Case 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

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 APPELLANTS

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Oral argument requested

Certificate of Interested Persons

(1) Number and Style of the Case:

JOSEPH A. ZADEH, ET AL,
Plaintiff – Appellant,
v. No. 17-50518
MARI ROBINSON, ET AL,
Defendant – Appellee.

(2) 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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5. Sharon Pease – Defendant-Appellee

6. Kara Kirby – Defendant-Appellee

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Statement Regarding Oral Argument

Appellants respectfully request oral argument because this case raises significant and urgent constitutional questions involving (1) Texas' purported ability to demand and conduct on-site warrantless inspections of doctors' offices to secure patients' entire medical files in furtherance of criminal investigations outside of the judicial process despite the absence of any exception to the Fourth Amendment's warrant requirement and (2) the Texas Medical Board's purported ability to authorize its Executive Director to re-delegate subpoena authority expressly delegated by the Texas Legislature to her specifically. Permitting state investigators to conduct criminal investigations and seize patients' entire medical files (which contain extremely private and sensitive information) without a warrant, any constitutionally sufficient oversight, or notification to the patients would set a chilling precedent with enormous potential for abuse while immeasurably denigrating well-established Fourth Amendment protections. Oral argument will aid the Court in its decisional process concerning the substantial constitutional and privacy interests at issue in this appeal.

TABLE OF CONTENTS

Table of Authorities

Cases

Rules

Statutes

Texas Administrative Code

Other

Jurisdictional Statement

Appellants brought this action on July 17, 2015 pursuant to 42 U.S.C. § 1983. On February 17, 2017, the trial court granted Appellee's motion for summary judgment. Appellants' Motion to Alter or Amend the Judgment was denied on May 18, 2017.

Appellants filed a timely Notice of Appeal on June 15, 2017. This is a direct appeal from the entry of judgment granting Appellee's motions to dismiss and for summary judgment. This Honorable Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291.

Statement of the Issues

1. On October 22, 2013, had the United States Supreme Court's decision in *See v. City of Seattle* (1967) clearly established that state administrative agencies were prohibited from utilizing agency personnel to demand immediate inspections in the field while depriving the People of their constitutionally guaranteed opportunity to secure pre-compliance reviews of the government's warrantless demands?

2. Does the Texas Medical Board's use of subpoenas *instanter* to search or inspect doctors' offices violate the Supreme Court's unambiguous holding in *New York v. Burger* (1987)?

3. Does Appellees' (a) warrantless search of Appellants' documents in conjunction with federal actors conducting a criminal investigation, (b) representation that said federal actors were "with the Medical Board", and (c) provision of Appellants' documents to said federal actors constitute "excessive entanglement with law enforcement" sufficient to deprive Appellees of qualified immunity?

4. Are administrative subpoenas *instanter* demanding immediate compliance and executed by administrative employees under color of state law without any opportunity for pre-compliance review effectively illegal executive branch search warrants that are not signed by a neutral and detached magistrate?

5. Does Texas law authorize the Executive Director of the Texas Medical Board to re-delegate her subpoena authority despite the fact that the Texas Legislature specifically identified only two Texas Medical Board employees who have said authority?

6. Does Texas law which purportedly permits the Texas Medical Board to delegate purported authority to issue subpoenas *instanter* violate binding constitutional jurisprudence from the United States Supreme Court?

7. Was the subpoena *instanter* served on Dr. Zadeh's office void?

8. Did the trial court abuse its discretion when it declined to hear Appellants' requests for declaratory judgment (declaring Texas statutes and administrative code provisions unconstitutional as applied) despite also finding those statutes satisfied this Honorable Court's holding in *Beck v. Texas Bd. of Dental Examiners*?

9. Did the trial court err when it deferred to the Texas Medical Board's implementation of an unambiguous statute in a manner that directly conflicted with the language selected by the Texas Legislature?

10. Does this Honorable Court's holding in *Beck v. Texas Bd. of Dental Examiners* support (a) state actors' purportedly reasonable beliefs that the medical profession is considered a "closely regulated industry" sufficient to arguably justify circumventing the Fourth Amendment's clearly established warrant requirement and (b) Appellees' entitlement to summary judgment despite (i) the absence of a Texas statute which provides a constitutional adequate substitute for a search warrant and (ii) conduct which exceeded the scope of Appellees' authority?

11. If *Beck* supports the trial court's Orders disposing of Appellants' causes of action, does *Beck* violate the Supreme Court's holding in *See*?

12. Did the trial court violate fundamental principles of law and the Supreme Court's holding in *Tolan v. Cotton* when it failed to view the evidence in the light most favorable to the Appellants and draw all inferences in favor thereof (*e.g.:*

    (a) that Appellees' search was pretextual because (i) the subpoena *instanter* was for a minority of Dr. Zadeh's patients in any given month; (ii) their search was performed in known furtherance of an active DEA criminal investigation; (iii) they provided private medical records to DEA investigators; and (iv) the DEA renewed Dr. Zadeh's DEA prescription number;

    (b) that Appellee Pease performed an impermissible search when she (i) entered into non-public portions of Dr. Zadeh's office without consent and (ii) had access therein to non-public records in which Appellants had a reasonable expectation of privacy; and

    (c) that the uncontested evidence demonstrated that Dr. Zadeh neither registered as a pain management clinic nor needed to register (thereby eliminating the arguable possibility that Appellees' search was authorized by Texas Occupations Code Chapter 168)?

13. Can the individual to whom the Texas Legislature delegated subpoena authority be held liable in her supervisory capacity for re-delegating said authority despite exercising zero oversight thereover herein?

14. Is the line between a legitimate administrative search and an illegal pretextual search so unclear that Appellees are entitled to qualified immunity as a matter of law?

Standard of Review

The court's Order granting Appellees' motion to dismiss Appellants' claims is reviewed de novo.[1]

The court's Order granting Appellees' motion for summary judgment is reviewed de novo applying the same standards as the district court.[2] Summary judgment is only appropriate if the evidence shows that there is no genuine dispute as to any material fact.[3] "An issue is 'genuine' if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party."[4] "A fact issue is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law."[5] All facts and inferences are drawn in the light most favorable to the party opposing summary judgment.[6]

The court's decision to refrain from hearing Appellants' requests for declaratory judgment is reviewed for abuse of discretion.[7]

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1 *Carroll v. Fort James Corp.,* 470 F.3d 1171, 1173 (5th Cir.2006).

2 See generally *Stephenson v. McClelland,* No. 15-20182, *6 (5th Cir. Dec. 4, 2015) (unpub.) (citing *Poole v. City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2012)).

3 *Nickell v. Beau View of Biloxi*, *L.L.C.*, 636 F.3d 752, 754 (5th Cir. 2011). See also FED. R. CIV. P. 56(a).

4 *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 812 (5th Cir. 2010) (quoting *Hamilton v. Segue Software*, *Inc.*, 232 F.3d 473, 477 (5th Cir. 2000)).

5 *Id.* (citation omitted).

6 *Dillon v. Rogers*, 596 F.3d 260, 266 (5th Cir. 2010).

7 *Sherwin-Williams Co. v. Holmes Cty,* 343 F.3d 383, 389 (5th Cir.2003).

Summary

Appellants (Dr. Zadeh and his Jane Doe patient) sued Appellees under § 1983. The Honorable District Court ["the court"] erroneously granted Appellees' motion to dismiss and motion for summary judgment. Specifically, the court ignored Supreme Court jurisprudence which prohibited Appellees from enforcing their demands for inspection without affording the People an opportunity to secure pre-compliance review.[8] The court also impermissibly ignored admissible evidence demonstrating that Appellees' search (1) was pretextual, (2) would not have been initiated but for their collusion with the DEA to knowingly advance a criminal investigation via unconstitutional access to the People's protected health information, (3) was not limited to the matters listed in the Board's subpoena *instanter*, and (4) was not supported by any constitutionally relevant or sufficient statute. The court also incorrectly held that the Executive Director had authority to re-delegate subpoena authority that the Texas Legislature specifically assigned to her. The trial court concluded that "the line between a legitimate administrative search and an illegal pretextual search has not been defined with sufficient clarity to allow [Appellants] to overcome [Appellees'] qualified immunity defense."[9] Appellants respectfully and forcefully disagree with the court's conclusions.

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8 *See v. City of Seattle,* 387 U.S. 541, 544-45, 87 S.Ct. 1741, 18 L.Ed.2d 930 (1967).

9 ROA. 1441.

Statement of the Case

In late September of 2013, DEA Diversion Investigator Michelle Penfold ["Penfold"] sent an email to Belinda West ["West"] at the Texas Medical Board ["TMB"]; this email informed West that Penfold was, "at the point in the **criminal** case that [she] need[ed] to interview Dr. Zadeh and review his patient files"[10] and expressly asked West if a TMB investigator could "accompany" her during her interview and review at Dr. Zadeh's office.[11] DEA agent Penfold's criminal investigation targeted Dr. Zadeh *and* his patients.[12] Despite not yet receiving an actual complaint, West forwarded said email to TMB staff and wrote, "This is a new complaint. It needs to move quickly for processing. It's a priority 1 with NO notice at any time."[13]

The trial court correctly found that Appellees Pease and Kirby were both investigators with the Texas Medical Board and that:

> "[they] served a subpoena instanter on the medical office of [Appellant]…The subpoena bore the electronic signature of [Appellee Robinson]…and **demanded immediate production** of the medical records of sixteen of [Dr. Zadeh's] patients, including the medical records of [Appellant] Jane Doe. [Appellees] Pease and Kirby were accompanied by two agents with the Drug Enforcement Agency

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10 ROA. 1524 (emphasis added).

