No. _____

In The
Supreme Court of the United States

JOSEPH COTROPIA,

Petitioner,

v.

MARY CHAPMAN, Individually,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Is the presumption that warrantless searches are *per se* unreasonable so obvious a violation of the Fourth Amendment that the presumption gives government officials fair warning?

Parties to the Proceedings

The caption of the case contains the names of all the parties.

Statement of Related Cases

There are no related cases.

Corporate Disclosure Statement

The caption of the case contains the relationship of all the parties to institutions involved in the petition.

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An appeal was taken from the United States District Court for the Southern District of Texas No. 4:16-CV-742 to the Fifth Circuit in Cause No. 19-20688 *Joseph Cotropia v. Mary Chapman*. The Fifth Circuit entered judgment of October 22nd, 2020. The United States Court of Appeals for the Fifth Circuit denied request for en banc hearing on 12/02/2020.

Statement of the Basis for Jurisdiction

The Fifth Circuit issued its opinion on October 22nd, 2020. Petitioner's Motion for en banc hearing was denied on December 2nd, 2020. The Court jurisdiction rests on 28 U.S.C. section 1254(1).

Writ's Importance

This writ is important because the current state of cases transforms qualified immunity into a shield for governmental officials' bad acts. Requiring factually identical or highly similar factual cases guts the protection of the Fourth Amendment. Each year qualified immunity cases occur with enormous frequency. There is disagreement among courts of appeal regarding the degree of factual similarity required to grant qualified immunity. The Fifth Circuit requires a very high degree of factual similarity with past precedent. In contrast, this Court held that fair notice can exist absent factual similarity. *Hope v. Pelzer*, 536 U.S. 730.

Does clearly established law prohibit government officials from enforcing an administrative subpoena instanter by force? It is undisputed that Cotropia's office was searched, his private papers rummaged through, and documents not listed on an administrative subpoena taken by force. This Court's Fourth Amendment analysis is grounded in a baseline principle that warrantless searches are per se unreasonable absent an applicable exception. The Fifth Circuit in this case has denied Cotropia his constitutional rights even though his constitutional rights are clearly established.

The Fifth Circuit has sanctioned the adage that if a government official is first to violate a constitutional right, a citizen has no redress. To escape responsibility just violate the citizen's right first! If skillful pleadings can make the constitution occur in a factual unique manner, the government official is granted qualified immunity. By skillful pleadings, the Appellee claimed the case was unique because of the claim that Defendant Chapman was searching a pain clinic, a fact that Chapman denied. In order to prevent this manifest injustice, the Court is asked to consider a two-category approach.

The Court is asked to consider a two-category approach based on whether or not obvious constitutional violation has occurred. Does the baseline principle give fair warning that is specific enough to clearly establish the law even in the absence of case law? Does the obvious violation give fair warning as contrasted to the Fifth Circuit's requirement for a narrow fact-specific case?

Cotropia asks the Court to adopt a two-tier approach to better balance the protection of constitutional rights with the promotion of government efficiency. This Court is asked to consider whether that fair warning is given by a clearly established legal principle. The Fifth Circuit has so narrowly required materially similar facts that the result is to deny Cotropia legal redress. The government's official conduct is egregious enough to supply fair warning that the conduct violates a constitutional right.

Cotropia lost because no previous case had a specific fact-pattern close enough to meet the Fifth Circuit's standard. The effect is to let government officials duck consequences for bad behavior if they were to first to behave badly. A two-tier approach would balance the government interest versus Cotropia's constitutional protections.

The Fifth Circuit denied Cotropia his constitutional rights when the panel could have found that the legal principle barring such conduct was clearly established. A two-category approach based on the obviousness of a general constitutional principle would satisfy the tension between effective government action and citizen protection from government oppression. The obvious category would be a generally established constitutional principle that clearly establishes the law when the precedent facts are not identical. In the non-obvious category, the Plaintiff would be required to cite precedent of a factually similar case to make a viable § 1983 claim.

Constitutional Provisions and Statutes

U.S. Const. amend. IV. Appendix Page 46a.

Statement of the Case

On March 28, 2015, the Texas Medical Board executed an administrative subpoena searching Dr. Cotropia's closed medical office. Dr. Cotropia had lost his medical license and the office was closed to patients. ROA 506. Dr. Cotropia's assistant, Spaugh unlocked the door to the clinic. ROA 508-09, 846. Chapman, a Texas Medical Board Investigator, showed Spaugh an administrative subpoena. Spaugh called Cotropia's attorney who was traveling with Cotropia to Austin for a hearing. Cotropia instructed his attorney, who instructed Spaugh, that Chapman should be told to leave, and Chapman should not be provided with any records. ROA 835, 847.

Spaugh stated that Chapman copied 23 documents against her protest and then refused to leave. ROA 479-501, 511, 954. Chapman conceded that she did not leave at Spaugh's request. Chapman even refused to allow Spaugh to leave and Chapman physically barred Spaugh's egress. Chapman then threatened Spaugh with arrest if Spaugh did not give Chapman medical records. Chapman called the local constable office. When the Constable arrived, he communicated to Chapman that she must leave the office. ROA 474.

Chapman admitted that she used force to rummage thorough Dr. Cotropia's documents and

took documents that were outside the scope of the Texas Medical Board's Administrative Subpoena. Chapman was essentially executing a writ of assistance which is not allowed by the Fourth Amendment.

The Lower Court stated that "it was undisputed that the TMB was searching his office to determine if he was practicing medicine after his license had been suspended - a legitimate administrative purpose. Chapman is entitled to summary judgment on this issue." Memorandum and Recommendation of the United States Court of the Southern District of Texas Houston District. Appendix Page 40a.

The Texas Medical Board physically occupied private property for the purpose of obtaining information. Such physical intrusion is a search within the meaning of the Fourth Amendment. *Entick v. Carrington*, 95 Eng. Rep 807 (C.P. 1765). It is clearly established law that a trespass violates the Fourth Amendment. *Entick*, supra, at 817. The Fourth Amendment protects against trespassory searches with regards to "persons, houses, papers, and effects". The Fourth Amendment violation is obvious, undisputed, and established.

Chapman's egregious conduct violated clearly established legal principles. This Court has made clear in *See and Patel*, the need for pre-compliance review prior to an administrative subpoena enforcement. *City of Los Angles, Calif v. Patel,* 135 S. Ct. 2443 (2015). *See v. City of Seattle,* 387 U.S. 541 (1967). However, the Fifth Circuit found that there

were no earlier cases with materially similarly facts to give notice to Chapman that her egregious conduct violated the Fourth Amendment. The Fifth Circuit followed *Ashcroff v. Kidd* requiring Cotropia to cite existing precedent to place the statutory or constitutional question beyond doubt. *Ashcroft v. al-Kidd* 563 U.S. 731, 741-43. This standard requires the Fifth Circuit to search for precedent that is sufficiently tied to the specific facts in every qualified immunity case. The Fifth Circuit had to read Chapman's mind that she was inspecting a pain clinic in spite of her specific testimony and the lower court opinion that Chapman was investigating Cotropia to determine if he was practicing medicine without a license. Memorandum and Recommendation of the United States for Southern District of Texas, Houston District. Appendix Page 40a.

The established baseline presumption is that warrantless searches are per se unreasonable absent an applicable exception. *Riley v. California,* 573 U.S. 373, 382 (2014). Despite having fair warning of this well-established principle, Chapman demanded immediate compliance with her subpoena. When Spaugh refused to comply with Chapman's demands, Chapman then took documents by force. It was unreasonable for Chapman to rely on the Burger exception to a warrantless search. The Burger exception's notice requirement is clearly established that notice is required for on-demand inspection. However, Chapman was not making a demand for inspection, she was enforcing an administrative subpoena with specific enumerated documents. She

rummaged through Cotropia's papers and took documents by force that were not identified in the administrative subpoena.

