APPENDICES

APPENDIX A
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50518

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

Appeals from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING EN BANC

Before: JOLLY, SOUTHWICK, and WILLET, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

No member of the panel nor judge in regular active service requested that the court be polled on rehearing en banc. The petition for rehearing en banc is therefore DENIED. *See* FED. R. APP. P. and 5th Cir. R. 35. Treating the petition for rehearing en banc as a

petition for panel rehearing, the petition is GRANTED. We withdraw our prior opinion, *Zadeh v. Robinson*, 902 F.3d 483 (5th Cir. 2018), and substitute the following.

The Texas Medical Board executed an administrative subpoena on Dr. Joseph Zadeh's medical office. Thereafter, Dr. Zadeh and one of his patients sued several Board members under 42 U.S.C. § 1983, claiming that the Board's actions violated the Fourth Amendment. The district court partially granted the defendants' motion to dismiss and later granted their motion for summary judgment rejecting all remaining claims. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Dr. Joseph Zadeh appeals the dismissal of his Section 1983 claim against several members of the Texas Medical Board who he claims violated his constitutional rights through a warrantless search of his office and medical records. Dr. Zadeh, an internal medicine doctor, owns and operates a medical practice in Euless, Texas. One of his patients, Jane Doe, is also a plaintiff-appellant in this case.

Dr. Zadeh was the subject of an administrative proceeding before the State Office of Administrative Hearings ("SOAH") for violations of the Board's regulations. The Drug Enforcement Agency ("DEA") also was investigating him. Indeed, it appears the Board first learned about allegations against Dr. Zadeh when the DEA filed a complaint with the Board about his prescribing practices in September 2013. The DEA investigator emailed a representative of the Board, stating, "I'm at a point in the criminal case that I need to interview Dr. Zadeh and review his patient files." The Board then initiated an investigation.

As part of this investigation, Defendants Sharon Pease and Kara Kirby, who were investigators with the Board, served an administrative subpoena on Dr. Zadeh on October 22, 2013. The subpoena had the electronic signature of Defendant Mari Robinson, who was the Executive Director of the Board. The subpoena was for the immediate production of the medical records of sixteen of Dr. Zadeh's patients. Two DEA agents who were investigating related criminal allegations accompanied Kirby and Pease.

The district court found the "facts surrounding the execution of the subpoena" to be "largely undisputed." Dr. Zadeh was not present when the investigators arrived. The subpoena was handed to the doctor's assistant. The investigators sat in the medical office waiting room to give the doctor time to appear. While they waited, the assistant spoke on the phone with Dr. Zadeh, his lawyer, and his brother who also is a lawyer. The assistant testified that after these calls had occurred but no permission to proceed had been given, the investigators told her they would suspend Dr. Zadeh's license if the records they sought were not produced. The investigators admit something was said that was akin to a promise of some vague "disciplinary action." What was said at that point is at least unclear. The assistant eventually complied, taking the defendants into a conference room and delivering the requested records to them. Although most of their time was spent inside the public waiting area or conference room, the investigators also approached the medical assistant to ask for help while she was in exam rooms and later in a storage room.

As a result of that search, Dr. Zadeh and his patient, Jane Doe, sued Robinson, Pease, and Kirby in their individual capacities and Robinson in her official capacity in the United States District Court for the

Western District of Texas. They alleged the defendants' actions violated their Fourth Amendment, due process, and privacy rights. The plaintiffs sought monetary damages under 42 U.S.C. § 1983 as well as declaratory relief. The defendants moved to dismiss the claims on these grounds: (1) the plaintiffs lacked standing; (2) the *Younger* abstention doctrine barred the requests for declaratory relief; (3) the claim against Robinson in her official capacity was barred by the doctrine of sovereign immunity; (4) the doctrine of qualified immunity applied to the claims against the defendants in their individual capacities.

In ruling on the motion to dismiss, the district court held Dr. Zadeh had standing to pursue declaratory relief, but Jane Doe did not. Nonetheless, the district court concluded that "the *Younger* abstention doctrine require[d] [it] to abstain from adjudicating Plaintiff Zadeh's claims for declaratory relief." The district court also held that sovereign immunity barred the plaintiffs' claims for monetary damages against Robinson in her official capacity. Finally, the court concluded that the defendants were entitled to qualified immunity for the privacy and due process claims. The only part of the suit left, then, was Dr. Zadeh's claim that the defendants violated his clearly established Fourth Amendment rights during the search of his office.

The defendants moved for summary judgment on "whether Defendants exceeded their statutory subpoena authority by searching and inspecting Plaintiff's office and records." Although the plaintiffs alleged that the investigators performed a thorough search of Dr. Zadeh's office, the district court found that the record did not support this allegation. Instead, the district court determined that the "Defendants' presence at Plaintiff's office was solely to execute

the subpoena instanter." The district court also held that Robinson was not liable as she neither affirmatively participated in the alleged search nor implemented unconstitutional policies that caused the alleged constitutional deprivation. Further, there was "no evidence Defendants Pease and Kirby inspected Plaintiff's office or searched his records." The plaintiffs timely appealed.

DISCUSSION

The plaintiffs appeal both the order granting the motion to dismiss in part and the order granting the motion for summary judgment. Although we review both *de novo*, a different legal standard applies to each:

> In the former, the central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief. In the latter, we go beyond the pleadings to determine whether there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 440 n.8 (5th Cir. 2000) (citations omitted).

We first address the plaintiffs' challenge to the district court's grant of qualified immunity, evaluating whether clearly established law prohibited the defendants' conduct. Next, we discuss whether the district court erred in abstaining from deciding the plaintiffs' claims for declaratory judgment. Finally, we analyze whether Robinson was liable in her supervisory capacity.

I. Grant of qualified immunity

"The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal." *Morgan v. Swanson*, 659 F.3d 359, 370–71 (5th Cir. 2011). Officials are entitled to qualified immunity "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S.Ct. 577, 589, 199 L.Ed.2d 453 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

Using this framework, we analyze the plaintiffs' arguments that clearly established law prohibited the defendants' execution of the subpoena instanter. The plaintiffs offer two theories for why the defendants' conduct was unconstitutional. First, they argue it was a warrantless search that did not satisfy the administrative exception. Second, they argue it was a pretextual search and thus unconstitutional.

a. Warrantless search

The plaintiffs argue the Board violated the Fourth Amendment when it demanded immediate compliance with its administrative subpoena. We have previously considered a challenge to a subpoena instanter executed by the Texas Medical Board. *See Cotropia v. Chapman*, 721 F. App'x 354 (5th Cir. 2018). In that nonprecedential opinion, we held: "Absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." Id. at 358 (quoting *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015)).

In that case, the physician at the center of a Board investigation pled sufficient facts to overcome qualified immunity. *Id*. at 361. The doctor alleged that a Board member "violated the clearly established right to an opportunity to obtain precompliance review of an administrative subpoena before a neutral decisionmaker" when he took documents from the physician's office over objections from the office receptionist. *Id*. at 357. Relying on Supreme Court precedent, we held that it was clear at the time that "prior to compliance, *Cotropia* was entitled to an opportunity to obtain review of the administrative subpoena before a neutral decisionmaker." *Id*. at 358 (citing *See v. City of Seattle*, 387 U.S. 541, 545 (1967); *Donovan v. Lone Steer, Inc*., 464 U.S. 408, 415 (1984)). Similarly, the demand to turn over Dr. Zadeh's medical records immediately did not provide an opportunity for precompliance review. We agree, then, that a requirement of precompliance review in many, if not most, administrative searches had been clearly established by Supreme Court precedent prior to the search here.

The defendants acknowledge this law but maintain there was no constitutional violation because this search fell into an exception to the general rule requiring precompliance review. We next examine that argument.

i. Closely regulated industry

No opportunity for precompliance review is needed for administrative searches of industries that "have such a history of government oversight that no reasonable expectation of privacy" exists for individuals engaging in that industry. *Marshall v. Barlow's, Inc*., 436 U.S. 307, 313 (1978). Even so, warrantless inspections in closely regulated industries must still

satisfy three criteria: (1) a substantial government interest, (2) a regulatory scheme that requires warrantless searches to further the government interest, and (3) "a constitutionally adequate substitute for a warrant." *New York v. Burger*, 482 U.S. 691, 702–03 (1987) (quoting *Donovan v. Dewey*, 452 U.S. 594, 603 (1981)).

Cotropia did not resolve whether the Board's use of administrative subpoenas satisfied the Burger criteria because the issue was not raised until oral argument. *Cotropia*, 721 F. App'x at 360 & n.6. As a result, the panel's holding was expressly limited to concluding that the Board's demand for immediate compliance with the subpoena did not satisfy the general administrative exception to the warrant requirement. The argument has timely been raised here, though. Thus, we must discuss whether the *Burger* exception permitted the Board's administrative subpoena and whether that law was clearly established at the time of its execution.

To categorize industries under *Burger*, courts consider the history of warrantless searches in the industry, how extensive the regulatory scheme is, whether other states have similar schemes, and whether the industry would pose a threat to the public welfare if left unregulated. *See Burger*, 482 U.S. at 704; *Patel*, 135 S. Ct. at 2454. The defendants characterize the relevant industry in two different ways. We evaluate first whether the practice of medicine is a closely regulated industry and then whether the practice of prescribing controlled substances is closely regulated.

Acknowledging that the medical profession is subject to close oversight, the district court emphasized the absence of a history of warrantless inspections to conclude that the medical profession was not a closely regulated industry. Important to its conclusion was

the confidential nature of the doctor-patient relationship: "It strains credibility to suggest that doctors and their patients have no reasonable expectation of privacy." On appeal, the defendants all but concede that there is not a lengthy history of warrantless searches. They instead emphasize the extensive regulatory scheme governing the practice of medicine and the risk that the industry could pose to the public welfare.

There is no doubt that the medical profession is extensively regulated and has licensure requirements. Satisfying the *Burger* doctrine requires more. The Supreme Court instructs "that the doctrine is essentially defined by 'the pervasiveness and regularity of the federal regulation' and the effect of such regulation upon an owner's expectation of privacy." *Burger*, 482 U.S. at 701 (quoting *Dewey*, 452 U.S. at 605–06). Another key factor is "the duration of a particular regulatory scheme." *Id*. (quoting *Dewey*, 452 U.S. at 606).

The Board cites several laws or regulations governing the behavior of doctors. Outside of citing Texas's licensure requirement for physicians, the regulations the Board cites do not apply to the entire medical profession. Instead, they target the practice of prescribing controlled substances. As examples, the Board states that doctors must register with the DEA to prescribe controlled substances, TEX. HEALTH & SAFETY CODE § 481.061; that prescriptions of controlled substances are monitored by several law enforcement agencies, *id*. §§ 481.067, 481.075, 481.076; and that pain management clinics must register as such, which allows the Board to inspect them from time to time, TEX. OCC. CODE §§ 168.101, 168.052; 37 Tex. Reg. 10079, 10079–80 (2012), *adopted* 38 Tex. Reg. 1876, 1876–77 (2013), *amended* 39 Tex. Reg. 297, 297–98 (2014) (former 22 TEX. ADMIN. CODE § 195.2);

35 Tex. Reg. 1924, 1925–26 (2010), *adopted* 35 Tex. Reg. 3281, 3281–82 (2010), *amended* 43 Tex. Reg. 768, 768–74 (2018) (former 22 TEX. ADMIN. CODE § 195.3). The Board also refers us to laws and regulations that similarly regulate anesthesia. These, though, do not amount to pervasiveness and regularity of regulation over the medical industry as a whole as *Burger* requires. Instead, only specific groups of doctors may have been put on notice that the Board may perform some inspections.

We also do not see in the medical profession an entrenched history of warrantless searches. Its absence is relevant, though not dispositive, to our issue. *Burger*, 482 U.S. at 701. For example, when the Court held that the liquor industry was closely regulated, it mentioned that English commissioners could inspect brewing houses on demand in the 1660s, and that Massachusetts passed a similar law in 1692. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75 (1970). It then referred to a 1791 federal law that has continued in various forms, permitting federal officers to perform warrantless searches of distilleries and imposing an excise tax on distilled liquor. *Id*. Because the focus there was "the liquor industry long subject to close supervision and inspection," the Court concluded that the Fourth Amendment did not prohibit the warrantless searches authorized by Congress. *Id*. at 77. Here, there is no such history.

In considering the reasonable expectation of privacy, we also consider the sensitive nature of medical records. The Ninth Circuit explained that "the theory behind the closely regulated industry exception is that persons engaging in such industries, and persons present in those workplaces, have a diminished expectation of privacy." *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004). We agree with that

court's observation that in medical contexts, the expectation of privacy likely is heightened. *Id*.

Admittedly, federal regulations do exempt the Board from the privacy requirements of the Health Insurance Portability and Accountability Act ("HIPAA"). 45 C.F.R. § 164.512. Further, the Board cites Texas laws providing that where the Board does obtain information, it is subject to confidentiality requirements. *See* TEX. OCC. CODE §§ 159.002; 159.003(a)(5); 164.007(c). That HIPAA permits disclosure to the Board and that the regulations governing the Board continue to protect that information from disclosure does not mean that the Board is entitled to access to that information through an administrative search without allowing an opportunity for precompliance review.

We conclude, then, that the medical industry as a whole is not a closely regulated industry for purposes of *Burger*. Still, even if the medical profession at large cannot be said to fall within these *Burger* factors, it is possible that a subset, such as those who prescribe controlled substances, would do so. Because the parties focus their analysis of whether there is a closely regulated industry on the medical profession as a whole and not on pain management clinics, we assume only for purposes of our analysis today that pain management clinics are part of a closely regulated industry and that Dr. Zadeh was operating such a clinic even if his clinic was not certified as one. Such assumptions are appropriate in this case because ultimately our resolution turns on whether the relevant law was clearly established. At this point, we can at least say that the law was not clearly established whether pain management clinics are part of a closely regulated industry. The remaining relevant law, established with clarity or not, is analyzed below.

ii. Burger *exception requirements*

Even were we to accept the defendants' argument that doctors prescribing controlled substances are engaging in a closely regulated industry with less reasonable expectations of privacy, administrative searches of such industries still must satisfy the three *Burger* criteria. There is no meaningful dispute in this case as to the first two factors, namely, that the State has a substantial interest in regulating the prescription of controlled substances and that the inspection of a doctor's records would aid the Government in regulating the industry. We thus analyze only whether the statutory scheme is a proper substitute for a search warrant. The Board relies on its authority to issues subpoenas and to inspect pain management clinics. The principal response from plaintiffs is that neither provides a constitutionally adequate substitute for a warrant.

In order for a warrant substitute authorized by statute to be constitutionally adequate, "the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 703. The relevant statute provides: "The board may issue a subpoena or a subpoena duces tecum to compel the attendance of a witness and the production of books, records, and documents." TEX. OCC. CODE. § 153.007(a). The Board argues that the statute, when considered with the following regulation, limits the discretion of the officials. The regulation provides that after a "request by the board or board representatives, a licensee shall furnish to the board copies of medical records or the original records within a reasonable time period, as prescribed at the

time of the request." 22 TEX. ADMIN. CODE § 179.4(a). The regulation defines "reasonable time" as "fourteen calendar days or a shorter time if required by the urgency of the situation or the possibility that the records may be lost, damaged, or destroyed." *Id*.

The district court held that a search using the Board's subpoena authority did not satisfy the third factor of the *Burger* test as it was "purely discretionary," allowing the Board "to choose which doctors to subpoena and to do so at a frequency it determines." To evaluate that holding, we consider the limits that do exist: only licensees are subject to the subpoena; only medical records must be produced; and it is the Board or its representatives who will be asking for the records. As the district court stated, though, there is no identifiable limit on whose records can properly be subpoenaed.

As to inspections of pain management clinics, the Board argues that some limits to its authority are set by the statute permitting it to inspect pain management clinics. Specifically, the statute allows it to examine "the documents of a physician practicing at the clinic, as necessary to ensure compliance with this chapter." TEX. OCC CODE. § 168.052(a). Providing more specific guidance, the regulation in effect at the time provided:

> The board may conduct inspections to enforce these rules, including inspections of a pain management clinic and of documents of a physician's practice. The board may contract with another state agency or qualified person to conduct these inspections.

35 Tex. Reg. 1925, 1925–26 (2010), *adopted* 35 Tex. Reg. 3281, 3281–82 (2010), *amended* 43 Tex. Reg. 768, 768–74 (2018) (former 22 TEX. ADMIN. CODE § 195.3).