11 ROA. 1524.

12 See Transcript of Proceedings (Evidentiary Hearing), at p. 10: 22-25, 11:1-3, *United States v. Joseph Zadeh,* 4:14-cv-00105 (N.D. Tex., July 31, 2014), ECF #57 ("MR. MAHAFFEY: At this juncture it's fair to say and I'll represent both the physicians and some of the patients are targets of the investigation, Your Honor."). See also ROA. 1788 (Dr. Zadeh only).

13 ROA. 1524.

> ('DEA'), which was involved in an ongoing criminal investigation of [Dr. Zadeh's] prescription of controlled substances to the patients under his care."[14]

Dr. Zadeh's assistant asked Pease and Kirby if she could contact counsel when she was served with the subpoena *instanter*,[15] was denied the opportunity,[16] was threatened that Dr. Zadeh's medical license would be revoked if she did not immediately comply with the subpoena *instanter*,[17] believed said threats,[18] and ultimately produced the documents as ordered.[19] Dr. Zadeh was not present when the subpoena was served.[20]

Pease and Kirby arrived at Dr. Zadeh's office with two DEA investigators, including Penfold.[21] Pease told Dr. Zadeh's office manager that they were "with the Medical Board".[22] Appellee Pease followed Appellant Zadeh's office manager into several non-pubic rooms without asking permission,[23] asked about where Dr. Zadeh kept controlled substances,[24] and went into the chart room (where she could read the names on the outside of the charts).[25] Pease's conduct comported with the TMB's

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14 ROA. 1392 (emphasis added).
15 ROA. 951 at p. 66: 23-25, 67: 1-25; 68: 1-9.
16 *Id.*
17 See also ROA. 949: 10-21; ROA. 943: 13-16 and ROA. 952: 17-25, 953: 1-2.
18 ROA. 941, 29: 12-14.
19 ROA. 940, 22: :1-7.
20 ROA. 945, 44: 3-6.
21 ROA. 1032, ¶ 3.
22 ROA. 952, 72: 25, 73: 1-6.
23 ROA. 940, 24: 3-9.
24 ROA. 940, 24: 11-13.
25 ROA. 951-952, at pp. 68-70.

policy to tour doctors' offices.[26] Additionally, Appellees Pease and Kirby allowed the DEA investigators to review Dr. Zadeh's patient medical files during their onsite search;[27] Appellees claimed that they were "required by Texas law to 'cooperate and assist' a law enforcement agency that is conducting a criminal investigation of a physician by providing information to the same."[28]

Appellees argued below that the search was conducted pursuant to Texas Occupations Code Chapter 168;[29] this chapter permits "inspections" of "pain management clinics" [30] and defines same as "a publicly or privately-owned facility for which a ***majority*** of patients are issued ***on a monthly basis*** a prescription for opioids, benzodiazepines, barbiturates, or carisoprodol, but not including suboxone." (emphases added). It is uncontested that Dr. Zadeh was not registered as a pain clinic[31] and that 16 patients did not constitute a majority of his patients seen in September 2013.[32] The trial court correctly acknowledged that the TMB did not have authority to inspect his office and records.[33]

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26 ROA. 1772.
27 ROA. 942, p. 30: 13-25, 31: 1-12.
28 ROA. 193.
29 ROA. 1621, 85: 15-20.
30 Tex. Occ. Code § 168.052.
31 ROA. 1787, at ¶ 7. Compare also ROA. 430 at ¶ 48 (b) with ROA. 485 at ¶ 48 (b).
32 ROA. 1787 at ¶ 4.
33 ROA. 559 ("However, the legal authorities cited by [Appellees] do not support their contention that the TMB has the authority to inspect any facility it *suspects* is a pain management clinic.") (emphasis added, citations omitted).

Even if Dr. Zadeh fit the general criteria for pain management registration, however, he still would have been exempted therefrom as a matter of statutory law because the record demonstrates his clinic was "owned or operated by a physician who treats patients within the physician's area of specialty and who personally uses other forms of treatment, including surgery, with the issuance of a prescription for a majority of the patients."[34] Specifically, (1) Dr. Zadeh owned and operated his clinic at all times relevant hereto[35] and (2) at the time of the complaint and incident in question, he had been treating his patients within the area of his specialty at his clinic using other forms of treatment (besides prescribing controlled substances) with the issuance of a prescription for the majority of patients.[36] It is unclear from the record what legitimate statutory purpose the subpoena *instanter* at issue herein purportedly served given that it was for sixteen specific and named patient records despite the fact that Dr. Zadeh saw approximately 190 patients in September 2013.[37]

Appellants brought suit pursuant to (1) 42 U.S.C § 1983 and (2) the Declaratory Judgment Act. Appellants specifically alleged causes of action for violations of the Fourth and Fourteenth Amendments to the United States Constitution. Appellants also made seven separate requests for declaratory

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34 Compare Tex. Occ. Code. § 168.002(7) with ROA. 1787-1790.
35 ROA. 1787, at ¶ 5.
36 1788, at ¶¶ 8-9.
37 ROA. 1787.

judgment concerning Texas law and the unconstitutional application thereof. Appellants filed a motion for summary judgment on October 9, 2015 asking the trial court to declare Texas Occupations Code § 153.007(c) unconstitutional as applied[38] because the TMB admitted to using this statute to justify the execution of subpoenas *instanter* by agents in the field.[39] The trial court dismissed the majority of Appellants' claims,[40] dismissed the requests for declaratory judgment based on *Younger*,[41] and granted Appellees' motion for summary judgment.[42]

The trial court correctly concluded that the medical profession is not a closely-regulated industry.[43] Despite this conclusion, Appellee Robinson admitted that "there is no predictive regularity as to who is going to receive a subpoena and who will not"[44] and that licensees who did not comply with subpoenas would be referred to the Board for discipline.[45] Robinson also stated she was unaware of any mechanism whereby a physician could seek pre-compliance review of a subpoena *instanter.*[46] Additionally, the record shows the TMB has unilaterally revoked

38 ROA. 197.
39 ROA. 73.
40 ROA. 569.
41 ROA. 550.
42 ROA. 1392-1407.
43 ROA. 554.
44 ROA. 1613, at 53: 3-4.
45 ROA. 807 at 92: 2-15.
46 ROA. 773, 4-6.

doctors' licenses (without any judicial branch involvement) for failing to comply with TMB subpoenas.[47]

Appellees initially stated in their Answers to Appellants' Complaint that Appellee Robinson signed the subpoena executed on Dr. Zadeh's office by Appellees Pease and Kirby.[48] Appellee Pease's testimony affirmed same.[49] Robinson, however, testified that (1) she did not review the subpoena,[50] (2) she delegated her subpoena authority to Belinda West,[51] and (3) she had no personal knowledge about the facts of this case.[52] Texas Occupations Code § 153.007 (b) provides that the Texas Medical Board may delegate its subpoena authority "to the executive director or the secretary-treasurer of the board"; the Texas Legislature has not authorized any other person to wield subpoena power on behalf of the TMB.

Despite being a Texas lawyer and the (now former) Executive Director of the Texas Medical Board, Robinson (1) has testified to the Texas Legislature that, "The Fourth Amendment only applies to criminal law enforcement, we [the TMB] are civil law enforcement…",[53] (2) is not aware of any opportunity for the recipient of

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47 ROA. 1759-1762.

48 Compare ROA. 424 at ¶ 10 with ROA. 482 at ¶ 10 ("Admit").

49 ROA. 1635, 32: 2-15.

50 ROA. 766: 19-25 and ROA 776: 1-11.

51 ROA. 907. See also ROA. 768: 17-25 and ROA. 769: 1-25.

52 See ROA. 1608: 9-11; ROA. 1614: 7-12 and 18-19; *id.*: 25 and *id*: 1 and 20-24; ROA. 1617: 13-17, *id.*: 8-11 and 19-20, and ROA. 1623: 20-24.

53 https://www.youtube.com/watch?v=LmV-utEnSfk at 4:50. This same evidence was presented below. ROA. 143 and 654.

a subpoena *instanter* to secure pre-compliance review,[54] (3) does not know what the phrase "constitutionally adequate substitute for a search warrant" means,[55] and (4) has testified that a search is only conducted when the government does not know what it seeks.[56] The TMB's policy is to tour doctors' offices and to observe storage of controlled substances and drug records[57] despite the facts that (1) "The TMB is not authorized to physically search or inspect a doctor's office"[58] and (2) the medical profession is not a "closely regulated industry".[59] Finally, the trial court correctly concluded that, "The TMB's subpoena and inspection authorities are purely discretionary. Nothing in the language of either statute creates certainty that a medical office will [be] inspected with regularity."[60]

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54 ROA. 773: 4-6 (Q: "[D]oes a subpoena instanter permit a licensee to obtain precompliance review? A: Not that I'm aware of.").

55 ROA. 774: 2-4 ("Q: Are you familiar with the term ['] constitutionally adequate substitute for a search warrant[']? A: Not really."). See also ROA. 774, 5-25; ROA. 775: 1-25; and ROA. 776: 1-13 ("Q: Do you believe the phrase ['] constitutionally adequate substitution for a search warrant['] is vague?...THE WITNESS: I believe that you obviously have a specific intent in mind when you are asking me that. I don't know what it is and I don't understand what you are asking me.").

56 ROA. 772: 3-9 ("Q. So a search is only if you don't know what you are looking for? [Objection]…THE WITNESS: That's why it's called a search.").