The legal principle that warrantless search is *per se* unreasonable is so clearly established that Chapman had fair warning that her conduct was a constitutional violation. Lack of identical precedent is not a legitimate reason to deny Cotropia his constitutional rights. The Fifth Circuit failed to engage in an inquiry that considered whether the warrantless search legal principle was significant notice that Chapman's conduct violated Cotropia's constitutional rights. *Hope v. Pelzer,* 536 U.S. 730. 739-41. The warrantless search is an obvious Fourth Amendment violation that gives warning that is enough to establish the law, even when the facts of precedent are not identical. *Vinyard v. Wilson,* 311 F. 3d 1340 (11th Cir. 2002). The constitutional provision is specific enough to clearly give fair warning that a warrantless search by force is unconstitutional.

Reasons for the Court to Grant Writ

State investigators without notice and without a warrant, entered Cotropia's office, and by force, rifled through his papers. Chapman, Texas Medical Board Investigator, demanded immediate compliance. The lower courts found the facts surrounding Texas Medical Board investigator almost entirely undisputed.

The Fourth Amendment forbids such roughshod rummaging. The baseline presumption is

that warrantless searches are per se unreasonable absent an applicable exception. *Riley v. California,* 573 U.S. 373, 382 (2014). Despite having fair warning of this well-established principle, Chapman, Texas Medical Board Investigator, demanded immediate compliance with a medical board administrative subpoena and rummaged through Cotropia's records. The Fifth Circuit holding granting Chapman qualified immunity denied Cotropia his constitutional rights despite clearly established law.

Cotropia's constitutional rights were denied since a case did not exist with material similar facts. The Court is asked to address the question whether a law which is clearly established gives officials fair warning that their conduct is unconstitutional without a factually similar precedent. *Hope v. Pelzer,* 536 U.S at 739-41. Cotropia would suggest that the proper standard is whether a legal principle is sufficiently established to give officials fair warning that their conduct violates constitutional rights.

Chapman had fair warning her egregious conduct was unconstitutional because the constitutional provision is specific enough to clearly establish the law even in the absence of case law. *Vinyard v. Wilson,* 311 F.3d 1340 (11th Cir. 2002). The baseline presumption regarding warrantless searches gave Chapman fair warning that her conduct was per se unconstitutional.

This case concerns a key policy issue that allows Cotropia's rights to be violated because no fact specific case law exists to allow vindication. Cotropia

is asking the Court to consider that qualified immunity be denied if the constitutional violation is obvious. The Fifth Circuit decision was essentially ruling that it is immaterial that Chapman acted unconstitutionally if no specific prior case held such misconduct unlawful. This ruling flies in the face of the violation of an undisputed established constitutional principle.

This Court has warned government officials that the absence of analogous precedent does not guarantee immunity for egregious constitutional violations. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Hope v. Pelzer*, 536 U.S. 730, 741, 45-46 (2002); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78 (2009); *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018); *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019). This case is important because the Court is being asked to develop a more refined procedural approach. Chapman has ducked the consequences of her bad behavior. The Constable's behavior in telling Chapman she must leave Cotropia's office established what an objective law officer knows. The Constable that ordered Chapman out of Cotropia's office knew her conduct was unlawful. The U.S. Court of Appeals for the Fifth Circuit affirming the District Court. Appendix Page 6a

Courts of Appeal are divided over what degree of factual similarity must exist to deny qualified immunity protection to government officials. This Court has reassures plaintiffs that caselaw does not

require a case directly on point for a right to be clearly established. *Kisela v. Hughes* 138 S. Ct. at 1152 (quoting *White v. Pauly*, 137 S. Ct 548, 551 (2017).

Chapman's conduct obviously violated the Fourth Amendment. Chapman's use of physical force to execute a mere administrative subpoena was particularly egregious. Chapman seized Dr. Cotropia's assistant and grabbed his paper despite being told explicitly to leave. In Colonnade Catering, this Court unanimously condemned the use of unauthorized force during warrantless searches. *Colonnade Catering v. United States*, 397 U.S. 72 (1970).

The baseline presumption that warrantless searches are per se unreasonable gave Chapman a fair warning that her conduct violated the Fourth Amendment. The long-established principle that a pre-compliance hearing before a neutral magistrate is required before an administrative subpoena is enforced gave Chapman fair warning that taking documents not listed on an administrative subpoena by force was a violation of the Fourth Amendment.

Vinyard v. Wilson suggests that when a federal statute or constitutional provision is specific enough that clearly establishes fair warning. This case is one where the constitutional violation is so obviously well established that Chapman had fair warning that her conduct violated the Fourth Amendment. Chapman should not be protected by qualified immunity.

As Chapman's conduct was sufficiently beyond the pale, the notice necessary to defeat a claim of

qualified immunity is inseparable from the violation itself. "The unlawfulness of the officer's conduct is sufficiently clear" to defeat qualified immunity "even though existing precedent does not address similar circumstances." *City of Escondido*, 139 S. Ct. at 504 (quoting *Wesby*, 138 S. Ct. at 581).

Conclusion

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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ENTERED: October 22, 2020

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20688

JOSEPH COTROPIA,

Plaintiff – Appellant,

versus

MARY CHAPMAN, INDIVIDUALLY,

Defendant – Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-742

Before Smith, Clement, and Oldham,
Circuit Judges.

JERRY E. SMITH, *Circuit Judge*

Joseph Cotropia sued Mary Chapman, an investigator for the Texas Medical Board ("TMB"), under 42 U.S.C. § 1983 for searching his medical office and seizing documents without a warrant. The district court granted Chapman's motion for summary judgment on the basis of qualified immunity ("QI"). We affirm.

I.

On February 13, 2015, the TMB issued a Final Order revoking Cotropia's medical license[1] because he had improperly prescribed controlled substances and had directed and supervised an unregistered pain management clinic ("PMC"), an entity that needed to be registered under Texas law. Tex. Occ. Code § 168.101. The TMB's Final Order instructed Cotropia to "immediately cease practice in Texas," explaining that violations could result in "disciplinary action by the Board or prosecution for practicing with-out a license in Texas."[2]

But Cotropia, by his own admission, continued to practice after the February 13, 2015, revocation, until March 20, 2015. After the TMB received a complaint against Cotropia, the TMB sent Chapman

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[1] *In re Cotropia*, SOAH Dkt. No. 503-13-3809 (Feb. 13, 2015), https://perma.cc/A2DX-QDBU ("Final Order")

[2] Final Order at 15. Cotropia asserts a slew of so-called "*Tolan* violations" under *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam), arguing that the district court improperly weighed the evidence by resolving disputed issues in favor of Chapman. Cotropia insists that he was not required to stop practicing medicine until March 20, 2015, because that was the day that the TMB denied his rehearing and the Final Order became final. But the Final Order required Cotropia to cease immediately. The denial of his motion for rehearing resulted only in "[a]dministrative finality," namely an exhaustion of the TMB's review for purposes of appeal. 22 Tex. Admin. Code § 187.37(*l*); *see Lawson v. Laird*, 443 F.2d 617, 619 (5th Cir. 1971) (summarizing the "test of administrative finality for purposes of judicial review"). Cotropia cites no evidence indicating that the TMB held the Final Order in abeyance pending review or gave overriding instructions permitting him to practice med-icine between February 13, 2015, and March 20, 2015.

to execute an administrative subpoena at Cotropia's office on March 27, 2015.[3] The subpoena directed Cotropia to produce copies of prescriptions and patient sign-in sheets from February 27, 2015, to the present.

