. Dep't of Health*, 344 F. App'x 43 (5th Cir. 2009) (per curiam) (childcare industry); *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181 (5th Cir. 2009) (liquor industry); *United States v. Fort*, 248 F.3d 475 (5th Cir. 2001) (commercial trucking); *Beck*, 204 F.3d 629 (dental profession); *United States v. Blocker*, 104 F.3d 720 (5th Cir. 1997) (per curiam) (insurance industry); *United States v. Thomas*, 973 F.2d 1152 (5th Cir. 1992) (salvage yards); *United States v. Schiffman*, 572 F.2d 1137 (5th Cir. 1978) (pharmaceutical industry); *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir. 1978) (massage parlors). In fact, this Court has never found an industry as heavily regulated as the medical industry *not* to be closely regulated for purposes of *Burger*. Additionally, this Court consistently treats businesses related to the medical profession—such as the dental profession and the pharmaceutical industry—as closely regulated. *See Beck*, 204 F.3d at 638; *Schiffman*, 572 F.2d at 1142 ("The pharmaceutical industry is a 'pervasively regulated business' like the liquor and gun industries.").

In determining whether a business is closely regulated, this Court often finds dispositive the fact that an applicable regulation authorized administrative inspections in the industry. *See Fort*, 248 F.3d at 480 (noting that "[b]ecause commercial trucking is governed by extensive federal and state regulations, the district court correctly concluded that *Burger* was applicable"); *Blocker*, 104 F.3d at 727 (finding search of insurance records governed by *Burger* because "his audit was conducted pursuant to a state administrative scheme"); *DeRamus*, 675 F. App'x at 413 (noting that "the laws governing secondhand dealers do in fact permit a warrantless search

of this heavily regulated industry"); *Pollard*, 578 F.2d at 1014 (finding massage industry to be closely regulated because it had "a history of regulation, albeit not as extensive as the liquor or firearms industries" (citation omitted)); *Beck*, 204 F.3d at 638 (analyzing search of dentist office under *Burger* because "the inspection was conducted pursuant to two then coexisting regulatory schemes": on-site inspections of records and documents (under the Texas Administrative Code) and physical premises inspections (under the Texas Controlled Substances Act)).

In a closely regulated analysis, this Court will also look to whether a license is required for participation in the industry, whether the industry is required to maintain records, whether the regulation requires that records are subject to inspection, and whether non-compliance with regulations can result in the loss of the license. *See Anderton*, 605 F. App'x at 343 (finding deer breeding to be a closely regulated industry because, in order to participate in the industry, a business must "obtain a permit, keep detailed records, and submit reports, and is subject to inspection of facilities and records at any time" and that the "[v]iolation of the statutes or regulations may result in nonrenewal of a deer breeder's permit and criminal penalties" (citations omitted)); *Schiffman*, 572 F.2d at 1140 (holding pharmaceutical industry to be a pervasively regulated business because "[r]egistrants are required [by the Comprehensive Drug Abuse Prevention and Control Act of 1970] to keep certain records, which must be made available for inspection" and "[t]he statute informs registrants the Government is authorized to inspect their establishments in accordance with the rules and regulations promulgated under the statute"); *see also Ellis v. Miss. Dep't of Health*, No. 4:07CV81, 2008 WL 2007153, at *8 (N.D. Miss. May 8,

2008), *aff'd*, 344 F. App'x 43, 45 (5th Cir. 2009) (per curiam) (finding childcare industry to be closely regulated based on regulations requiring childcare facilities to be licensed, to maintain extensive records, and allow the state Department of Health to regularly inspect the facilities and records).

The licensing requirement is important since it usually carries with it the decreased expectation of privacy with regard to appropriately tailored administrative searches. *See Pollard*, 578 F.2d at 1014 ("[A]s a member of a regulated business, a licensee does impliedly consent to inspections at any and all reasonable times and places by obtaining a license." (citation omitted)); *Schiffman*, 572 F.2d at 1140 ("[A] potential registrant is put on notice that, as a condition of engaging in the manufacture or distribution of drugs, he subjects himself to the regulatory system imposed by the Act including administrative inspections by the DEA"); *see also Ellis*, 2008 WL 2007153, at *9 ("[B]y accepting a license . . . the director has agreed to be subject to search and seizure by licensing agents at any time, with or without a search warrant, and with or without probable cause."). The medical profession—with its onerous licensing requirements—falls comfortably within the scope of what this Court considers closely regulated.