The district court found this inspection authority, like the subpoena authority, to be "purely discretionary." The governing criteria for an inspection is that the target be a pain management clinic, that the Board performs the inspection, and that the purpose for the search be to determine compliance with pain management rules. We agree with the district court, though, that these requirements suffered from the same fatal *Burger* flaw as the subpoena authority: they did not limit how the clinics inspected are chosen.

In summary, there are insufficient limits on the discretion of the Board to satisfy the *Burger* requirements, whether considering the medical profession in general or as to pain management clinics. What is left is the question of whether the law on these points was clearly established and, regardless, whether the search was invalid as pretextual.

iii. Clearly established law for qualified immunity

To summarize, we have concluded there was a violation of Dr. Zadeh's constitutional rights. That is true even with our twin assumptions that pain management clinics are part of a closely regulated industry and that Dr. Zadeh operated a pain management clinic. Nonetheless, the defendants are entitled to qualified immunity unless the constitutional requirements they violated were clearly established at the time of their actions. *Reichle*, 566 U.S. at 664. We hold that it was clearly established at the time of this search that the medical profession as a whole is not a closely regulated industry, meaning that governmental agents violate the Constitution when they search clinics that are not pain management clinics without providing an opportunity for precompliance review. We also hold, even assuming that pain management

clinics are part of a closely regulated industry, that ondemand searches of those clinics violate the constitution when the statutory scheme authorizing the search fails to provide sufficient constraints on the discretion of the inspecting officers. We need to analyze, though, whether that last statement of law was clearly established when this search occurred.

Our analysis of the clarity of relevant law is objective, meaning it does not focus on the specific defendants' knowledge. "The touchstone of this inquiry is whether a reasonable person would have believed that his conduct conformed to the constitutional standard in light of the information available to him and the clearly established law." *Goodson v. City of Corpus Christi*, 202 F.3d 730, 736 (5th Cir. 2000). "[E]ven law enforcement officials who 'reasonably but mistakenly [commit a constitutional violation]' are entitled to immunity." *Glenn v. City of Tyler*, 242 F.3d 307, 312–13 (5th Cir. 2001) (quoting *Goodson*, 202 F.3d at 736). For the law to be clearly established, there must be a close congruence of the facts in the precedent and those in the case before us. *Wesby*, 138 S. Ct. at 589–90. "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiffs seek to apply." *Id*. at 590.

Defendants rely on one of our precedents that reviewed an administrative search of a dentist's office by agents of the Texas State Board of Dental Examiners, accompanied by Department of Public Safety officials. *Beck v. Tex. State Bd. of Dental Exam'rs*, 204 F.3d 629, 632 (5th Cir. 2000). Dentist Beck was a target because of complaints filed against him for prescribing controlled substances. *Id*. We concluded that the search did not violate the plaintiff's clearly established rights. *Id*. at 638–39. We applied the *Burger* exception and determined there was a significant state

interest in regulating dentists' use of controlled substances; the search was conducted pursuant to two regulatory schemes; and there was an adequate substitute for a warrant where the statute permitted the official to conduct inspections during "reasonable times" after "stating his purpose" and presenting his credentials to the owner. *Id*. at 638–39. In light of *Beck*, the Board argues that reasonable investigators could have believed the *Burger* exception permitted the execution of the subpoena as they too were investigating prescriptions of controlled substances within the medical industry.

The plaintiffs insist that *Beck* is "patently distinguishable" for the same reason argued in the separate opinion here. The clarity of any possible distinction, though, must be viewed through the lens that the law, including a distinction, must be "sufficiently clear that every reasonable official would understand that what he is doing is unlawful" at that time. *Wesby*, 138 S. Ct. at 589 (quotation marks omitted). That means "existing law must have placed the constitutionality of the officer's conduct 'beyond debate." *Id*. Perhaps most relevant, the "legal principle [must] clearly prohibit the officer's conduct *in the particular circumstances before him*. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id*. at 590 (emphasis added).

The claimed sufficient distinction here is that the regulations and statutes under which the investigators in *Beck* acted explicitly permitted inspections without prior notice. *See Beck*, 204 F.3d at 639. The *Beck* court discussed that point at the end of the opinion, as it addressed several questions regarding whether what occurred was a valid administrative search of a closely regulated industry. *Id*. The final

subject the court discussed was that one of the statutes under which the inspection was conducted did not require that prior notice be given. *Id*. (quoting Section 5.01(c) of the Texas Controlled Substances Act.) That is no small distinction, and we conclude today that absent similar statutory or perhaps regulatory authority that dispenses with prior notice, a search such as occurred here cannot be conducted without prior notice. The issue for us, though, is whether that law was clearly established at the time of the search we are reviewing today.

As we already stated, the right is not clearly established unless it is beyond debate using an objective test. We have discussed the intricacies of *New York v. Burger*, which permit warrantless searches when they satisfy a three-factor test. Our *Beck* decision held that the search there was of a closely regulated industry, and therefore went through the three *Burger* factors. The discussion of the specific statutory authorization for no-notice inspections was to show that the third *Burger* factor was satisfied, which is that an adequate substitute for a warrant existed. We did not say in *Beck* that the only sufficient substitute under *Burger* was a statute authorizing no-notice searches. We did hold that "under these circumstances, Beck does not show a violation of a clearly established constitutional right." *Beck*, 204 F.3d at 639.

Instead of clearly establishing the principle that prior notice of a regulatory search must be given unless the authorizing statute explicitly announces it is unnecessary, *Beck* applied the general *Burger* principle to the facts of that case that a warrant substitute authorized by a "regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly

defined scope, and it must limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 703. In the *Beck* situation, that factor was satisfied with the statutory language already discussed. We cannot see, though, that every reasonable official prior to conducting a search under the circumstances of this case would know this *Burger* factor was not satisfied. We think some, even many, reasonable officers would believe under the third *Burger* factor that the owner of the premises was charged with knowledge that a statute authorized the search, and the officers would reasonably believe the scope of the search and the discretion of the officials was validly limited. We have held that the statute fails this standard, but we do not hold that all reasonable officers would have known that, until now.

Therefore, although *Beck* does not control the constitutionality of the Board's actions in this case, it does weigh in favor of the defendants' receiving qualified immunity. We find more guidance from cases where a statute did not clearly limit the official's discretion in selecting who would be subject to an administrative search. In one, we held that the statute provided a constitutionally adequate substitute for a warrant where the statute provided:

> The licensing agency shall make or cause to be made inspections relative to compliance with the laws and regulations governing the licensure of child care facilities. Such inspections shall be made at least once a year but additional inspections may be made as often as deemed necessary by the licensing agency.

See Ellis v. Miss. Dep't of Health, 344 F. App'x 43 (5th Cir. 2009) (citing MISS. CODE. ANN. § 43-20-15). Though that opinion is not precedential, we agree with its reasoning.

We also upheld an administrative search where, despite limits on the conduct of an officer after a traffic stop, there were not clear limits on an officer's discretion as to whom to stop. *See United States v. Fort*, 248 F.3d 475, 482 (5th Cir. 2001). Because we have not so far required there to be a clear limit on determining whom officials select for an administrative search, the defendants reasonably could have believed that the administrative scheme here provided a constitutionally adequate substitute for a warrant.

Finally, the plaintiffs argue that even if qualified immunity might apply to defendants who conducted a proper search, the defendants did not follow the statutory scheme. Therefore, they assert, caselaw in which the legal requirements for the search were followed is inapplicable. The claims of overstepping authority, though, are minor. First, while the medical assistant was waiting for Dr. Zadeh to appear, there is evidence one of the investigators approached the assistant at her desk, then followed her into two exam rooms. While in one of the rooms, the investigator asked if controlled substances were kept in the room. Second, there is evidence this same investigator also approached the assistant while the latter was in a storage room and asked if the investigators could use the medical office's copy machine. The district court said there was no evidence the investigator ever looked at any files or went somewhere in the medical office without the assistant. Finally, as soon as the investigators were asked to leave the office, they did so. We agree with the district court that there is "no support in the record" to sustain the allegation the investigators did a "thorough search and inspection." The factual basis for deviations from search protocols is insubstantial.

In conclusion, the unlawfulness of the defendants' conduct was not clearly established at the time of the search.

b. Pretextual searches

The plaintiffs also argue that the search was a pretext for uncovering evidence of criminal wrongdoing, not a valid administrative search. According to the plaintiffs, the DEA brought Dr. Zadeh's possible misdeeds before the Medical Board. A DEA agent then was present during the search. To finish the story, though, the Medical Board proceeded against Dr. Zadeh. Before there was a full hearing on the merits, the Board entered an agreed order. In the order, the panel found that Dr. Zadeh was operating a pain management clinic without registering it. There is nothing in this record indicating whether the DEA's investigation resulted in a criminal prosecution or any other action.

"Even under a valid inspection regime, the administrative search cannot be pretextual." *Club Retro, LLC v. Hilton*, 568 F.3d 181, 197 (5th Cir. 2009). It is incorrect, though, to use the label "pretext" simply because of an overlap between an administrative search and a criminal search. The *Burger* Court remarked that "a State can address a major social problem both by way of an administrative scheme and through penal sanctions." *Burger*, 482 U.S. at 712. To determine whether the search there was constitutional, the Court looked to whether the administrative scheme really "authorize[d] searches undertaken solely to uncover evidence of criminality." *Id*.

Similarly, the Supreme Court dismissed a defendant's argument "that because the Customs officers were accompanied by a Louisiana State Policeman, and were following an informant's tip that a vessel in

the ship channel was thought to be carrying marijuana," the Government could not rely on the administrative search exception. *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983).

We have applied these principles to a search of an automobile salvage yard. *United States v. Thomas*, 973 F.2d 1152, 1155–56 (5th Cir. 1992). There, an investigator with the Texas Department of Public Safety tracked a vehicle to an auto salvage business and there conducted an inventory inspection under Texas statute. *Id*. at 1155. Even though the inventory inspection was prompted by suspicion of criminal conduct, the investigator still was entitled to use information gained during the inspection to obtain a search warrant for the salvage-yard owner's residence. *Id*. "Administrative searches conducted pursuant to valid statutory schemes do not violate the Constitution simply because of the existence of a specific suspicion of wrongdoing." *Id*. at 1155–56.

Beck has similar analysis. As here, the administrative search in *Beck* was initiated after a tip. Dental Board member Michael Pitcock "stated in his deposition that information was forwarded to him alleging that Beck had ordered unusually high volumes of controlled substances." *Beck*, 204 F.3d at 632. The Dental Board suspected Beck of violating criminal statutes, and a law enforcement officer accompanied the board agent in its inspection of the dental office. *Id*. The dentist argued that the search was conducted to uncover criminal wrongdoing and thus was not conducted pursuant to a valid administrative scheme. *Id*. at 638. We held that the suspicions of criminal wrongdoing "did not render the administrative search unreasonable," citing *Villamonte-Marquez* and *Thomas*. *Id*. at 639.

As to Dr. Zadeh, the DEA was closely involved with the Board's investigation. Under *Burger*, though,

we look to whether the search that occurred was under a scheme serving an administrative purpose. The Board's purpose is demonstrated by the subsequent administrative action against Dr. Zadeh. The search was not performed "solely to uncover evidence of criminality." *See Burger*, 482 U.S. at 698. Thus, the search was not pretextual.

II. Declaratory Judgment

Dr. Zadeh argues that the district court erred in abstaining from deciding the declaratory judgment claims following *Younger*. Dr. Zadeh asked the district court to make declaratory judgments on several laws implicating the Board. The district court did not resolve any.

"In *Younger*, the Supreme Court 'instructed federal courts that the principles of equity, comity, and federalism in certain circumstances counsel abstention in deference to ongoing state proceedings.'" *Wightman v. Tex. Supreme Court*, 84 F.3d 188, 189 (5th Cir. 1996) (citations omitted). Following Supreme Court precedent, this court follows "a three-part test describing the circumstances under which abstention [is] advised: (1) the dispute should involve an 'ongoing state judicial proceeding;' (2) the state must have an important interest in regulating the subject matter of the claim; and (3) there should be an 'adequate opportunity in the state proceedings to raise constitutional challenges.'" *Id*. (citation omitted).

The district court applied the reasoning of one of our unpublished cases, *Perez v. Tex. Med. Bd*., 556 F. App'x 341 (5th Cir. 2014). There, we held that Younger barred the plaintiffs' suit seeking to enjoin the Board from pursuing any causes of action against them. *Id*. at 342–43. We agree with that panel's deter-

mination that Texas had a strong interest in regulating the practice of medicine, and the Perez plaintiffs could raise their constitutional challenges in the state court because the law provided for judicial review of the administrative decision. *Id*. at 342. Following *Perez*, the district court concluded that Dr. Zadeh had an ongoing administrative action pending; the state had a significant interest in regulating medicine in Texas; and Dr. Zadeh could appeal his administrative action in state court and raise constitutional challenges there. Accordingly, the district court abstained from adjudicating the requests for declaratory relief.

Dr. Zadeh claims *Younger* is inapplicable because the Board argued that the lawsuit did not implicate the underlying investigation. Dr. Zadeh also argues that there will be no adequate opportunity in the state proceedings to raise any constitutional challenges. He claims that "[d]octors 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)."

Dr. Zadeh was subject to an ongoing state administrative proceeding, and that qualifies as a judicial proceeding for this analysis. *See Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). As we stated in *Perez*, Texas has a strong interest in regulating the practice of medicine. Finally, despite plaintiffs' contrary view, Texas law does permit judicial review by either party of an administrative decision.[1] "A person who has exhausted all administrative remedies available within a state agency

[1] The plaintiffs note that the administrative law judge in the SOAH proceeding declined to address the constitutional questions. Even so, all the law requires is that the issue have been

and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter." TEX. GOV'T CODE. § 2001.171.

The district court did not abuse its discretion in abstaining from deciding the declaratory judgment claims.

III. Director Robinson's potential supervisory capacity liability

The plaintiffs argue that Robinson should be held liable in her supervisory capacity. "A supervisory official may be held liable under § 1983 only if (1) he affirmatively participates in the acts that cause the constitutional deprivation, or (2) he implements unconstitutional policies that causally result in the constitutional injury." *Gates v. Tex. Dep't of Protective and Regulatory Servs.*, 537 F.3d 404, 435 (5th Cir. 2008). A failure to train claim requires that the plaintiff show (1) the supervisor's failure to train; (2) the failure to train resulted in the violation of the plaintiff's rights; and (3) the failure to train shows deliberate indifference. Id. For deliberate indifference, "there must be 'actual or constructive notice' 'that a particular omission in their training program causes . . . employees to violate citizens' constitutional rights' and the actor nevertheless 'choose[s] to retain that program.'" *Porter v. Epps*, 659 F.3d 440, 447 (5th Cir. 2011) (citation omitted).

The plaintiffs argue that Robinson improperly delegated her subpoena authority to subordinates whose training she knew nothing about. Therefore, the subpoena did not comply with Texas law because the Executive Director of the Board is not permitted

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preserved for the appeal to the state court. *See Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 629 (1986).

to delegate her subpoena authority. The district court did not determine whether the delegation was permissible. "In light of the express regulatory authority for the delegation, the precedent set by her predecessors, and the sheer volume of subpoenas issued every year by the TMB," Robinson's actions did not amount to deliberate indifference.

In Texas administrative law, a rule of statutory construction presumes that where a statute grants specific authority to a designated public officer, the legislature intended only that officer to have that authority. *Lipsey v. Tex. Dep't of Health*, 727 S.W.2d 61, 64 (Tex. App.— Austin 1987, writ ref'd n.r.e.). Still, *Lipsey* recognized "the authority to 'subdelegate' or transfer the assigned function may be *implied* and the presumption defeated owing to the nature of the assigned function, the makeup of the agency involved, the duties assigned to it, the statutory framework, and perhaps other matters." *Id*. at 65.

In this case, a statute permits the Board to subpoena records. TEX. OCC. CODE. § 153.007. Section 153.007(b) permits the Board to delegate subpoena authority "to the executive director or the secretary-treasurer of the board." By administrative rule, the executive director may "delegate any responsibility or authority to an employee of the board." 22 TEX. ADMIN. CODE § 161.7(c).

In resolving this issue, we start with the fact the rule articulated in *Lipsey* is only a presumption. Even assuming that the plaintiffs could show that Robinson failed to train her subordinates and that failure resulted in a constitutional violation, Robinson was not deliberately indifferent in delegating her subpoena authority in light of the fact she was acting pursuant to the regulations in the same way as her predecessors and the numerous subpoenas issued each year. To the

extent the plaintiffs seek to impose Section 1983 liability on Kirby and Pease through the subdelegation argument, that law also was not clearly established.

