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

APPELLANTS' REPLY BRIEF

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Oral argument requested

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1. INTRODUCTION

The Texas Medical Board ["TMB"] employees' misunderstandings of law and inaccuracies reinforce the judiciary's critical role in protecting the People's constitutional rights. The issuance and enforcement of the TMB's subpoena *instanter* violated Appellants' clearly established rights because (*inter alia*):

(1) administrative agents are prohibited from enforcing their own demands for inspection in the field;[1]

(2) subpoena recipients have a right to pre-compliance review;

(3) the medical profession is not a closely regulated industry;

(4) no statutory inspection scheme provides an adequate substitute for a search warrant;

(5) it was pretextual; and/or

(6) it was unreasonable in scope.

[1] *See v. City of Seattle,* 387 U.S. 541, 544-45, 87 S.Ct. 1741, 18 L.Ed.2d 930 (1967). See also ROA. 1756 [Sunset Advisory Commission Staff Report: Texas Medical Board (2016-2017)] ("To get copies of the records for inspection, the board must use its general subpoena authority. However, the Medical Board's statutory subpoena authority does not provide for a mechanism to enforce its subpoena if a clinic should refuse to comply, which effectively shuts down the board's inspection process. This issue has come up in seven separate federal and state district court cases since 2015."). See also *id*., at ROA. 1753 ("In addition, 10 of the board's more than 40 enforcement actions and lawsuits stemming from its pain management clinic inspections resulted in a judge questioning the board's statutory enforcement authority."). Cf. *United States v. Bell*, 564 F.2d 953, 959 (Emer. Ct. App. 1977) ("Bifurcation of the power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them, is an inherent protection against abuse of subpoena power.").

Therefore, the trial court erred when it granted Appellees' motions to dismiss and for summary judgment.

2. THE TMB EMPLOYEES' BRIEF RELIES ON MULTIPLE ARGUMENTS AND FACTS WITHOUT CITING ANY EVIDENCE IN SUPPORT THEREOF

The TMB employees' arguments include the following:

- TMB investigators' discretion is limited;[2]
- Dr. Zadeh operated a pain management clinic;[3]
- The medical industry is historically highly regulated;[4]
- The relevant regulatory scheme is pervasive and has "long taken place in Texas";[5]
- The subpoena at issue "has been standard in the medical field";[6]
- The Texas legislature "crystalized" its pre-existing intent when it codified Texas Occupations Code § 168.052 (b);[7]

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2 Appellees' Response ["Response"], at p. 31.

3 Response, at pp. 13 and 18.

4 Response, at p. 23.

5 Response, at p. 13.

6 Response, at p. 12.

7 Response, at p. 20 n. 4.

- "This Court's precedent in *Beck* rightly treats doctors, specifically ones that provide controlled substances to patients, as a closely regulated business";[8] and
- Medical records are easily altered.[9]

Appellees' brief fails to cite any facts in the record or authority for any of these propositions; each unsupported argument is therefore frivolous and/or abandoned.[10]

3. THE TMB EMPLOYEES HAVE MATERIALLY MISREPRESENTED FACTS TO AT LEAST TWO COURTS

In their response, the TMB employees simultaneously argue: (1) "[t]he subpoena was signed by Mari Robinson"[11] and (2) the District Court properly concluded Mari Robinson was entitled to summary judgment (in part) because she "did not actually sign it".[12] It is indisputably impossible for Mari Robinson to have both "signed" and "not actually sign[ed]" the subpoena at issue herein.

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8 Response, at p. 13.

9 See Response, at p. 2.

10 See Fed. R. App. P. 28(a)(8)(A); Fed. R. App. P. 28(b); and *Mironescu v. Costner,* 480 F.3d 664, 677 n. 15 (4th Cir.2007).

11 Response, at p. 4. Compare also ROA. 424 (Complaint), at ¶10 with ROA. 482 (Answer) at ¶ 10.

12 Response, at p. 10.

The TMB employees have also represented to this Honorable Court that, "**there is no evidence** that the TMB ever provided the DEA with any information obtained via the administrative subpoena."[13] This representation unjustifiably misrepresents an unambiguous record. Specifically, said representation ignores (1) testimony from Dr. Zadeh's assistant that, "The two DEA agents each had a chart,"[14] (2) testimony that two DEA agents were sitting at a conference table in Dr. Zadeh's office with patient charts open in front of them while asking his assistant to make copies of same,[15] and (3) a representation in open court that, "The United States does not deny that its [DEA] investigators may have seen some of the patient files that were produced to the Medical Board personnel."[16]

4. THE TEXAS ATTORNEY GENERAL'S OPINION IS HIGHLY PERSUASIVE

Appellees have never attacked the legitimacy of the Texas Attorney General's Opinion ["the Opinion"] before their response brief. "The general rule of this court is that arguments not raised before the district court are waived and will not be

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13 Response, at p. 36 (emphasis added).