Though the district court reached the opposite conclusion, it did so primarily on the basis of distinguishable authority and without squarely addressing *Beck*'s treatment of the dental profession as closely regulated. The district court first correctly noted the important value of privacy in the context of the doctor-patient relationship. ROA.554. It is true that a medical *patient* has a "reasonable expectation of privacy" and can assume that records "will not be shared with nonmedical personnel without

her consent." *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001). But privacy in that relationship is not enough to discount the regulations to which the medical *profession* is rightly subjected and to disregard the fact that the Texas Medical Board is a group of medical professionals—not law enforcement officers—who are charged specifically with overseeing the integrity of the profession, including the doctor-patient relationship. The Board operates as medical personnel, ensuring the safety of patients, and thus there is no reasonable expectation of privacy from its oversight. *See also Blue v. Koren*, 72 F.3d 1075, 1081 (2d Cir. 1995) ("Mistreated patients may find it difficult or impossible to contact regulatory officials or to rebut denials by the operator or staff regarding conditions of care. Unannounced, on-site inspections are thus essential to the regulatory scheme."). That is precisely why the federal government excludes the TMB from its otherwise stringent privacy requirements in the Health Insurance Portability and Accountability Act (HIPPA) and explicitly authorizes the Board to obtain medical records without a patient's consent. 45 C.F.R. § 164.512. This authorization that could not survive the district court's logic.[8]

Not only does a holding that the medical profession is not closely regulated blink reality, it would be detrimental to Texas citizens currently protected by the Board's ability to monitor and regulate the use of prescription drugs (such as opioids) through the use of administrative subpoenas and inspections. Though the amount

[8] Consistent with TMB's role as medical professionals, Texas imposes a strict confidentiality regime on the Board when any such records are obtained. Tex. Occ. Code §§ 159.002; 159.003(a)(5); 164.007(c).

of regulation to which an industry or profession is subject is not definitive in resolving whether it is a "closely regulated" business, it must play a role since the government must have the ability to make those regulations enforceable. The sheer volume of regulations on the medical profession, combined with the history of subpoenas and enforcements to make those regulations effective, shows it to be a closely regulated business.[9]

2. The regulatory scheme established here satisfies the *Burger* requirements.

In *New York v. Burger*, the Supreme Court recognized that "where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened," warrantless searches may be reasonable. 482 U.S. at 702. The Court then set forth a three-part test to ensure that closely regulated businesses receive Fourth Amendment protection in the use of

[9] A prior Texas Attorney General Opinion reached the opposite conclusion regarding the medical profession. Tex. Att'y Gen. Op. No. JC-0274 (2000). That opinion was incorrect for several reasons. First, and most importantly, it did not address *Beck* or other cases from this circuit dealing with the closely regulated exception, instead relying heavily on a district court opinion. Second, it looked to the lack of a "long history" (*id.* at 3) of warrantless state inspection to conclude that it is inappropriate today, but did not address *Burger*'s recognition that the regulations at stake there "could be said to be of fairly recent vintage." 482 U.S. at 705. Third, the AG opinion believed that "the practice of medicine [is not] an industry in which heavy regulation is crucial to assure careful distribution of dangerous weapons." Tex. Att'y Gen. Op. No. JC-0274 at 3. That claim has proven to be mistaken. Though it may not deal with firearms, the practice of medicine is certainly "an industry in which heavy regulation is crucial to assure careful distribution of dangerous weapons" such as opioids and other controlled substances. *Id.*

such searches by the government. *Id.* at 702-03. First, there must be a "'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made." *Id.* at 702. Second, the "warrantless inspections must be 'necessary to further [the] regulatory scheme.'" *Id.* (quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)). Third, the regulatory scheme must provide a "constitutionally adequate substitute for a warrant." *Id.* at 703. The district court assumed that the first two prongs were met, noting that it is "difficult to dispute that the state has a substantial interest in regulating and controlling the provision of prescription drugs and that doing so may require the use of subpoenas and inspections." ROA.556. Because appellants have not argued otherwise, this inquiry thus turns on the third prong of *Burger*.