AFFIRMED.

DON R. WILLETT, Circuit Judge, concurring in part, dissenting in part:

State investigators, without notice and without a warrant, entered a doctor's office and demanded to rifle through the medical records of 16 patients. Or else. The doctor was not in, and the investigators, after being told that the doctor contested the subpoena, warned his assistant that if she didn't produce the patient files at once, there would be grave repercussions. According to her, the investigators threatened to suspend the doctor's medical license. They demanded compliance—immediately.

The Fourth Amendment forbids such roughshod rummaging. The Framers cared deeply about We the People's right "to be secure in [our] persons, houses, papers, and effects against unreasonable searches and seizures."[1] The Fourth Amendment was the Founding generation's "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity."[2] In fact, outrage over unchecked searches was "one of the driving forces behind the Revolution itself."[3]

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[1] U.S. CONST. amend. IV.

[2] *Riley v. California*, 134 S. Ct. 2473, 2494 (2014).

[3] *Id*.

The majority opinion correctly diagnoses Dr. Zadeh's injury but refuses to prescribe a remedy: His rights were violated, but since the law wasn't clearly established, Dr. Zadeh loses. I originally agreed with this violation-without-vindication result.[4]

But deeper study has convinced me that the officials' constitutional misstep violated clearly established law, not a previously unknown right. And it has reaffirmed my broader conviction that the judge-made immunity regime ought not be immune from thoughtful reappraisal.

I

To rebut the officials' qualified-immunity defense and get to trial, Dr. Zadeh must plead facts showing that the alleged misconduct violated clearly established law.[5] He has done so.

A

The Supreme Court held 40-plus years ago in *See* that the Fourth Amendment requires precompliance review.[6] An administrative subpoena "may not be made and enforced by the inspector in the field . . . ."[7] Almost 20 years later, the Court in *Lone Steer* elaborated that although an agency "may issue an administrative subpoena without a warrant," it must give the subpoenaed person an opportunity "to question the reasonableness of the subpoena . . . by raising objections in an action in district court" before suffering

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[4] *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante).

[5] *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

[6] *See v. City of Seattle*, 387 U.S. 541 (1967).

[7] *Id*. at 544-45.

any penalties for noncompliance.[8] The Court reaffirmed this settled precompliance-review requirement again just four years ago in *Patel*.[9]

Here, Texas officials gave Dr. Zadeh no time to question the subpoena's reasonableness. That's a violation. Plain and simple.

B

But there are exceptions to most every rule. Under the Supreme Court's 1981 decision in *Burger*, officials don't have to give people time to comply if:

- the business is part of a closely regulated industry;
- there's a substantial government interest;
- warrantless searches are necessary; and
- there's a "constitutionally adequate substitute for a warrant."[10]

This search whiffs two requirements. So I agree with the majority opinion: The *Burger* exception doesn't apply.

1

Medical practices—including pain-management clinics—aren't "closely regulated" industries. In both *Burger*[11] and *Patel*,[12] the Supreme Court considered the history of warrantless searches, then-current regulations, and the public interest. Take *Patel*. The

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[8] *Donovan v. Lone Steer, Inc*., 464 U.S. 408, 415 (1984).

[9] *City of Los Angeles v.* Patel, 135 S. Ct. 2443, 2452 (2015) ("[T]he subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker.").

[10] *New York v. Burger*, 482 U.S. 691, 702-03 (1987).

[11] *See id*. at 704.

[12] *See Patel*, 135 S. Ct. at 2454.

Court held that hotels aren't a closely regulated industry—no history of regular, warrantless searches.[13] Public-accommodation laws require hotels to serve all paying customers. That just doesn't equate to state officials knocking down doors.[14]

Likewise, state officials haven't historically rummaged through pain-management clinics without warrants. If anything, it's the opposite. The law has consistently protected doctor–patient confidentiality. In 2011, the Supreme Court in *Sorrell* noted that "for many reasons, physicians have an interest in keeping their prescription decisions confidential."[15] Ten years earlier, the Court in *Ferguson* recognized medical patients' "reasonable expectation of privacy"— that no one will share their records without permission.[16]

It's not just our Nation's highest court. Lower courts recognize this too. The district court here emphasized that "warrantless inspections of doctors' offices" don't often happen.[17] In 2017, another Texas federal district court stressed a stark distinction between medicine and "closely regulated" industries. The court noted that the government has long treated liquor and guns very differently than doctors.[18]

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[13] *Id*. at 2455.

[14] *Id*.

[15] *Sorrell v. IMS Health Inc*., 564 U.S. 552, 572 (2011).

[16] *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001).

[17] *Zadeh v. Robinson*, No. 1:15-CV-598, Dkt. No. 40, at *10 (W.D. Tex., Apr. 26, 2016), *aff'd*, 902 F.3d 483 (5th Cir. 2018).

[18] *Barry v. Freshour*, No. H-17-1403, 2017 WL 4682176, at *6-7 (Rosenthal, J.) (S.D. Tex. Oct. 18, 2017), *rev'd on other grounds*, 905 F.3d 912 (5th Cir. 2018).

True, we held in *Schiffman* that pharmaceuticals are a "pervasively" regulated industry.[19] But that was in 1978. And the Supreme Court has since clarified things. As the Court said in *Patel*, the closely-regulated-industry exception is very much that—"the exception."[20] So *Schiffman* doesn't control.

In sum, the law strongly protects privacy in medicine. Pain management is a medical field. So pain-management clinics aren't closely regulated.

Unfortunately, the majority opinion assumes without deciding that pain-management clinics are closely regulated. In doing so, the majority blurs constitutional contours.[21] Our legal system serves the public best when it provides clear rules, consistently applied—bright lines and sharp corners. We owe clarity to the courts below us, the litigants before us, and the cases beyond us. Thankfully, our court has at least established that medicine generally isn't closely regulated.

2

Setting aside the "closely regulated" issue, the *Burger* exception still doesn't apply. The laws here aren't a constitutionally adequate substitute for a warrant. In *Burger*, the Court explained that a statute has to notify the public that the government can

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[19] *United States v. Schiffman*, 572 F.2d 1137, 1142 (5th Cir. 1978).

[20] 135 S. Ct. at 2455.

[21] *See* discussion *infra* Section III.

search on-demand. And it must limit officer discretion.[22] These statutes neither notify nor limit.[23]

Our 2000 decision in *Beck* sheds light on what counts for notice.[24] There, the Controlled Substances Act explicitly authorized officers to search dental offices "upon stating [their] purpose[s]" and showing their credentials.[25] That was clear statutory notice. And so we upheld an on-demand search. In other words, there had to be notice that no notice is necessary.[26]

Consider our 2001 opinion in *Fort* too.[27] There, we stamped our approval on a statute that allowed officers to inspect vehicles "after stating the purpose of the

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[22] *Burger*, 482 U.S. at 703 ("[Statutes must] perform the two basic functions of a warrant: it must advise . . . that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of inspecting officers.").

[23] TEX. OCC. CODE § 153.007 ("[T]he board may issue a subpoena or a subpoena duces tecum to compel the attendance of a witness and the production of books, records, and documents."); TEX. OCC. CODE § 168.052 (allowing the Board to examine "the documents of a physician practicing at the clinic, as necessary to ensure compliance with this chapter"); 22 TEX. ADMIN. CODE § 179.4 ("Upon the request by the board or board representatives, a licensee shall furnish to the board copies of medical records . . . within a reasonable time period . . . . "); 22 TEX. ADMIN. CODE § 195.3 ("The board may inspect a pain management clinic certified under this chapter, including the documents of a physician practicing at the clinic, to determine if the clinic is being operated in compliance with applicable laws and rules.").

[24] *Beck v. Tex. St. Bd. of Dental Exam'rs*, 204 F.3d 629, 639 (5th Cir. 2000).

[25] *Id*. at 639.

[26] *Id*. ("Thus, [the statute] did not require that prior notice be given.").

[27] *United States v. Fort*, 248 F.3d 475, 482 (5th Cir. 2001).

inspection."[28] The law put Texas drivers on notice that their cars could be searched. Eight years later in *Club Retro*, we again enforced the notice requirement.[29] That time, a SWAT team had raided a nightclub— replete with "physical assault, threats at gunpoint, and prolonged detention."[30] But the supposed authorizing statute notified owners only of periodic fire-safety and alcohol compliance checks.[31] So we held that the search failed to meet the notice requirement.[32]

Here, the statutes don't notify business owners of on-demand searches. These statutes allow "a reasonable time" to produce records.[33] And they define "reasonable time" as "fourteen calendar days"; less only if there's an emergency or a risk "that the records may be lost, damaged, or destroyed."[34] That's not notice of routine, on-the-spot searches.

Lastly, the statutes don't limit officer discretion. The only limits: who can subpoena things (the Board);[35] who the Board can subpoena (licensees);[36]

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[28] *Id*. (citing TEX. TRANSP. CODE § 644.104(b)).

[29] *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 200 (5th Cir. 2009).

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] TEX. ADMIN. CODE § 179.4(a).

[34] *Id*.

[35] *Id*. ("Upon the request *by the board* or board representatives, a licensee shall furnish to the board copies of medical records . . . within a reasonable time period . . . . " (emphasis added)).

[36] *Id*. ("Upon the request by the board or board representatives, a *licensee shall furnish* to the board copies of medical records . . . within a reasonable time period . . . . " (emphasis added)).

and what the Board can demand (medical records).[37] But that's it. Otherwise, there's total discretion.

Thus, the *Burger* exception doesn't apply. And so all that's left to decide is if the violation was clearly established.

C

It was. Just last year in *Wesby*, the Supreme Court explained that "clearly established" means "settled law."[38] "[C]ontrolling authority" must explicitly adopt the principle; or else there must be "a robust consensus of cases of persuasive authority."[39] Mere implication from precedent doesn't suffice.[40]

What's more, the Court in *Wesby* reiterated that the legal principle must be specific— not general. The rule must "prohibit the officer's conduct in the particular circumstances before him."[41] The Court doesn't require "a case directly on point."[42] But it does require a case "where an officer acting under similar circumstances . . . violated the Fourth Amendment."[43]

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[37] *Id*. ("Upon the request by the board or board representatives, a licensee shall furnish to the board *copies of medical records* . . . within a reasonable time period . . . . " (emphasis added)).

[38] *Wesby*, 138 S. Ct. at 589 (2018) (quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam)).

[39] *Id*. at 590 (cleaned up) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011)).

[40] *Id*.

[41] *Id*.

[42] *Id*. (quoting *al-Kidd*, 563 U.S. at 741).

[43] *Id*. (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam)). *But cf*. discussion *infra* Section III.

The Supreme Court in *See*,[44] *Lone Steer*,[45] and *Patel*[46] made clear the need for precompliance review of administrative subpoenas. That's controlling law.

Summing up: The Board violated Dr. Zadeh's Fourth Amendment rights. No exception applies. And the law was clearly established. The state officials are thus not immune. On this basis alone, Dr. Zadeh deserves his day in court.

II

Respectfully, I think that the majority opinion is wrong for two reasons. First, this court shouldn't determine whether exceptions to violations are clearly established. Second, even if we should, Dr. Zadeh should win anyway.

A

The majority concedes that the statutes here don't limit the discretion of the inspecting officers as *Burger* requires. The court also acknowledges that statutes must provide notice. Yet the court holds that these requirements weren't—themselves—clearly established.

I understand the impulse. After all, qualified immunity is supposed to protect "all but the plainly incompetent or those who knowingly violate the law"—that's what the Supreme Court remarked in *Wesby*.[47] So if reasonably competent officers wouldn't necessarily know that they're violating the law, they shouldn't be liable. For example, the majority says

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[44] 387 U.S. at 544–45.

[45] 464 U.S. at 415.

[46] 135 S. Ct. at 2452.

[47] 138 S. Ct. at 589 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

that since we haven't yet enforced the limiteddiscretion requirement, reasonable officials could've thought that the subpoena satisfied *Burger*. Thus, they wouldn't necessarily realize they're breaking the law.

But that hyperspecific take snubs the Supreme Court's time-worn test: Was there a clearly established violation?[48] Yes, it's a violation to conduct a warrantless search without precompliance review. Sometimes there's an exception to this test. But not here. No exception applies. And it's only when an exception applies that the general rule doesn't.

B

Yet even if we should ask whether the *Burger* exception was clearly established, Dr. Zadeh still ought to win. Controlling law dictates that there must be statutory notice.

Recall *Beck*. In that case, the law authorized on-demand, warrantless searches. And so we upheld the search.[49] Don't forget *Fort*[50] or *Club Retro*[51] either, in which we similarly enforced the notice requirement. Then of course there's *Burger* itself. In upholding a warrantless search, the Supreme Court emphasized that the statute "set[ ] forth the scope of the inspection and, accordingly, place[d] the operator on notice as to how to comply with the statute."[52]

Those cases control. They require statutory notice. So the *Burger* exception's notice element is

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[48] *See* discussion *infra* Section III.

[49] 204 F.3d at 639.

[50] 248 F.3d at 482.

[51] 568 F.3d at 200.

[52] 482 U.S. at 711.

clearly established. And the Texas laws don't provide notice for on-demand inspections.

For that reason, the limited-discretion requirement shouldn't matter. The notice requirement would govern. No matter how you shake it, the officials shouldn't be immune.

III

Yet here we are—Dr. Zadeh still loses; there and back again. Everyone agrees his Fourth Amendment rights were violated. But owing to a legal *deus ex machina*—the "clearly established" prong of qualified-immunity analysis—the violation eludes vindication. At first I agreed with the panel majority that the government violated the law but not *clearly established* law. I was wrong. Beyond this case, though, I must restate my broader unease with the real-world functioning of modern immunity practice.

To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable— as long as they were the *first* to behave badly. Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question "beyond debate" to "every" reasonable officer.[53] Put differently, it's immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful. This current "yes harm, no foul" imbalance leaves victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached.

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[53] *Ashcroft*, 563 U.S. at 741; *see also, e.g., Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam).

Today the majority opinion says Dr. Zadeh loses because his rights weren't clearly established. But courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist. How indistinguishable must existing precedent be? On the one hand, the Supreme Court reassures plaintiffs that its caselaw "does not require a case directly on point for a right to be clearly established."[54] On the other hand, the Court admonishes that "clearly established law must be 'particularized' to the facts of the case."[55] How to square these abstract instructions? Take Dr. Zadeh. Effectively, he loses since no previous panel has ever held this exact sort of search unconstitutional. In day-today practice, the "clearly established" standard is neither clear nor established among our Nation's lower courts.

Two other factors perpetuate perplexity over "clearly established law." First, many courts grant immunity without first determining whether the challenged behavior violates the Constitution.[56] They avoid scrutinizing the alleged offense by skipping to the simpler second prong: no factually analogous precedent. Forgoing a knotty constitutional inquiry makes for easier sledding, no doubt. But the inexorable result is "constitutional stagnation"[57]—fewer courts establishing law at all, much less *clearly* doing so. Section

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[54] *Kisela*, 138 S. Ct. at 1152 (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)).

[55] *Pauly*, 137 S. Ct. at 552 (quoting *Anderson*, 483 U.S. at 640).

[56] *See Pearson v. Callahan*, 555 U.S. 223, 227 (2009).

[57] Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 12 (2015) ("Because a great deal of constitutional litigation occurs in cases subject to qualified immunity, many rights potentially\ might never be clearly established should a court skip ahead to the question whether the law

1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.

Second, constitutional litigation increasingly involves cutting-edge technologies. If courts leapfrog the underlying constitutional merits in cases raising novel issues like digital privacy, then constitutional clarity—matter-of-fact guidance about what the Constitution requires—remains exasperatingly elusive. Result: gauzy constitutional guardrails as technological innovation outpaces legal adaptation.

Qualified immunity aims to balance competing policy goals: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[58] And I concede that the doctrine enjoys special favor at the Supreme Court, which seems untroubled by any one-sidedness.[59] The Court recently declined to

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clearly established that the officer's conduct was unlawful in the circumstances of the case. The danger, in short, is one of constitutional stagnation." (cleaned up))

[58] *Pearson*, 555 U.S. at 231 (flagging these "two important interests").

[59] That said, four sitting Justices "have authored or joined opinions expressing sympathy" with various doctrinal, procedural, and pragmatic critiques of qualified immunity. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018) (including Justices Thomas,

take up a closely watched case challenging the warrantless strip search of a four-year-old preschooler.[60] A strangebedfellows alliance of leading scholars and advocacy groups of every ideological stripe—perhaps the most diverse amici ever assembled—had joined forces to urge the Court to fundamentally reshape immunity doctrine. Even in this hyperpartisan age, there is a growing, cross-ideological chorus of jurists[61] and scholars[62] urging recalibration of contemporary immunity jurisprudence.