57 ROA. 1772.

58 ROA. 557.

59 ROA. 554.

60 ROA. 565.

Arguments and Authorities

I. The trial court erred because Appellants' rights were clearly established at all times relevant hereto

a. Appellants' right to remain free from unreasonable searches and seizures

The United States Supreme Court has held:

> "The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in *Camara v. Municipal Court,* 387 U.S. 523, 528, 87 S.Ct. 1727 1730, 18 L.Ed.2d 930, the 'basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.' The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943, *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 311-313, 98 S.Ct. 1816, 1819-1821, 56 L.Ed.2d 305. These deviations from the typical police search are thus **clearly** within the protection of the Fourth Amendment."[61]

Therefore, Appellants' rights to remain free from unreasonable searches and seizures were clearly established at all times relevant hereto.

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[61] *Michigan v. Tyler,* 436 U.S. 499, 504-05 (1978) (emphasis added). See also *id,* at 507-08; *Club Retro LLC v. Hilton,* 568 F.3d 181, 202-03 (5th Cir.2009); and *United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945, 950-51 n.3 (2012).

b. Appellants' right to pre-compliance review

The trial court correctly concluded that, "The rule that an agency must provide an opportunity for a party to challenge an administrative subpoena prior to compliance is longstanding and unambiguous."[62] Despite this longstanding and unambiguous right, Appellees intentionally deprived Appellants of their right to secure pre-compliance review because (1) the subpoena demanded immediate compliance[63] and (2) TMB agents unlawfully threatened Dr. Zadeh's assistant that his license would be unilaterally revoked if she failed to comply.[64] While there are exceptions to the right to secure pre-compliance review, none exist herein (particularly because there was no exigency, no consent, no adequate substitute for a search warrant, and the trial court correctly concluded that the medical profession

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62 ROA. 562 (citing *Donovan v. Lone Steer, Inc.,* 464 U.S. 408, 415 (1984) and *See v. Seattle*, 387 U.S. 541, 544-45 (1967)). See also *Patel,* 576 U.S., at ___ (slip op., at 10) (citations omitted); *id.* (slip op., at 9) (finding the Act "facially unconstitutional because it fails to provide hotel operators with an opportunity for precompliance review….the Court has repeatedly held that 'searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge] are *per se* unreasonable…subject only to a few established and well-delineated exceptions."); *Lone Steer, Inc.*, 464 U.S., at 415 (It is "clear" that recipients of administrative subpoenas may "question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court.") (citations omitted); and *U.S. v. Sturm, Ruger & Co., Inc.*, 84 F.3d 1, 3 (1st Cir.1996).

63 See ROA. 1392.

64 See *United States v. Security State Bank & Trust*, 473 F.2d 638, 641 (5th Cir. 1973) ("[A]n administrative agency which enjoys subpoena powers…cannot 'under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment.'") (citing *Interstate Commerce Commission v. Brimson,* 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047 (1894)). See also *id.,* at 642 and *United States v. Zadeh*, 820 F.3d 746, 756 (5th Cir. 2016).

is not a closely regulated industry). Therefore, Appellees violated Appellants' clearly established rights when they demanded and enforced immediate compliance with an administrative subpoena.

II. The trial court erred because clearly established law plainly prohibits administrative agencies from enforcing their own demands for inspection (QUESTION 1)

The trial court incorrectly concluded that, "The available evidence consistently indicates that [Appellees'] presence at [Dr. Zadeh's] office was solely to execute the subpoena instanter and, therefore, their presence did not violate the Fourth Amendment."[65] This holding flatly ignores the United States Supreme Court's unambiguous holding that administrative agencies' demands for inspection "may ***not*** be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *See,* 387 U.S., at 544-45 (emphasis added). Despite the trial court's (1) conclusion that the TMB's subpoena "demanded immediate production" of medical records[66] and (2) recognition that Appellee Pease "may have told [Dr. Zadeh's assistant] that [he] was obligated to comply with the subpoena and that failure to do so 'could result in additional

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65 ROA. 1404 (citing *Lone Steer, Inc.,* 464 U.S., at 413).

66 ROA. 1392.

disciplinary action'",[67] the court nonetheless incorrectly concluded that Pease and Kirby acted "within the scope of their statutory subpoena authority."[68] The trial court plainly erred because (1) Texas statutes cannot authorize government action which is prohibited by the Constitution and (2) if Texas statutes authorized Appellees' conduct, then Appellants' requests for declaratory relief should have been heard. As a result, the trial court's Orders were incontrovertibly erroneous to the extent that they refused to acknowledge or distinguish binding United States Supreme Court jurisprudence and the fundamental importance of both federalism and *stare decisis*.

III. The trial court erred because Appellees' conduct was *per se* unreasonable as a matter of controlling law

a. The reasonableness of Appellees' conduct is a question of law

The reasonableness of Appellees' conduct is a question of law because it implicates (*inter alia*) the Fourth Amendment to the United States Constitution.[69] "[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only

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67 ROA. 1403, n 3.

68 ROA. 1405.

69 *United States v. Williams,* 343 F.3d 423, 435 (5th Cir.2003), *cert. denied,* 540 U.S. 1093 (2003).

to a few specifically established and well-delineated exceptions."[70] Here, there was no such exception. As a result, Appellees' conduct was *per se* unreasonable[71] (and their subpoena was void[72]) as a matter of controlling law.[73]

b. The TMB's search was unreasonable as a matter of law

Despite this protection against unreasonable searches, the record demonstrates Appellees compelled the immediate inspection of papers from a business.[74] "Where, as here, the government compels the inspection of 'papers' that are the property of a business, 'a "search" within the original meaning of the Fourth Amendment' has "undoubtedly occurred."[75] The trial court concluded that (1) "The TMB's subpoena

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70 *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

71 *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 29 L.Ed. 746 (1886) ("A compulsory production of the private books and papers…is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and *an unreasonable search and seizure*—within the meaning of the Fourth Amendment.") (emphasis added). See also *Katz,* 389 U.S., at 357.

72 See *Boyd,* 116 U.S., at 638 (finding government conduct and the law authorizing same "unconstitutional and void"). See also *State v. Opperman*, 74 Tex. 136, 11 S. W. 1076, 1077 (Tex.1889) (finding government action void when it was performed in an unauthorized manner) and *Lufkin v. City of Galveston*, 56 Tex. 522, 531-32 (1882).

73 *Mapp v. Ohio*, 367 U.S. 643, 646-47, 81 S.Ct. 1684, 1686-87, 6 L.Ed.2d 1081 (1961) (the doctrines of the Fourth and Fourteenth Amendments "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property…Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation [of those Amendments].") (quoting *Boyd,* 116 U.S., at 635). See also *Mid-Fla Coin Exchange, Inc. v. Griffin*, 529 F. Supp. 1006, 1031 (M.D. Fla.1981); and *Boyd*, 116 U.S., at 634.

74 ROA. 1709: 14-25, ROA. 1710: 1-25, and ROA. 1711: 1-21.

75 *United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945, 950-51 n.3 (2012).

authority is limited to compelling the production of books, records, and documents or compelling the attendance of a witness"[76] and (2) "The TMB is not authorized to physically search or inspect a doctor's office."[77] Despite these prohibitions, Appellee Pease admits both that she went into Dr. Zadeh's records room[78] and that the records room was not "open to the public".[79] Appellee Pease did so without asking permission,[80] asked where Dr. Zadeh kept controlled substances,[81] and (without permission) went into the chart room (where she could read the names on the outside of the charts).[82] Standing alone, these acts demonstrate Appellees conducted an impermissible and patently unreasonable search as a matter of law[83] (particularly when all facts and reasonable inferences are read in the light most favorable to Appellants).

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76 ROA. 557 (citing Tex. Occ. Code § 153.007(a)).

77 *Id.*

78 ROA. 1651, at 93: 15-19.

79 ROA. 1651, at 96: 1-6.

80 ROA. 940, at 24: 3-9.

81 ROA. 940, 24: 11-13.

82 ROA. 951-952, at pp. 68-70. Instead of viewing these facts in the light most favorable to Appellants, the court found that Pease "accompanied" Dr. Zadeh's assistant into non-public rooms (thereby implying that she was somehow permitted to be there). Compare ROA. 908 (Appellees' motion for summary judgment) with ROA. 1392 (Order adopting Appellees' language).

83 *Arizona v. Hicks,* 480 U.S. 321, 325 (1987) ("[T]aking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry… A search is a search, even if it happens to disclose nothing but the bottom of a turntable.") and *United States v. Pierre,* 932 F.2d 377, 383 (5th Cir.1991) ("We are aware of no case holding that an officer did not conduct a 'search' when he physically intruded part of his body into a space in which the suspect had a reasonable expectation of privacy.").

This Honorable Court has held that, "[A]t least three elements are necessary to establish the reasonableness of a proposed administrative search: 1) whether the proposed search is authorized by statute; 2) whether the proposed search is properly limited in scope; and, 3) how the administrative agency designated the target of the search."[84] Here, the proposed search was not authorized by statute, Appellee Pease went into non-public areas of Dr. Zadeh's office where she had unmitigated access to non-public information in which Appellants had a reasonable expectation of privacy, and Dr. Zadeh's office was designated as the target for the search because the DEA directly informed the TMB that it was conducting a criminal investigation (and asked for the TMB's help). As a result, the search herein was clearly unreasonable.

c. *The TMB's use of a subpoena* instanter *to search or inspect Dr. Zadeh's office violates the Supreme Court's holding in* New York v. Burger *(QUESTIONS 2 and 8)*

Appellee Robinson has admitted (1) "there is no predictive regularity as to who is going to receive a subpoena and who will not"[85] and (2) she (as the Executive Director of the TMB at the time) did not even understand the meaning of the term

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84 *United States v. Harris Methodist Ft. Worth*, 970 F.2d 94, 101 (5th Cir.1992). See also *Donovan*, 452 U.S., at 599 (citing *Colonnade,* 397 U.S., at 77).