Cotropia was away from his office that day, preparing for a hearing involving the TMB. Betty Spaugh, Cotropia's receptionist, remained at the office to handle communications with patients. Accompanied by a federal DEA agent, Chapman arrived at Cotropia's office and presented Spaugh with the administrative subpoena. After speaking on the phone with Cotropia's attorney, Spaugh requested that Chapman leave the office, but Chap-man stayed.

Chapman removed several documents from Spaugh's desk and made copies.[4] Those documents

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[3] Cotropia alleges another Tolan violation, noting that in its first sentence of background, the district court erroneously described the subpoena as an "administrative search warrant." That mistake, the argument goes, "shined a more favorable light on the unconstitutional actions of the administrative state, since a search based on a warrant would be reasonable under the Fourth Amendment." Cotropia devotes a solitary paragraph to this argument, and rightfully so. The district court conducted its analysis under the "Administrative Process Exception to the Warrant Requirement," demonstrating that the absence of a warrant was a baseline assumption of its analysis. Nowhere did the court suggest that Chapman's search was reasonable because she had a warrant.

[4] Here, Cotropia alleges another *Tolan* violation, claiming that the district court erroneously concluded that "Chapman was provided twenty-three documents before Spaugh refused to produce additional records." Cotropia fails to explain how Spaugh's consent to the search is relevant to this appeal. In any event, consent is a separate basis for finding that a search is

included appointment ledgers, a patient payment ledger,[5] sign-in sheets, and five credit card receipts showing payments to "T.E. Swate."[6] After an hour, a constable arrived and told Chapman to leave.

Cotropia filed this § 1983 action against Chapman for violations of his Fourth and Fourteenth Amendment rights based on Chapman's search and seizure of documents without a warrant. Chapman then moved to dismiss on the basis of QI. Although

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reasonable under the Fourth Amendment. *See City of L.A. v. Patel*, 576 U.S. 409, 420 (2015). Chapman relies on the administrative exception—not consent—to justify her search.

[5] Cotropia alleges another *Tolan* violation. The district court referred to those documents as "analogous to a patient log," although, the argument goes, they were actually "financial records" that are "outside the scope of the TMB's authority" to investigate. There are two problems with that theory—one legal, one factual. First, although 22 Texas Administrative Code § 179.4(a) allows the TMB to investigate only "medical records," Cotropia cites no legal authority suggesting that the presence of finan-cial information undermines the TMB's authority over a document that otherwise qualifies as a medical record. Second, Cotropia claims that "Chapman conceded to seizing financial records belonging to Dr. Cotropia." But Cotropia mischaracterizes the record. When asked whether particular documents were financial documents, Chapman answered "They are—" before being cut off by an objection. When allowed to answer, Chapman said that the documents "have financial information."

[6] T.E. Swate refers to Tommy Swate, a physician who lost his medical license for improperly treating chronic-pain and addiction patients. *See Swate v. Tex. Med. Bd.*, 2017 WL 3902621, at *1 (Tex. App.—Austin Aug. 31, 2017, pet. denied). Cotropia's 2015 prac-tice involved the care of patients whom Cotropia took over from Swate. Swate now works as a licensed attorney and serves as Cotropia's counsel in this matter.

the district court granted Chapman's motion to dismiss with prejudice, we reversed. *See Cotropia v. Chapman*, 721 F. App'x 354 (5th Cir. 2018) (per curiam). We concluded that Cotropia "alleged sufficient facts to show that Chapman . . . violated the clearly established right to an opportunity to obtain precompliance review of an administrative subpoena before a neutral decisionmaker." *Id.* at 357.

In that appeal, we declined to adopt two of Chapman's arguments. First, although we noted that 22 Texas Administrative Code § 179.4(a) and Texas Occupations Code § 153.007(e)—which to-gether constitute the TMB's subpoena authority—might provide the power to demand medical records on short notice, Chapman had not "made clear (on the arguments that she ha[d] provided thus far) whether § 179.4(a) applies to this situation at all." *Cotropia*, 721 F. App'x at 359.[7] Second, Chapman contended, at oral argument, that medical practices constitute "a closely regulated industry and that the regulatory scheme TMB has in place provides a constitutionally adequate substitute for a warrant" under *New York v.*

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[7] Our previous decision did not examine Chapman's authority under Texas Occupations Code § 168.052 or 22 Texas Administrative Code § 195.3—which together authorize the TMB to inspect pain management clinics—because "Chap-man ha[d] not argued that these provisions [were] sources of authority under which she operated." *Cotropia*, 721 F. App'x at 359 n.4. That led us to doubt whether Chapman's subpoena authority allowed her to "take the subpoenaed records by force." *Id.* at 359. On this appeal, Chapman has asserted her authority under §§ 168.052 and 195.3. Although Cotropia decries the TMB's taking of documents by "physical force," he does not contend that Chapman lacked authority to do so.

Burger, 482 U.S. 691 (1987). *Cotropia*, 721 F. App'x at 360. But because Chapman had not previously raised that argument, we declined to address it. *Id.*

On remand, after discovery, Chapman moved for summary judgment on the basis of QI. She argued that, because she reasonably relied on the Texas Administrative Code and Texas Occupations Code, her search was reasonable. The magistrate judge issued a Recommendation and Memorandum granting Chapman's motion, which the district court adopted in full, and Cotropia appeals.

II.

After a defendant makes a "good-faith assertion of [QI]," the burden of proof for summary judgment purposes "shift[s] . . . to the plaintiff to show that the defense is not available." *Melton v. Phillips*, 875 F.3d 256, 261 (5th Cir. 2017) (en banc) (quotation omitted). To satisfy its burden, a plaintiff must show "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc) (quotation omitted).

Cotropia contends that (1) Chapman violated his constitutional rights, by executing the administrative subpoena without any opportunity for Cotro-pia to obtain precompliance review, and (2) Cotropia's constitutional rights were clearly established at the time of the search. We agree that Chapman violated Cotropia's constitutional rights,

but the law was not clearly established at the time of the search.

A.

"Warrantless searches and seizures are per se unreasonable unless they fall within a few narrowly defined exceptions." *United States v. Kelly*, 302 F.3d 291, 293 (5th Cir. 2002) (quotation omitted). Two are relevant. First, as a general matter, "in order for an administrative search to be con-stitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Patel*, 576 U.S. at 420. Second, even without precompliance review, there is an "administrative exception," the relevant test for which comes from *Burger*. *Zadeh v. Robinson*, 928 F.3d 457, 465 (5th Cir. 2019), *cert. denied*, No. 19-676, 2020 WL 3146691 (U.S. June 15, 2020). Under *Burger*, "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.'" *Id.* at 464–65 (quoting *Burger*, 482 U.S. at 703). Because Chapman did not have a warrant and Cotropia had no opportunity for precompliance review of the subpoena, we analyze whether Chapman complied with the administrative exception.

Last year, in *Zadeh*—a case factually similar to this one—we examined whether the TMB's authority to investigate the medical industry as a whole—and

PMCs in particular—fell within the administrative exception under *Burger*. *Zadeh*, 928 F.3d at 466. We declined to apply *Burger* to the medical industry as a whole, because it "is not a closely regulated industry for purposes of *Burger*." *Id.* PMCs, on the other hand, are medical facilities in which "a majority of patients are issued on a monthly basis a prescription for opioids, benzodiazepines, barbiturates, or carisoprodol." Tex. Occ. Code § 168.001(1). Assuming that PMCs could be considered a closely regulated industry, we concluded that the TMB's administrative-subpoena authority for searching PMCs failed on the third prong of *Burger*. *Zadeh*, 928 F.3d at 466–68. That prong requires "a warrant substitute authorized by statute to be constitutionally adequate." *Id.* at 467. Constitutional adequacy in turn requires that "the regulatory statute . . . must limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 703.