Ginsburg, Breyer, and Sotomayor, plus recently retired Justice Kennedy).

[60] *Doe v. Woodard*, 912 F.3d 1278 (10th Cir. 2019), *cert. denied*, No. 18-1173, 2019 WL 1116409, at *1 (May 20, 2019).

[61] *See, e.g., Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) (fearing the Supreme Court's "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment" and signaling "that palpably unreasonable conduct will go unpunished"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at *11 (E.D.N.Y. June 26, 2018) (Weinstein, J.) ("The Supreme Court's recent emphasis on shielding public officials and federal and local law enforcement means many individuals who suffer a constitutional deprivation will have no redress . . . . ").

[62] Last year's symposium issue of the Notre Dame Law Review gathers several scholarly essays that scrutinize qualified immunity and discuss potential refinements given mounting legal and empirical criticism. Symposium, *The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793 (2018); *see also, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018) (claiming the doctrine "lacks legal justification, and the Court's justifications are unpersuasive"); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 70 (2017) (concluding that "the Court's efforts to advance its policy

Indeed, it's curious how this entrenched, judge-created doctrine excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations.[63] Count me with Chief Justice Marshall: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[64]

Doctrinal reform is arduous, often-Sisyphean work. Finding faults is easy; finding solutions, less so. But even if qualified immunity continues its forward

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goals through qualified immunity doctrine has been an exercise in futility"); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 869 (2010) ("Today, the law of qualified immunity is out of balance . . . . The Supreme Court needs to intervene, not only to reconcile the divergent approaches of the Circuits but also, and more fundamentally, to rethink qualified immunity and get constitutional tort law back on track."). The essays in Notre Dame Law Review feature lively disagreement, including a nuanced pro-immunity piece by Professors Aaron Nielson and Christopher Walker, *A Qualified Defense of Qualified Immunity*, that addresses two principal anti-immunity arguments— that qualified immunity (1) is unlawful as a matter of positive law and (2) fails to advance its purported policy objectives. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018).

[63] *Cf. United States v. Ugalde*, 861 F.2d 802, 810 (5th Cir. 1988) ("We must ensure that for every right there is a remedy." (citing *Marbury*, 5 U.S. at 163)).

[64] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). In *Little v. Barreme*, Chief Justice Marshall's opinion declined to "excuse from damages" Captain George Little for unlawfully capturing a Danish vessel, though it was "seized with pure intention." 6 U.S. (2 Cranch) 170, 179 (1804).

march and avoids sweeping reconsideration, it certainly merits a refined procedural approach that more smartly—and fairly—serves its intended objectives.

APPENDIX B
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50518

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

Appeals from the United States District Court
for the Western District of Texas

Before JOLLY, SOUTHWICK, and WILLET, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

The Texas Medical Board executed an administrative subpoena on Dr. Joseph Zadeh's medical office. Thereafter, Dr. Zadeh and one of his patients sued several Board members under 42 U.S.C. § 1983, claiming that the Board's actions violated the Fourth Amendment. The district court partially granted the defendants' motion to dismiss and later granted their

motion for summary judgment rejecting all remaining claims. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Dr. Joseph Zadeh appeals the dismissal of his Section 1983 claim against several members of the Texas Medical Board who he claims violated his constitutional rights through a warrantless search of his office and medical records. Dr. Zadeh, an internal medicine doctor, owns and operates a medical practice in Euless, Texas. One of his patients, Jane Doe, is also a plaintiff-appellant in this case.

Dr. Zadeh was the subject of an administrative proceeding before the State Office of Administrative Hearings ("SOAH") for violations of the Board's regulations. The Drug Enforcement Agency ("DEA") also was investigating him. Indeed, it appears the Board first learned about allegations against Dr. Zadeh when the DEA filed a complaint with the Board about his prescribing practices in September 2013. The DEA investigator emailed a representative of the Board, stating, "I'm at a point in the criminal case that I need to interview Dr. Zadeh and review his patient files." The Board then initiated an investigation.

As part of this investigation, Defendants Sharon Pease and Kara Kirby, who were investigators with the Board, served an administrative subpoena on Dr. Zadeh on October 22, 2013. The subpoena had the electronic signature of Defendant Mari Robinson, who was the Executive Director of the Board. The subpoena was for the immediate production of the medical records of sixteen of Dr. Zadeh's patients. Two DEA agents who were investigating related criminal allegations accompanied Kirby and Pease.

Dr. Zadeh was not at his office when the investigators arrived, so the investigators presented the subpoena to his medical assistant. According to the plaintiffs, the medical assistant requested time to seek advice from legal counsel, but the investigators told her that failure to turn the records over immediately could result in the loss of Dr. Zadeh's medical license. She eventually complied, taking the defendants into a conference room and delivering the requested records to them. Although most of their time was spent inside the public waiting area or the conference room, the investigators also approached the medical assistant to ask for help while she was in exam rooms and later in a storage room.

Dr. Zadeh and his patient, Jane Doe, sued Robinson, Pease, and Kirby in their individual capacities and Robinson in her official capacity in the United States District Court for the Western District of Texas. They alleged the defendants' actions violated their Fourth Amendment, due process, and privacy rights. The plaintiffs sought monetary damages under 42 U.S.C. § 1983 as well as declaratory relief. The defendants moved to dismiss the plaintiffs' claims on these grounds: (1) the plaintiffs lacked standing; (2) the Younger abstention doctrine barred the requests for declaratory relief; (3) the claim against Robinson in her official capacity was barred by the doctrine of sovereign immunity; (4) the doctrine of qualified immunity applied to the claims against the defendants in their individual capacities.

In ruling on the motion to dismiss, the district court held Dr. Zadeh had standing to pursue declaratory relief, but Jane Doe did not. Nonetheless, the district court concluded that "the Younger abstention doctrine require[d] [it] to abstain from adjudicating Plaintiff Zadeh's claims for declaratory relief." The

district court also held that sovereign immunity barred the plaintiffs' claims for monetary damages against Robinson in her official capacity. Finally, the court concluded that the defendants were entitled to qualified immunity for the privacy and due process claims. The only part of the suit left, then, was Dr. Zadeh's claim that the defendants violated his clearly established Fourth Amendment rights during the search of his office.

The defendants moved for summary judgment on "whether Defendants exceeded their statutory subpoena authority by searching and inspecting Plaintiff's office and records." Although the plaintiffs alleged that the investigators performed a thorough search of Dr. Zadeh's office, the district court found that the record did not support this allegation. Instead, the district court determined that the "Defendants' presence at Plaintiff's office was solely to execute the subpoena instanter." The district court also held that Robinson was not liable as she neither affirmatively participated in the alleged search nor implemented unconstitutional policies that caused the alleged constitutional deprivation. Further, there was "no evidence Defendants Pease and Kirby inspected Plaintiff's office or searched his records." The plaintiffs timely appealed.

DISCUSSION

The plaintiffs appeal both the order granting the motion to dismiss in part and the order granting the motion for summary judgment. Although we review both *de novo*, a different legal standard applies to each:

> In the former, the central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief. In the

> latter, we go beyond the pleadings to determine whether there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 440 n.8 (5th Cir. 2000) (citations omitted).

We first address the plaintiffs' challenge to the district court's grant of qualified immunity, evaluating whether clearly established law prohibited the defendants' conduct. Next, we discuss whether the district court erred in abstaining from deciding the plaintiffs' claims for declaratory judgment. Finally, we analyze whether Robinson was liable in her supervisory capacity.

I. Grant of qualified immunity

"The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal." *Morgan v. Swanson*, 659 F.3d 359, 370–71 (5th Cir. 2011). Officials are entitled to qualified immunity "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.' " *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

Using this framework, we analyze the plaintiffs' arguments that clearly established law prohibited the defendants' execution of the subpoena instanter. The plaintiffs offer two theories for why the defendants' conduct was unconstitutional. First, they argue it was a warrantless search that did not satisfy the administrative exception. Second, they argue it was a pretextual search and thus unconstitutional.

a. Warrantless search

The plaintiffs argue the Board violated the Fourth Amendment when it demanded immediate compliance with its administrative subpoena. We have been faced with a challenge to a subpoena instanter executed by the Texas Medical Board before. *See Cotropia v. Chapman*, 721 F. App'x 354 (5th Cir. 2018). In that nonprecedential opinion, we held: "Absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Id*. at 358 (quoting *City of Los Angeles v. Patel*, 135 S. Ct. 2243, 2452 (2015)).

In that case, the physician at the center of a Board investigation pled sufficient facts to overcome qualified immunity. *Id*. at 361. The doctor alleged that a Board member "violated the clearly established right to an opportunity to obtain precompliance review of an administrative subpoena before a neutral decisionmaker" when he took documents from the physician's office over objections from the office receptionist. *Id*. at 357. Relying on Supreme Court precedent, we held that it was clear at the time that "prior to compliance, Cotropia was entitled to an opportunity to obtain review of the administrative subpoena before a neutral decisionmaker." Id. at 358 (citing *See v. City of Seattle*, 387 U.S. 541, 545 (1967); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984)). Similarly, the demand to turn over Dr. Zadeh's medical records immediately did not provide an opportunity for precompliance review. We agree, then, that a requirement of precompliance review in many, if not most, administrative searches had been clearly established by Supreme Court precedent prior to the search here.

The defendants acknowledge this law but maintain there was no constitutional violation because this search fell into an exception to the general rule requiring precompliance review. We next examine that argument.

i. Closely regulated industry

No opportunity for precompliance review is needed for administrative searches of industries that "have such a history of government oversight that no reasonable expectation of privacy" exists for individuals engaging in that industry. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). Even so, warrantless inspections in closely regulated industries must still satisfy three criteria: (1) a substantial government interest, (2) a regulatory scheme that requires warrantless searches to further the government interest, and (3) "a constitutionally adequate substitute for a warrant." *New York v. Burger*, 482 U.S. 691, 702–03 (1987) (quoting *Donovan v. Dewey*, 452 U.S. 594, 603 (1981)).

Cotropia did not address whether the Board's use of administrative subpoenas satisfied the *Burger* criteria because the issue was not raised until oral argument. *Cotropia*, 721 F. App'x at 360 & n.6. As a result, the panel's holding was expressly limited to concluding that the Board's demand for immediate compliance with the subpoena did not satisfy the general administrative exception to the warrant requirement. The argument was raised here. Thus, we must answer whether the *Burger* exception permitted the Board's administrative subpoena and whether that law was clearly established at the time of its execution.

To categorize industries under *Burger*, courts consider the history of warrantless searches in the industry, how extensive the regulatory scheme is, whether

other states have similar schemes, and whether the industry would pose a threat to the public welfare if left unregulated. *See Burger*, 482 U.S. at 704; *Patel*, 135 S.Ct. at 2454. The defendants characterize the relevant industry in two different ways. We evaluate first whether the practice of medicine is a closely regulated industry and then whether the practice of prescribing controlled substances is closely regulated.

Acknowledging that the medical profession is subject to close oversight, the district court emphasized the absence of a history of warrantless inspections to conclude that the medical profession was not a closely regulated industry. Important to its conclusion was the confidential nature of the doctor-patient relationship: "It strains credibility to suggest that doctors and their patients have no reasonable expectation of privacy." On appeal, the defendants all but concede that there is not a lengthy history of warrantless searches. They instead emphasize the extensive regulatory scheme governing the practice of medicine and the risk that the industry could pose to the public welfare.

There is no doubt that the medical profession is extensively regulated and has licensure requirements. Satisfying the *Burger* doctrine requires more. The Supreme Court instructs "that the doctrine is essentially defined by 'the pervasiveness and regularity of the federal regulation' and the effect of such regulation upon an owner's expectation of privacy." *Burger*, 482 U.S. at 701 (quoting *Dewey*, 452 U.S. at 605–06). Another key factor is "the duration of a particular regulatory scheme." *Id*. (quoting *Dewey*, 452 U.S. at 606).

The Board cites several laws or regulations governing the behavior of doctors. Outside of citing Texas's licensure requirement for physicians, the regulations the Board cites do not apply to the entire

medical profession. Instead, they target the practice of prescribing controlled substances. As examples, the Board states that doctors must register with the DEA to prescribe controlled substances, TEX. HEALTH & SAFETY CODE § 481.061; that prescriptions of controlled substances are monitored by several law enforcement agencies, *id*. §§ 481.067, 481.075, 481.076; and that pain management clinics must register as such, which allows the Board to inspect them from time to time, TEX. OCC. CODE. §§ 168.101, 168.052; 22 TEX. ADMIN. CODE §§ 195.2, 195.3. The Board also refers us to laws and regulations that similarly regulate anesthesia. These, though, do not amount to pervasiveness and regularity of regulation over the medical industry as a whole as *Burger* requires. Instead, only specific groups of doctors may have been put on notice that the Board may perform some inspections.

We also do not see in the medical profession an entrenched history of warrantless searches that is relevant but not dispositive. *Burger*, 482 U.S. at 701. For example, when the Court held that the liquor industry was closely regulated, it mentioned that English commissioners could inspect brewing houses on demand in the 1660s, and that Massachusetts passed a similar law in 1692. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75 (1970). It then referred to a 1791 federal law that has continued in various forms, permitting federal officers to perform warrantless searches of distilleries and imposing an excise tax on distilled liquor. *Id*. Because the focus there was "the liquor industry long subject to close supervision and inspection," the Court applied the rule from *See* to conclude that the Fourth Amendment did not prohibit the warrantless searches authorized by Congress. *Id*. at 77. Here, there is no such history.

In considering the reasonable expectation of privacy, we also consider the sensitive nature of medical records. The Ninth Circuit explained that "the theory behind the closely regulated industry exception is that persons engaging in such industries, and persons present in those workplaces, have a diminished expectation of privacy." *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004). We agree with that court's observation that in medical contexts, the expectation of privacy likely is heightened. *Id*.

Admittedly, federal regulations do exempt the Board from the privacy requirements of the Health Insurance Portability and Accountability Act ("HIPAA"). 45 C.F.R. § 164.512. Further, the Board cites Texas laws providing that where the Board does obtain information, it is subject to confidentiality requirements. *See* TEX. OCC. CODE. §§ 159.002; 159.003(a)(5); 164.007(c). That HIPAA permits disclosure to the Board and that the regulations governing the Board continue to protect that information from disclosure does not mean that the Board is entitled to access to that information through an administrative search without allowing an opportunity for precompliance review.

We conclude, then, that the medical industry as a whole is not a closely regulated industry for purposes of *Burger*. Even if the medical profession at large cannot be said to fall within these *Burger* factors, it is possible that a subset, such as those who prescribe controlled substances, would do so. We examine that possibility.

We look again at the extent of the regulation of the prescription of controlled substances. Although the Board has not identified a Texas law or regulation that would put all doctors on notice that they are subject to warrantless inspections, the Board did identify

regulations that put doctors who operate pain management clinics on notice that their offices can be inspected. *See* TEX. OCC. CODE. §§ 168.101, 168.052; 22 TEX. ADMIN. CODE §§ 195.2, 195.3. Further, we have held that "the pharmaceutical industry is a 'pervasively regulated business'" because "[d]ealers in drugs, like dealers in firearms, are required to be federally licensed." *United States v. Schiffman*, 572 F.2d 1137, 1142 (5th Cir. 1978). "The dealer accepts the license knowing that [a statute] authorizes inspection of his business." *Id*. "Inspections are essential to the federal regulatory scheme to ensure that drugs are distributed only through 'regular channels' and not diverted to illegal uses." *Id*. The same concerns exist here.

There is a strong case that doctors who operate pain management clinics are engaging in a closely regulated industry. Dr. Zadeh, though, had not registered his clinic as a pain management clinic. How that fact might affect the analysis we leave open. Rather than considering whether the volume of his business in that specialty would itself affect his expectations of privacy and otherwise place him in the closely regulated category, we decline to resolve this question and look at other considerations.

ii. Burger exception requirements

Even were we to accept the defendants' argument that doctors prescribing controlled substances are engaging in a closely regulated industry with less reasonable expectations of privacy, administrative searches of such industries still must satisfy the *Burger* criteria. There is no meaningful dispute in this case that the State has a substantial interest in regulating the prescription of controlled substances and that the inspection of a doctor's records would aid the

Government in regulating the industry. Our analysis of whether the statutory scheme is a proper substitute for a search warrant starts with identifying the search authority claimed by the Board: its subpoena authority and its authority to inspect pain management clinics. The principal response from plaintiffs is that neither provides a constitutionally adequate substitute for a warrant.