A constitutionally adequate substitute for a warrant will ensure that a business owner "cannot help but be aware that his property will be subject to periodic inspections." *Burger*, 482 U.S. at 703. In other words, the statute "must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.* In applying this prong, the *Burger* Court focused on the fact that the statute informed the owner that inspections would be made on a regular basis and that they would "not constitute discretionary acts by a government official but are conducted pursuant to statute." *Id.* at 711. The inspections there could only occur during business hours and the scope of the search was limited by the statute to those things touching on the regulation at issue. *Id.* at 711-12.

The third prong of *Burger* is easily met here. Consideration of the authorizing statutes—the subpoena authority, Tex. Occ. Code § 153.007, and the inspection authority, Tex. Occ. Code § 168.052—along with their respective implementing regulations—22 Tex. Admin. Code §§ 179.4(a) and 195.3(b)—reveals a regulatory scheme that both advises business owners of the administrative searches to which they are subject and limits the discretion of the officers carrying them out. For instance, the inspection authority of the Board is triggered either by a facility registering (or knowing it should register) as a pain management clinic, Tex. Occ. Code § 168.052, or by a formal complaint of which the licensee will have knowledge, ROA.176-77, 180. Either way, the doctor would be on notice of the Board's inspection authority and it would be cabined to obtaining information necessary for evaluating whether the pain management clinic laws are being followed. The subpoena authority is likewise limited by the scope of what may be obtained under the text of the statute. Tex. Occ. Code § 153.007. Requests for records and documents—even an *instanter* request—is neither intrusive nor surprising to doctors' offices. At the same time, the discretion of Board officers is further limited by the scope of the precise subpoena issued in each case and the fact that the *instanter* version of the subpoena may only be used in certain limited circumstances. 22 Tex. Admin. Code § 179.4(a); *id.* § 195.3(b).

The district court disagreed, finding that both authorizing statutes did not meet *Burger*'s third prong because they failed to limit the discretion of the officers. ROA.557-58, 560-61. The district court thought that the Board was given too much discretion in choosing doctors to be subpoenaed and that there was no certainty that

offices would be subject to inspections with regularity. ROA.558. That conclusion does not account for this Court's precedents in *Beck* and others, though. As even Appellants acknowledged (at 44), the authorizing statute in *Beck* "put dentists on notice that they could be inspected at any time." Precise predictability of administrative searches cannot be what *Burger* contemplated and regular, periodic inspections cannot mean that the business must know ahead of time when it will take place. That would undermine a central value of unannounced inspections: determining whether the business routinely complies with regulations (rather than just in anticipation of a scheduled inspection).

The district court, for its part, acknowledged what it believed was "tension" between *Burger* and this Court's holding in *Beck*. ROA.566. It chose, however, to resolve the perceived tension by setting *Beck* aside. Yet *Burger* did not demand that the officers be limited in every aspect of their warrantless searches—just to a reasonable degree. The regulatory inspection system established here accomplishes that goal. It allows minor intrusions in an area—controlled substances—where doctors maintain little reasonable expectation of privacy. After all, each of their prescriptions is already catalogued with the patient's name and the amount prescribed. Tex. Health & Safety Code § 481.075.[10] At the same time, the Board's subpoena regime

[10] Even though this information is already available to medical regulating authorities, the TMB's subpoena authority and inspection authority are still important for determining both whether a doctor is operating a pain management clinic (so that other regulations would be triggered) and whether the controlled substances are being prescribed according to law (*i.e.*, that the standard of care is being met with respect to the use of controlled substances). *See* Tex. Occ. Code § 168.052.

allows the concomitantly high interest of the State in stopping opioid addiction to be accomplished. The subpoena thus complies with the Supreme Court's direction in *Burger* and should be considered part of a regulatory scheme that serves as a substitute for a warrant.