85 ROA. 1613, at 53: 3-4.

"constitutionally adequate substitute for a search warrant."[86] Appellees' conduct was plainly unconstitutional as a matter of law because they (*inter alia*) utilized their own discretion to determine who would be subpoenaed, when they would be subpoenaed, and how they would be subpoenaed.[87]

The trial court correctly concluded that, (1) "[T]he TMB's inspection authority…is purely discretionary";[88] (2) "The TMB is allowed to choose which clinics to inspect and to do so at a frequency it determines";[89] and (3) "Accordingly, [the] TMB's inspection authority cannot meet the third prong of the *Burger* test because it 'fails sufficiently to constrain…discretion as to which [businesses] to search and under what circumstances."[90] Further, the trial court previously and correctly concluded that the statutes at issue provide neither regularity nor certainty pertaining to Appellees' purported authorities.[91] Therefore, there is no constitutionally adequate substitute for a search warrant as a matter of law because Texas doctors are completely unaware that the State intends to subject them to periodic inspections.[92] Texas doctors lack such awareness precisely because the

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86 ROA. 774: 2-4. See also ROA. 774, 5-25; ROA. 775: 1-25; and ROA. 776: 1-13.

87 ROA. 902: 21-25 and ROA. 903: 1-11. See also ROA. 1648, 82: 20-25, 83: 1-4, ROA. 1643, 62: 17-25, and 64: 17-24.

88 ROA. 560.

89 ROA. 561.

90 *Id.* (quoting *City of Los Angeles, Calif. v. Patel,* 135 S.Ct. 2443, 2456 (2015)).

91 ROA. 558. See also ROA. 565 ("Nothing in the language of either statute creates certainty that a medical office will inspected with regularity.").

92 See *New York v. Burger,* 482 U.S. 691, 703 (1987) ("[T]he statute must be 'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that

State does not intend to subject doctors to periodic inspections,[93] the Legislature cannot be presumed to have intended to violate the Constitution,[94] and even if it did so intend the present scheme would be blatantly unconstitutional (thereby evidencing the impropriety of dismissing Appellants' requests for declaratory judgment).

Additionally, the trial court correctly concluded that the statutes at issue herein do not satisfy *Burger* because they fail to limit the discretion of the officers;[95] Appellee Robinson testified that the TMB "can subpoena anything that is necessary in the course of our investigation" at any time[96] and Appellee Pease was unable to

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his property will be subject to periodic inspections undertaken for specific purposes.'") (quoting *Donovan v. Dewey,* 452 U.S. 594 600, 603 (1981)).

93 See 22 T.A.C. § 195.3(c) ("This section does not require the board to make an on-site inspection of a physician's office.").

94 See *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 303 (1924) ("Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.") (citing *ICC v. Brimson*, 154 U.S. 447, 479 (1894)). See also *U.S. v. Bulacan*, 156 F.3d 963, 967 (9th Cir.1998).

95 ROA. 561 ("TMB's inspection authority cannot meet the third prong of the *Burger* test because it 'fails sufficiently to constrain . . . discretion as to which [businesses] to search and under what circumstances.'") (quoting *Patel*, 135 S. Ct. 2443 at 2456). See also *Donovan v. Dewey,* 452 U.S. 594, 601 (1981) (such regulatory schemes "devolve[ ] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search."); *V-1 Oil Co. v. Wyo. Dep't of Envtl. Quality*, 902 F.2d 1482, 1487 (10th Cir.1990) ("Administrative searches conducted pursuant to statues of general applicability require search warrants."), *cert. denied sub nom. V-1 Oil Co. v. Gerber*, 498 U.S. 920, 111 S.Ct. 295, 112 L.Ed.2d 249 (1990); and *Bulacan,* 156 F.3d, at 973 ("[W]hen an administrative search scheme encompasses both a permissible and an impermissible purpose, and when the officer conducting the search has broad discretion in carrying out the search, the search does not meet the Fourth Amendment's reasonableness requirements.").

96 ROA. 1610: 25, ROA. 1611: 1-10.

identify *any* limitation to her authority.[97] The record is devoid of any admissible evidence demonstrating any constitutionally sufficient limitation of Appellees' purported authorities; therefore, the statutes (to the extent they permit Appellees' conduct at all) remain plainly unconstitutional and the trial court erred when it dismissed Appellants' requests for declaratory relief.

If TMB officials are somehow permitted to utilize the absence of a statutory scheme to unilaterally choose (1) who is subject to demands for immediate compliance, (2) what can be searched and seized, (3) whether law enforcement officials conducting a criminal investigation can attend, (4) what documents to share with such officials despite the absence of a warrant, and (5) to whom subpoena authority can be delegated, then there can be no constitutionally adequate substitute for a search warrant.[98] Furthermore, the regulation relied upon by the trial court (22 T.A.C. §179.4(a)) does not even mention the term "onsite inspection" (or any synonymous term); therefore, neither it nor any other Texas law put doctors on notice that they could "not help but be aware that his property will be subject to periodic inspections."[99] When read in the light most favorable to Appellants, the record reveals that there are no limits placed on TMB employees' discretion when it

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97 See ROA. 1650, 90: 9-25, 91: 1-7.

98 See *Club Retro,* 568 F.3d, at 197 ("To limit officer discretion…the regulation must carefully limit authorized inspections 'in time, place, and scope.'") (internal citations omitted).

99 *Donovan,* 452 U.S. at 600.

issues subpoenas (even when those subpoenas are in furtherance of a federal criminal investigation and are signed by someone other than the TMB's Executive Director or Treasurer-Secretary). As a result, the trial court erred because there was no constitutionally adequate substitute for a search warrant.

d. Appellees were excessively entangled with law enforcement (QUESTION 3)

Appellees' conduct was an impermissible investigatory search and seizure performed alongside federal law enforcement officials conducting a criminal investigation without a federal warrant (or even a federal subpoena).[100] The United States has admitted in open court that it was conducting an investigation into Dr. Zadeh and his patients[101] and Appellants request this Honorable Court take judicial notice of same. Further, the DEA was required to present its notice of inspection[102] and did not do so. Therefore, Appellees' conduct violated the Fourth Amendment's reasonableness requirements because they deliberately and knowingly searched Dr. Zadeh's office and seized his records in conjunction with federal law enforcement

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100 *U.S. v. Johnson*, 994 F.2d 740, 743 (10th Cir.1993) ("Once on the premises, the federal agent actively participated in the search, transforming the state inspection into a federal investigatory search."). See also *Williams v. Kentucky,* 213 S.W.3d 671, 677 (Ky.2006) ("[W]arrantless inspections do become unconstitutional when both the administrative agency's investigation and resulting search are inextricably entwined with law enforcement personnel and law enforcement objectives.").

101 Transcript of Proceedings (Evidentiary Hearing), *United States v. Joseph Zadeh,* 4:14-cv-00105 (N.D. Tex., July 31, 2014), ECF #57 at pp. 10: 22-25 and 11:1-3.

102 *U.S. v. Funaro*, 253 F.Supp.2d 286, 288 (D. Conn.2003). See also 21 C.F.R. § 1316.06.

officers, shared seized documents therewith,[103] knew (or must have known) said officers lacked their own warrant, knew (or must have known) said officers were performing a criminal investigation,[104] and knew said officers required a warrant as a matter of well-settled law.[105] Therefore, the trial court erred because Appellees were excessively entangled with law enforcement and were not entitled to dismissal or summary judgment as a result thereof.[106]

e. The People are clearly entitled to review from a neutral magistrate (QUESTION 4)

Regardless of whether Robinson or West signed the subpoena, it was not signed by a neutral magistrate. A neutral and detached magistrate is an

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103 ROA. 942, p. 30: 13-25, 31: 1-8.

104 See ROA. 1524.

105 *Club Retro LLC,* 568 F.3d, at 202-03 (quoting *Donovan,* 452 U.S., at 599). See also *Bulacan,* 156 F.3d, at 973 and *Johnson*, 994 F.2d, at 743-44 ("Federal agents may not cloak themselves with the authority granted by state inspection statutes in order to seek evidence of criminal activity and avoid the Fourth Amendment's warrant requirement.").

106 See *Indianapolis v. Edmond,* 541 U.S. 32, 44 (2000) ("We decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control."). See also *Ferguson v. City of Charleston*, 532 U.S. 67, 79, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001); *Johnson*, 994 F.2d, at 743; and *id.,* at 743-44 ("Because the evidence uniformly establishes that the federal agent initiated this operation for federal law enforcement purposes, a remand is unnecessary, and we conclude that the warrantless search was unreasonable."); accord *Williams v. Kentucky,* 213 S.W.3d 671, 676-77 (Ky.2006); *id.,* at 677 (quoting *Ferguson,* 532 U.S., at 88 and citing *New Jersey v. T.L.O.,* 469 U.S. 325, 341, n. 7, 105 S.Ct.733, 83 L.Ed.2d 720 (1985)); *id.* ("[W]arrantless inspections do become unconstitutional when both the administrative agency's investigation and resulting search are inextricably entwined with law enforcement personnel and law enforcement objectives."); and *United States v. Heine,* 3:15-cr-238-SI-1 (D. Or. Nov. 17, 2016). Cf *United States v. Blocker*, 104 F.3d 720, 727-28 (5th Cir.1997) (affirming district court's denial of a motion to suppress because (in part) no federal agent participated in or had a hand in the decision to conduct a search or inspection).