Zadeh dealt with two sources of the TMB's authority. First, §§ 153.007(a) and 179.4(a) grant the TMB authority to issue administrative subpoenas. Those provisions, however, provide "no identifiable limit on whose records can properly be subpoenaed." *Zadeh*, 928 F.3d at 467. Sec-ond, §§ 168.052(a) and 195.3 grant the TMB authority to inspect PMCs. Those provisions, however, "d[o] not limit how the clinics inspected are chosen." *Zadeh*, 928 F.3d at 468. Given the dearth of constraints, we con-cluded that both sources of the TMB's authority failed under *Burger*. *Id.*

In the instant case, like *Zadeh*, Chapman relied on Texas Occupations Code §§ 153.007(a) and 168.052 and 22 Texas Administrative Code §§ 179.4(a) and 195.3 as the sources of her authority to execute the administrative subpoena and search Cotropia's office.[8] *Zadeh*'s *Burger* analysis, therefore, controls the constitutional question here. As Chapman concedes, "*Zadeh* already contains the very holding Cotropia asks the Court to announce in accordance with this constitutional analysis." Chapman thus violated Cotropia's constitutional rights when she copied documents in Cotropia's office without any precompliance review of the administrative subpoena.

B.

With the first prong satisfied, we address whether Cotropia's right to precompliance review was clearly established at the time of the search. In *Zadeh*, even though we concluded that the TMB's subpoena authority for searching pain management clinics was unconstitutional, we could not con-clude that "every reasonable official prior to conducting a search under the circumstances of this case would know this *Burger* factor was not satisfied." *Zadeh*, 928 F.3d at 470. We "[did] not hold that all reasonable officers would have known that, until now." *Id.* *Zadeh* was issued in 2019; Chapman searched Cotropia's office in 2015. Thus, at that time, it was not clearly established that her

[8] Unless otherwise noted, references to statutory provisions refer to the versions in effect on March 27, 2015, though they may have since been amended.

search per §§ 153.007(a), 168.052, 179.4(a), and 195.3 was unconstitutional. Cotropia seeks to avoid that conclusion by differentiating *Zadeh* in several respects.

1.

Cotropia tries to distinguish *Zadeh* by reasoning that, unlike the office in *Zadeh*, Cotropia's office was "undisputedly *not* a [PMC]." Because "it was clearly established at the time of this search that the medical profession as a whole is not a closely regulated industry," *Zadeh*, 928 F.3d at 468, Cotropia contends that "[e]very reasonable officer should have known that the closely regulated industry exception did not apply to the instant search of Cotropia's office."[9]

Cotropia is correct that his office was not registered as a PMC. The statute that provided the TMB authority to search Cotropia's documents, however, gives the TMB authority to investigate not only "a [PMC] certified under this chapter" but also "a physician who owns or operates a clinic in the same manner as other complaints under this subtitle." Tex.

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[9] Cotropia also styles this argument as a *Tolan* violation, claiming that "[t]he mistaken grant of summary judgement was entirely based on the false premise that Dr. Cotrpia's [*sic*] office was a pain management clinic." That is an odd assertion, given Cotro-pia's previous admission that "[n]either the court below nor Chapman have [*sic*] even at-tempted to claim that Cotropia's office was a [PMC]." In any event, although the district court described Cotropia's prior involvement with an unregistered PMC, the court dis-tinguished New Concept, which was Cotropia's office that Chapman searched, noting that it was not registered as a PMC.

Occ. Code § 168.053. For instance, in *Zadeh*, 928 F.3d at 470–71, the relevant clinic was not required to be registered as a PMC for an officer reasonably to have relied on the regulatory scheme relevant to PMCs. It is thus irrelevant whether Cotropia registered his office as a PMC. The question, instead, is whether Chapman was investigating a complaint that Cotropia was operating his clinic in the same manner as a PMC. Tex. Occ. Code § 168.053.

The record provides ample evidence that could lead a reasonable officer to believe that Cotropia operated New Concept in the same manner as a PMC. The TMB received allegations that Cotropia was operating an unregistered PMC. Cotropia, by his own admission, prescribed opioids through March 20, 2015, and previously had operated an unregistered PMC. His practice involved the care of patients whom he had taken over from Tommy Swate, whose medical license was revoked in 2014 for improper treatment of chronic-pain and addiction patients. Based on those undisputed facts, Chapman acted reasonably in relying on § 168.053 as authorizing her to investigate the allegations regarding Cotropia's practice.

2.

Cotropia claims that, unlike the physician in *Zadeh*, he is not a "licensee," and § 179.4(a) is limited to authorizing searches of "licensees."[10] He fails to fit

[10] In the first appeal, we noted that "Chapman has not made clear (on the argu-ments that she has provided thus far) whether § 179.4(a) applies to this situation at all, as Cotropia was not a 'licensee' at the time of Chapman's actions." *Cotropia*, 721 F.

the definition, the argument goes, because the TMB had already revoked his license before executing the administrative subpoena.

But Cotropia's initial definitional argument cites no definitions. And for good reason. Section 179 defines its terms: "Licensee" refers to "[a] person to whom the board ***has issued*** a license." 22 Tex. Admin. Code § 179.2(10) (emphasis added). The present perfect tense, "has issued," indicates that "licensee" includes any individual who received a license at some point in the past.[11]

Other sections of the Texas Administrative Code reinforce the conclusion that Cotropia counts as a licensee. For instance, the Code refers to physicians as "licensees" even after their licenses have been canceled or surrendered.[12] We presume that a given word is used consistently through-out the text of a statute.[13] Section 179.4 thus does not limit "licensees" to those who presently possess a valid license. Given

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App'x at 359. Our previous opinion, however, did not benefit from an analysis of § 179.2(10), and it explicitly conditioned its conclusion on the arguments presented "thus far." *Id.*

[11] *See Barrett v. United States*, 423 U.S. 212, 216 (1976) (concluding that the present perfect tense "denot[es] an act that has been completed").

[12] *See, e.g.*, 22 Tex. Admin. Code § 196.2(a) ("When a licensee has surren-dered his or her Texas medical license . . . ."); *id.* § 196.2(b) ("[A] licensee who reapplies for licensure must demonstrate that the licensee's return to the practice is in the best interest of the public.").

[13] *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 167–73 (2012).

the statutory definition and context, Cotropia was a licensee at the time of Chapman's search.

In response, Cotropia supplants his "non-licensee" argument with an argument that, at the time of the search, he was "*not* a physician."[14] For that proposition, Cotropia cites 22 Texas Administrative Code § 176.1(6)—a different chapter of the Code from § 179.4's administrative subpoena authority—which defines a "physician" as "any person licensed to practice medicine in this state." He then grafts § 176.1's definition onto § 179.4, because the title of § 179.4 is "Request[s] for Information and Rec-ords from ***Physicians***" (emphasis added). Even setting aside these statutory gymnastics, titles should be used in statutory interpretation only to resolve textual ambiguities, not to create a textual ambiguity that overrides a text's plain meaning. SCALIA & GARNER, *supra*, at 221–22.

Finally, Cotropia relies on the Cambridge Dictionary's definition of "licensee." But that doesn't supplant the definition by the Texas Legislature. Although we often use dictionaries in giving terms their ordinary meaning "[a]bsent a statutory definition," we need not resort to dictionary definitions where statutory definitions leave no

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[14] Cotropia raises this version of his argument for the first time in his reply brief. "[W]e ordinarily disregard arguments raised for the first time in a reply brief." *Sahara Health Care, Inc. v. Azar*, No. 18-41120, --- F.3d ---, 2020 U.S. App. LEXIS 29927, at *9 n.5 (5th Cir. Sept. 18, 2020). Though Cotropia arguably waived this theory, it also fails on the merits.

ambiguity. *United States v. Hildenbrand*, 527 F.3d 466, 476 (5th Cir. 2008).