14 ROA. 1717, at 2-4. See generally ROA. 1715-1717.

15 ROA. 989-90.

16 ROA. 338 (quoting *United States v. Joseph Zadeh,* 4:14-cv-00105, ECF #50 at p. 4 (N.D. Tex., Feb. 19, 2015)).

considered on appeal."[17] This rule should apply particularly where the TMB employees are arguing (through the Attorney General's Office) that the Attorney General's publicly held position is materially incorrect despite the facts that (1) it has been unquestioned for 17 years and (2) Appellants explicitly have relied upon same since their Original Complaint.[18]

The TMB employees' attempt to fabricate law without either citation or reasonable argument for the extension or modification of existing law constitutes the definition of frivolousness. The Opinion does not even warrant "close scrutiny" as a matter of law because it is not "in direct conflict with several earlier opinions of the Attorney General";[19] in fact, the TMB employees have failed to show any authority whatsoever controverting any portion of the Opinion. As a result, they should be (at a minimum) estopped from arguing against its highly persuasive, longstanding, relied upon, and cited positions.

5. THE TMB EMPLOYEES MISUNDERSTAND RELEVANT LAW

The TMB employees have attempted to convince this Honorable Court that the instant case is analogous to *Beck.* The trial court correctly concluded that neither

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17 *Celanese Corp. v. Martin K. Eby Constr. Co.*, 620 F.3d 529, 531 (5th Cir. 2010).

18 ROA. 21, at ¶ 34.

19 *State v. Ysleta del Sur Pueblo,* 2015 US. Dist. LEXIS 28026, *46 (W.D. Tex. 2015) (citing *Harris County,* 420 U.S. at 87 n. 10).

Texas Occupations Code § 153.007 nor § 168.052 supported Appellees' contention that "the TMB has the authority to inspect any facility it suspects is a pain management clinic."[20] Additionally, *Beck* is readily distinguished by the heavy *use* of prescription drugs in his practice (as opposed to simply prescribing them).

a. THE MEDICAL INDUSTRY IS NOT A "CLOSELY-REGULATED INDUSTRY"

i. APPELLEES MISUNDERSTAND THE DEFINITION OF SUCH INDUSTRIES

The TMB employees argue (without citation) that industries are not "closely" regulated if they are "no more regulated than any other industry."[21] The TMB employees seem to imply that the number of regulations in one industry controls the legal conclusion as to whether an unrelated industry is "closely regulated" for purposes of the Fourth Amendment. This attempted definition plainly misconstrues relevant law. The Supreme Court has unambiguously held that closely-regulated industries are those that (*inter alia*) "have such a history of government oversight

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[20] ROA. 525. See also Tex. Occ. Code § 168.052(b) (effective Sept. 1, 2017).

[21] Response, at p. 22. This argument is particularly problematic when viewed in light of Appellees' unsubstantiated averment that "[T]he medical field's greater use of controlled substances and even broader prescribing methods requires it to be more closely regulated than the dental field." *Id.,* at p 13. Despite Appellees' beliefs, the Texas Legislature is their source of authority and it has not even arguably identified the medical industry as a closely-regulated industry in a manner that comports with unambiguous constitutional jurisprudence.

that no reasonable expectation of privacy…could exist for a proprietor over the stock of such an enterprise."[22]

The TMB employees have not even attempted to argue against the Opinion's cited conclusion that "[t]he medical profession, unlike the liquor industry, has no 'long history' of warrantless state inspection"[23] Appellees' failure to do so is fatal because, "History is relevant when determining whether an industry is closely regulated."[24] Without evidence that doctors (much less doctors like Dr. Zadeh who do not store controlled substances in their offices)[25] have been subjected to a long history of warrantless inspections, the TMB's employees' contention that the medical profession is closely regulated is inherently frivolous according to clearly established law.

ii. TEXAS DOCTORS ARE NOT SUBJECT TO ON-DEMAND INSPECTIONS

In each "closely regulated" case adjudicated by the Supreme Court, the relevant governing body expressly granted government agents the authority to enter and inspect the relevant commercial enterprise without a warrant. The Texas

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22 *City of Los Angeles, Calif. v. Patel*, 576 U.S.___, 135 S.Ct. 2443 (2015) (slip op., at 14).

23 Tex. Att'y Gen. Op. No. JC-0274 (August 29, 2000) (emphasis added, brackets in the original) (quoting *Margaret S. v. Edwards*, 488 F. Supp. 181, 216-217 (E.D. La.1980)).

24 *Patel,* 576 U.S., at ___ (slip op., at 15) (citations omitted).

25 ROA. 940, at 24: 11-13.

Legislature has not authorized such conduct with respect to doctors and the TMB employees have failed to make any colorable showing to the contrary. Specifically, the Texas Legislature has identified eight industries subject to "on demand" inspections[26] and doctors are not on the list.

Instead of receiving authority from the Legislature, the TMB impermissibly attempted to seize power by enacting regulations in the Texas Administrative Code; these provisions are created by the TMB[27] as opposed to the People's elected representatives and cannot create powers which are contrary to fundamental law.[28]

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[26] See ROA. 306, at n. 13.

[27] See Tex. Gov. Code § 2002.051 (c) ("The administrative code shall contain each rule adopted by a state agency…").