"indispensable condition" for a valid search warrant[107] and "[t]he Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates."[108] Therefore, the trial court erred when it found Appellees' conduct to be arguably reasonable under the circumstances because they effectively executed a subpoena as a search warrant despite the absence of a neutral and disinterested magistrate.[109] Appellees' abuses of authority are inherently unreasonable and indefensible under our revered system of laws.

f. Appellees exceeded the scope of their inspection authority

The court noted that the Texas Administrative Code granted the People a "reasonable time period" with which to comply with the TMB's subpoenas.[110] The trial court concluded that despite this provision, the TMB could demand immediate compliance (without analyzing whether there was a possibility that records could have been lost, damaged, or destroyed). "When an officer undertakes to act as his

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107 *Mancusi v. DeForte*, 392 U.S. 364, 371-72 (1968) (finding search was "'unreasonable within the meaning of the Fourth Amendment" where it was conducted pursuant to a subpoena) (citations omitted). See also *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 529, 87 S. Ct. 1727, 1731 (1967) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."). Cf *Roska v. Peterson,* 328 F.3d 1230, 1242 (10th Cir.2003) (if exigent circumstances are not present "there is no need for surprise and sudden action that renders obtaining a warrant counterproductive").

108 *U.S. v. U.S. Dist. Court of Eastern Dist. of Mich., Southern Division,* 407 U.S. 297, 316-17, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972). See also *Coolidge v. New Hampshire,* 403 U.S. 443, 450 (1971).

109 *Mancusi*, 392 U.S., at 371-72.

110 ROA. 557, n. 3 (citing Tex. Admin. Code § 179.4(a)).

own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant."[111] There is no such evidence in the record; instead, Robinson testified it was possible for records to be altered, damaged, or destroyed in *all* cases.[112] Therefore, the trial court erred when it concluded that the TMB could demand instant compliance despite guarantees of a reasonable time therefor without any particular showing that the records could be altered, damaged, or destroyed.

IV. The trial court erred because the TMB's subpoena was invalid as a matter of law (QUESTIONS 5-8)

a. The TMB's subpoena was invalid because it was not signed by the Board's Executive Director or Treasurer-Secretary as required by Texas law (QUESTION 5)

The TMB's subpoena *instanter* was void because it was issued in violation of (*inter alia*) Texas law. Texas Occupations Code § 153.007(a) provides that the TMB may delegate its subpoena authority "to the executive director or the secretary-treasurer of the board." Appellees' expressly conceded this point below.[113] Despite

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111 Welsh v. Wisconsin, 466 U.S. 740, 751 (1984) (citing *McDonald v. United States,* 335 U. S. 451, 459-60 (1948) (JACKSON, J., concurring)).

112 ROA. 1615-16.

113 ROA. 192 ("This statute explicitly authorizes the Executive Director of the TMB—here, Robinson—to issue such subpoenas."). See also *id.* ("Texas law authorizes TMB investigators—here, Pease and Kirby—to execute a subpoena issued by the Executive Director.").

this limitation, Appellee Robinson contends the subpoena *instanter* served herein was signed by someone other than her.

Unambiguous Texas jurisprudence holds that, "the officer or body designated by the Legislature may not 'subdelegate' the assigned functions to their own employees within the agency, nor may they convey the assigned functions outside the agency to be performed by another public body, public official, or private individuals."[114] Despite Appellees' admission (to the same district court) that it only has "the authority ***expressly*** provided by statute or necessarily implied in order to carry out the ***express powers*** the legislature has given it[,]"[115] they argued that

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[114] *Lipsey v. Texas Dep't of Health,* 727 S.W.2d 61, 64-65 (Tex.App.—Austin 1987, writ ref'd n.r.e.) ("The rule holds that where such a statute entrusts specified functions to a designated public officer or body, the Legislature **presumably** intends that only that officer or body shall exercise the assigned functions. In consequence of the statutory presumption, the officer or body designated by the Legislature may not 'subdelegate' the assigned functions to their own employees within the agency, nor may they convey the assigned functions outside the agency to be performed by another public body, public official, or private individuals. When either kind of transfer is attempted by the public officer or body to whom a function has been entrusted, the consequences may be viewed in different ways: those making the transfer may be said to act in excess of their statutory authority; they fail to discharge the statutory duties entrusted to them by the Legislature; and the actions taken by those purportedly receiving authority to perform the functions ***are invalid*** because of their want of authority.") (emphases added, citations omitted). See also Texas Attorney General Opinion GA-0820 (2010), available at https://www.texasattorneygeneral.gov/opinions/opinions/50abbott/op/2010/pdf/ga0820.pdf (last visited September 21, 2017) ("When a statute vests a specific function in a designated public officer or body, the Legislature presumably intends that only that officer or body shall exercise the assigned functions…Absent express authority, a governmental entity may delegate only ministerial tasks.") (citations omitted).

[115] *Teladoc, Inc. v. Texas Medical Board*, 1:15-CV-00343-RP (W.D. Tex. July 30, 2015), ECF #64 (Texas Medical Board's Amended Motion to Dismiss) at p. 13 (emphases added, quoting *Harlingen Family Dentistry, P.C. v. Tex. Health & Human Servs. Comm'n*, 452 S.W.3d 479, 481-82 (Tex. App.—Austin 2014, pet. dism'd)).

someone other than the Executive Director or Treasurer-Secretary signed the subpoena at issue herein. Therefore, the TMB's re-re-delegation[116] of subpoena authority to someone who was not authorized by a Texas statute was a violation of Texas law and was invalid as a matter thereof.[117]

No one can seriously contend (and Appellees have not even tried to contend) that the Legislature's limitation on the TMB's subpoena authority was unreasonable, ambiguous, or absurd. The Texas Legislature took the trouble to assign subpoena authority to two (and only two) TMB officials; the Executive Director is appointed by the Board and acts as the chief executive thereof[118] and the Treasurer-Secretary is elected by the Board.[119] Therefore, neither the TMB nor Robinson were permitted to re-delegate expressly limited subpoena authority (particularly (1) to persons who were neither elected nor appointed by the Board or (2) *instanter* authority). Appellees' conclusory argument that Robinson was permitted to re-delegate her authority ignores (*inter alia*) (1) over a century of Texas jurisprudence,[120] (2) the

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116 Texas Occupations Code § 153.007(a) delegates subpoena authority to the TMB while sub-section (b) only authorizes the TMB to re-delegate said authority to the Executive Director and the Secretary-Treasurer.

117 *Lipsey*, 727 S.W.2d at 61 ("[T]he actions taken by those purportedly receiving authority to perform the functions are invalid because of their want of authority."). See also *id.,* at 64-65; *Boyd,* 116 U.S., at 638; and *Opperman*, 11 S. W., at 1077.

118 Tex. Occ. Code § 152.051.

119 Tex. Occ. Code § 152.008.

120 *Ferguson v. Halsell*, 47 Tex. 421, 423 (Tex.1877) (Roberts, C.J.) ("The general doctrine is, that as the County Court is the agent of the county, in its corporate capacity it must conform to the mode prescribed for its action in the exercise of the powers confided to it. The prescribing of a mode of exercising a power by such subordinate agencies of the Government has often been held

to be a restriction to that mode."). See also *Opperman*, 11 S. W., at 1077; *Foster v. City of Waco*, 255 S.W. 1104, 1105, 113 Tex. 352 (Tex., 1923) (Cureton, C.J.) ("[W]here a power is granted, and the method of its exercise prescribed, the prescribed method excludes all others, and must be followed.") (citations omitted); *Lufkin*, 56 Tex., at 533 ("By placing the power in the city council the legislature impliedly prohibited its exercise by any other body or officer.") (citations omitted); *id.,* at 531; *id.,* at 531-32 ("[N]othing short of the most positive and explicit language could justify the court in holding that the legislature intended to confer such a power, or to permit it to be conferred on a city officer or committee. The statute in question not only contained no such language, but, on the contrary, clearly expressed the intention of conferring the exercise of this power[.]") (citations omitted); *id.,* at 533 ("The principle is a plain one, that the public powers or trusts, devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, *cannot be delegated to others.*") (emphasis in the original, citations omitted); *id.,* at 534 (permitting sub-delegation despite legislative enactment "would be giving to the engineer the right at his discretion" to perform the act sub-delegated) (citations omitted); *Sundberg,* 5 Tex., at 419 ("Statutes which prescribe and limit the exercise of official duty ought to receive a strict interpretation in respect to the powers conferred and the manner of their exercise; and those powers are not to be enlarged by construction.") (citing *Hosner v. De Young* (1 Tex. R., 764) and *League v. De Young* (2 Tex. R., 497)); *id.,* at 422-23 ("But when the Legislature have undertaken to enumerate [specifics concerning the power at issue], the enumeration must, we think, be taken to include all that was intended, and consequently to exclude all that is not included in the enumeration. When they have undertaken thus affirmatively to prescribe the particular…we must conclude that it was their intention that nothing else should be [permissible]… where the legislative intention is clear, if not inconsistent with the Constitution, it is the duty of the courts to give effect to that intention."); *id.,* at 423 ("Affirmatives in statutes that introduce a new rule imply a negative of all that is not within the purview…And where a statute limits a thing to be done in a particular form it includes in itself a negative, viz, that it shall not be done otherwise.") (citing 1 KENT COMM., 5th edit., 467)); and *id.,* at 424-25. Cf *Peters v. United States*, 853 F.2d 692, 696 (9th Cir.1988) ("[t]he authority of an administrative agency to issue subpoenas for investigatory purposes is created **solely** by statute") (emphasis added).

language of the Legislature,[121] (3) *expressio unius est exclusio alterius,*[122] (4) *delegata potestas non potest delegari,*[123] (5) respected legal commentators,[124] (6) the designed separation of powers,[125] (7) the TMB's own representations,[126] and (8)

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121 Tex. Occ. Code § 153.007(b).