3.

Cotropia contends that, unlike the search in *Zadeh*, Chapman's search was pretextual.[15] Chapman violated clearly established law, the argument goes, because her search was done "solely to gather evidence of a crime . . . and potentially to harass." The district court concluded there was no pre-text.[16] We agree.

"It is incorrect . . . to use the label 'pretext' simply because of an overlap between an administrative search and a criminal search." *Zadeh*, 928 F.3d at 471. States are free to "address a major social problem *both* by way of an administrative scheme *and* through penal sanctions." *Burger*, 482

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[15] Once again, Cotropia describes this argument as a *Tolan* violation. Cotropia posits that practicing without a license has criminal penalties only under Texas Occu-pations Code § 165.153 but that it would be impossible for the TMB to bring admin-istrative proceedings against him, as his "license had already been revoked." This appears to rehash Cotropia's "licensee" argument. As indicated above, the TMB retained author-ity to pursue actions against Cotropia even after his license had been revoked.

[16] The district court also concluded that the issue of pretext was "beyond the man-date of the remand" because Cotropia did not raise the issue in the district court before dismissal or before this court on his previous appeal. Cotropia contests that application of the mandate rule, and Chapman neglects to defend the district court's application of the mandate rule. Because there was no pretext, we need not decide whether the district court properly applied the mandate rule.

U.S. at 712. Because a search can further both administrative and penal ends, we determine pretext by asking "whether the search that occurred was under a scheme serving an administrative purpose." *Zadeh*, 928 F.3d at 471.

The TMB had received a complaint that Cotropia was operating an unregistered PMC.[17] Even though Cotropia's license had been revoked at the time of the search, the Board still had the power to take disciplinary action against him, to issue administrative penalties, and to seek injunctions. *See* Tex. Occ. Code §§ 153.001(3), 164.001(b), 165.051. Therefore, Chapman's search served an administrative purpose, even if the TMB ultimately declined to take further administrative action against Cotropia. The search was not pretextual.

AFFIRMED.

ANDREW S. OLDHAM, *Circuit Judge*, concurring:

I would avoid the constitutional question in this case. In *Zadeh v. Robinson*, 928 F.3d 457 (5th Cir. 2019), we held that certain searches by the Texas Medical Board ("TMB") violate the Fourth

[17] Cotropia repeatedly insists that Chapman knew or should have known that Cotropia was not engaged in the practice of medicine at the time of her search because it was a matter of public record that his license had been revoked as of March 20, 2015. But, particularly in light of the allegations against Cotropia, the Board and its investigators were under no obligation to presume that Cotropia was abiding by the revocation order (as he undisputedly had not from February 13 until March 20).

Amendment. I do not know whether *Zadeh* was correct as an original matter. For example, it could be argued that TMB resembles a guild. *See* Tex. Occ. Code § 152.002(a)(1) (requiring 12 of TMB's 19 members to be licensed physicians); *id.* § 152.001 (empowering TMB to regulate physicians); *Guild*, Black's Law Dictionary (11th ed. 2019) ("A group of persons sharing a common vocation who unite to regulate the affairs of their trade in order to protect and promote their common vocation"). And guild searches have a rich common-law history. As early as 1297, a London city ordinance empowered six particular clothworkers to "examine and search" all rough clothwork before it left the city. William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 33 (2009). Guild searches persisted through 1485, *see id.* at 33–37; from 1485 to 1642, *id.* at 54; from 1642 to 1700, *id.* at 159, 173; and from 1700 to 1760, *id.* at 304–05, 412–14. Such searches (and the reactions to them) are part of the original public meaning of our Fourth Amendment. *See id.* at 727–73; *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) ("In reading the [Fourth] Amendment, we are guided by the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing . . . ." (quotation omitted)). Perhaps *Zadeh* accords with this history and meaning; perhaps not.

For present purposes, all that matters is that we needn't decide the question. *See Pearson v. Callahan*, 555 U.S. 223, 236–42 (2009). Because regardless of whether the TMB investigator violated the Fourth Amendment, we all agree she is entitled to qualified immunity.

ENTERED: October 22, 2020

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20688

JOSEPH COTROPIA,

Plaintiff – Appellant,

versus

MARY CHAPMAN, INDIVIDUALLY,

Defendant – Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-742

Before Smith, Clement, and Oldham, *Circuit Judges.*

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

Andrew S. Oldham, *Circuit Judge*, concurring.

ENTERED: September 12, 2019

IN THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HUSTON DIVISION

JOSEPH COTROPIA,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
v.	§	H-16-0742
	§	
MARY CHAPMAN,	§	
	§	
Defendant.	§	

ORDER ADOPTING
MEMORANDUM AND RECOMMENDATION

In accordance with the Order Adopting Memorandum and Recommendation, it is **ADJUDGED** that plaintiff Joseph Cotropia take nothing against defendant Mary Chapman.

Defendant is awarded her costs.

THIS IS A FINAL JUDGMENT.

SIGNED this 12th day of September, 2019, at Houston, Texas.

/s/ Sim Lake
SIM LAKE
SENIOR UNITED STATES
DISTRICT JUDGE

ENTERED: September 12, 2019

IN THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HUSTON DIVISION

JOSEPH COTROPIA,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
v.	§	H-16-0742
	§	
MARY CHAPMAN,	§	
	§	
Defendant.	§	

ORDER ADOPTING
MEMORANDUM AND RECOMMENDATION

Pending before the court are the Magistrate Judge's Memorandum and Recommendation (Docket Entry No. 73) and Plaintiff Joseph Cotropia's Written Objections to the Magistrate's Memorandum and Recommendation (Docket Entry No. 74).

The court must review de novo portions of the Magistrate Judge's proposed findings and recommendations on dispositive matters to which the parties have filed specific, written objections. See Fed. R. Civ. P. 72 (b); 28 U.S.C. § 636 (b) (1).

The court has reviewed plaintiff's objections and concludes that the purported fact issue of whether Chapman took the subpoenaed records from Cotropia's receptionist or was given the records is

immaterial to the court's determination that Chapman was entitled to qualified immunity for the seizure of the documents pursuant to the instanter subpoena. Plaintiff's objections are therefore **OVERRULED,** and the Memorandum and Recommendation is **ADOPTED** by the court.

SIGNED this 12th day of September, 2019, at Houston, Texas.

/s/ Sim Lake
SIM LAKE
SENIOR UNITED STATES
DISTRICT JUDGE

ENTERED: August 21, 2019

IN THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH COTROPIA,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
v.	§	H-16-0742
	§	
MARY CHAPMAN,	§	
	§	
Defendant.	§	

MEMORANDUM AND RECOMMENDATION

Pending before the court is Defendant Chapman's Motion for Summary Judgment (Doc. 66) and the response filed thereto. For the reasons discussed below, it is **RECOMMENDED** that the motion be **GRANTED**.

I. Case Background

Plaintiff Joseph Cotropia ("Cotropia") brings this action against an investigator for the Texas Medical Board ("TMB") alleging constitutional violations arising out of the execution of an administrative search warrant at his place of business.