[28] TEX. CONST., ART. III § 1 ("The legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled "The Legislature of the State of Texas."); *id.,* at § 30 ("No law shall be passed, except by bill, and no bill shall be so amended in its passage through either House, as to change its original purpose."). and *id.,* at §§ 31-32. See also *Spann v. City of Dallas,* 111 Tex. 350, 235 S.W. 513, 515 (1921) ("The powers of government, under our system, are nowhere absolute. They are but grants of authority from the people, and are limited to their true purposes. The fundamental rights of the people are inherent and have not been yielded to governmental authority. They are the subjects of individual authority. Constitutional powers can never transcend constitutional rights. The police power is subject to the limitations imposed by the Constitution upon every power of government; and it will not be suffered to invade or impair the fundamental liberties of the citizen, those natural rights which are the chief concern of the Constitution and for whose protection it was ordained by the people. All grants of power are to be interpreted in the light of the maxims of Magna Charta and the Common Law as transmuted into the Bill of Rights; and those things which those maxims forbid cannot be regarded as within any grant of authority made by the people to their agents.") (citations omitted) (quoted by *Texas Workers' Compensation Com'n v. Garcia*, 862 S.W.2d 61, 107 (Tex.App.—San Antonio 1993) (Biery, J., concurring)) and *New York v. Burger,* 482 U.S. 691, 703 (1987) (a "***statute's*** inspection program" must provide a constitutionally adequate substitute for a search warrant) (emphasis added).

Even if such a self-conferral of seemingly unrestrained power was somehow deemed acceptable, the relevant provision cited by the TMB employees (Tex. Admin. Code § 179.4 (a)) provides physicians with notice that they have "fourteen calendar days" to respond to TMB requests unless a shorter time "is required by the urgency of the situation or the possibility that records may be lost, damaged, or destroyed."[29] Given the TMB's exclusive domain to determine whether such a standard is satisfied,[30] doctors cannot be on constitutionally sufficient notice that they have been stripped of their Fourth Amendment rights in a manner that comports with the law.[31] There is zero evidence in the record that Dr. Zadeh satisfied the TMB's condition for providing fewer than fourteen calendar days to respond (other than the fact that he is a Texas doctor). Further, the fact that the TMB determines some cases require subpoenas *instanter* while others do not[32] (without any specific parameters)

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[29] The TMB's analysis of such scenarios on a "case-by-case basis" precludes any possibility that Texas doctors are on constitutionally sufficient notice that their Fourth Amendment rights have been justifiably limited by the Texas government. See ROA. 1612, at 50: 21-25, 51: 1-3. Furthermore, there is no evidence in the record that the TMB actually believed that Dr. Zadeh met the standards in 22 Tex. Admin. Code § 179.4(a). See ROA. 1612, at 51: 4-6.

[30] See Response brief, at p. 17 ("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."). Appellants respectfully aver the TMB's invocation of a regulatory scheme which attempts to convey such discretionary authority cannot survive constitutional scrutiny.

[31] In addition to establishing the TMB employees' liability, this result evidences the impropriety of dismissing Dr. Zadeh's and Jane Doe's constitutional challenges to this provision as applied.

[32] Response, at p. 16.

thoroughly undermines the TMB employees' implicit argument that doctors are on constitutionally sufficient notice that *all* Texas doctors are certain that the State intends to conduct warrantless inspections and has forewarned them that they have been deprived of their well-established right to secure pre-compliance review.[33] The TMB's conduct in this respect does not even comport with the public notice standards of administrative rulemaking.

iii. THE TMB EMPLOYEES IGNORE THE DISPOSITIVE NATURE OF THE PRIVACY INTERESTS AT ISSUE HEREIN

The Opinion and the trial court agreed that the medical profession has a "history of respect towards the recognized need for privacy in the doctor-patient relationship."[34] "History is relevant when determining whether an industry is closely regulated."[35] Therefore, the uncontroverted history of said privacy is controlling (despite Appellees' position that "there is no reasonable expectation of privacy from [the TMB's] oversight"[36]). Additionally, the Supreme Court has (a) presumed medical patients have expectations of privacy,[37] (b) found that intruding upon same

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33 This is particularly true given Appellees' reliance on "common-sense" rather than constitutionally legitimate statutory authority. Response, at p. 18.

34 Tex. Att'y Gen. Op. No. JC-0274.

35 *Patel,* 576 U.S., at ___ (slip op., at 15) (citations omitted).

36 Response, at p. 28.

may deter patients from receiving necessary medical care,[38] and (c) assumed that doctors have expectations of privacy in their prescriptions.[39] Further, Texas law provides for the reasonable expectation of privacy in medical records[40] and precedent demonstrates patients have at least *some* reasonable expectation of privacy therein.[41] These unchallenged conclusions preclude a finding that the medical profession is a closely regulated industry as a matter of law.