In order for a warrant substitute to be constitutionally adequate, "the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 703.

The relevant statute provides: "The board may issue a subpoena or a subpoena duces tecum to compel the attendance of a witness and the production of books, records, and documents." TEX. OCC. CODE. § 153.007(a). The Board argues that the statute, when considered with the following regulation, limits the discretion of the officials. The regulation provides that after a "request by the board or board representatives, a licensee shall furnish to the board copies of medical records or the original records within a reasonable time period, as prescribed at the time of the request." 22 TEX. ADMIN. CODE § 179.4(a). The regulation defines "reasonable time" as "fourteen calendar days or a shorter time if required by the urgency of the situation or the possibility that the records may be lost, damaged, or destroyed." *Id*.

The district court held that a search using the Board's subpoena authority did not satisfy the third factor of the *Burger* test as it was "purely discretionary," allowing the Board "to choose which doctors to

subpoena and to do so at a frequency it determines." To evaluate that holding, we consider the limits that do exist: only licensees are subject to the subpoena; only medical records must be produced; and it is the Board or its representatives who will be asking for the records. As the district court stated, though, there is no identifiable limit on whose records can properly be subpoenaed.

As to inspections of pain management clinics, the Board argues that some limits to its authority are set by the statute permitting it to inspect pain management clinics. Specifically, the statute allows it to examine "the documents of a physician practicing at the clinic, as necessary to ensure compliance with this chapter." TEX. OCC. CODE. § 168.052(a). Providing more specific guidance, the regulation in effect at the time provided:

> The board may inspect a pain management clinic certified under this chapter, including the documents of a physician practicing at the clinic, to determine if the clinic is being operated in compliance with applicable laws and rules.

22 TEX. ADMIN. CODE § 195.3(b).

The district court found this inspection authority, like the subpoena authority, to be "purely discretionary." The governing criteria for an inspection is that the target be a pain management clinic, that the Board performs the inspection, and that the purpose for the search be to determine compliance with pain management rules. We agree with the district court, though, that these requirements suffered from the same fatal *Burger* flaw as the subpoena authority: they did not limit how the clinics inspected are chosen.

In summary, there are insufficient limits on the discretion of the Board to satisfy the *Burger* requirements, whether considering the medical profession in general or as to pain management clinics. What is left is the question of whether the law on these points was clearly established and, regardless, whether the search was invalid as pretextual.

iii. Requirement of clearly established law for qualified immunity

We have concluded that there was a violation of Dr. Zadeh's constitutional rights. Even so, these defendants are entitled to summary judgment unless the fact that their actions violated his constitutional rights was "clearly established at the time" of the search. *Howards*, 566 U.S. at 664.

Our analysis of the clarity of relevant law is objective, meaning it does not focus on the specific defendants' knowledge. "The touchstone of this inquiry is whether a reasonable person would have believed that his conduct conformed to the constitutional standard in light of the information available to him and the clearly established law." *Goodson v. City of Corpus Christi*, 202 F.3d 730, 736 (5th Cir. 2000). "[E]ven law enforcement officials who 'reasonably but mistakenly [commit a constitutional violation]' are entitled to immunity." *Glenn v. City of Tyler*, 242 F.3d 307, 312–13 (5th Cir. 2001) (quoting *Goodson*, 202 F.3d at 736). For the law to be clearly established, there must be a close congruence of the facts in the precedent and those in the case before us. *Wesby*, 138 S.Ct. at 589–90. "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiffs seek to apply." *Id*. at 590.

Defendants rely on one of our precedents that reviewed an administrative search of a dentist's office

by agents of the Texas State Board of Dental Examiners, accompanied by Department of Public Safety officials. *Beck v. Tex. State Bd. of Dental Exam'rs*, 204 F.3d 629, 632 (5th Cir. 2000). Dentist Beck was a target because of complaints filed against him for prescribing controlled substances. *Id*. We concluded that the search did not violate the plaintiff's clearly established rights. *Id*. at 638–39. We applied the *Burger* exception and determined there was a significant state interest in regulating dentists' use of controlled substances; the search was conducted pursuant to two regulatory schemes; and there was an adequate substitute for a warrant where the statute permitted the official to conduct inspections during "reasonable times" after "stating his purpose" and presenting his credentials to the owner. *Id*. at 638–39. In light of *Beck*, the Board argues that reasonable investigators could have believed the *Burger* exception permitted the execution of the subpoena as they too were investigating prescriptions of controlled substances within the medical industry.

The plaintiffs urge that *Beck* is "patently distinguishable." Any possible distinction, though, must be viewed through the requirement that the law, including a distinction, must be "sufficiently clear that every reasonable official would understand that what he is doing is unlawful" at that time. *Wesby*, 138 S.Ct. at 589 (quotation marks omitted). That means "existing law must have placed the constitutionality of the officer's conduct 'beyond debate.'" *Id*. Perhaps most relevant, the "legal principle [must] clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id*. at 590 (emphasis added).

Thus, it was not for these Medical Board investigators to try to resolve whether what was permitted for the Dental Board would not be permitted under the different statutes and regulations applicable to them. Although *Beck* does not control the constitutionality of the Board's actions in this case, it does weigh in favor of the defendants' receiving qualified immunity. We have decided cases where a statute did not clearly limit the official's discretion in selecting who would be subject to an administrative search. In one, we held that the statute provided a constitutionally adequate substitute for a warrant where the statute provided:

> The licensing agency shall make or cause to be made inspections relative to compliance with the laws and regulations governing the licensure of child care facilities. Such inspections shall be made at least once a year but additional inspections may be made as often as deemed necessary by the licensing agency.

See Ellis v. Miss. Dep't of Health, 344 F. App'x 43 (5th Cir. 2009) (citing MISS. CODE. ANN. § 43-20-15). Though that opinion is not precedential, we agree with its reasoning.

We also upheld an administrative search where, despite limits on the conduct of an officer after a traffic stop, there were not clear limits on an officer's discretion as to whom to stop. *See United States v. Fort*, 248 F.3d 475, 482 (5th Cir. 2001). Because we have not so far required there to be a clear limit on determining whom officials select for an administrative search, the defendants reasonably could have believed that the administrative scheme here provided a constitutionally adequate substitute for a warrant.

The plaintiffs also argue the defendants did not follow the statutory scheme and therefore caselaw in which the legal requirements for the search were followed is inapplicable. Regardless of the legal argument, the factual basis for it was rejected by the district court. It found only meaningless deviations from search protocols. That finding is not clearly erroneous.

Thus, the unlawfulness of the defendants' conduct was not clearly established at the time of the search.

b. Pretextual searches

The plaintiffs also argue that the search was a pretext for uncovering evidence of criminal wrongdoing, not a valid administrative search. According to the plaintiffs, the DEA brought Dr. Zadeh's possible misdeeds before the Medical Board. A DEA agent then was present during the search. To finish the story, though, the Medical Board proceeded against Dr. Zadeh. Before there was a full hearing on the merits, the Board entered an agreed order. In the order, the panel found that Dr. Zadeh was operating a pain management clinic without registering it. There is nothing in this record indicating whether the DEA's investigation resulted in a criminal prosecution or any other action.

"Even under a valid inspection regime, the administrative search cannot be pretextual." *Club Retro, LLC v. Hilton*, 568 F.3d 181, 197 (5th Cir. 2009). It is incorrect, though, to use the label "pretext" simply because of an overlap between an administrative search and a criminal search. The *Burger* Court remarked that "a State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions." *Burger*, 482 U.S. at 712. To determine whether the search there was constitutional, the Court looked to whether the administrative scheme

really "authorize[d] searches undertaken solely to uncover evidence of criminality." *Id*.

Similarly, the Supreme Court dismissed a defendant's argument "that because the Customs officers were accompanied by a Louisiana State Policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marijuana," the Government could not rely on the administrative search exception. *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983).

We have applied these principles to a search of an automobile salvage yard. *United States v. Thomas,* 973 F.2d 1152, 1155–56 (5th Cir. 1992). There, an investigator with the Texas Department of Public Safety tracked a vehicle to an auto salvage business and there conducted an inventory inspection under Texas statute. *Id*. at 1155. Even though the inventory inspection was prompted by suspicion of criminal conduct, the investigator still was entitled to use information gained during the inspection to obtain a search warrant for the salvageyard owner's residence. *Id*. "Administrative searches conducted pursuant to valid statutory schemes do not violate the Constitution simply because of the existence of a specific suspicion of wrongdoing." *Id*. at 1155–56.

Beck has similar analysis. As here, the administrative search in *Beck* was initiated after a tip. Dental Board member Michael Pitcock "stated in his deposition that information was forwarded to him alleging that Beck had ordered unusually high volumes of controlled substances." *Beck*, 204 F.3d at 632. The Dental Board suspected Beck of violating criminal statutes, and a law enforcement officer accompanied the board agent in its inspection of the dental office. *Id*. The dentist argued that the search was conducted to uncover

criminal wrongdoing and thus was not conducted pursuant to a valid administrative scheme. *Id*. at 638. We held that the suspicions of criminal wrongdoing "did not render the administrative search unreasonable," citing *Villamonte-Marquez and Thomas*. *Id*. at 639.

As to Dr. Zadeh, the DEA was closely involved with the Board's investigation. Under *Burger*, though, we look to whether the search that occurred was under a scheme serving an administrative purpose. The Board's purpose is demonstrated by the subsequent administrative action against Dr. Zadeh. The search was not performed "solely to uncover evidence of criminality." *See Burger*, 482 U.S. at 698. Thus, the search was not pretextual.

II. Declaratory judgment

Dr. Zadeh argues that the district court erred in abstaining from deciding the declaratory judgment claims following *Younger*. Dr. Zadeh asked the district court to make declaratory judgments on several laws implicating the Board. The district court did not resolve any.

"In *Younger*, the Supreme Court 'instructed federal courts that the principles of equity, comity, and federalism in certain circumstances counsel abstention in deference to ongoing state proceedings.'" *Wightman v. Tex. Supreme Court*, 84 F.3d 188, 189 (5th Cir. 1996) (citations omitted). Following Supreme Court precedent, this court follows "a three-part test describing the circumstances under which abstention [is] advised: (1) the dispute should involve an 'ongoing state judicial proceeding;' (2) the state must have an important interest in regulating the subject matter of the claim; and (3) there should be an 'adequate opportunity in the state proceedings to raise constitutional challenges.' " *Id*. (citation omitted).

The district court applied the reasoning of one of our unpublished cases, *Perez v. Tex. Med. Bd.*, 556 F. App'x 341 (5th Cir. 2014). There, we held that *Younger* barred the plaintiffs' suit seeking to enjoin the Board from pursuing any causes of action against them. *Id.* at 342–43. We agree with that panel's determination that Texas had a strong interest in regulating the practice of medicine, and the *Perez* plaintiffs could raise their constitutional challenges in the state court because the law provided for judicial review of the administrative decision. *Id.* at 342. Following *Perez*, the district court concluded that Dr. Zadeh had an ongoing administrative action pending; the state had a significant interest in regulating medicine in Texas; and Dr. Zadeh could appeal his administrative action in state court and raise constitutional challenges there. Accordingly, the district court abstained from adjudicating the requests for declaratory relief.

Dr. Zadeh claims *Younger* is inapplicable because the Board argued that the lawsuit did not implicate the underlying investigation. Dr. Zadeh also argues that there will be no adequate opportunity in the state proceedings to raise any constitutional challenges. He claims that "[d]octors 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)."

Dr. Zadeh was subject to an ongoing state administrative proceeding, and that qualifies as a judicial proceeding for this analysis. *See Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). As we stated in *Perez*, Texas has a strong interest in regulating the practice of medicine. Finally, despite plaintiffs' contrary view, Texas law does permit judicial review by either party of an adminis-

trative decision.[1] "A person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter." TEX. GOV'T CODE. § 2001.171.

The district court did not abuse its discretion in abstaining from deciding the declaratory judgment claims.

III. Director Robinson's potential supervisory capacity liability

The plaintiffs argue that Robinson should be held liable in her supervisory capacity. "A supervisory official may be held liable under § 1983 only if (1) he affirmatively participates in the acts that cause the constitutional deprivation, or (2) he implements unconstitutional policies that causally result in the constitutional injury." *Gates v. Tex. Dep't of Protective and Regulatory Servs.*, 537 F.3d 404, 435 (5th Cir. 2008). A failure to train claim requires that the plaintiff show (1) the supervisor's failure to train; (2) the failure to train resulted in the violation of the plaintiff's rights; and (3) the failure to train shows deliberate indifference. *Id*. For deliberate indifference, "there must be 'actual or constructive notice' 'that a particular omission in their training program causes . . . employees to violate citizens' constitutional rights' and the actor nevertheless 'choose[s] to retain that program.'"

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[1] The plaintiffs note that the administrative law judge in the SOAH proceeding decline to address the constitutional questions. Even so, all the law requires is that the issue hav been preserved for the appeal to the state court. *See Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 629, 106 S. Ct. 2718, 91 L.Ed.2d. 512 (1986).

Porter v. Epps, 659 F.3d 440, 447 (5th Cir. 2011) (citation omitted).

The plaintiffs argue that Robinson improperly delegated her subpoena authority to subordinates whose training she knew nothing about. Therefore, the subpoena did not comply with Texas law because the Executive Director of the Board is not permitted to delegate her subpoena authority. The district court did not determine whether the delegation was permissible. "In light of the express regulatory authority for the delegation, the precedent set by her predecessors, and the sheer volume of subpoenas issued every year by the TMB," Robinson's actions did not amount to deliberate indifference.

In Texas administrative law, a rule of statutory construction presumes that where a statute grants specific authority to a designated public officer, the legislature intended only that officer to have that authority. *Lipsey v. Tex. Dep't of Health*, 727 S.W.2d 61, 64 (Tex. App.— Austin 1987, writ ref'd n.r.e.). Still, Lipsey recognized "the authority to 'subdelegate' or transfer the assigned function may be implied and the presumption defeated owing to the nature of the assigned function, the makeup of the agency involved, the duties assigned to it, the statutory framework, and perhaps other matters." *Id*. at 65.

In this case, a statute permits the Board to subpoena records. TEX. OCC. CODE. § 153.007. Section 153.007(b) permits the Board to delegate subpoena authority "to the executive director or the secretary-treasurer of the board." By administrative rule, the executive director may "delegate any responsibility or authority to an employee of the board." 22 TEX. ADMIN. CODE § 161.7(c).

In resolving this issue, we start with the fact the rule articulated in *Lipsey* is only a presumption. Even assuming that the plaintiffs could show that Robinson failed to train her subordinates and that failure resulted in a constitutional violation, Robinson was not deliberately indifferent in delegating her subpoena authority in light of the fact she was acting pursuant to the regulations in the same way as her predecessors and the numerous subpoenas issued each year. To the extent the plaintiffs seek to impose Section 1983 liability of Kirby and Pease through the subdelegation argument, that law also was not clearly established.

AFFIRMED.

DON R. WILLETT, Circuit Judge, concurring dubitante:

The court is right about Dr. Zadeh's rights: They were violated.

But owing to a legal *deus ex machina*—the "clearly established law" prong of qualified- immunity analysis—the violation eludes vindication. I write separately to register my disquiet over the kudzu-like creep of the modern immunity regime. Doctrinal reform is arduous, often-Sisyphean work. And the entrenched, judgemade doctrine of qualified immunity seems Kevlar-coated, making even tweak-level tinkering doubtful. But immunity ought not be immune from thoughtful reappraisal.[1]

* * *

To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable— as long as they were the *first* to behave badly. Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question "beyond debate" to "every" reasonable officer.[2] Put differently, it's immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful.

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[1] "[Four] of the Justices currently on the Court have authored or joined opinions expressing sympathy" with various doctrinal, procedural, and pragmatic critiques of qualified immunity. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018).

[2] *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *see also, e.g., Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018) (per curiam); *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (per curiam).

Today's case applies prevailing immunity precedent (as best we can divine it): Dr. Zadeh loses because no prior decision held such a search unconstitutional. But courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist. How indistinguishable must existing precedent be? On the one hand, the Supreme Court reassures plaintiffs that its caselaw "does not require a case directly on point for a right to be clearly established."[3] On the other hand, the Court admonishes that "clearly established law must be 'particularized' to the facts of the case."[4] But like facts in like cases is unlikely. And this leaves the "clearly established" standard neither clear nor established among our Nation's lower courts.