C. The Administrative Subpoena Was Validly Issued and Served.

The balance of Appellants' arguments regarding the validity of the subpoena revolve around the Board's issuance of the subpoena—including its legitimacy and the Board's justifications for issuing it—and the presence of DEA agents at the subpoena's enforcement. As the district court held, the Board was free to delegate its subpoena issuing authority as necessary and there is nothing in the record indicating that the TMB improperly colluded with the Drug Enforcement Agency (or anyone else) in issuing and serving the administrative subpoena.

1. The Board may subdelegate its authority to issue subpoenas.

Appellants argue (at 29-35) that the administrative subpoena issued here was invalid as a matter of law, primarily because it was not signed by the Board's Executive Director or Treasurer-Secretary. This is the same argument Appellants unsuccessfully raised in the district court to argue that Robinson should be liable in her supervisory capacity, and that argument should be rejected here, too. ROA.1400-01.[11]

[11] Here, Appellants split those claims (at 46-48) in an effort to show that Robinson showed "deliberate indifference" to the "violation of Appellants[']s rights." This fails for at least two reasons. One, under this Court's holding in *Beck*, there was no violation of Appellants' rights here. Two, the TMB has authority to delegate subpoena issuing authority and so Robinson would, of course, not have knowledge

The Board's subpoena authority may be delegated "to the executive director or the secretary-treasurer of the board." Tex. Occ. Code § 153.007(b). As the district court noted, Texas law specifically provides for such delegation of authority. 22 Tex. Admin. Code § 161.7(c) ("The executive director may delegate any responsibility or authority to an employee of the board . . . ."). Appellants challenge this delegation under the general presumption of nondelegation noted in *Lipsey v. Tex. Dep't of Health*, 727 S.W.2d 61, 64-65 (Tex. App.—Austin 1987, writ ref'd n.r.e.). *Lipsey* holds, though, that "the authority to 'subdelegate' or transfer the assigned function may be *implied* and the presumption [against nondelegation] defeated owing to the nature of the assigned function, the makeup of the agency involved, the duties assigned to it, the statutory framework, and perhaps other matters." *Id.* at 65 (emphasis in original). Rather than attempting to create an unworkable situation—which forcing one individual, already busy with other tasks of leading the agency, to evaluate and sign thousands of subpoenas a year would create—the Austin Court of Appeals recognized the complexity of the modern administrative state and held in *Lipsey* that there was no "unlawful reassignment" (*i.e.*, there was no subdelegation issue). *Id.* at 68.

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of each of the thousands of cases that come through the office each year. That fact, or even a general lack of understanding concerning the district court's interpretation of Fourth Amendment law in this area, certainly do not evidence "deliberate indifference" to constitutional rights. TMB officials were being trained according to the law at the time, which allowed for the administrative subpoena here, and Robinson is entitled to sovereign immunity in her official capacity.

In other words, the impracticalities of the Executive Director trying to evaluate and sign every one of the thousands of subpoenas that come through each year are not a plea to avoid the law. ROA.1402. It merely points toward the implied ability to sub-delegate recognized in *Lipsey*. This is also consistent with the overall statutory framework that provides the Board with authority to make rules necessary to perform its duties and enforce the subtitle in which the delegation to the Executive Director is made. Tex. Occ. Code § 153.001. Thus, as the Texas Administrative Code states, the Executive Director may delegate the subpoena authority at issue here. 22 Tex. Admin. Code § 161.7(c).

2. The Board may issue administrative subpoenas based on complaints from law enforcement agencies who may also assist in serving the subpoena.

Appellants also claim (at 41-46) that the subpoena was invalid because it was a pretext for the DEA's criminal investigation against Dr. Zadeh. This claim is also packaged (at 26-27) as excessive entanglement with law enforcement. These arguments are supported by neither the law nor the record.

While an "administrative search cannot be pretextual," *Club Retro,* 568 F.3d at 197-98, the district court found that there was no evidence of that here. The physical intrusion—with weapons, physical assault, and prolonged detention—in *Club Retro*, *id.* at 200, does not approach the passive accompaniment of the DEA with the TMB investigators here. And although the DEA may have instigated the investigation with its complaint, there was "an actual TMB investigation that culminated in an administrative action against [Dr. Zadeh.]" ROA.1406. Thus the DEA's criminal

investigation cannot have been the "sole" reason the subpoena was issued. ROA.1407 (quoting *Club Retro*, 568 F.3d at 198). Moreover, contrary to Appellants' contention, there is no evidence that the TMB ever provided the DEA with any information obtained via the administrative subpoena. *See* ROA.242 (explaining that no patient records were provided to or requested by the DEA). If that were the case, it would be strange that the DEA issued its own subpoena for many of the same documents previously requested by the TMB. ROA.1407 (citing *Zadeh*, 820 F.3d at 749).