A. Factual Background

Cotropia is the former supervising physician of a pain management clinic in Houston, Texas.[1] On February 13, 2015, the TMB revoked Cotropia's license to practice medicine after he was found to have failed to comply with the required standard of care for the treatment of chronic pain.[2] The revocation was based on an administrative law judge's findings that Cotropia violated the Medical Practices Act and TMB rules by prescribing opioids and other controlled substances that were not therapeutic, by failing to maintain records that supported the prescribed therapeutic regime, for inadequately supervising midlevel providers and working at an unregistered, uncertified pain management clinic.[3] That revocation became final on March 17, 2015.[4] Cotropia prescribed opioid medications until March 20, 2015.[5]

On March 27, 2015, Defendant Mary Chapman ("Chapman"), an investigator for the TMB, traveled to Cotropia's office at the direction of her supervisor

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[1] See Doc. 9-1, Ex. A to Defs.' Mot. to Dismiss, Proposal for Action pp. 4, 6.

[2] See Doc. 9-2, Ex. B to Defs.' Mot. to Dismiss, TMB Minutes Dated Feb. 13, 2015.

[3] See Doc. 9-1, Ex. A to Defs.' Mot. to Dismiss, Proposal for Action pp. 4, 6.

[4] See Doc. 66-8, Ex. G to Def.'s Mot. for Summ. J., Dep. of Cotropia p. 17.

[5] See id. p. 18. Cotropia claimed that his attorney, Thomas Swate, who officed in a connecting suite, failed to notify him of the revocation. See id. p. 14.

with an instanter subpoena to search for patient sign-in sheets for all patients seen from February 27, 2015, to the present, and copies of all prescriptions written from February 27, 2015, to the present.[6] Chapman was accompanied by a Drug Enforcement Administration ("DEA") agent.[7]

Chapman presented the instanter subpoena to Cotropia's receptionist, Betty Spaugh ("Spaugh").[8] Spaugh initially stated that she was the record custodian for Cotropia's records and agreed to produce the records but, after talking with Cotropia's attorney, Spaugh denied that she had access to Cotropia's records.[9] Chapman was provided twenty-three documents before Spaugh refused to produce additional records.[10] The DEA agent called for police backup.[11] After a deputy constable arrived, Chapman and the DEA agent left with the twenty-three documents initially provided; Chapman did not consider this to be full compliance with the

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[6] See Doc. 66-9, Ex. H to Def.'s Mot. for Summ. J., Chapman's Dep. p. 2; Doc. 66-3, Ex. B to Def.'s Mot. for Summ. J., Subpoena Duces Tecum p. 3.

[7] See Doc. 66-9, Ex. H to Def.'s Mot. for Summ. J., Chapman's Dep. p. 3.

[8] See id.

[9] See id.

[10] See Doc. 66-2, Ex. A to Def.'s Mot. for Summ. J., Aff. of Chapman p. 2.

[11] See id.

subpoena.[12] This encounter spanned approximately one hour.[13]

B. Procedural History

On March 21, 2016, Cotropia filed suit pursuant to 42 U.S.C. § 1983 against Chapman, the TMB, nineteen members of the TMB, and the executive director of the TMB for violations of his Fourth and Fourteenth Amendment rights arising from the "warrantless search and seizure of documents."[14] Cotropia also alleged that the TMB'sfailure to train Chapman caused Cotropia's constitutional injuries.[15]

On June 9, 2016, Defendants filed a motion to dismiss and on June 28, 2016, Defendants filed an amended motion to dismiss.[16] Cotropia responded on July 12, 2016, and a reply brief was filed by Defendants on July 28, 2016.[17] In their motions to dismiss, Defendants argued that sovereign immunity barred Cotropia's claims against the TMB and its members sued in their official capacities, Cotropia

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[12] See id. p. 3.

[13] See Doc. 69, Ex. G to Pl.'s Resp. to Def.'s Mot. for Summ. J., Betty Spaugh's Aff. p. 2.

[14] See Doc. 1, Pl.'s Orig. Compl. pp. 5-6.

[15] See id. pp. 6-7.

[16] See Doc. 4, Defs.' Mot. to Dismiss; Doc. 9, Defs.' Am. Mot. to Dismiss.

[17] See Doc. 13, Pl.'s Resp.; Doc. 18, Defs.' Reply.

lacked standing to assert claims for injunctive relief and Chapman was entitled to qualified immunity.[18]

On November 16, 2016, the court granted Defendants' motion and dismissed the action with prejudice.[19] Plaintiff appealed the dismissal to the Court of Appeals for the Fifth Circuit.[20] On June 2, 2017, the appeal was dismissed for want of prosecution.[21] On June 19, 2017, the appellate court reopened the appeal.[22]

On March 27, 2018, the Fifth Circuit affirmed the dismissal of the TMB, the members of the TMB, and the Board's executive director ("Cotropia I").[23] The court reversed the dismissal of the claims against Chapman.[24] In doing so, the court found that Cotropia had alleged sufficient facts to show that Chapman's taking documents from Cotropia's office over his receptionist's objection violated Cotropia's clearly established right to an opportunity to obtain a precompliance review of the administrative subpoena. In so holding, the court expressly recognized that there were statutory and regulatory provisions that granted the TMB instanter inspection authority but, as those arguments were not raised by

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[18] See Doc. 9, Defs.' Am. Mot. to Dismiss pp. 10-12, 16-22.

[19] See Doc. 20, Ord. Dated Nov. 16, 2016.

[20] See Doc. 21, Not. of Appeal.

[21] See Doc. 27, Ord. Dated June 2, 2017.

[22] See Doc. 28, Ord. Dated June 19, 2017.

[23] See Doc. 32, Per Curiam Op. p. 2.

[24] See id. pp. 6-7.

Chapman in the lower court, it did not consider them. The court also refused to consider as untimely Chapman's Burger[25] argument that the practice of medicine was a closely regulated industry and therefore its regulatory scheme was a constitutionally adequate substitute for a warrant.[26]

After remand, the parties engaged in discovery and, on November 2, 2018, Defendant Chapman filed her motion for summary judgment on the issue of qualified immunity. Briefing is complete and the court now considers the motion.

II. Legal Standards

A. Summary Judgment Standard

Summary judgment is warranted when the evidence reveals that no genuine dispute exists regarding any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Stauffer v. Gearhart, 741 F.3d 574, 581 (5th Cir. 2014). A material fact is a fact that is identified by applicable substantive law as critical to the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Ameristar Jet Charter, Inc. v. Signal Composites, Inc., 271 F.3d 624, 626 (5th Cir.

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[25] See New York v. Burger, 482 U.S. 691 (1987); Beck v. Tex. State Bd. of Dental Exam'rs, 204 F.3d 629 (5th Cir. 2000)(finding that the Texas Controlled Substances Act gave the investigators and the DPS agent the right to conduct an instanter warrantless search of a dentist's office).

[26] See Doc. 32, Per Curiam Op. p. 9.

2001). To be genuine, the dispute regarding a material fact must be supported by evidence such that a reasonable jury could resolve the issue in favor of either party. See Royal v. CCC & R Tres Arboles, L.L.C., 736 F.3d 396, 400 (5th Cir. 2013)(quoting Anderson, 477 U.S. at 248).

The movant must inform the court of the basis for the summary judgment motion and must point to relevant excerpts from pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of genuine factual issues. Celotex Corp., 477 U.S. at 323; Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992). The movant may meet this burden by demonstrating an absence of evidence in support of one or more elements of the case for which the nonmovant bears the burden of proof. See Celotex Corp., 477 U.S. at 322; Exxon Corp. v. Oxxford Clothes, Inc., 109 F.3d 1070, 1074 (5th Cir. 1997). If the movant carries its burden, the nonmovant may not rest on the allegations or denials in the pleading but must respond with evidence showing a genuine factual dispute. Stauffer, 741 F.3d at 581 (citing Hathaway v. Bazany, 507 F.3d 312, 319 (5th Cir. 2007)).

B. Section 1983 and Fourth Amendment Standards

In order to prevail on a claim under Section 1983,[27] a plaintiff must establish that the defendant

[27] The provision reads, in relevant part:

deprived the plaintiff of his constitutional rights while acting under the color of state law. Moody v. Farrell, 868 F.3d 348, 351 (5th Cir. 2017). Government officials have qualified immunity from Section 1983 "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009)(quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

Plaintiff's claim of unreasonable seizure of records arises pursuant to the protections of the Fourth Amendment. The Fourth Amendment,[28] applied to state actors through the Fourteenth

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

[28] The full text of the Fourth Amendment is:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Reasonableness is the ultimate measure of the constitutionality of a seizure of person or property. See Trent v. Wade, 776 F.3d 368, 377 (5th Cir. 2015)(quoting Fernandez v. California, 571 U.S. 292, 298 (2014)).

Qualified immunity protects an officer even for reasonable mistakes in judgment. See id. (quoting Groh v. Ramirez, 540 U.S. 551, 567 (2004))("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'"); Ashcroft v. Al-Kidd, 563 U.S. 731, 743 (2011)("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.").

By invoking qualified immunity, a summary judgment movant shifts the burden to the nonmovant to rebut the movant's assertion. Cantrell v. City of Murphy, 666 F.3d 911, 918 (5th Cir. 2012). In order to overcome an assertion of qualified immunity, a plaintiff must produce evidence that the alleged conduct violated a statutory or constitutional right and that the right was clearly established at the time of the challenged conduct. See Morgan v. Swanson, 659 F.3d 359, 371 (5th Cir. 2011). The Supreme Court has held that the order in which these two considerations are addressed is at the court's discretion. See Pearson, 555 U.S. 818-21.

III. Analysis

In her motion for summary judgment, Chapman argues that in March 2015, she did not have fair notice that the use of an instanter subpoena was constitutionally limited and therefore she is entitled to qualified immunity. Chapman also argues that the practice of medicine is a closely regulated business that qualifies under an exception to precompliance review of an administrative subpoena, as authorized by New York v. Burger, 482 U.S. 691, 702 (1987), and its progeny.

Plaintiff counters that because his license to practice medicine had been revoked, the primary purpose of the instanter subpoena must have been pretextual and thus was an improper use of the administrative process. Cotropia also complains that Chapman seized financial records outside the scope of the subpoena.

A. Administrative Process Exception to the Warrant Requirement

It is well-settled that the Fourth Amendment's prohibition of unreasonable searches and seizures is applicable to commercial premises, with the caveat that a business owner's expectation of privacy is less than that expected in an individual's home. See See v. City of Seattle, 387 U.S. 541, 543 (1967); Donovan v. Dewey, 452 U.S. 594, 598-599 (1981). The Supreme Court has found that the expectation of privacy was "particularly attenuated" in commercial property

engaged in "closely regulated" industries. See Katz v. United States, 389 U.S. 347, 351-52 (1967).

In Burger, the owner of a junkyard objected to an warrantless search of his business that was authorized by a state statute regulating vehicle-dismantling/automobile junkyard businesses. See Burger, 482 U.S. at 693-94, 698. After the officers found evidence of stolen vehicles, the owner was arrested. Id. at 695-96. The owner moved to suppress the evidence on the ground that the statute permitting the warrantless inspection was unconstitutional. Id. at 696. The trial court held that the junkyard business was a "pervasively regulated" industry in which warrantless administrative inspections were appropriate. Id. The court of appeals reversed, finding that the statute violated the Fourth Amendment's prohibition of unreasonable searches because it authorized searches to be undertaken to uncover evidence of criminality and not to enforce a regulatory scheme. Id. at 698.

The Supreme Court reversed and found that a warrantless inspection of commercial premises in a "closely regulated" industry could satisfy the Fourth Amendment's reasonableness standard if three criteria were met. Id. at 702. First, there must be a substantial government interest that underpinned the regulatory scheme and the related inspection. Id. Second, the warrantless inspection must be necessary to further the regulatory scheme. Id. And, finally, the inspection program must provide a "constitutionally adequate substitute for a warrant." Id. at 703. In the context of a warrantless inspection, the statute must

advise the owner of the property that the search was made pursuant to the law, and the statute limited the discretion of the searching officers as to time, place and scope of items searched. Id.

Applying those factors to the search of Burger's junkyard, the court found that the regulation of auto dismantlers was a new branch of the historically closely regulated business of operating a junkyard. Id. at 707. Addressing the second factor, the Court rejected the court of appeals' concern that the warrantless search was a pretext for a search to uncover evidence of criminality and found that the state could address a major social problem with both an administrative scheme and criminal penalties. Id. at 712. Concluding, the court determined that the challenged statute adequately informed the owner of such a business that inspections would be made on a regular basis by those authorized by the statute and that searches were limited to records, vehicles and vehicle parts on the premises during business hours. Id.

In Beck v. Tex. Bd. of Dental Examiners, 204 F.3d 629, 632 (5th Cir. 2000), the Fifth Circuit applied the Burger exception to allow an instanter inspection of a dental office based on allegations of the mishandling of controlled substances. There, the Fifth Circuit determined that there was a significant state interest in the regulation of a dentist's use of controlled substances and the search was conducted pursuant to two regulatory schemes. The appellate court found that there was an adequate substitute for a warrant where the statute permitted an administrative inspection by a credentialed official during "reasonable times," and "after stating his

purpose." Id. at 638. The court also favorably cited the regulatory scheme that allowed notice and an opportunity to be heard at a subsequent disciplinary hearing, the results of which were appealable in district court. Id. at 635.

Recently, in Zadeh v. Robinson, 928 F.3d 457, 462 (5th Cir. 2019), a different result was reached on an instanter subpoena issued by the TMB. Zadeh, an internal medicine doctor, was the subject of an investigation for violations of the TMB's regulations. At the request of a DEA agent, the TMB initiated an instanter inspection of Zadeh's office. Id. Zadeh and a patient sued for violations of their Fourth Amendment, due process and privacy rights based on that instanter inspection. Id. at 463.

Relevant to the present issue, the district court considered whether the TMB defendants exceeded their statutory subpoena authority by searching and inspecting Zadeh's office and records. Id. at 463. The court ultimately dismissed all Zadeh's constitutional claims. Id.

On appeal, the Fifth Circuit considered whether the TMB violated the Fourth Amendment when it demanded instanter compliance with its administrative subpoena. Id. at 464. Attempting to evade he court's Cotropia I holding that, absent exigent circumstances, the subject of an administrative search must be afforded an opportunity for a precompliance review of the subpoena, the TMB argued that the practice of medicine was a closely regulated industry and fell within the Burger exception to Fourth Amendment's

requirement of a warrant or other precompliance process. Id. at 464-65.

Conceding that the practice of medicine was an extensively regulated profession and had licensure requirements, the Fifth Circuit nonetheless held that various regulatory schemes concerning the operation of pain clinics and the dispensing of controlled substances did not support a conclusion that the medical profession had a history of permitting warrantless inspections and searches of a doctor's office. Id. at 466.

After finding that Zadeh's Fourth Amendment rights had been violated, the court turned to whether the law was clearly established at the time of the search, on October 22, 2013. The court found that the parameters of Burger and Beck were not so clearly established that all reasonable officers would have known that the Burger factors were not present in the context of the administrative search of a doctor's office at the time of the search. Id. at 470. Notably, Zadeh cited no pre-March 2015 case that would have put the TMB on notice that the instanter subpoena would not pass constitutional muster as it had in Beck.

Applying the above legal landscape to the present facts, it was not until August 31, 2018, when the court issued its first opinion in Zadeh, that the TMB and its employees were put on notice that its instanter subpoena process fell outside the Burger and Beck exception. One only needs to read the Fifth Circuit decisions in Cotropia I (March 27, 2018) and Zadeh (July 2, 2019), to conclude that the law was not clearly established in 2015 when Chapman served the instanter subpoena on Cotropia. Prior to those cases,

the TMB could arguably rely on Beck's approval of the instanter subpoena process. Therefore, Chapman is entitled to qualified immunity for the execution of the instanter subpoena on March 27, 2015.

B. Pretext

Cotropia argues that the instanter subpoena was constitutionally invalid because it was a pretext for a criminal investigation. Chapman argues that this argument is barred by the mandate rule and, alternatively, argues that Cotropia's pretext argument fails as a matter of fact and law.

The mandate rule is a corollary of the law of the case doctrine, which prohibits the district court from addressing issues that were beyond the mandate from the appellate court on remand. See United States v. Lee, 358 F.3d 315, 320 (5th Cir. 2004). "Absent exceptional circumstances, the mandate rule compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court. Lee, 358 F.3d at 321 (citing U.S. v. Bell, 988 F.2d 247, 251 (1st Cir. 1993)). The mandate rule bars litigation of those issues decided by the district court or those otherwise waived because they were not raised in the district court. See id. (citing Bell, 988 F.2d at 250). The Fifth Circuit has stated, "Remand is not the time to bring new issues that could have been raised initially." United States v. McCrimmon, 443 F.3d 454, 459 (5th Cir. 2006)("All other issues not arising out of this court's ruling and not raised before the appeals court, which could have been brought in the original appeal, are not proper for reconsideration by the district court below."); see also Henderson v. Stalder, 407 F.3d 351,

354 (5th Cir. 2005)(commenting that the narrow ground for remand was not an invitation to add new claims or rationales). In the present case, Plaintiff failed to raise the issue of pretext as a challenge to the instanter subpoena in his complaint or his response to the original motion to dismiss.[29] The only issues before this court on remand were whether Cotropia's claim against Chapman in her individual capacity was barred by qualified immunity, whether there was a consent to search and whether the medical profession was a closely regulated industry.[30]

The court concludes that whether the instanter subpoena was a pretext for collecting information for a criminal investigation was not raised before the district court prior to the court's dismissal of the action and was not raised before the appellate court. As a result, Plaintiff may not raise the issue now as it is beyond the mandate of the remand. Even if the court were to consider this issue, Plaintiff has failed to support his pretext argument with relevant facts or applicable case law.

In Zadeh, the TMB investigator searched Zadeh's medical office accompanied by a DEA agent. See Zadeh, 928 F.3d at 471. Relying on United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983) and United States v. Thomas, 973 F.2d 1152, 1155-56 (5th Cir. 1992), the Fifth Circuit rejected Zadeh's argument that the DEA agent's presence was evidence of a pretextual search because the TMB had a valid reason to search the medical office. Id. An

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[29] See Doc. 1, Pl.'s Orig. Compl.; Doc. 6, Pl.'s 1st Am. Orig. Compl.; Doc. 13, Pl.'s Resp. to Defs.' Mot. to Dismiss,

[30] See Doc. 32, Per Curiam Op., pp. 9-11.

administrative search was improper only when performed "solely to uncover evidence of criminality." Id. at 472 (citing Burger, 482 U.S. at 698).

Here, Cotropia has failed to adduce any evidence that the search of his office was solely to investigate a crime. Rather, it appears undisputed that the TMB was searching his office to determine if he was practicing medicine after his license had been suspended, a legitimate administrative purpose. Chapman is entitled to summary judgment on this issue.

C. Scope of the seizure

Cotropia argues that some of the records seized by Chapman exceeded the express scope of the instanter subpoena and, therefore, Chapman violated Cotropia's constitutional rights. Chapman counters that Cotropia has expressly disclaimed any ownership interest in those particular records seized and, therefore, lacks standing to complain about the seizure of those records.

It is well-settled that Fourth Amendment rights are personal rights that may only be asserted by the person whose rights were violated. Rakas v. Illinois, 439 U.S. 128, 133-34 (1978). In Rakas, the Supreme Court found that two passengers in a vehicle searched by police had no ownership interest in the vehicle or otherwise a reasonable expectation of privacy in the vehicle. Cotropia only has a Fourth Amendment right to privacy concerning his own records, not records belonging to another. Id.

The subpoena commanded Cotropia to produce: (1) patient signin heets and/or patient log/register for

all patients evaluated from February 27, 2015, to the present date; and (2) copies of any and all prescriptions issued for February 27, 2017, to the present date.[31] Only twenty-three pages of documents were actually seized by Chapman that day. Those documents were: (1) thirteen pages of an appointment ledger for the relevant time period; (2) a blank page; (3) two sign-in sheets for "T.E. Swate, M.D." dated February 25-27, 2015; (4) a two-page ledger reflecting patient payments for February 27, 2015, to Dr. Cotropia; and (5) five credit card receipts showing payments to T.E. Swate ranging from $85 to $195 on February 27, 2015.

At his deposition, Cotropia agreed that the patient sign-in ledgers belonged to his practice.[32] He also agreed that the patient sign-in ledgers captioned "T.E. Swate, M.D." were used by him on the dates reflected.[33] Those documents in categories 1 and 3 fall within the plain reading of the subpoena.[34] Category 4, the two-page ledger from February 27, 2015, showing patient names and payments also falls within the plain language of the subpoena because it discloses the patients seen on a that day and therefore is analogous to a patient log or register. As these records were within the scope of the subpoena,

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[31] See Doc. 66-3, Ex. B to Def.'s Mot. for Summ. J., Subpoena Duces Tecum p. 3.

[32] See Doc. 66-8, Ex. G. to Def.'s Mot. for Summ. J., Dep. of Cotropia pp. 6-7.

[33] See id. p. 7.

[34] As to category 2, the seizure of a blank sheet of paper does not raise a constitutional claim.

Cotropia's argument that the documents seized were outside the scope of the subpoena fails.

Category five, the credit card receipts for T.E. Swate, does not fall within the subpoena. However, Cotropia disavowed any knowledge or ownership of the Swate receipts.[35] Cotropia even denied that they had been seized from his office on March 27, 2015.[36] Based on his testimony, Cotropia lacks standing to complain about the wrongful seizure of these credit card receipts. Chapman is entitled to summary judgment on this claim.

IV. Conclusion

Based on the foregoing, the court **RECOMMENDS** that Defendant's Motion for Summary Judgment be **GRANTED.**

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties who have fourteen days from the receipt thereof to file written objections thereto pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002-13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk

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[35] See Doc. 66-8, Ex. G. to Def.'s Mot. for Summ. J., Dep. of Cotropia p. 14.

[36] See id. Cotropia stated, "I don't know where they were recovered from." When asked if the credit card Receipts were his, he responded, "No," for each receipt. Id. p. 15.

electronically. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

SIGNED in Houston, Texas, this 21st day of August, 2019.

/s/ Nancy K. Johnson
Nancy K. Johnson
United States Magistrate Judge

ENTERED: December 2, 2020

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20688

JOSEPH COTROPIA,

Plaintiff – Appellant,

versus

MARY CHAPMAN, INDIVIDUALLY,

Defendant – Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-742

Before Smith, Clement, and Oldham, *Circuit Judges*.

ON PETITION FOR REHEARING EN BANC

(Opinion 978 F.3d 282 (5th Cir. Oct. 22, 2020))

Before Smith, Clement, and Oldham, *Circuit Judges*.

Per Curiam:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. No member of the panel or judge in regular active service having requested that the court be polled on rehearing en banc (FED. R. APP. P. 35; 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.