Two other factors perpetuate perplexity over "clearly established law." First, many courts grant immunity without first determining whether the challenged behavior violates the Constitution.[5] They avoid scrutinizing the alleged offense by skipping to the simpler second prong: no factually analogous precedent. Forgoing a knotty constitutional inquiry makes for easier sledding. But the inexorable result is "constitutional stagnation"[6]—fewer courts establishing law at

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[3] *Kisela*, 138 S.Ct. at 1152 (quoting *White v. Pauly*, 137 S.Ct. 548, 551 (2017)).

[4] *Pauly*, 137 S.Ct. at 552 (quoting *Anderson*, 483 U.S. at 640).

[5] *See Pearson v. Callahan*, 555 U.S. 223, 227 (2009).

[6] Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 12 (2015) ("Because a great deal of constitutional litigation occurs in cases subject to qualified immunity, many rights potentially might never be clearly established should a court skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case. The danger, in short, is one of constitutional stagnation.") (cleaned up).

all, much less *clearly* doing so. Second, constitutional litigation increasingly involves cutting-edge technologies. If courts leapfrog the underlying constitutional merits in cases raising novel issues like digital privacy, then constitutional clarity—matter-of-fact guidance about what the Constitution requires—remains exasperatingly elusive. Result: blurred constitutional contours as technological innovation outpaces legal adaptation.

Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because those questions are yet unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose.

Count me with Chief Justice Marshall: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[7] The current "yes harm, no foul" imbalance leaves victims violated but not vindicated; wrongs are not righted, wrongdoers are not reproached, and those wronged are not redressed. It is

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[7] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). In *Little v. Barreme*, Chief Justice Marshall's opinion declined to "excuse from damages" Captain George Little for unlawfully capturing a Danish vessel, though it was "seized with pure intention." 6 U.S. (2 Cranch) 170, 179 (1804).

indeed curious how qualified immunity excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations.[8]

* * *

Qualified immunity aims to balance competing policy goals.[9] And I concede it enjoys special favor at the Supreme Court, which seems untroubled by any one-sidedness. Even so, I add my voice to a growing, cross-ideological chorus of jurists[10] and scholars[11] urg-

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[8] *Cf. United States v. Ugalde*, 861 F.2d 802, 810 (5th Cir. 1988) ("We must ensure that for every right there is a remedy." (citing *Marbury*, 5 U.S. at 163)).

[9] The Supreme Court has flagged "two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231.

[10] *See, e.g., Kisela*, 138 S.Ct. at 1162 (Sotomayor, J., dissenting) (fearing the Supreme Court's "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment" and signaling "that palpably unreasonable conduct will go unpunished"); *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at *11 (E.D.N.Y. June 26, 2018) (Weinstein, J.) ("The Supreme Court's recent emphasis on shielding public officials and federal and local law enforcement means many individuals who suffer a constitutional deprivation will have no redress . . . .").

[11] The most recent issue of the *Notre Dame Law Review* gathers several scholarly essays that carefully examine qualified immunity and discuss potential refinements in light of mounting legal

ing recalibration of contemporary immunity jurisprudence and its "real world implementation."[12]

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and empirical criticism. Symposium, *The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793 (2018); see also, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018) (claiming the doctrine "lacks legal justification, and the Court's justifications are unpersuasive"); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 70 (2017) (concluding that "the Court's efforts to advance its policy goals through qualified immunity doctrine has been an exercise in futility"); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 869 (2010) ("Today, the law of qualified immunity is out of balance . . . . The Supreme Court needs to intervene, not only to reconcile the divergent approaches of the Circuits but also, and more fundamentally, to rethink qualified immunity and get constitutional tort law back on track.").

[12] *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2097 (2018).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOSEPH A. ZADEH and JANE DOE, Plaintiffs, v. MARI ROBINSON, in her individual capacity and in her official capacity SHARON PEASE, in her individual capacity, and KARA KIRBY, in her individual capacity. Defendants.	1:15-CV-598 RP

ORDER

Before the Court are Defendants' Motion to Dismiss and Request for Rule 7 Reply, filed October 9, 2015 (Dkt. 11), Plaintiffs' Response, filed October 23 (Dkt. 23), and Defendants' Reply, filed October 30, 2015 (Dkt. 20), as well as supplemental briefing filed at the Court's request. Defendants move the Court to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, and pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim. The Court concludes that Defendants' motion should be granted in part and denied in part.

I. Background

Plaintiff Joseph Zadeh is a doctor who specializes in internal medicine. (Pls.' Am. Compl. ¶¶ 44-46, Dkt. 7.)[1] He owns and operates a medical office in Euless, Texas. (*Id*.) Plaintiff Jane Doe is one of his patients. (*Id.* ¶ 4.) Dr. Zadeh is currently the subject of an administrative action by the Texas Medical Board ("TMB") before the State Office of Administrative Hearings ("SOAH") for alleged violations of the Texas Medical Practices Act and the Texas Medical Board Rules related to his prescription of controlled substances to patients under his care. (Defs.' Mot. Dismiss 2, Dkt. 11.) Dr. Zadeh is also the subject of an investigation by the Drug Enforcement Agency ("DEA") for alleged violations of the Controlled Substances Act. (*Id.*)

According to Plaintiffs' complaint, Defendant Mari Robinson, executive director of the TMB, signed an administrative subpoena for medical records located at Dr. Zadeh's office. (Pls.' Am. Compl. ¶ 10, Dkt. 7.) Among the records requested were those of Plaintiff Jane Doe. (*Id.* at ¶ 4.) The subpoena was expressly designated as a subpoena "instanter" and specifically demanded immediate compliance. (*Id.* at ¶ 23.) The

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[1] After Defendants filed their motion to dismiss, Plaintiffs filed their Second Amended Complaint (Dkt. 31). Plaintiffs' sole purpose in amending the Complaint was "to add a request that this Honorable Court declare Texas Occupations Code § 168.052 unconstitutional as applied." (Second Am. Compl. ¶ 2, Dkt. 31.) Otherwise, the two complaints are identical. Accordingly, the Second Amended Complaint does not render the motion to dismiss moot. The Court continues to cite the First Amended Complaint, but this order applies to the Second Amended Complaint, which technically is Plaintiffs' live pleading.

day after the subpoena was signed, Defendants Sharon Pease and Kara Kirby, both investigators with the TMB, went to Dr. Zadeh's office with the subpoena. (*Id.* at ¶¶ 11-12.) Peace and Kirby were accompanied by two investigators from the DEA. (*Id.* ¶ 13.) At the time, Dr. Zadeh was out of the office, so the investigators presented the subpoena to Dr. Zadeh's medical assistant. (*Id.* ¶¶ 19-22.) Plaintiffs contend that Dr. Zadeh's assistant asked for an opportunity to confer with Dr. Zadeh's attorney but was told that if she did not turn over the records immediately, Dr. Zadeh would lose his medical license. (*Id.* ¶ 24.) Accordingly, Dr. Zadeh's assistant provided the investigators with the records requested in the subpoena. (*Id.* ¶ 27.) Plaintiffs claim that Dr. Zadeh's assistant did not give anyone consent to search the premises, but Defendants Pease and Kirby, along with the two DEA investigators, nonetheless executed a thorough search of the office. (*Id.* ¶¶ 24-26.) According to Plaintiffs, the investigators searched, reviewed, and copied Dr. Zadeh's medical records for several hours. (*Id.* ¶ 28.) Dr. Zadeh's lawyer eventually arrived and instructed the investigators to leave the premises. (*Id.* ¶ 29.)

Plaintiff Zadeh and his patient, Plaintiff Jane Doe, now bring suit against Defendants Robinson, Pease, and Kirby in their individual capacities, as well as Defendant Robinson in her official capacity. Plaintiffs allege that Defendants' use of an administrative subpoena to demand immediate production of medical records without providing an opportunity for judicial review violated the Fourth Amendment. Moreover, Plaintiffs allege that Defendants' conduct violated their privacy and due process rights. Plaintiffs bring suit pursuant to 42 U.S.C. § 1983 and seek monetary damages. Plaintiffs also seek declaratory relief stating

that certain Texas statutes and regulations are unconstitutional insofar that they allow the TMB to issue administrative subpoenas in violation of the Fourth Amendment.

II. Discussion

Defendants make four arguments for dismissal: First, Plaintiffs do not have standing to raise the claim for declaratory relief. Second, this Court should abstain from hearing Plaintiffs' claims under the Younger abstention doctrine. Third, Defendant Robinson, in her official capacity, has sovereign immunity. Fourth, Defendants Robinson, Pease, and Kirby, in their individual capacities, have qualified immunity. The Court addresses each argument in turn.

A. Standing

Defendants contend that Plaintiffs lack the necessary standing to pursue declaratory relief. Generally, standing requires plaintiffs to demonstrate (1) that they have suffered an injury in fact, (2) that the injury is fairly traceable to the defendant's conduct, and (3) that the injury can be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To pursue a declaratory judgment, a plaintiff must allege not only a past injury, but also a likelihood of future injury. *See Armstrong v. Turner Industries, Inc.*, 141 F.3d 554, 563 (5th Cir. 1998). "[S]tanding to seek declaratory relief respecting a challenged statute [is] not established merely by the fact that the plaintiff had on a single previous occasion been harmed by the statute's application, absent a realistic likelihood that the statute would in the future be applied to the detriment of the particular plaintiff in the action." *Brown v. Edwards*, 721 F.2d 1442, 1447 (5th Cir. 1984) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983)).

Accordingly, the question for the Court is whether the allegations in the amended complaint support a "realistic likelihood" that the Texas Medical Board and its employees will again seek to serve an administrative subpoena instanter on Plaintiffs. With regard to Plaintiff Joseph Zadeh, the Court finds such a likelihood. Dr. Zadeh is the subject of an ongoing administrative action brought by the TMB. (Defs.' Mot. Dismiss 2, Dkt. 11.) Moreover, since filing this action, the TMB has announced that it is investigating multiple new complaints against Dr. Zadeh. (Pls.' Opposed Mot. Conduct Exp. Disc. 2-3, Dkt. 10.) The Court finds that Plaintiffs' allegations support a finding that it is reasonably likely that the TMB will again choose to subpoena Dr. Zadeh's records. Accordingly, there is a realistic likelihood that Dr. Zadeh will be subject to future injury and, therefore, Dr. Zadeh has standing to pursue declaratory relief.

However, Plaintiffs have not alleged sufficient facts to allow the Court to infer that Plaintiff Jane Doe is realistically likely to face future injury. According to the amended complaint, her medical records have already been subpoenaed and are in the possession of the TMB and the DEA. (Pls.' Am. Compl. ¶ 4, Dkt. 7.) Nothing in the amended complaint supports an inference that the TMB is using its subpoena power to request additional documents or records regarding Plaintiff Jane Doe, either from Dr. Zadeh or otherwise. Accordingly, the Court finds that there is not a realistic likelihood that Plaintiff Jane Doe will be subject to future injury, and therefore, Plaintiff Jane Doe does not have standing to pursue declaratory relief.

B. *Younger* Abstention Doctrine

Defendants next contend that Plaintiffs' claims are barred by the *Younger* abstention doctrine. In *Younger v. Harris*, the Supreme Court required that

federal courts abstain from enjoining a pending state criminal proceeding. 401 U.S. 37 (1971). The Court subsequently applied *Younger* "to non-criminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 423, 432 (1983). Dr. Zadeh is currently the subject of an administrative action by the TMB before the State Office of Administrative Hearings for alleged violations of the Texas Medical Practices Act and the Texas Medical Board Rules related to his prescription of controlled substances to patients under his care in part, and involving, in part, evidence acquired through the search at issue in this case. *See In Re Complaint Against Joseph Hassan Zadeh*, D.O., S.O.A.H. Dk. No. 503-15-2821.DO (Mar. 12, 2015). Accordingly, Defendants contend that Younger requires the Court to abstain from adjudicating Plaintiffs' claims.

Younger does not apply to claims for monetary damages. *Lewis v. Beddingfield*, 20 F.3d 123, 125 (5th Cir. 1994) ("*Younger* abstention doctrine is not applicable to a claim for damages."); *Allen v. Louisiana State Bd. of Dentistry*, 835 F.2d 100, 104 (5th Cir. 1988) ("[R]equests for monetary damages do not fall within the purview of the *Younger* abstention doctrine."); *Bishop v. State Bar of Texas*, 736 F.2d 292, 295 (5th Cir. 1984) ("The district court also erred in dismissing Bishop's claim for damages, a species of relief wholly unaffected by *Younger*.") Accordingly, it would be improper for the Court to abstain from hearing Plaintiffs' claims for damages.

However, Plaintiff Zadeh's claims for declaratory relief are potentially subject to *Younger* abstention. Three criteria are used to determine whether abstention is proper: "(1) the dispute should involve an 'ongoing state judicial proceeding;' (2) the state must

have an important interest in regulating the subject matter of the claim; and (3) there should be an 'adequate opportunity in the state proceedings to raise constitutional challenges.'" *Wightman v. Texas Supreme Court*, 84 F.3d 188, 189 (5th Cir. 1996) (quoting *Middlesex County Ethics Committee*, 457 U.S. at 432).

In *Perez v. Texas Medical Board.*, the Fifth Circuit applied these criteria to a case where a physician assistant was subject to a disciplinary proceeding by the Texas Physician Assistant Board. 556 F. App'x 341 (5th Cir. 2014). The circuit court held that *Younger* abstention barred the physician assistant from suing to enjoin the Texas Medical Board. On the first prong, the court held that an administrative disciplinary hearing before SOAH is an "ongoing state judicial proceeding" under *Younger*. *Id.* at 342. On the second prong, the court held that "the State of Texas has a strong interest in protecting the public through the regulation and oversight of those practicing medicine in the state." *Id.* On the third prong, the court held that the plaintiffs would have an adequate opportunity to raise their constitutional issues in state court because Texas law provides for judicial review of administrative decisions. *Id.* at 342-43.

The relevant facts in this case are similar to those in *Perez*. First, Dr. Zadeh is subject to an ongoing administrative disciplinary proceeding before SOAH. Such a proceeding counts as an "ongoing state judicial proceeding." *Id.* at 342. Second, the state has an important interest in regulating the practice of medicine. *Id.* Finally, Plaintiff Zadeh has a right to appeal the outcome of the pending state administrative proceeding in court. *See* Tex. Occ. Code. § 164.009. If Plaintiff Zadeh appeals an adverse ruling to state court he has the right to raise federal constitutional issues. *See*

Tex. Gov't Code § 200.174. Thus, the ongoing administrative proceeding against Plaintiff Zadeh provides him an adequate opportunity to raise the constitutional issues alleged in this case. *See Perez*, 556 F. App'x at 342-43. The Court concludes that the *Younger* abstention doctrine requires this Court to abstain from adjudicating Plaintiff Zadeh's claims for declaratory relief.

C. Sovereign Immunity

Defendant Mari Robinson, in her official capacity, contends that she is protected by sovereign immunity. "The Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). However, "[t]he Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State." *Id.* Moreover, "when a plaintiff sues a state official alleging a violation of federal law, the federal court may award [relief] that governs the official's future conduct, but not one that awards retroactive monetary relief." *Id.* at 102-103; *see also Edelman v. Jordan*, 415 U.S. 651 (1974) (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945)) ("[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.")

Here, Plaintiffs seeks both damages and declaratory relief. The Court concludes that the Eleventh Amendment bars Plaintiffs from seeking monetary damages from Defendant Robinson, in her official capacity. However, although sovereign immunity would not bar Plaintiffs from suing Defendant Robinson, in

her official capacity, for non-monetary relief, the Court has concluded above that it should abstain from hearing such claims.

D. Qualified Immunity

Defendants Robinson, Pease, and Kirby, in their individual capacities, contend that they are protected by qualified immunity. "The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal." *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011). The burden rests with the plaintiff to rebut the defendant's qualified immunity defense. *Hathaway v. Bazany*, 507 F.3d 312, 319 (5th Cir. 2007).

There are two steps to determining whether a defendant is protected by qualified immunity. *See Saucier v. Katz*, 533 U.S. 194 (2001) (endorsing the traditional two-step approach to assessing a qualified immunity defense). First, the court asks whether the official "violated a statutory or constitutional right." *Morgan*, 659 F.3d at 371 (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)). Second, the court asks whether "the right was 'clearly established' at the time of the challenged conduct." *Id.* (quoting *al-Kidd*, 131 S. Ct. at 2083). A court may, at its discretion, skip the first step and begin its analysis by asking whether the right in question was clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (making *Saucier*'s two-step sequence discretionary). However, beginning the analysis by asking whether a right was violated "is often beneficial." *Id.*

The Court now turns to Plaintiffs' Fourth Amendment claims and begins with the first step of the qualified immunity analysis by asking whether Plaintiff

has alleged the violation of a Fourth Amendment right.