122 *Environmental Conservation v. City of Dallas*, 529 F.3d 519 (5th. Cir.2008) (*expressio unius est exclusio alterius* instructs "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.") (citing *Christensen v. Harris County*, 529 U.S. 576, 583, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000)). See also *Duke v. University of Texas at El Paso*, 663 F.2d 522, 526 (5th Cir.1981) ("Simply stated, '(i)t expresses the learning of common experience that generally when people say one thing they do not mean something else.'") (citations omitted)) and *Zamora v. Edgewood Independent School Dist*., 592 S.W.2d 649, 649- 50 (Tex.App.—Beaumont 1979, writ ref'd n.r.e.) ("The inclusion of the specific limitation excludes all others.") (quoting *Harris County v. Crooker*, 112 Tex. 450, 248 S.W. 652, 655 (1923) (Cureton, C.J.)).

123 ELLIS PAXSON OBERHOLTZER, REFERENDUM IN AMERICA 208 (1911) (quoted {without attribution} by *Ex Parte Mode*, 180 S.W. 708, 729, 77 Tex.Crim. 432 (Tex.Crim.1915) (Harper J., dissenting) and {with attribution} by *Brawner v. Curran*, 141 Md. 586, 119 A. 250 (Md., 1922) ("The general principle that a body acting under delegated authority cannot redelegate its authority to some other person or body is a well-settled point in American law. `Delegata potestas non potest delegari' is a rule the virtue of which no one disputes."); cf *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405-06 (1928). See also *Brawner* (*supra*), 119 A., at 252 ("And this statement [of the foregoing maxim] fairly reflects the views of the courts in the decisions to which he [Mr. Oberholtzer] refers.") (citing 23 cases, including *State v. Swisher*, 17 Tex. 441).

124 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 163 (J.V. Prichard ed. & Thomas Nugent trans., Fred B. Rothman & Co. 1991) (1748) ("There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."). See also JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 13, at 15 (The Lawbook Exchange 2004) (1863) (*Delegata potestas non potest delegari* signals "an exclusive personal trust and confidence reposed in the particular agent."); and *id*. § 14, at 15-16 ("In general, therefore, when it is intended, that an agent shall have a power to delegate his authority, it should be given to him by express terms of substitution.").

125 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 77 (Max Farrand ed., 1911) ("Instead therefore of contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate & distinct, it was proposed to add a defensive power to each which should maintain the Theory in practice. In so doing we did not blend the departments together. We erected effectual barriers for keeping them separate."), *available at* http://avalon.law.yale.edu/18th_century/debates_721.asp (last visited September 21, 2017).

126 *Teladoc, Inc. v. Texas Medical Board*, 1:15-CV-00343-RP (W.D. Tex. July 30, 2015), ECF #64 (Texas Medical Board's Amended Motion to Dismiss) at p. 13 ("[T]he authority expressly

ample United States Supreme Court jurisprudence plainly prohibiting administrative constructions contrary to legislative enactments.[127]

The trial court disagreed and invoked the TMB's "pragmatic necessity in light of the thousands of subpoenas the TMB issues every year."[128] However, "'Necessity' is the argument of tyrants rather than the rule of law."[129] As the TMB correctly acknowledged (to the same district court), "An agency may not exercise what is effectively a new power on the theory that such exercise is expedient for the agency's purposes."[130] Therefore, the Executive Director of the Texas Medical Board has no arguable authority to re-delegate re-delegated sovereign authority to

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provided by statute or necessarily implied in order to carry out the express powers the legislature has given it. An agency may not exercise what is effectively a new power on the theory that such exercise is expedient for the agency's purposes.") (quoting *Harlingen Family Dentistry, P.C. v. Tex. Health & Human Servs. Comm'n*, 452 S.W.3d 479, 481- 82 (Tex. App.—Austin 2014, pet. dism'd)).

127 *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 127 S.Ct. 1534, 167 L.Ed.2d 449 (2007) ("In *Chevron*…we also made quite clear that 'administrative constructions which are contrary to clear congressional intent' must be rejected.") (citing *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 n. 9, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). See also *Chevron,* 467 U.S., at 843, n. 9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.") (citations omitted); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 516-17 (1988) (finding re-delegation was "inconsistent with the administrative structure that Congress enacted into law."); and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406, 48 S.Ct. 348, 351, 72 L.Ed. 624 (1928) (the limits of delegation "must be fixed according to common sense and the inherent necessities of the governmental co-ordination").

128 ROA. 1400.

129 *Pulaski v. Republic of India*, 212 F.Supp.2d 653, 656 (S.D. Tex.2002) (Hughes, J.) (citing Pitt, William, The Younger, Speech to the House of Commons on the India Bill, (Nov. 18, 1783), *in The Oxford Dictionary of Quotations* 374, at ¶ 3 (3d ed. 1979)).

130 *Teladoc, Inc. v. Texas Medical Board*, 1:15-CV-00343-RP (W.D. Tex. July 30, 2015), ECF #64 (Texas Medical Board's Amended Motion to Dismiss) at p. 13 (emphases added, quoting *Harlingen Family Dentistry, P.C. v. Tex. Health & Human Servs. Comm'n*, 452 S.W.3d 479, 481-82 (Tex. App.—Austin 2014, pet. dism'd)).

inspect or seize the People's papers and effects, particularly (1) because "The TMB is not authorized to physically search or inspect a doctor's office"[131] and (2) to someone (a) neither elected nor appointed by the Board and (b) over whom Robinson exercised zero supervision with respect to the subpoena issued herein.[132]

b. Even if the Texas Legislature intended to permit the Executive Director of the TMB to re-delegate her subpoena authority, such re-delegation with respect to subpoenas instanter *violates the United States Constitution and the Supreme Court's holding in (*inter alia*)* See v. Seattle *and* Donovan v. Lone Steer (*QUESTIONS 5, 6, and 7)*

Even if Appellee Robinson somehow had the authority to delegate subpoena authority without exercising even a scintilla of oversight, the Texas Legislature was unambiguously prohibited from assigning authority which permits administrative agencies to demand immediate compliance because (1) such actions are prohibited by the Supreme Court's holding in *See* and *Lone Steer* and (2) there is no statutory scheme which provides regularity, certainty, a constitutionally adequate substitute for a search warrant, or the opportunity to secure pre-compliance review. As a result, Appellee Robinson's re-re-delegation of subpoena authority which demanded immediate compliance in conjunction with threats of administrative repercussions is inherently unconstitutional and the subpoena served upon Dr. Zadeh's office bearing

131 ROA. 557.
132 ROA. 767: 3-11.

her signature is void.[133] This is particularly true because there is no need for her to delegate authority demanding immediate compliance.

More specifically, Appellee Robinson has testified that the TMB issued approximately 20-40 subpoenas *instanter* a year[134]; these subpoenas demand immediate compliance[135] and the trial court recognized same.[136] 20-40 subpoenas a year executed by agents of the state demanding immediate compliance and threatening repercussions for failure to comply therewith are not "routine matters" which can even arguably necessitate re-delegation of this particular subpoena authority; instead, they are impermissibly fabricated administrative procedures calculated to circumvent the Fourth Amendment to the United States Constitution while eliminating the People's clearly established right to pre-compliance review. Therefore, even if this court finds that Robinson had the authority to delegate subpoena authority because it was necessary, there is no such necessity with respect to subpoenas *instanter*. As a result, the trial court erred when it concluded that (1) Robinson had the authority to re-delegate authority to issue subpoenas *instanter* and (2) the subpoena at issue herein was not void.

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133 See n. 72, *supra.*

134 ROA. 1613, 56: 3-5.

135 See *Rippey v. State,* 104 S.W.2d 850, 851 (Tex.Crim.App.1937). See also *Caudillo v. State,* 541 S.W.2d 617, 618 (Tex.Crim.App.1976) (citing *International Fidelity Insurance Company v. State,* 495 S.W.2d 240 (Tex.Crim.App.1973)); *Euziere v. State,* 648 S.W.2d 700, 702 (Tex.Crim.App.1983); and *Yarbrough v. State,* 703 S.W.2d 645, 647 (Tex.Crim.App.1985).