Not only is there no record evidence for anything improper on this score, Appellants overlook the Supreme Court's direction in *Villamontes-Marquez*. There, the Court held that federal officers were free to accompany state officers in an administrative search without transforming the search into a criminal one. 462 U.S. at 584 n.3. Furthermore, this Court has already rejected the argument that the motivation behind a search has an effect on the legality of an otherwise valid search. *Thomas*, 973 F.2d at 1155–56 ("Administrative searches conducted pursuant to valid statutory schemes do not violate the Constitution simply because of the existence of a specific suspicion of wrongdoing."). Finally, Appellants' authority for this point is distinguishable on its own terms. In *United States v. Johnson*, 994 F.2d 740 (10th Cir. 1993), the Tenth Circuit held that an administrative inspection is a sham only if it is "a pretext solely to gather evidence of criminal activity." *Id.* at 742. That court went on to note that, in scenarios where federal law enforcement officers accompany

state regulatory officers, it is only of concern when the federal law enforcement officer is "actively participat[ing]" and thus conducting a search of their own. *Id.* at 743. Nothing in the record indicates that took place here.

The DEA filing a complaint and going along with the TMB investigators to see if Dr. Zadeh would be available for questioning are both commonplace events—similar to both *Villamontes-Marquez*, 462 U.S. at 584 n.3, and *Beck*, 204 F.3d at 638-39—and thus there is no issue with the issuance and service of the administrative subpoena here.

II. Alternatively, the TMB's Reasonable Enforcement of the Administrative Subpoena Warrants Qualified Immunity.

Though the trial court erred in its Fourth Amendment analysis, it correctly determined that this Court's precedent in *Beck* made it reasonable for Board officials to believe that authority existed for the administrative subpoena to be issued and served in an *instanter* posture.

Qualified immunity shields government officials "from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). And it is not enough to allege generally that rights have been violated—"a high degree of particularity" is required in order to ensure that the officer had "fair warning" that the specific conduct in question was unlawful. *Morgan*, 659 F.3d at 372 (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[T]he salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave

respondents fair warning that their alleged treatment of Hope was unconstitutional.")). Qualified immunity applies even if the government official commits "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson*, 555 U.S. at 231. For the plaintiffs to overcome the TMB defendants' right to qualified immunity, they must show both a violation of a clearly established constitutional right and that the conduct of the defendants was not objectively reasonable in light of clearly established law at the time of the events giving rise to the suit. *See Davis*, 518 F.3d at 317. They can show neither here.

As noted previously, *supra* Part I, the district court effectively overruled this Court's decision in *Beck* by (1) finding the related field of medicine not to be closely regulated, ROA.554, even though *Beck* was also based on the rationale of regulating doctors' distribution of controlled substances; and (2) finding *Beck*'s treatment of the constitutionally "adequate substitute for a warrant" to be in tension with *Burger* and disregarding it, ROA.566. Implicitly recognizing this shift in the law, qualified immunity was granted once the district court determined that the Board had not overstepped what it should have understood its authority to be, even in light of *Beck*. ROA.1405. "Even if the government official's conduct violates a clearly established right, the official is entitled to qualified immunity if his conduct was objectively reasonable." *See Davis*, 518 F.3d at 317. It was objectively reasonable here for the Board officers to follow *Beck*, the controlling law at the time, and therefore, even if this Court agrees with and adopts the district court's view of Fourth Amendment law, Appellees would still be entitled to qualified immunity for the issuance and serving of the administrative subpoena here.

Conclusion

The judgment of the district court should be affirmed.

Respectfully submitted.

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Certificate of Service

On November 9, 2017, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ John C. Sullivan
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,431 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ John C. Sullivan
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