Furthermore, the Supreme Court's language in *Patel* demonstrates that ***any*** reasonable expectation of privacy from a business proprietor precludes a finding that

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[37] *Sorrell v. IMS Health, Inc.,* 131 S.Ct. 2653, 2668, 180 L.Ed.2d 544, 2011 US. LEXIS 4794 (2011). See also *Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Agency* ["OPDMP"], 3:12-cv-02023-HA (D. Or. 2014) ECF #60 at p. 10 ("Doctor James Roe also has a subjective expectation of privacy in his prescribing information."), *rev'd on other grounds,* No. 14-35402 (9th Cir. June 26, 2017) (available at http://cdn.ca9.uscourts.gov/datastore/opinions/2017/06/26/14-35402.pdf) (last visited Nov. 24, 2017).

[38] *Ferguson v. City of Charleston*, 532 U.S. 67, 78 & n. 14, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001).

[39] Dkt. 7, ¶ 62(a) at p. 13. See also *id.,* ¶ 63(a) at p. 13; and *id.,* at ¶¶ 64-66.

[40] Tex. Occ. Code § 159.002 (a).

[41] See, *e.g., Ferguson,* 532 U.S., at 78; *Tarrant Cnty. Hosp. Dist. v. Hughes*, 734 S.W.2d 675, 679 (Tex. App.—Fort Worth 1987) ("An individual's medical records have been declared to be within a zone of privacy protected by the Federal Constitution"); *Richardson v. State,* 865 S.W.2d 944, 952-953 & 953 n. 7 (Tex.Crim.App.1993); and *R.K. v. Ramirez,* 887 S.W. 2d 836, 840 (Tex.1994) (orig. proceeding) (recognizing that medical records are private). See also OPDMP, *supra* n. 37 at pp. 10-11 (finding medical records "have long been treated with confidentiality", relying on the Hippocratic Oath, and observing that, "a number of signers of the Declaration of Independence and delegates to the Constitutional Convention were physicians trained at the University of Edinburgh, which required its graduates to sign an oath swearing to preserve patient confidentiality."); *id.,* at *13-14; and *id.,* at *15 ("[T]he prescription records here are protected by a heightened privacy interest rendering the use of administrative subpoenas unreasonable."). Cf. Health Insurance Portability and Accountability Act, Privacy Rule, 45 C.F.R § 164.512.

the industry is closely regulated.[42] Here, (1) this test is not satisfied in any part, (2) the Attorney General's undisputed (in relevant part) Opinion concedes the medical profession has a "history of respect towards the recognized need for privacy in the doctor-patient relationship,"[43] (3) there is no showing to the contrary, (4) there is no statute depriving doctors or patients of their reasonable expectation of privacy in medical records, (5) ample precedent establishes the existence of ***some*** reasonable expectation of privacy in medical records,[44] and (6) the TMB employees acknowledge the TMB determined that Dr. Zadeh did not have to register as a pain management clinic.[45] Therefore, there can be no legitimate argument that neither doctors nor patients have ***any*** reasonable expectations of privacy in their respective medical records and *Patel* properly precludes a conclusion that the medical profession is closely regulated. Finally, *Patel* dispelled any notion that designating an industry as "closely regulated" is essential to prevent document destruction.[46]

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42 *Patel,* 576 U.S., at ___ (slip op., at 14) (quoting *Barlow's, Inc.,* 436 U.S., at 313).

43 Tex. Att'y Gen. Op. No. JC-0274.

44 See n. 41, *supra.*

45 Response, at p. 18.

46 *Patel,* 135 S.Ct., at 2456 ("As explained above, noting in our decision today precludes an officer from conducting a surprise inspection by obtaining an *ex parte* warrant or, where an officer reasonably suspects the registry would be altered, from guarding the registry pending a hearing on a motion to quash.") (citing *Barlow's, Inc.,*436 U.S., at 319–321, 98 S.Ct. 1816 and *Riley,* 134 S.Ct., at 2486).

iv. THE TMB'S EMPLOYEES CLEARLY FAIL TO UNDERSTAND "CONSTITUTIONALLY ADEQUATE SUBSTITUTE FOR A SEARCH WARRANT" JURISPRUDENCE

On-demand inspection schemes can be permissible when they provide constitutionally adequate substitutes for search warrants.[47] In order to properly advise proprietors that a search is constitutional, "the statute must be 'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.'"[48] "In addition, in defining how a statute limits the discretion of the inspectors…it must be 'carefully limited in time, place, and scope.'"[49] In many such cases, the governing bodies codified comprehensive and predictable inspection schemes; here, there is no codified scheme at all.

Additionally, there is undisputed evidence in the record that the trial court correctly concluded there are no limitations placed on TMB officials' discretion.[50]

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47 *Donovan*, 452 U.S., at 605. See also *Burger,* 482 U.S., at 711.

48 *Burger,* 482 U.S., at 703.

49 *Burger,* 482 U.S., at 703 (quoting *Biswell,* at 315). See also *id.,* (citing *Barlow's,* at 323); and *Sinclair v. Sav. & Loan Comm'r*, 696 S.W.2d 142, 151 (Tex.App.—Dallas 1985, writ ref'd n.r.e.) (holding that administrative subpoenas "must follow the necessary ***statutory*** procedures.") (emphasis added) (citing *Securities and Exchange Commission v. OKC Corp.,* 474 F. Supp. 1031, 1034 (N.D. Tex.1979)).

50 ROA. 565. See also ROA. 561 (quoting *Patel*, 135 S. Ct. 2443 at 2456); and *Donovan*, 452 U.S., at 600-01. Cf. ROA. 902: 21-25 and 903: 1-11; ROA. 1648, 82: 20-25, 83: 1-4; ROA. 1643, 62: 17-25, and 64: 17-24.

Apparently, TMB investigators are somehow even permitted to facilitate warrantless criminal investigations,[51] to fraudulently imply that DEA investigators conducting a warrantless criminal investigation are "with the TMB",[52] to threaten recipients of subpoenas with administrative repercussions in the event they do not immediately produce the requested documents,[53] to execute their own subpoenas demanding immediate compliance (despite (*inter alia*) *See*),[54] to seize documents not listed in their subpoenas,[55] and to share records with law enforcement agents conducting a criminal investigation without a warrant.[56] Despite the TMB employees' implication that the subpoena itself imposes constitutionally adequate limitations on their discretion,[57] (1) their testimony reveals (a) they believe they can subpoena documents *instanter* at any time[58] and (b) they do not know what a constitutionally

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51 See ROA. 1524 (email from the DEA to the TMB).

52 ROA. 945, at 43: 14-24. See also ROA. 952, 72: 25, 73: 1-6.

53 See ROA. 948, at 56: 16-23.

54 *See,* 387 U.S., at 544-45.

55 Compare Response, at p. 19 with ROA. 977-979 (Appellees' subpoena).

56 See nn. 14-16, *supra.* The fact that the DEA renewed Dr. Zadeh's DEA registration certificate in 2016 without taking any administrative action further demonstrates the investigation was criminal in nature. ROA. 1421.

57 Response, at p. 31.

58 ROA. 1611, at 45: 8-10.

adequate substitute for a search warrant is,[59] (2) a thorough review of Texas statutes reveals no authority to conduct warrantless inspections at all[60] (much less any limitations on such a non-existent authority), and (3) the TMB employees have failed to point to any such limitation.

Finally, *Club Retro* was decided after *Beck*; therefore, the trial court erred when it concluded that it was "unclear to what degree, if at all, a regulatory scheme allowing for the warrantless inspection of a closely regulated business must limit the discretion of the inspecting officer."[61] This supposed lack of clarity was eliminated by *Club Retro*'s unequivocal requirement that, "The regulation must limit authorized inspections in time, place and scope."[62] Here, there is no such limitation.

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[59] 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.

[60] See, *e.g.,* ROA. 557 (court's conclusion that the TMB exceeded its subpoena authority) and ROA. 558 (court's conclusion that the TMB exceeded its inspection authority). The TMB employees' implicit attempt to argue against these conclusions constitutes an attempt to enlarge their relief on appeal; based on their failure to file a notice of cross-appeal, said argument is improperly before this Honorable Court.

[61] ROA. 567.

[62] *Club Retro v. Hilton,* 568 F.3d 181, 197 (5th. Cir.2009). See also *id.,* at 200 ("The administrative inspection regimes limit law enforcement authority to periodic inspections of public places and limit the inspectors' authority through defined procedures, such as various warning, petition, affidavit, summons, and warrant provisions. The inspection statutes and ordinances do not grant law enforcement officers unfettered discretion to conduct searches of business premises through any means of their choosing[…]").

v. THE TMB CONCLUDED THAT DR. ZADEH DID NOT NEED TO REGISTER AS A PAIN CLINIC

The TMB employees acknowledge the TMB informed Dr. Zadeh that he did not need to register as a pain management clinic.[63] Despite said acknowledgement, they effectively argue they can unilaterally revoke said instruction without notice based on a confidential complaint from law enforcement officers conducting a criminal investigation.[64] Appellees cite to zero authority which even arguably supports their frivolous position that secret processes triggered by unknown persons deprive Texas doctors and patients of their respective constitutional rights at the TMB's exclusive discretion.[65] The conditional nature of the TMB's supposed power precludes any possibility that Texas doctors (much less their patients) are sufficiently certain that they will permissibly be exposed to warrantless searches in furtherance of criminal investigations or that they will be systematically precluded from securing pre-compliance review thereof.

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63 Response, at p. 18.

64 Response, at p. 18.

65 See n. 30, supra.

vi. APPELLEES' BRIEF VOLUNTARILY EVIDENCES THE DISTRICT COURT'S ERROR

The TMB employees' response brief admits (1) Dr. Zadeh's legal assistant "alleged that the investigator made a physical search of the premises"[66] and (2) Pease went into two exam rooms and a records storage room.[67] The record evidences Pease's concession that the storage room was not "open to the public".[68] Therefore, the TMB employees' contention that there was "no physical search of the premises"[69] is contrary to both their response brief and the record.

Even more disturbingly, the TMB employees contend (for the first time) that TMB investigators "received copies of the patient log-in sheets" when they illegally executed their subpoena.[70] Patient sign-in sheets were not listed in the subpoena "signed" (but not "actually" signed) by Appellee Mari Robinson.[71] Therefore, the TMB employees have now judicially admitted to searching and seizing documents

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66 Response, at p. 5.