136 ROA. 1392.

c. *If the Texas Legislature and the TMB intended to permit the TMB's Executive Director to re-delegate her authority to issue subpoenas* instanter *and to demand immediate compliance under penalty of administrative repercussions without affording the People the opportunity to seek pre-compliance review, then the trial court clearly erred when it dismissed Appellants' requests for declaratory judgment (QUESTION 8)*

Even if Texas Occupations Code § 153.007 is interpreted to mean that the TMB's subpoena authority can be re-delegated to anyone, the trial court erred when it dismissed Appellants' requests for declaratory judgment. Specifically, Appellants sought declaratory judgments that:

(1) The TMB is subject to the Fourth Amendment to the United States Constitution;
(2) Texas Occupations Code § 153.007(c) is unconstitutional as applied because it purportedly permits the TMB to issue subpoenas *instanter* and TMB personnel to execute them;[137]
(3) Texas Occupations Code § 160.009(b) is unconstitutional as applied because it purportedly permits the TMB to unilaterally punish doctors who exercise their right to secure pre-compliance review;[138]
(4) 22 Texas Administrative Code § 179.4(a) is unconstitutional as applied because the TMB has interpreted the Legislature's use of the phrase "shorter time" to mean "no time";[139]

137 ROA. 462-63.
138 ROA. 467-69.
139 ROA. 469-70.

(5) Texas Occupations Code § 164.007(g)-(h) is unconstitutional as applied because it requires the TMB to share patient files with law enforcement who lack a warrant despite depriving the People of their right to secure pre-compliance review;[140]

(6) The Texas Legislature did not provide the TMB with authority to issue subpoenas *instanter;*[141] and

(7) Texas Occupations Code §§ 168.051 and 168.052 are unconstitutional as applied because they purportedly authorize warrantless searches without (*inter alia*) a constitutionally adequate substitute for a search warrant.[142]

The trial court dismissed all of Appellants' requests based on *Younger.*[143] In the event this Honorable Court concludes that the TMB acted in accordance with Texas law, the trial court erred when it dismissed Appellants' requests for declaratory judgment because said laws violate the United States Constitution and the Supreme Court's binding jurisprudence in (*inter alia*) *Lone Steer* and *See.*

The trial court's invocation of *Younger* was particularly flawed because Appellees argued that Appellants' "lawsuit **does not involve** the merits of the underlying TMB investigation that led to the pending state administrative

140 ROA. 471-72.
141 ROA. 472.
142 ROA. 472-73.
143 ROA. 1393.

proceedings against him."[144] This single representation converted Appellees' unsustainable argument into a facially frivolous one.[145]

Furthermore, *Younger* abstention requires an "adequate opportunity in the state proceedings to raise constitutional challenges."[146] Here, there is no such opportunity. Instead, Texas law provides (1) the TMB is purportedly empowered to vacate or alter the ALJ's orders;[147] (2) the ALJ is only permitted to propose findings of fact and conclusions of law;[148] (3) only the TMB may appeal a final decision;[149] (4) only the TMB has the authority to obtain judicial review of said findings and conclusions;[150] (5) the ALJ "may not make any recommendation regarding the appropriate action";[151] and (6) "A board decision on a certified question or interlocutory appeal is not subject to a motion for rehearing."[152] Doctors do not have the power to file an appeal concerning the findings of fact and conclusions of law contained in a final decision (but the TMB does). As a result, the trial court erred when it declined to hear Appellants' requests for declaratory judgment.

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144 ROA. 208-09 (emphasis added).

145 See ROA. 187 [Appellees' Second Motion to Dismiss] ("*Younger* requires federal courts to abstain from a matter where: (1) the dispute **involves** an 'ongoing state judicial proceeding[.]") (emphasis added) (citing *Wightman v. Tex. Supreme Ct.,* 84 F.3d 188, 189 (5th Cir.1996)).

146 *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423, 432 (1982).

147 22 Tex. Admin. Code § 187.23(f).

148 Tex. Occ. Code § 164.007(a-1).

149 22 Tex. Admin. Code § 187.37(d).

150 Tex. Occ. Code § 164.007(a-1).

151 *Id.*

152 22 Tex. Admin Code § 187.36(c).

V. The trial court erred when it deferred to the TMB's construction of Texas statutes because the TMB neither "administers" (nor has any specialized knowledge concerning) the statute which limits the manner in which subpoenas are issued (QUESTION 9)

Unelected administrative agencies are not permitted to re-write laws enacted by the People's elected representatives.[153] While courts frequently defer to agencies' interpretations of statutes within their particular expertise, the TMB has no special expertise concerning the Legislature's delegation of subpoena authority. The interpretation of the statutes at issue herein is reserved to the courts as a matter of law because there is nothing therein that is within the TMB's "particular expertise and special charge to administer."[154]

Additionally, subpoena power is vested in (*inter alia*) thousands of Texas attorneys;[155] the TMB does not have any specialized knowledge with respect to the

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153 See *Sullivan v. Stroop*, 496 U.S. 478, 493 110 L.Ed.2d 438, 110 S.Ct. 2499 (1990) ("If a court, employing traditional rules of statutory construction ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). See also *Comacho v. Texas Workforce Com'n*, 408 F.3d 229, 234 (5th Cir.2005) and *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1313 (10th Cir.2012) (Gorsuch, J.) ("But whatever *Chevron* deference we owe to an agency's interpretations and regulations when a statute is ambiguous, we are never permitted to disregard clear statutory directions in favor of administrative rules.").

154 *Hydro Resources, Inc. v. U.S. Environmental Protection Agency*, 608 F.3d 1131, 1146 (10th Cir.2010) (en banc) (Gorsuch, J.) (citing *Metro. Stevedore Co. v. Rambo,* 521 U.S. 121, 137 n.9 (1997); *Adams Fruit Co. v. Barrett,* 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); and *Crandon v. United States,* 494 U.S. 152, 174 (1990) (Scalia, J., concurring in the judgment) ("The law in question, a criminal statute, is not administered by any agency but by the courts.")).

155 Tex. R. Civ. P. 176.4(b).

issuance of subpoenas that requires (or even justifies) federal courts deferring to its interpretation of Texas statutes which authorize only two specific people to wield agency subpoena power. Finally, the Texas statutes do not require interpretation because they are not capable of being understood to provide agency subpoena authority to anyone other than the TMB's Executive Director and Treasurer-Secretary.[156]

*a. The subpoena was invalid because (*inter alia*) Appellees' conduct was pre-textual (QUESTIONS 10 and 11)*

Appellees' search and service/execution of a subpoena *instanter* herein were each illegally pre-textual because each was in known and designed furtherance of (1) a criminal investigation, (2) a fraudulent invocation of Texas' constitutionally inadequate regulatory scheme, and (3) the TMB's effort to secure Dr. Zadeh's billing records despite the absence of any statutory authority enabling it to do so. Under comparable facts, this Honorable Court has clearly held that, "The search…deserves to be called what it was—a raid to discover evidence of criminal wrongdoing. Such raids are 'not the sort of conduct that was approved by the Supreme Court in *Burger.*'"[157]

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[156] *Southern Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1238 (10th Cir.2010) (citations omitted).

[157] See also *Club Retro,* 568 F.2d, at 202 (quoting *Bruce v. Beary,* 498 F.3d 1232, 1245 (11th Cir.2007)) and *id.*, at 197-98.

It is uncontested that Dr. Zadeh was not registered as a pain clinic.[158] Therefore, the trial court correctly acknowledged that the TMB did not have authority to inspect his offices and records as a matter of unambiguous statutory law.[159] Further, the record (particularly when read in the light most favorable to Appellants) demonstrates that even if Dr. Zadeh fit the general criteria for pain management registration, he still would have been exempted therefrom under Chapter 168 of the Texas Occupations Code because the uncontested record demonstrates his clinic was "owned or operated by a physician who treats patients within the physician's area of specialty and who personally uses other forms of treatment, including surgery, with the issuance of a prescription for a majority of the patients."[160] Specifically, (1) Dr. Zadeh owned and operated his clinic at all times relevant hereto[161] and (2) at the time of the complaint and incident in question, he had been treating his patients within the area of his specialty at his clinic using other forms of treatment (besides prescribing controlled substances) with the issuance of a prescription for the majority of patients.[162] The record is devoid of any controverting evidence. "By failing to credit evidence that contradicted some of its

158 Compare ROA. 430 at ¶ 48 (b) (alleging same) with ROA. 485 at ¶ 48 (b) (admitting same). See also ROA. 1787, at ¶ 7.
159 ROA. 559.
160 Compare Tex. Occ. Code. § 168.002(7) with ROA. 1788.
161 ROA. 1787, at ¶ 5.
162 ROA. 1788, at ¶¶ 8-9.

key factual conclusions" (*e.g.*, that the search was pretextual) "the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party[.]"[163]

Texas Occupations Code § 168.001(1) clearly states that a "pain management clinic" means a publicly or privately-owned facility for which a ***majority*** of patients are issued ***on a monthly basis*** a prescription for opioids, benzodiazepines, barbiturates, or carisoprodol, but not including suboxone." Tex. Occ. Code § 168.001(1) (emphases added). *Even if* the TMB was legitimately conducting a warrantless investigation into whether Dr. Zadeh was running a *suspected* "pill mill" or "unregistered pain management clinic",[164] it was impossible for a review of the 16 patient records at issue[165] to have satisfied any legitimate purpose furthered by Texas Occupations Code § 168.001(1) because said patients were not a majority of the patients that Dr. Zadeh saw in September 2013.[166] Finally, there is neither evidence nor argument that the records Appellees searched and seized would have shown whether Dr. Zadeh was running an unlicensed pain management clinic (particularly because the record is devoid of any evidence Appellees even arguably

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163 *Tolan v. Cotton,* 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895, 82 USLW 3647, 82 USLW 4358 (2014) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

164 ROA. 1634: 18-21.

165 ROA. 1634, at 28: 18-24.

166 ROA. 1787 at ¶ 4.

believed said 16 patients were seen within the same month or that they constituted a majority of Dr. Zadeh's patients in any given month). Therefore, the TMB's entry into Dr. Zadeh's clinic was an illegal pretext to provide the DEA (which had renewed Dr. Zadeh's DEA prescription number[167]) with warrantless access to his medical and billing records and the trial court erred when it concluded such evidence was insufficient for a factfinder to find Appellees' search was pretextual.[168]

b. The prohibition against pretextual searches was clearly established (QUESTIONS 10 and 11)

The trial court found that, "even if the TMB subpoena was simply a pretext for the DEA's criminal investigation, Defendants are nonetheless entitled to qualified immunity: in light of the Fifth Circuit's decision in *Beck*, 204 F.3d at 638, sanctioning closely analogous conduct, it cannot be said that the law in this area was 'clearly established'"[169] However, *Beck* did not involve "closely analogous facts" because it involved statutory and administrative schemes that put dentists on notice that they could be inspected at any time.[170] This case has no statute comparable to the one utilized by the Dental Board in *Beck*. In fact:

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167 ROA. 1415.