1. Plaintiffs' Fourth Amendment Claims (Counts 1-4, 7 & 8)

a. Qualified Immunity Step One

The first step of the qualified immunity analysis is to determine whether the plaintiff has alleged a violation of a constitutional right. Here, Plaintiffs contend that Defendants violated the Fourth Amendment by signing and executing an administrative subpoena instanter. Plaintiffs allege that the subpoena signed by Defendant Robinson demanded immediate compliance and that Defendants Pease and Kirby refused Plaintiff Zadeh's assistant an opportunity to consult a lawyer before complying with the subpoena. (Pl.'s Am. Compl. ¶¶ 23-24, Dkt. 7.) Moreover, Plaintiffs allege that Defendants Pease and Kirby searched Dr. Zadeh's office without consent. (*Id.* ¶¶ 24-26.) In short, Plaintiffs argue that Defendants violated the Fourth Amendment by treating an administrative subpoena as if it were a search warrant. (*See id.* ¶ 81.)

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and provides that "no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. The Supreme Court has repeatedly held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). One such exception is for administrative

searches. *See Camara v. Municipal Court of City & County of San Francisco*, 387 U.S. 523, 534 (1967).

Administrative searches are not immune from Fourth Amendment scrutiny. As a general rule, when an agency intends to execute a search pursuant to the administrative search exception, it must provide an opportunity for precompliance judicial review. *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2452 (2015) (citing *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984); *See v. Seattle*, 387 U.S. 541 (1967)). A more relaxed standard is applied to administrative searches of "closely regulated" businesses. *Patel*, 135 S. Ct. at 2454. Under *New York v. Burger*, an agency can search a closely regulated business without providing an opportunity for precompliance judicial review, but only if the search is necessary to further a regulatory scheme that is informed by a substantial government interest. 482 U.S. 691, 702-03 (1987). Moreover, the regulatory scheme must provide "a constitutionally adequate substitute for a warrant." *Id*. at 703 (quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981).

Accordingly, the first step in assessing the constitutionality of an administrative search is to determine whether the subject of the search is a closely regulated business. A business is considered closely regulated if it is subject to regulation so pervasive that its owners have a "reduced expectation of privacy." *Id.* at 701. The Supreme Court has identified only four industries that fall within the scope of this exception. *Id.* at 691 (automobile junkyards); *Donovan*, 452 U.S. at 594 (mining); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms dealing); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor sales). These industries all "have such a history of government oversight that no reasonable expectation of privacy . . .

could exist for a proprietor over the stock of such an enterprise. . . . [W]hen an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (internal citations omitted).

In *City of Los Angeles v. Patel*, the Supreme Court held that hotels are not closely regulated businesses. 135 S. Ct. at 2454-57. In doing so, the Court made clear "that the closely regulated industry . . . is the exception" and cautioned against allowing "what has always been a narrow exception to swallow the rule." *Id.* at 2455 (quoting *Barlow's*, 436 U.S. at 313). The Supreme Court allowed that "[h]istory is relevant when determining whether an industry is closely regulated." *Id.* But, the Court differentiated between industries with a history of regulation, generally, and industries with a history of warrantless inspections, specifically. *Id.* (holding that, for example, "laws obligating inns to provide suitable lodging to all paying guests are not the same as laws subjecting inns to warrantless searches"). The appropriate inquiry, then, is to ask whether historically "government authorities could have viewed [the business's] documents on demand without [the business's] consent." *Id.* at 2456. A closely regulated industry is one with such a consistent history of warrantless inspections that an industry participant has "no reasonable expectation of privacy." *Id.* at 2454 (quoting *Barlow's, Inc.* 436 U.S. at 313).

The medical profession is not such an industry. While the practice of medicine is admittedly subject to significant oversight, there is no history of warrantless inspections of doctor's offices. In fact, the prevailing tradition is quite to the contrary. There is a long

history of recognizing the need for privacy in the medical profession out of respect for doctor-patient confidentiality. It strains credibility to suggest that doctors and their patients have no reasonable expectation of privacy. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2668 (2011) (stipulating that "for many reasons, physicians have an interest in keeping their prescription decisions confidential"); *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (acknowledging that a medical patient has a "reasonable expectation of privacy" and can assume that medical records "will not be shared with nonmedical personnel without her consent"); *In re Vioxx Products Liab. Litig.*, No. MDL 1657, 2005 WL 2036797, at *3-4 (E.D. La. July 22, 2005) (tracing the history of doctor-patient confidentiality to fifth century B.C. and arguing that the erosion of privacy protections in the medical field could reduce the quality of medical care). Thus, the Court concludes that the practice of medicine is not a closely regulated industry. *See Margaret S. v. Edwards*, 488 F. Supp. 181, 216-17 (E.D. La. 1980) (holding that "the health industry . . . is not a closely regulated industry" given the "history of respect towards the recognized need for privacy in the doctor-patient relationship").

Given that the medical profession is not a closely regulated industry for Fourth Amendment purposes, the general rule for administrative searches applies: "in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Patel*, 135 S. Ct. at 2452. Plaintiffs allege that the TMB served Dr. Zadeh's office with an administrative subpoena which demanded immediate compliance. Moreover, Plaintiff Zadeh asserts that when the subpoena was served on his office, his assistant was refused an opportunity to

seek counsel before complying. Finally, Plaintiffs allege that Defendants, in addition to demanding production of certain medical records, also physically searched Dr. Zadeh's office. Accordingly, the Court concludes that the allegations, taken as true and viewed in a light favorable to Plaintiffs, suggest a Fourth Amendment violation.

Even if the medical profession were to be considered closely regulated, the Court finds that Plaintiffs' allegations, if proven, would still establish a Fourth Amendment violation. A regulatory agency does not have free license to execute warrantless searches on closely regulated businesses. In *New York v. Burger*, the Supreme Court set out a three part test for determining whether the warrantless search of a closely regulated business is consistent with the Fourth Amendment. 482 U.S. at 702-03. First, "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made." *Id.* at 702 (quoting *Donovan*, 452 U.S. at 602). Second, "the warrantless inspections must be 'necessary to further [the] regulatory scheme.'" *Id.* at 702-03 (quoting *Donovan*, 452 U.S. at 600). Third, the regulatory scheme must provide "a constitutionally adequate substitute for warrant." *Id.* at 703 (quoting *Donovan*, 452 U.S. at 603). In order to meet the third prong of the *Burger* test, the regulatory scheme must provide for searches to be executed with sufficient "certainty and regularity" that the business owner "cannot help but be aware that his property will be subject to periodic inspections." *Id.* at 703 (quoting *Donovan*, 452 U.S. at 600, 603). Put differently, "the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant

to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.*

Defendants claim that the search of Dr. Zadeh's office was conducted pursuant to two distinct sources of statutory authority. First, Defendants point to the TMB's authority to issue subpoenas, created by Tex. Occ. Code § 153.007 and implemented at 22 Tex. Admin. Code § 179.4(a) (collectively, "the TMB's subpoena authority"). Second, Defendants point to the TMB's authority to inspect pain management clinics, created by Texas Occupations Code § 168.00 et seq. and implemented at 22 Texas Administrative Code § 195.3 (collectively, "the TMB's inspection authority").

The Court assumes that the TMB's subpoena authority and the TMB's inspection authority survive the first two prongs of the *Burger* test. It is difficult to dispute that the state has a substantial interest in regulating and controlling the provision of prescription drugs and that doing so may require the use of subpoenas and inspections. The Court focuses its inquiry on the much narrower question of whether TMB's subpoena authority and TMB's inspection authority provide an adequate substitute for a warrant as required by the third prong of the *Burger* test.

i. TMB's Subpoena Authority

The TMB is afforded the authority by statute to "issue a subpoena or a subpoena duces tecum to compel the attendance of a witness and the production of books, records, and documents." Tex. Occ. Code § 153.007(a). The TMB has interpreted this statute, through implementing regulation, to require the following:

> Upon the request by the board or board representatives, a licensee shall furnish to the board copies of medical records or the original

> records within a reasonable time period, as prescribed at the time of the request. 'Reasonable time,' as used in this section, shall mean fourteen calendar days or a shorter time if required by the urgency of the situation or the possibility that the records may be lost, damaged, or destroyed.

22 Tex. Admin. Code § 179.4(a).[2] The Court concludes that insofar that the alleged search of Dr. Zadeh's office and records was conducted pursuant to the TMB's subpoena authority, the search was inconsistent with the third prong of the *Burger* test.

First, the search of Dr. Zadeh's office and records, as alleged by Plaintiffs, exceeded the TMB's subpoena authority. Plaintiffs assert that Defendants Pease and Kirby physically searched Dr. Zadeh's office, despite Dr. Zadeh's assistant refusing to consent to the search. (Pls.' Am. Compl. ¶¶ 24-26, Dkt. 7.) The TMB's subpoena authority is limited to compelling the production of books, records, and documents or compelling the attendance of a witness. Tex. Occ. Code §

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[2] Plaintiffs repeatedly suggest that this regulation is an improper reading of the TMB's statutory authority. Plaintiffs contend that the statute gives the TMB the limited power to issue subpoenas, which by definition, allow for an opportunity to seek judicial review prior to compliance. Accordingly, Plaintiffs argue that the TMB has through the creative interpretation of its own statute conferred upon itself the authority to conduct warrantless searches. However, the question of whether the TMB has appropriately interpreted its statutory subpoena authority is not relevant to the question of whether the overall regulatory scheme survives Fourth Amendment scrutiny under *Burger*. Accordingly, the Court reads Tex. Occ. Code § 153.007(c) and 22 Tex. Admin. Code § 179.4(a) together and inquires as to whether the combined regulatory scheme serves as an adequate substitute for a warrant.

153.007(a). The TMB is not authorized to physically search or inspect a doctor's office.[3] *Id.* Accordingly, Plaintiffs' allegations support a finding that the execution of the subpoena and subsequent search of Dr. Zadeh's office was done in contravention of, not pursuant to, the relevant regulatory scheme.

The third prong of the *Burger* test aspires to ensure that closely regulated businesses are put on notice that they will be subject to regular searches and that their owners are able to assess whether those searches are conducted in accordance with the law. A regulatory scheme can only put a business owner on notice of searches that fall within its parameters. Given that the alleged search of Dr. Zadeh's exceeded the TMB's subpoena authority it, therefore, must also fail the third prong of the *Burger* test.

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[3] Plaintiffs would go further. They contend that the TMB is not authorized to issue subpoenas instanter, arguing that 22 Tex. Admin. Code § 179.4(a) requires the provision of a "reasonable time period" to comply with a subpoena's terms. The regulation states that by default a "reasonable time period" means fourteen calendar days, but the TMB may provide less time to comply "if required by the urgency of the situation or the possibility that the records may be lost, damaged, or destroyed." From Plaintiffs' perspective, demanding immediate compliance is inconsistent with the regulation's requirement that the subpoenaed party be provided a reasonable amount of time to comply. However, the Court finds that the issuance of a subpoena instanter which demands immediate compliance is consistent with the language in the regulation allowing the TMB to provide less than fourteen days to comply if there is a possibility that records will be lost, damaged, or destroyed. Accordingly, the Court's finding that the alleged search exceeded the TMB's authority is limited to the allegation that Defendants searched and inspected Dr. Zadeh's office.

Second, the TMB's subpoena authority is purely discretionary. The TMB has the authority to issue administrative subpoenas to compel the production of medical records. Tex. Occ. Code § 153.007(c). The TMB is allowed to choose which doctors to subpoena and to do so at a frequency it determines. Accordingly, TMB's subpoena 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." *Patel*, 135 S. Ct. at 2456. The inspection authority does not provide clinics "certainty" that they will be subject to inspection with "regularity." *Burger*, 482 U.S. at 703 (quoting *Donovan*, 452 U.S. at 600, 603). Therefore, the Court concludes that the alleged search of Dr. Zadeh's office, insofar that it was conducted pursuant to the TMB's subpoena authority, is inconsistent with the third prong of *Burger* and, thus, violated the Fourth Amendment.

ii. TMB's Inspection Authority

The TMB is afforded the authority by statute to "inspect a pain management clinic, including the documents of a physician practicing at the clinic, as necessary to ensure compliance with this chapter." Tex. Occ. Code § 168.052. The implementing regulation to the statute provides in part the following:

> (b) Unless it would jeopardize an ongoing investigation, the board shall provide at least five business days' notice before conducting an on-site inspection under this section.
>
> (c) This section does not require the board to make an on-site inspection of a physician's office.
>
> (d) The board shall conduct inspections of pain management clinics if the board suspects that

> the ownership or physician supervision is not in compliance with board rules.

22 Tex. Admin. Code § 195.3. The Court concludes that insofar that the alleged search of Dr. Zadeh's office was conducted pursuant to the TMB's inspection authority, the search was inconsistent with the third prong of the *Burger* test.

First, the search, as alleged, exceeded the TMB's inspection authority. The parties dispute whether Dr. Zadeh's medical practice meets the definition of a pain management clinic. The statute defines a pain management clinic as a "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. The statute expressly exempts from the definition any "clinic 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 the majority of the patients." *Id.* § 168.002(7).

Plaintiffs allege that Texas Occupations Code § 168 does not apply to Dr. Zadeh's medical clinic because the clinic is exempt from the statutory definition of a pain management clinic. (Second Am. Compl. ¶ 49.) They further claim that no governmental agency had reason to believe that Dr. Zadeh's medical office was a pain management clinic. (*Id.* ¶ 86.) Finally, Plaintiffs contend that the TMB had previously provided Dr. Zadeh written instructions acknowledging that his office was not a pain management clinic and instructing him not to register as a pain management clinic. (*Id.* ¶¶ 50, 85.) Moreover, Plaintiffs pled

the specific facts necessary to indicate that Dr. Zadeh's clinic was exempt under § 168.002(7), specifically that (a) Dr. Zadeh owns and operates the facility in question, (b) the facility is not registered as a pain management clinic, (c) Dr. Zadeh treats patients within his area of specialty at the facility, and (d) he personally uses other forms of treatment with the issuance of a prescription for a majority of the patients treated at the facility. (*Id.* ¶ 48.) Accordingly, Plaintiffs' allegations suggest that Dr. Zadeh's medical office does not meet the statutory definition of a pain management clinic.

Defendants argue that the TMB's inspection authority allows inspections of "actual or suspected pain management clinics." (Def.'s Supp. Briefing 2, Dkt. 24.) However, the legal authorities cited by Defendants do not support their contention that the TMB has the authority to inspect any facility it suspects is a pain management clinic. *See* Tex. Occ. Code § 168.052 (authorizing inspections of pain management clinics, not suspected pain management clinics); 22 Tex. Admin. Code § 195.3 (making no mention of suspected pain management clinics). Yet, even if Defendants' interpretation of the TMB's inspection authority is correct, there is nonetheless a dispute between the parties as to whether the TMB suspected Dr. Zadeh's medical office met the definition of a pain management clinic. As discussed above, Plaintiffs pled that the TMB had previously provided Dr. Zadeh written instructions acknowledging that his clinic is exempt from the definition of pain management clinic. (Second Am. Compl. ¶¶ 50, 85.) Accordingly, Plaintiffs assert in their complaint that "[n]o state governmental agency had justifiable reason to believe Dr. Zadeh's medical facility was not exempt from pain management clinic registration based on Texas Occupations

Code § 168.002(7)." (*Id.* ¶ 86.) Moreover, Plaintiffs contend that the contents of the subpoena were inconsistent with an investigation of whether Dr. Zadeh was illegally operating a pain management clinic. Plaintiffs allege that the subpoena at issue requested the records for sixteen patients (*id.* ¶ 23(b)) and that in September 2013 Dr. Zadeh averaged approximately ten patient visits per day (*id.* ¶ 44). However, to be considered a pain management clinic a majority of the patients on a monthly basis must be prescribed one of four types of painkillers. Tex. Occ. Code § 168.001. 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.

The Court concludes that the search of Dr. Zadeh's office and records, as alleged by Plaintiffs, exceeded the TMB's inspection authority. As discussed above, a statute cannot put a business on notice of a search that falls outside its parameters. Therefore, Plaintiffs' allegations support a finding that the TMB's inspection authority did not serve as an adequate substitute for a warrant for the search of Dr. Zadeh's office, and consequently, the search was inconsistent with the third prong of the *Burger* test.