67 Response, at p. 5.

68 ROA. 1651 (Pease: "I wouldn't say it [the records storage room] was, quote, open to the public.").

69 Response, at p. 20.

70 Response, at p. 19. The record, however, contains testimony which appears to controvert this new assertion. ROA. 956, at 87: 11-18.

71 ROA. 977-979.

which were not covered by the subpoena.[72] This plainly constitutes an unconstitutional search and seizure insofar as (1) they seized Appellants' papers without any process or review by anyone other than the TMB's agents in the field and (2) the utilization of said discretion was plainly prohibited by well-established law.[73] As a result, the TMB employees have judicially admitted facts that establish the unavailability of qualified immunity because their search was unreasonable in scope as a matter of law.[74]

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[72] While Appellants concede this argument is being raised for the first time in their Reply, Appellees had never mentioned that they seized this information prior to their response brief.

[73] *Stanford v. State of Tex.*, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965) ("[N]othing is left to the discretion of the officer executing the warrant."); *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S. Ct. 367, 92 L. Ed. 436 (1948) (the Fourth Amendment is reduced to a nullity if the security of the people's homes is left "in the discretion of police officers"); and *Malley v. Briggs,* 475 U.S. 335. 352 (1986) (POWELL, J., concurring). See also *See,* 387 U.S., at 544-45.

[74] See *Club Retro v. Hilton,* 568 F.3d 181, 195 (5th. Cir., 2009). See also *United States v. Zadeh*, No. 15-10195, ___ F.3d ___, 2016 WL 1612754, *13 (5th Cir. July 8, 2016) ("The Supreme Court has distinguished 'cases of actual search and seizure,' which require probable cause, from those involving an administrative subpoena, which the Court characterized as 'constructive' searches. In light of the fact that 'the person served with [an administrative] subpoena may challenge it in court before complying with its demands,' administrative subpoenas 'are limited by the general reasonableness standard of the Fourth Amendment…not by the probable cause requirement.'") (ellipses in the original).

vii. THE TMB EMPLOYEES HAD NO RIGHT TO INSPECT DR. ZADEH'S BUSINESS

Dr. Zadeh introduced *uncontested* evidence that he was not a "pain management clinic"[75] and the TMB employees agree that they expressly informed him that he did not need to register as one.[76] Therefore, the TMB employees had no arguable authority to warrantlessly inspect his clinic *with or without notice*. Appellees' implication that there is some relevant but unidentified distinction between a pain management clinic and "the statutory definition" of a pain management clinic[77] further evidences their willingness to undermine the rule of law when it is convenient to their (1) unconstitutional objectives and (2) efforts to avoid liability for plainly unconstitutional conduct.

viii. THE TEXAS LEGISLATURE'S USE OF THE WORDS "AS NECESSARY" DO NOT ELIMINATE THE PEOPLE'S FOURTH AMENDMENT RIGHTS

Appellees cite Texas Occupations Code § 153.001 for the proposition that it can adopt rules "as necessary".[78] The TMB employees have not pointed to a single instance in which the Texas Legislature used the phrase "as necessary" to authorize

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75 ROA. 1787-90.

76 See Response, at p. 18.

77 Response, at p. 17.

78 Response, at pp. 15, 17, and 35.

warrantless searches that deprived the People of their rights to pre-compliance review. No known Texas statute utilizes the phrase "as necessary" to mean warrantless searches are permitted.[79] 21 of these statutes temporally qualify the phrase by using the words "as often as necessary."[80] Additionally, the Texas Legislature utilized the phrase "as necessary" in at least 12 statutes within the Texas Occupations Code which at least arguably attempt to provide a constitutionally adequate substitute for a search warrant for certain industries.[81] Doctors are not included. As a result, the TMB employees were not even arguably authorized to inspect Dr. Zadeh's clinic in 2013.

ix. TEXAS OCCUPATIONS CODE § 168.052(b) DID NOT EXIST AT ANY TIME RELEVANT HERETO

The TMB employees erroneously represent that Texas Occupations Code § 168.052(b) was "revised" in 2017;[82] instead, it is beyond dispute that subsection (b) did not even exist prior to the latest Texas legislative session and did not go into effect until September 1, 2017 (approximately *four years* after the instant search).

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79 See ROA. 332 at n. 8 (and statutes cited).

80 See ROA. 332 at n. 9 (and statutes cited).

81 See Tex. Occ. Code §§ 51.351; 351.1575 and 802.062 (b); § 351.1575 (a)(2) and (b)(2); § 802.062 (a); § 802.062; § 2309.106 (a); § 2309.358; § 2302.0015; § 2302.258 (a); § 2001.557 (a); and § 2007.557 (b).

82 Response, at p. 20.

Similarly, there is no evidence that this subsection "crystalized" any pre-existing legislative intent;[83] instead, it enacted an entirely new provision that was not in effect at any time relevant hereto. The Legislature cannot be presumed to have enacted a redundancy.[84] Beyond being improperly argued for the first time on appeal, the TMB employees cite to nothing which even purports to have expressed the Legislature's supposed previous or present intentions. In fact, 2017 legislation expressly codified (for the first time) the procedure which requires pre-compliance review of TMB subpoenas;[85] this eviscerates any argument that the Legislature changed the law to permit the instant search. Additionally, the TMB employees' arguments concerning legislative intent are manifestly improper because the statute reveals no ambiguity concerning the TMB's ability to conduct on-demand inspections at any time relevant hereto.[86]

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83 Response, at p. 20.

84 *Colgrove v. Battin 8212 1442*, 413 U.S. 149, 184, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973) (MARSHALL, J., dissenting) ("There is, of course, a well-recognized canon of construction which requires courts to read statutory provisions so that, when possible, no part of the statute is superfluous.") (citing 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4705 (3d ed. 1943) "and cases cited therein").

85 See Tex. Occ. Code § 154.007(e) and (f).

86 See *Esquivel v. Lynch*, No. 13-60326, *10 (5th Cir., 2015) and *Cruz v. Abbott*, 849 F.3d 594, 599 n. 8 (5th Cir., Feb. 23, 2017).

x. AT LEAST ONE TEXAS TRIAL COURT HAS ALREADY FOUND THE TMB'S USE OF SUBPOENAS *INSTANTER* IN CONJUNCTION WITH THE DEA TO BE UNCONSTITUTIONAL

On October 13, 2015, the 24th District Court of Victoria County, Texas granted a motion to suppress evidence unconstitutionally seized by the TMB, DEA, and DPS pursuant to a TMB administrative subpoena *instanter.*[87] Specifically, the court found that (1) "the TMB's interest in serving the subpoenas upon the defendant was not a legitimate pursuit of its administrative authority but an exercise to circumvent both the Texas and US Constitutions' requirement for a warrant"; (2) "the TMB acted in bad faith in partnering up with law enforcement to conduct the search of defendant's business"; (3) "the actions of the TMB and law enforcement bordered on intimidation"; (4) "the actions by the TMB and law enforcement in this case do not provide a substitute for a warrant"; (5) "defendant was immediately served with notice of the actions of the TMB to ensure that there was no judicial oversight of the search by TMB and law enforcement"; (6) "the subject of the search must be afforded an opportunity to obtain pre-compliance review before a neutral decision maker"; (7) "the warrantless search of the defendant by TMB in conjunction with numerous law enforcement agencies was [not] necessary to further the

[87] *State of Texas v. Courtney Ricardo Morgan,* Cause No. 14-08-28128-A, Judicial Findings of Fact and Conclusions of Law and Order Granting the Defendant's Motion to Suppress (October 23, 2015). Appellees acknowledged this case and attempted to distinguish same below. Compare ROA. 263-64 with ROA. 293-94. Appellants do not necessarily agree with all the findings and conclusions from said court.

regulatory scheme"; and (8) "The fact that a regulatory agency and law enforcement agencies are contacting each other and sharing information to conduct and coordinate a warrantless 'administrative search' is a cause of concern for this Court."

b. THE TMB EMPLOYEES HAVE FAILED TO INTRODUCE EVEN A SCINTILLA OF EVIDENCE THAT TMB SUBPOENAS CANNOT BE EVALUATED AND SIGNED BY THE EXECUTIVE DIRECTOR *AND/OR* THE TREASURER-SECRETARY

The TMB employees rely on a section from the Administrative Code for the proposition that the Executive Director can sub-delegate subpoena authority to any TMB employee.[88] This regulation impermissibly contravenes (*inter alia*) an unambiguous Texas statute.[89] While Appellees complain that it issues too many subpoenas each year for the Executive Director *alone* to evaluate and sign,[90] there is zero evidence in the briefs or record that the number of said subpoenas is so large that it cannot be handled by the Executive Director *and/or* the Secretary-Treasurer

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88 Response, at p. 34.

89 Tex. Occ. Code § 153.007(b).

90 Response, at p. 34. Appellants respectfully aver problems of an administrative agency's own creation cannot authorize that agency to seize (much less delegate) powers which it never possessed. See *Teladoc, Inc. v. Texas Medical Board*, 1:15-CV-00343-RP (W.D. Tex. July 30, 2015), ECF #64 at p. 13. If the TMB employees' argument is honored, *all* state agencies would have the apparent authority to sub-delegate powers exclusively assigned to named positions simply by creating more work than those positions could handle. This administrative circumvention of the Legislature's exclusive purview to create law finds zero support in Appellees' brief or in known law. See *Sexton v. Mount Olivette Cemetery Association*, 720 S.W.2d 129, 137 (Tex.App.—Austin 1986, writ ref'd n.r.e.) ("It is axiomatic that [administrative] agencies are creatures of statute and have no inherent authority. They may, therefore, exercise only those specific powers conferred upon them by law in clear and express language, and no additional authority will be implied by judicial construction.").

(the other person to whom the Legislature delegated subpoena authority).[91] In fact, a review of the record demonstrates Appellees have *never even mentioned* the Treasurer-Secretary in this case. As a result, there is absolutely no evidence which supports Appellees' argument that sub-delegation was necessarily implied by the Texas Legislature or authorized under Texas law. Additionally, Appellees do not explain why neither the Executive Director nor the Treasurer-Secretary are so busy that they cannot review 20-40 subpoenas *instanter* issued each year.[92]

c. THE TMB EMPLOYEES' SEARCH WAS PRETEXTUAL

The DEA's issuance of its own subpoena to Dr. Zadeh following the instant search under 21 U.S.C. § 876 is irrelevant since courts have permitted DEA subpoenas for purely criminal investigations.[93] Appellants have expressly argued that the TMB's effort to secure Dr. Zadeh's billing records was supported by zero authority;[94] Appellees have failed to refute same. "Whether an administrative search is a pretext for a criminal investigation is a factual question."[95] As a result, the TMB employees' motion for summary judgment was erroneously granted.

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91 See Tex. Occ. Code § 153.007(b).

92 See Appellees' Brief, at p. 16.

93 See, *e.g., United States v. Phibbs,* 999 F.2d 1053, 1076-77 (6th Cir.1993).

94 Appellants' brief, at p. 41.

d. THE TMB EMPLOYEES' SEARCH WAS UNREASONABLE IN SCOPE

Even if (1) Texas doctors who receive subpoenas have no right to pre-compliance review, (2) the medical profession is closely regulated, (3) there is a constitutionally adequate substitute for a search warrant (or no requirement for same), and (4) the search was not pretextual, the TMB employees are still not entitled to qualified immunity because their search was unreasonable in scope. First, the search violated 21 U.S.C. § 880 and 21 C.F.R. § 1316.06 because the DEA agents were allowed to search Dr. Zadeh's office without first identifying themselves or presenting notice of their inspection authority. Second, Appellees violated Texas Occupations Code § 159.003(a)(5) by failing to protect patient identities from the DEA. Third, Appellees violated Texas Occupations Code § 159.003(b) by providing law enforcement personnel access to confidential patient information while criminally investigating patients. Fourth, the TMB employees have admitted they seized documents outside the scope of the subpoena. Therefore, the TMB employees are not entitled to qualified immunity.

6. APPELLEES HAVE ABANDONED THEIR ARGUMENT THAT THE STATUTES AT ISSUE ARE CONSTITUTIONAL

Appellants' requests for declaratory judgment accurately foresaw a scenario in which a Texas federal court would craft a way to determine the statutes at issue

[95] *U.S. v. Johnson*, 994 F.2d 740, 743 (10th Cir.1993) (citing *Abel v. United States*, 362 U.S. 217, 225-30 (1960)).

somehow provided Appellees with qualified immunity. Based thereon, Appellants' requests for declaratory judgment designedly attacked the constitutionality of relevant statutes (as applied) which the trial court ultimately utilized to grant the TMB employees' motions to dismiss and for summary judgment. Based on Appellees' failure to brief the constitutionality of the statutes at issue, their arguments that said statutes are constitutional are effectively abandoned on appeal (thereby demonstrating the propriety of Appellants' requests for declaratory relief). Appellants respectfully aver that they cannot properly lose both (1) their § 1983 claims because the statutes permit Appellees' conduct and (2) their requests for declaratory judgment concerning statutes which (as applied) are inherently unconstitutional.

7. CONCLUSION

The TMB employees essentially argue that despite the absence of any Legislative authority, they managed to acquire power which authorizes Fourth Amendment violations and that the law(s) which permitted them to do so inexplicably comport with the Constitution. Responsible administrative agencies

recognize the limitations placed on their authority and act accordingly.[96] Permitting law enforcement officials to have immediate warrantless access to patients' entire medical files via administrative regulations (rather than the People's elected representatives) violates the People's clearly established constitutional rights, particularly when there is no constitutionally adequate substitute for a search warrant.

Allowing government actors to wield such unchecked power would cause potential patients proper pause when considering their needs for medical attention and the level of honesty they want to share with their physicians. This unconstitutionality cannot be overlooked, particularly insofar as it will foreseeably cause (1) missed diagnoses and (2) unjustifiable harm to (a) the People (including Appellant Jane Doe) and (b) the public health. The extremely sensitive nature of the papers demanded, searched, and seized (and place searched) should weigh heavily against approving the immediate enforcement of subpoenas *instanter* by investigators in the field seeking to force the medical profession to betray an oath of confidentiality to their patients that dates back over two thousand years.

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[96] See, *e.g.,* Ryan Lucas, *Lawmakers Say The ATF Should Regulate Bump Stocks. It's Not That Simple* (Oct. 13, 2017), https://www.npr.org/2017/10/13/557440570/lawmakers-say-the-atf-should-regulate-bump-stocks-its-not-that-simple ("But the law hasn't changed since the ATF originally signed off on bump stocks, so a regulatory change would require the bureau to reverse its original decision on the devices without Congress writing a new law or changing the controlling laws.") (last visited Nov. 21, 2017).

Respectfully submitted,

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CERTIFICATE OF SERVICE

In compliance with Fed. R. App. P. 31, 5th Cir. R. 31, and ECF Filing Standards, I certify that a PDF copy was served electronically when this brief was filed on November 24, 2017 through the ECF system on the following counsel of record:

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/s/ Meagan Hassan
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Dated November 24, 2017

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