168 See *Johnson*, 994 F.2d at 743 ("Whether an administrative search is a pretext for a criminal investigation is a factual question.") (citing *Abel v. United States*, 362 U.S. 217, 225-30 (1960)).

169 ROA. 1407.

170 *Beck,* 204 F.3d, at 638.

- the trial court correctly concluded that,
    - "The TMB is not authorized to physically search or inspect a doctor's office"[171]
    - "The TMB's subpoena and inspection authorities are purely discretionary. Nothing in the language of either statute creates certainty that a medical office will [be] inspected with regularity.";[172]
- Appellee Robinson admitted that "there is no predictive regularity as to who is going to receive a subpoena and who will not";[173]
- Pease was unable to identify *any* limitation on her authority;[174] and
- Appellees' utilize their own discretion to determine who would be subpoenaed, when they would be subpoenaed, and how they would be subpoenaed.[175]

As a result, *Beck* is patently distinguishable. Furthermore, the search of Dr. Zadeh's billing records exceeded the scope of the purportedly applicable inspection authority (22 T.A.C. §179.4(a)). Therefore, the court clearly erred when it defined the context

171 ROA. 557.
172 ROA. 565.
173 ROA. 1613, at 53: 3-4.
174 ROA. 1650, 90: 9-25, 91: 1-7.
175 ROA. 902: 21-25 and ROA. 903: 1-11. See also ROA. 1648, 82: 20-25, 83: 1-4, ROA. 1643, 62: 17-25, and 64: 17-24.

of the instant case as being closely analogous to *Beck* despite the absence of a relevant and constitutionally sufficient statutory scheme.[176]

Despite the fact that the trial court was plainly aware of this argument (and the import thereof) when it issued its Order denying Appellees' motion to dismiss,[177] it nonetheless implicitly concluded that Appellants' evidence simply demonstrated a "suspicion[ ] of criminal wrongdoing" that was insufficient to render the search pretextual.[178] As a result, the trial court erred when it utilized *Beck* as justification to both dismiss Appellants' claims and to grant summary judgment. Alternatively (and to the extent this Honorable Court accepts the trial court's interpretation of *Beck*), Appellants respectfully aver *Beck* violates the Supreme Court's holdings in *Lone Steer* and *See.*

VI. APPELLEE ROBINSON IS LIABLE IN HER SUPERVISORY CAPACITY (QUESTION 13)

Appellee Robinson has supervisory liability herein as a matter of law if: "(1) [she] either failed to supervise or train the subordinate official; (2) a causal link exists

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176 *Tolan,* 134 S.Ct., at 1866 (citing *Brosseau v. Haugen,* 543 U.S. 194, 195, 198 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (*per curiam*).

177 ROA. 560 ("Plaintiffs allegations, therefore, suggest that the subpoena was unlikely intended to prove the facility's status as a pain management clinic given that the records purportedly requested were not sufficient to prove that a majority of the facility's patients were being prescribed one of the four relevant painkillers. Accordingly, Plaintiffs' allegations suggest that the TMB did not suspect that Dr. Zadeh's medical office constituted a pain management clinic.") (internal citations omitted).

178 See ROA. 1406.

between the failure to train or supervise and the violation of the Appellants rights; and (3) the failure to train or supervise amounts to deliberate indifference."[179] Alternatively, she is liable because she was personally involved in the deprivation of Appellants' civil rights under color of law.[180]

Here, the evidence shows Appellee Robinson received her subpoena authority from the Texas Legislature and did not know anything about the subpoena[181] or the training of her subordinates[182] (despite the fact that she purportedly delegated her discretion thereto). Alternatively, the evidence shows she signed the subpoena[183] and is liable because she was personally involved. Furthermore, despite being a lawyer and in charge of the TMB, she has no opinion as to (1) whether or not her investigators' conduct herein comported with the TMB's procedures,[184] (2) Dr. Zadeh needed to register as a pain management clinic,[185] or (3) whether the mechanism which allows law enforcement agents to make a complaint to the TMB

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179 *Reyes v. Bridgwater*, 362 Fed. App'x. 403, 409 (5th Cir.2010). Accord *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003) and *McQurter v. City of Atlanta*, 572 F. Supp. 1401, 1415–16 (N.D. Ga. 1983), *overruled in part on other grounds by Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988).

180 *Dilworth v. Box*, 53 F.3d 1281 (5th Cir. 1995). See also *Thompkins v. Belt*, 828 F.2d 298, 303 (5th Cir. 1987); and *Davis v. Stalder*, 51 F.3d 1043 (5th Cir. 1995); accord *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir.1994).

181 ROA. 767, 3-11.

182 ROA. 1623, 95: 1-5.

183 Compare ROA. 424 at ¶ 10 (alleging Robinson signed the subpoena) with ROA. 482 at ¶ 10 ("Admit"). See also ROA. 1635, 32: 2-15.

184 ROA. 1617, 72: 5-7.

185 ROA. 1621, 87: 11-13.

(so that the TMB can make unannounced visits) comports with the Fourth Amendment.[186] Additionally, she knows the TMB has issued subpoenas *instanter* with her name on it multiple times per year and still claims to have no knowledge of any facts surrounding any of those cases.[187] Instead, she appears to genuinely believe that a search can only be conducted if the government *does not know* what it seeks[188] and that copying documents is not a seizure thereof.[189] These absurd positions demonstrate the existence of a causal link between Robinson's conduct, failures, and deliberate indifference to Appellants' clearly established constitutional rights and the violations thereof at issue herein. Therefore, the trial court erred when it concluded she is entitled to qualified immunity.

CONCLUSION

Appellees Pease and Kirby entered Dr. Zadeh's clinic without a warrant, consent, or exigency in furtherance of a criminal investigation and accessed non-public areas with private information despite the fact that the subpoena granted no such authority. Pease and Kirby then (1) demanded immediate access to Dr. Zadeh's medical records, (2) threatened his medical license in the event their demands were

186 ROA. 800: 11-23.
187 ROA. 1618, 73: 20-23.
188 ROA. 772: 3-9.
189 ROA. 1604, 17: 1-10.

not met, and (3) were successful in acquiring Appellants' private papers. Without more, Appellees' conduct was *per se* unreasonable as a matter of law.[190] Appellees then shared Dr. Zadeh's records with DEA investigators on-scene because they knew the DEA was conducting a criminal investigation.[191] Such a scheme to circumvent the Fourth Amendment cannot withstand judicial scrutiny[192] and the trial court erred by both dismissing Appellants' requests for declaratory judgment and finding Appellees were entitled to qualified immunity.

This Honorable Court's decision in *Beck* does not support the court's rulings (and to the extent it does, *Beck* violates Supreme Court jurisprudence). Even if a Texas statute applied, the legality thereof would control.[193] No valid Texas statute authorizes warrantless on-site searches of doctors' offices while satisfying the tripartite test in *Burger*[194] or the predictability standard in *Donovan.*[195]

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190 *Katz,* 389 U.S., at 357 ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.").

191 ROA. 193 (Appellees' motion to dismiss).

192 See, *e.g. Johnson*, 994 F.2d, at 743 ("Once on the premises, the federal agent actively participated in the search, transforming the state inspection into a federal investigatory search.").

193 *Biswell*, 406 U.S., at 315.

194 *Burger,* 482 U.S., at 702-03. See also *McLaughlin v. King's Island,* 849 F.2d 990, 996 (6th Cir.1988) (citations omitted), *vacated and remanded*, 436 U.S. 942, 56 L. Ed. 2d 783, 98 S. Ct. 2841 (1978), *judgment reinstated,* 579 F.2d 1011 (6th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) ("Even if federal law requires records to be maintained and specifically authorizes on-premises inspection, the inspection must be pursuant to a warrant or its equivalent.")).

195 *Donovan*, 452 U.S., at 599 (citing *Barlow's,* 436 U.S., at 323). See also *id.,* at 600-01 (concluding the provision at issue was unconstitutional because it "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when and whom to search[.]").

Appellees correctly knew that the 16 patient records they sought could not enable them to make the requisite determinations[196] even for *registered* pain management clinics. The record shows Dr. Zadeh neither registered nor needed to register.[197] Therefore, his clinic was indisputably exempt from the entirety of Texas Occupations Code chapter 168 (including the inspection authority therein).

As a result, Appellees' conduct was objectively unreasonable, was not justified by *Beck* (or any other authority), was knowingly insufficient to satisfy constitutional standards, and was plainly incompetent and/or a knowing violation of the law. Similar to *Club Retro,* the statutory scheme at issue is insufficient to clothe Appellees with qualified immunity because their actions went beyond those which were authorized by Texas law. Therefore, the trial court clearly erred when it dismissed Appellants' causes of action, declined to hear their requests for declaratory relief, and granted summary judgment.

PRAYER

Based on the foregoing, Appellants respectfully request that this Honorable Court (1) reverse the trial court's Orders (a) dismissing their causes of action and requests for declaratory judgment and (b) granting Appellees summary judgment

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196 Compare ROA. 1787 at ¶ 4 (16 patients were not a majority) with ROA. 1790, at ¶ 26 (Appellees had access to the number of prescriptions written by Dr. Zadeh).

197 ROA. 1787-88, at ¶¶ 5, 8, and 9.

and (2) grant all other relief to which Appellants have shown themselves entitled, both at law and in equity.

Respectfully submitted,
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John C. Sullivan– counsel for Defendant-Appellees Mari Robinson, Sharon Pease, and Kara Kirby

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Dated October 24, 2017

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