Second, the TMB's inspection authority, like its subpoena authority, is purely discretionary. The statute provides that the TMB has the discretion to inspect pain management clinics "as necessary to ensure compliance." Tex. Occ. Code § 168.052. The implementing regulations provide that the TMB should

inspect a facility if it "suspects that the ownership or physician supervision is not in compliance with board rules." 22 Tex. Admin. Code § 195.3(d). However, the regulation does not require the TMB to inspect pain management clinics. *Id.* § 195.3(c). The TMB is allowed to choose which clinics to inspect and to do so at a frequency it determines. Accordingly, 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." *Patel*, 135 S. Ct. 2443 at 2456. The inspection authority does provide clinics "certainty" that they will be subject to inspections with "regularity." *Burger*, 482 U.S. at 703 (quoting *Donovan*, 452 U.S. at 600, 603). Therefore, the Court concludes that the alleged search of Dr. Zadeh's office, insofar that it was conducted pursuant to the TMB's subpoena authority, is inconsistent with the third prong of *Burger* and, thus, violated the Fourth Amendment.

In sum, the Courts finds that the alleged use of an administrative subpoena instanter to search Dr. Zadeh's office violated Plaintiff's Fourth Amendment rights. If, as the Court concludes, the medical profession is not a closely regulated industry, then the alleged search violated Plaintiff's right to an opportunity for judicial review prior to complying with an administrative subpoena. Alternatively, if the medical profession is a closely regulated industry, then the alleged search violated Plaintiffs' right to be put on notice that Dr. Zadeh's office and records would be subject to regular inspections. Either way, the allegations, taken as true and viewed in a light favorable to Plaintiffs, suggest the violation of a constitutional right.

b. Qualified Immunity Step Two

The second step of the qualified immunity analysis is to determine whether the constitutional right in question was clearly established at the time of its alleged violation. For a right to be clearly established there must be a "controlling authority or a robust consensus of persuasive authority . . . that defines the contours of the right in question with a high degree of particularity." *Morgan*, 659 F.3d at 371 (quoting *al-Kidd*, 131 S. Ct. at 2084). The law must "so clearly and unambiguously" prohibit the conduct in question that "every reasonable official would understand what he is doing violates the law." *Id.* (quoting *al-Kidd*, 131 S. Ct. at 2083). Put differently, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *al-Kidd*, 131 S. Ct. at 2083). "The sine qua non of the clearly-established inquiry is 'fair warning.'" *Id.* at 372 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). "[I]f judges . . . disagree on a constitutional question, it is unfair to subject [government officials] to money damages for picking the losing side of the controversy." *Id.* (quoting *Wilson v. Layne*, 526 U.S. 603, 618 (1999)).

Before proceeding, the Court notes that Plaintiffs rely heavily throughout their briefing on the Supreme Court's ruling in *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015). However, the Supreme Court did not rule in *Patel* until more than a year after the alleged search at issue in this case. Accordingly, while *Patel* guides the Court's decision as to whether a constitutional right was violated, it plays no role in the Court's inquiry as to whether the right was clearly established at the time of its violation.

The rule that an agency must provide an opportunity for a party to challenge an administrative sub-

poena prior to compliance is longstanding and unambiguous. *See Donovan v. Lone Steer, Inc.*, 464 U.S. at 415 ("[A]lthough our cases make it clear that [an agency] may issue an administrative subpoena without a warrant, they nonetheless provide protection for a subpoenaed employer by allowing him to 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."); *City of Seattle*, 387 U.S. at 544-45 ("It is now settled that, when an administrative agency subpoenas . . . books or records, the Fourth Amendment requires that the subpoena . . . 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."). However, this rule does not apply to closely regulated industries. *See Burger*, 482 U.S. at 718-19. Thus, if it was unclear whether the medical profession was a closely regulated industry, then Defendants could have reasonably believed they had no obligation to provide an opportunity for precompliance review. Accordingly, the Court begins by asking whether at the time of the search of Dr. Zadeh's office, it was clearly established that the medical profession is a closely regulated industry was clearly established.

The Texas Attorney General has clearly stated that the medical profession is not a closely regulated industry. Tex. Att'y Gen. Op. No. JC-274. In the opinion issued in 2000, the Attorney General advised that the Texas State Board of Podiatric Medical Examiners lacked the authority to conduct warrantless inspections of its licensees, because the medical profession is not a closely regulated industry under the Fourth Amendment. *Id.* The opinion reasoned that the medical profession "has no long history of warrantless state

inspection." *Id.* at 3 (internal quotation marks omitted) (quoting *Margaret S. v. Edwards*, 488 F. Supp. 181, 216 (E.D. La. 1980)). Moreover, it is an industry "with a history of respect towards the recognized need for privacy in the doctor-patient relationship." *Id.* (quoting *Margaret S.*, 488 F. Supp. at 216). The opinion "found no evidence of pervasive regulation of the practice of . . . medicine . . . nor any Texas case that would furnish any basis for concluding that it should be so characterized." *Id.*

On the other hand, the Fifth Circuit has treated the dental profession as a closely regulated industry. In *Beck v. Texas State Bd. of Dental Examiners*, the circuit court confronted a set of facts similar those before the Court now. 204 F.3d 629 (5th Cir. 2000). In that case a dentist sued an investigator for the Texas State Board of Dental Examiners, alleging that the investigator had conducted an illegal search when he inspected the dentist's office and reviewed his records. The Fifth Circuit held that the investigator was protected by qualified immunity because the warrantless inspection did not violate a clearly established constitutional right. *Id.* at 638-39. The court did not explicitly address the question of whether the dental profession is a closely regulated industry. However, the Court implicitly treated the dental profession as a closely regulated industry by evaluating the allegations under *Burger* and concluding that the dentist had no right to precompliance judicial review. *See id.* at 639.

In light of the Fifth Circuit's holding in *Beck*, the Court concludes that Defendants could reasonably have believed that the medical profession is considered a closely regulated industry and, thus, fairly concluded that the precompliance review requirement

does not apply to the search of a medical office. Accordingly, the Court stipulates that, for the purpose of the qualified immunity analysis, the medical profession is a closely regulated industry and turns to the question of whether Plaintiffs have alleged the violation of a clearly established right under the more accommodating standard for these businesses.

In *Burger*, the Supreme Court set out the test for determining whether the administrative search of a closely regulated business survives Fourth Amendment scrutiny. 482 U.S. at 702-03. The third and final prong of that test requires that the search of a closely regulated business be executed pursuant to a statutory scheme that provides "certainty" that the business will be inspected with "regularity." *Id.* at 703 (quoting *Donovan v. Dewey*, 452 U.S. at 603.) *Burger* clearly establishes that the owner of a closely regulated business has a right to be put on notice that his or her business "will be subject to periodic inspections undertaken for specific purposes." *Id.* (quoting *Donovan v. Dewey*, 452 U.S. at 600).

While it may be difficult to define the exact contours of the right created by the third prong of the *Burger* test, the jurisprudence in this field is unambiguous in two regards. First, a search that is not conducted pursuant to a regulatory scheme cannot be constitutional. The Supreme Court requires that regulatory statute "perform the . . . basic functions of a warrant" by "advising the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope." *Id.* at 703. A statute cannot put a business on notice of searches that fall outside its scope or contravene its parameters. Second, the regulatory statute must do some-

thing to "limit the discretion of the inspecting officers." *Id.* (citing *United States v. Biswell*, 406 U.S. 311, 315 (1972).

For the reasons discussed in the Court's analysis under the first step of the qualified immunity inquiry, the Court finds that search of Dr. Zadeh's office, as alleged by Plaintiffs, clearly violates the third prong of the *Burger* test. *See* discussion *supra* pp. 14-17. First, Plaintiffs allege that the search overstepped the TMBs authority insofar that (a) the TMB's subpoena authority does not authorize it to physically inspect or search a doctor's office and (b) the TMB's inspection authority is inapplicable as Dr. Zadeh's office does not meet the statutory definition of a pain management clinic. Second, the TMB's subpoena and inspection authorities are purely discretionary. Nothing in the language of either statute creates certainty that a medical office will inspected with regularity. Accordingly, the TMB's subpoena and inspection authorities did not put Dr. Zadeh on notice that his office would be subject to regular inspections.

Defendants contend that even if the Court is right that Plaintiffs' allegations suggest a clear violation of the third prong of the *Burger* test, the contours of that right were not clearly established at the time of the search of Dr. Zadeh's office. In support of this contention, Defendants cite two cases: *Ellis v. Mississippi Dep't of Health*, 344 F. App'x 43 (5th Cir. 2009) and *Beck*, 204 F.3d 629.

In *Ellis*, the Fifth Circuit upheld the warrantless inspection of a child care facility by the Mississippi Department of Health, which was conducted pursuant to a statute which "permits inspections by the agency 'as often as deemed necessary.'" 344 F. App'x at 45 (citing Miss. Code. § 43-20-15). The statute in question required that inspections of child care facilities "be

made at least once a year." Miss. Code. § 43-20-15. Accordingly, the statute puts the owners of child care facilities in Mississippi on notice that their businesses will be subject to inspections with certainty and regularity and is therefore consistent with the third prong of the *Burger* test. The TMB, however, is not required to inspect or subpoena medical offices with any minimum frequency. The agency's subpoena and inspection authorities are purely discretionary. As such, the present case is easily distinguished from *Ellis*.

The Fifth Circuit's holding in *Beck* proves more troublesome. In that case, the court of appeals upheld the warrantless inspection of a dental office. With regard to the third prong of the *Burger* test, the court found the Texas Controlled Substances Act authorized on demand inspections and, thus, provided the dentist with sufficient notice that his office would be subject to periodic warrantless searches. *Beck*, 204 F.3d at 639.

The Fifth Circuit found that the inspection of the dental office was constitutional despite the fact that the Texas Controlled Substances Act does not provide any certainty that dental offices will be inspected nor does it limit the discretion of inspecting officers as to when or under what circumstances an office will be inspected. *See Beck*, 204 F.3d at 639 (upholding, as consistent with the third prong of *Burger*, § 5.01(c) of the Texas Controlled Substances Act which gives officers "the right to enter premises and conduct such inspection at reasonable times upon stating his purpose and presenting to the owner . . . of the premises appropriate credentials and written notice of his inspection authority"). This holding appears to be in tension with the third prong of *Burger*, which requires that a regulatory scheme that allows warrantless inspections to place "appropriate restraints upon the

discretion of the inspecting officers" such that the business owner "cannot help but be aware that his property will be subject to periodic inspections." *Burger*, 482 U.S. at 711, 705 n.16. Thus, in light of the Fifth Circuit's holding in *Beck*, Defendants reasonably could have believed that a search conducted pursuant to a purely discretionary inspection scheme was legal.

However, *Beck* provides no support for the proposition that a statute can serve as an adequate substitute for a warrant in a case where the search goes beyond what is authorized by the statute. In *Beck*, there was no dispute as to whether the Texas Controlled Substances Act authorized the inspection of the dentist's office. At issue was simply whether the language of the statute provided sufficient clarity to serve as a substitute for a warrant. Here, Plaintiffs contend that Defendants overstepped their statutory authority when they physically searched and inspected Dr. Zadeh's office and files. If true, Defendants' conduct was clearly inconsistent with *Burger* which requires that a warrantless inspection at the very least be conducted pursuant to a regulatory scheme.

In sum, the Court concludes that at the time of the search of Dr. Zadeh's office, it was unclear whether the medical profession should be considered a closely regulated business. Moreover, it was also 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. But, it was clearly established that if a state official executes a warrantless search of a closely regulated business, the search must, at the very least, be conducted pursuant to a clear regulatory scheme. This basic rule ensures that the owner of a business is given fair notice that his or business may be subject to warrantless inspection.

Here, the allegations, taken as true and viewed in a light favorable to Plaintiffs, suggest that the search of Dr. Zadeh's office was not conducted pursuant to such a regulatory scheme and thus Plaintiffs had no reason to suspect that Dr. Zadeh's office would be subject to regular inspection. Thus, with regard to Plaintiffs' Fourth Amendment allegations, the Court concludes that Defendants' qualified immunity defense should be denied. The Court, however, acknowledges that the present inquiry is limited to assessing the sufficiency of Plaintiffs allegations. Plaintiffs have alleged, but have not yet proven, a violation of their clearly established rights under the Fourth Amendment. *See McKee v. Lang*, 393 F. App'x 235, 238 (5th Cir. 2010) ("[W]e take the well-pleaded facts of the complaint as true and construe those facts in the light most favorable to the plaintiff when assessing a motion to dismiss based upon qualified immunity.").

2. Plaintiffs' Privacy Claims (Counts 5 & 6)

Plaintiffs also allege that Defendants violated their constitutional and statutory rights to privacy. Here, the Court exercises its discretion to begin with inquiry of whether the right that was allegedly violated was clearly established at the time of the conduct in question.

Plaintiffs argue that Defendants (1) illegally provided DEA agents access to Dr. Zadeh's records and (2) illegally posted patient data on the TMB website. Plaintiffs vaguely suggest that this conduct contravened a number of privacy protections under both state and federal law. To the extent that Plaintiffs allege a violation of state privacy law, their allegations do not support a cause of action under 42 U.S.C. § 1983, which provides a remedy for "the deprivation of any federally protected rights." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 658 (1978).

To the extent that Plaintiffs allege a violation of the federal constitutional right to privacy, the Court finds that Plaintiffs have not shown that the relevant law was clearly established at the time of the alleged violation. Plaintiffs do not cite a single federal authority proscribing the sharing of medical records between a state investigative agency and a federal law enforcement agency. Similarly, Plaintiffs do not cite a single federal authority prohibiting the posting of redacted patient information online. It may be that these allegations implicate constitutional privacy concerns. However, to overcome a qualified immunity defense the plaintiff "must be able to point to controlling authority . . . that defines the contours of the right in question with a high degree of particularity." *Morgan*, 659 F.3d at 371-72. Plaintiffs have not done so here. Therefore, Defendants are entitled to immunity with regard to Plaintiffs' privacy allegations.

3. Plaintiff's Due Process Claims (Counts 9 & 10)

Finally, Plaintiffs allege that Defendants violated their constitutional right to procedural due process. (Pls.' Am. Compl. ¶¶ 123-28, Dkt. 7.) Again, the Court exercises its discretion to begin with the second step of the qualified immunity analysis.

Plaintiffs argue that they "were entitled to notice and a meaningful opportunity to be heard before Dr. Zadeh's medical records were searched and/or seized by the TMB." (*Id.*) Plaintiffs allegations here are identical to those raised as part of their Fourth Amendment claims, with the exception that Plaintiffs seek redress under the Due Process Clause. However, Plaintiffs do not cite a single authority creating a due process right to precompliance review of an administrative subpoena. It may be that Plaintiffs' allegations implicate due process concerns in addition to Fourth

Amendment concerns. However, the Court finds that the relevant law was not clearly established at the time of the alleged violation. Therefore, Defendants are entitled to immunity with regard to Plaintiffs' due process allegations.

4. Defendants' Request for a Rule 7 Reply

Finally, Defendants invoke Federal Rule of Civil Procedure 7(a) and request that Plaintiffs be ordered to file a reply pleading specific facts tailored to Defendants' qualified immunity defense. "When a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official's motion or on its own, require the plaintiff to reply to that defense in detail." *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995). The Court concludes that the factual allegations contained in the amended complaint are sufficiently specific to allow for a fair assessment of Defendants' qualified immunity defense. Further detail would be of little assistance in determining whether Plaintiffs have alleged the violation of a clearly established right. Accordingly, the Court declines to exercise its discretion to order a Rule 7 reply.

III. Conclusion

The Court finds that (1) Plaintiff Jane Doe does not have standing to pursue declaratory relief; (2) Plaintiff Zadeh's claims for declaratory relief are barred by the Younger abstention doctrine; (3) the doctrine of sovereign immunity prevents either Plaintiff from suing Defendant Robinson in her official capacity for damages; (4) the doctrine of qualified immunity requires the Court to dismiss Plaintiffs' privacy claims and due process claims.

Accordingly, the Court hereby **GRANTS IN PART AND DENIES IN PART** Defendants' Motion to Dismiss and Request for Rule 7 Reply (Dkt. 11).

Plaintiffs' claims for declaratory relief are hereby **DISMISSED WITHOUT PREJUDICE**.

Plaintiffs' claims against Defendant Mary Robinson, in her official capacity, for monetary damages are hereby **DISMISSED WITH PREJUDICE**.

Plaintiffs' privacy claims (Counts 5 & 6) are hereby **DISMISSED WITH PREJUDICE**.

Plaintiffs' due process claims (Counts 9 & 10) are hereby **DISMISSED WITH PREJUDICE**.

SIGNED on March 29, 2016.

[handwritten signature]

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE