No._____

In The

Supreme Court of the United States

DR. GENE N. BARRY

Petitioner,

v.

SCOTT M. FRESHOUR; BELINDA WEST; MARI ROBINSON; ANNE RAUCH; MARY CHAPMAN; DEBBI HENNEKE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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May 10, 2019

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APPENDIX A

[Filed October 26, 2018]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-20726

DOCTOR GENE N. BARRY,

Plaintiff - Appellee

v.

SCOTT M. FRESHOUR; BELINDA WEST; MARI ROBINSON; ANNE RAUCH; MARY CHAPMAN; DEBBI HENNEKE,

Defendants - Appellants

Appeal from the United States District Court for the Southern District of Texas

Before SMITH, CLEMENT, and COSTA, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Plaintiff Gene Barry is a physician licensed to practice medicine in Texas, who works part-time at the Red Bluff Clinic in Pasadena.[97] Defendants Scott

[97] As this case comes to us on appeal from a motion to dismiss, we rely on the verified complaint for an account of

Freshour, Belinda West, Mari Robinson, Anne Rauch, Mary Chapman, and Debbi Henneke are all employees of the Texas Medical Board ("TMB") serving in various roles.

On May 7, 2015, a TMB employee signed an administrative subpoena instanter[98] on behalf of Mari Robinson, the executive director for TMB. The subpoena targeted "Barry . . . and/or Records Custodian" at the Red Bluff Medical Clinic, requiring them "to personally appear . . . before the [TMB], and . . . provide to [the TMB] the documents" listed in an attachment. The attached list included medical and billing records concerning Barry's patients.

TMB investigators Rauch, Chapman, West, and Henneke then arrived at the clinic, accompanied by U.S. Drug Enforcement Administration ("DEA") agents, Texas Department of Public Safety officers, and Texas Board of Nursing investigators. They demanded that the identified records be handed over immediately. Barry and his attorney, whom he had called to the clinic, refused to consent, prompting some of the officials to leave. But Rauch stayed, insisting that she speak with Freshour, TMB's general counsel, before deciding whether to go. Barry's

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the facts. *See Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007) (per curiam).

98 The subpoena instanter is defined by the Texas Administrative Code as a subpoena requiring immediate compliance. Specifically, the regulation provides that "[i]f immediate production is not made in compliance with the subpoena, the board, acting through the attorney general, may file suit to enforce the subpoena in a district court in Travis County." 22 Tex. Admin. Code § 195.3(f).

attorney then called Freshour, who refused to order the investigators to leave.

The investigators then informed the Clinic's Administrator—who also served as its records custodian—that "she could be detained by [the Department of Public Safety]" or that "TMB investigators would merely go through *all* of the clinic's files instead." After this statement, the Administrator decided to comply. The Administrator delivered stacks of files to the investigators, who, in turn, "sat on the floor and [went] through [the] files" with a Department of Public Safety officer. Barry alleges that, contrary to the subpoena's terms, the investigators "did not randomly choose" the records, but instead "looked through each file in the stack[s] . . . and cherry-picked only the files . . . they believed to be incomplete or deficient."

Barry filed suit on May 6, 2017, seeking relief under 42 U.S.C. § 1983 and alleging a violation of his Fourth Amendment rights. On September 11, 2017, the defendants moved to dismiss, arguing (in pertinent part) that Barry lacked standing to raise his claims and that the state officials were entitled to qualified immunity. The district court denied the motions as to those grounds on October 18, 2017, and the defendants timely appealed.

The Supreme Court has long held that a claimant alleging a Fourth Amendment violation "must have a cognizable Fourth Amendment interest"— a concept known as "Fourth Amendment standing." *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018). This is so because "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 133–34

(1978) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969), and collecting cases). In other words, "the application of the Fourth Amendment depends on whether the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (internal quotation marks omitted). This is the plaintiff's burden to prove. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980). The Supreme Court has articulated the Fourth Amendment interest as a "reasonable expectation of privacy," defined by "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *United States v. Jones*, 565 U.S. 400, 408 (2012) (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)).

Barry's attempt to establish such an interest is unavailing. Barry neither owns nor operates the Red Bluff Clinic where the records were filed. He is not its records custodian. Instead, he merely works there on a part-time basis. Barry does not argue that he has an ownership or possessory interest in the records seized. Indeed, he appears to concede as much on appeal. Moreover, Barry has not alleged that the TMB conducted a search of any area in which he had a privacy interest. *Cf. Mancusi v. DeForte*, 392 U.S. 364, 367–68 (1968) (when records seized do not belong to an individual, Fourth Amendment standing is only possible if the search itself violated "a reasonable expectation of freedom from governmental intrusion").

Instead, Barry relies on a list of pure privacy interests in the information the records contain. All

but one, as he concedes, are specifically tied to his *patients'* privacy interests in their own medical records. To the extent such interests are constitutionally cognizable, they cannot be asserted by Barry. *Rakas*, 439 U.S. at 133–34. The sole remaining interest he proffers relies on a passing assumption by the Supreme Court when it discussed the merit of a state's justification for a statute regulating speech: *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011). *Sorrell* is a First Amendment case, which merely observes that states have a legitimate interest in protecting the privacy of medical records on behalf of doctors. *See id.* at 571–72. We decline to infer from *Sorrell* a reasonable expectation of privacy in patient records on the part of doctors against the TMB under the Fourth Amendment.

The district court concluded Barry had standing because the records were sought in a proceeding against him and the subpoena was addressed to him personally (though it was also addressed to the records custodian). But the Supreme Court has rejected a "target" approach to Fourth Amendment standing that would look to whether the evidence obtained could be used against the person seeking to challenge the search. *Rakas*, 439 U.S. at 132–38. It has instead focused on whether the person raising the Fourth Amendment claim has a protected property or privacy interest in the place or things searched. For the reasons we have discussed, Barry does not have such an interest.

Accordingly, Barry has failed to show a sufficient interest to assert a Fourth Amendment claim. Without a cognizable interest in the subpoenaed records, Barry cannot assert a Fourth

Amendment violation. His claim must be dismissed.[99] Accordingly, we REVERSE the district court and RENDER judgment in favor of the defendants.

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[99] We note that the constitutionality of TMB's administrative searches has been a subject of significant litigation of late. Indeed, this court recently held that the agency's use of its subpoena authority to gain immediate access to medical records violated the Fourth Amendment. *See Zadeh v. Robinson*, No. 17-50518, 2018 WL 4178304, at **3–6 (5th Cir. Aug. 31, 2018). The *Zadeh* panel still afforded the TMB officials qualified immunity protection, however, since the search's illegality had not yet been clearly established at the time of the search. *Id.* at **6–7.

The parties contest the meaning and impact of *Zadeh*'s holding, but a key factual distinction establishes its irrelevance: In *Zadeh*, the plaintiff—also a doctor—owned and operated the practice from which TMB seized medical records. *Id.* at *1. Accordingly, he had a Fourth Amendment interest that Barry does not possess.

APPENDIX B

[Filed October 18, 2017]

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

GENE N. BARRY,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	H-17-1403
SCOTT M. FRESHOUR,	§	
et al.,	§	
Defendants.	§	

MEMORANDUM AND ORDER

This case challenges an administrative subpoena used to seize patient records in a medical clinic suspected of operating as a "pain mill." The plaintiff, Dr. Gene N. Barry, is a licensed physician practicing medicine in Texas. He filed this suit under 42 U.S.C. § 1983 against Mari Robinson, the executive director of the Texas Medical Board; Anne Rauch, Mary Chapman, Debbi Henneke, and Belinda West, Board investigators; and Scott Freshour, the Board's general counsel, alleging Fourth Amendment violations. (Docket Entry Nos. 1, 12). The defendants filed a motion to dismiss. (Docket Entry No. 15). Based on the pleading, the record, the applicable law, and the arguments of counsel at an oral hearing, the motion is granted in part and denied in part for the reasons stated in detail below.

I. Background

The following facts are alleged in Dr. Barry's complaint. On May 7, 2015, a Texas Medical Board employee signed executive director Mari Robinson's name on an administrative subpoena instanter addressed to Dr. Barry, covering patient records located at the Red Bluff Medical Clinic in Pasadena, Texas. (Docket Entry No. 12, at ¶ 13). Dr. Barry worked at the clinic part-time. *Id.* at ¶ 25. That same day, Texas Medical Board investigators, including Rauch, Chapman, West, and Henneke, entered the clinic. They were accompanied by U.S. Drug Enforcement Administration agents, Texas Department of Public Safety officers, and Texas Board of Nursing investigators. *Id.* at ¶¶ 14–15. The Texas Medical Board investigators stated that they were in the clinic to do an investigation and instructed the Texas Department of Public Safety officers to turn off any security cameras, which they did. *Id.* at ¶ 19–21. Clinic staff turned the cameras back on, and the officers turned them off again, throughout the day, until the Texas Medical Board investigators forbade the clinic staff from going into the room where the cameras were located. *Id.* at ¶¶ 22–23.

Dr. Barry arrived shortly after the Texas Medical Board investigators entered the clinic. They presented him with the subpoena instanter directed to him. *Id.* at ¶ 24. He called his lawyer, Meagan Hassan, who arrived at the clinic an hour later. *Id.* at ¶¶ 26, 30. Hassan told the Texas Medical Board investigators, the Department of Public Safety officers, the Drug Enforcement Administration

agents, and the Texas Board of Nursing investigators to leave immediately. *Id.* at ¶¶ 31–32. Most left, but Rauch stayed, insisting that she speak with Freshour, the general counsel of the Texas Medical Board. *Id.* at ¶ 34. Hassan called Freshour and demanded that he order the Board investigators to leave the clinic. *Id.* at ¶ 35. Freshour refused. *Id.* at ¶ 36. Hassan then demanded that the investigators show her what gave them authority to execute the subpoena as a search warrant. *Id.* at ¶ 39. In response, an investigator gave Hassan a copy of Texas Occupational Code § 153.007. *Id.* at ¶ 40. Section 153.007 states: "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. The board may administer oaths and take testimony regarding any matter within its jurisdiction." *Id.* § 153.007(a). The Texas Medical Board's implementing regulations interpret § 153.007 to require that:

> 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).

Hassan continued to protest that the Board was engaging in an illegal seizure. *Id.* at ¶ 43. The investigators responded that Department of Public Safety officers could detain the clinic administrator if she did not allow them access to the patient records. The investigators also insisted that they could go through all of the clinic's patient files, not only the ones specified in the subpoena instanter, if the clinic staff did not comply. *Id.* at ¶ 44. The clinic administrator subsequently directed the clinic staff to deliver any requested files to the Texas Medical Board investigators. *Id.* at ¶ 45.

The subpoena instanter did not identify the covered records by patient name. *Id.* at ¶ 47. Instead, the subpoena required:

2. Patient sign-in sheets or patient log for all patients evaluated from April 1, 2015 to April 30, 2015.
3. Copies of the corresponding exam and prescription for each patient identified in item #2.
4. Complete & accurate medical & billing records for a random sample of 15 patient records identified in item # 2.

Id. at ¶ 48.

The Texas Medical Board investigators did not randomly choose 15 patient medical and billing records to review and copy. *Id.* at ¶ 49. Instead, the investigators looked through the records of each patient evaluation and copied all that were incomplete or deficient. *Id.* at ¶ 49–50. Dr. Barry does

not allege that the investigators searched medical records of patients who were evaluated earlier than April 1, 2015 or later than April 30, 2015, the time period specified in the subpoena.

In this suit, Dr. Barry makes the following allegations:

- The Board investigators, Rauch, Chapman, West, and Henneke, violated the Fourth Amendment by searching and seizing his medical records, amounting to an unconstitutional abuse of process. (Docket Entry No. 12, at ¶¶ 97–92, 126–29, 145–53).

- Robinson, the executive director, West, a supervisor of the investigators, and Freshour, the general counsel, are liable because they directed or permitted the search and seizure and failed to supervise and train their employees in a manner reasonably calculated to prevent the unconstitutional abuse of process. *Id.* at ¶¶ 93–114, 130–33, 154–57.

- Freshour failed to protect Dr. Barry from the unconstitutional search, seizure, and abuse of process. *Id.* at ¶¶ 115–25, 134–37, 158–61.

- All the defendants violated or conspired to violate Dr. Barry's rights to procedural due process. *Id.* at ¶¶ 138–44.

The parties cited *Zadeh v. Robinson*, No. 1:15-cv-598-RP (W.D. Tex. 2016), a case with analogous facts and legal issues. Dr. Joseph Zadeh, a doctor practicing in Texas, was personally named in an action by the Texas Medical Board before the State Office of Administrative Hearings. (Docket Entry No. 40, at 1–2). Robinson signed an administrative subpoena for the patient medical records at Dr. Zadeh's clinic. *Id.* at 2. Like Dr. Barry, Dr. Zadeh was suspected of running an opioid pain mill. *Id.* at 14–17. Texas Medical Board investigators, accompanied by Drug Enforcement Administration investigators, gave the subpoena to Dr. Zadeh's medical assistant. *Id.* When the assistant asked to speak to Dr. Zadeh's attorney, she was told that Dr. Zadeh would lose his medical license unless she turned over the records immediately. *Id.* The investigators searched, reviewed, and copied Dr. Zadeh's patient medical records. *Id.* He sued under § 1983, alleging Fourth Amendment violations. *Id.* at 2–3.

The defendants moved to dismiss Dr. Zadeh's complaint, arguing that: (1) Dr. Zadeh did not have standing; (2) the *Younger* abstention doctrine barred his claims; (3) Robinson had sovereign immunity in her official capacity; and (4) the defendants had qualified immunity in their individual capacities. *Id.* at 3. The defendants here raise the same arguments. The *Zadeh* court granted in part and denied in part the defendants' motion to dismiss. *Id.* at 25. The analysis in the opinion is useful and thorough, and this court uses a similar analysis and reaches a similar result.

II. The Legal Standards

A. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) governs challenges to a court's subject-matter jurisdiction. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Bloom v. Mem'l Hermann Hosp. Sys.*, 653 F. App'x 804, 805 (5th Cir. 2016). "Lack of subject-matter jurisdiction may be found in the complaint alone, the complaint supplemented by the undisputed facts as evidenced in the record, or the complaint supplemented by the undisputed facts plus the court's resolution of the disputed facts." *Gonzalez v. United States*, 851 F.3d 538, 543 (5th Cir. 2017).

The plaintiff bears the burden of demonstrating that subject-matter jurisdiction exists. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). When examining a factual challenge to subject-matter jurisdiction under Rule 12(b)(1), which does not implicate the merits of plaintiff's cause of action, the district court has substantial authority "to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Arena v. Graybar Elec. Co.*, 669 F.3d 214, 223 (5th Cir. 2012). The court has wide discretion to allow affidavits or other documents and to hold a limited evidentiary hearing to resolve disputed jurisdictional facts. *See Superior MRI Servs., Inc. v. All. Healthcare Servs., Inc.*, 778 F.3d 502, 504 (5th Cir. 2015). The court may consider matters outside the pleadings to resolve factual challenges to subject-matter jurisdiction without converting the

motion to dismiss to one for summary judgment. *See Battaglia v. United States*, 495 F. App'x 440, 441 (5th Cir. 2012).

B. Rule 12(b)(6)

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court confirmed that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). To withstand a Rule 12(b)(6) motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *see also Elsensohn v. St. Tammany Parish Sheriff's Office*, 530 F.3d 368, 372 (5th Cir. 2008). The Supreme Court explained that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the- defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 677.

A court considers the pleadings in deciding a motion for judgment on the pleadings, *see United States v. 0.073 acres of land, more or less, situate in Pars. of Orleans & Jefferson, Louisiana*, 705 F.3d 540, 543 (5th Cir. 2013), and "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *See, e.g.*,

Cuellar v. Sw. Gen. Emergency Physicians, P.L.L.C., 656 F. App'x 707, 709 (5th Cir. 2016); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). Exhibits attached to a complaint are part of the complaint "for all purposes." FED. R. CIV. P. 10(c); *U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 375 (5th Cir. 2004) ("[I]t is not error to consider the exhibits to be part of the complaint for purposes of a Rule 12(b)(6) motion.").

III. Analysis

A. Standing

The defendants argue that Dr. Barry lacks standing to bring any of his claims because he has not demonstrated an injury in fact. (Docket Entry No. 15, at 4). The defendants point to the facts that Dr. Barry does not own the records that were searched or have an ownership interest in the clinic, where he worked part-time. *Id.*

Though Dr. Barry has no ownership interest in the clinic, one of the subpoenas was addressed to him, (Docket Entry No. 18-1, at 5), and he alleges that the records searched were his, *see, e.g.*, (Docket Entry No. 12, at ¶ 139). It is undisputed that Dr. Barry is personally named in the proceedings before the State Office of Administrative Hearings. (Docket Entry No. 15, at 8–9; Docket Entry No. 17, at 6–7). Because Dr. Barry alleges that the medical records were obtained illegally, and because they are being used against him in those proceedings, *id.* at 8–9, Dr. Barry has pleaded an injury sufficient for standing.

The defendants argue that the clinic administrator and the clinic owner's attorney consented to the search. *Id.*, at 4. But viewing the factual allegations in the light most favorable to Dr. Barry, he did not consent. Dr. Barry's counsel repeatedly demanded that the investigators not conduct the search or seizure and instead leave the clinic. (Docket Entry No. 12, at ¶ 31). When the defendants refused, Dr. Barry's counsel continued to challenge the defendants' authority to execute the subpoena. *Id.* at ¶¶ 35–36, 39–43. The clinic administrator eventually complied with the investigators' orders, but not until they threatened to have her detained if she refused. *Id.* at ¶¶ 44–45. The allegations plead no effective, voluntary consent. *See United States v. Huerta*, 252 F. App'x 694, 696 (5th Cir. 2007) (the presence of threats is a factor weighing against finding valid consent).

The defendants also argue that Dr. Barry cannot raise claims that seizing the patient medical records violated the patients' privacy rights. (Docket Entry No. 15, at 5). To the extent that Dr. Barry asserts Fourth Amendment claims solely on his patients' behalf, those claims are dismissed. *See Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978) ("Fourth Amendment rights are personal rights which, like some other constitutional rights ,may not be vicariously asserted." (quotation omitted)). But his claims that his own Fourth Amendment rights were violated are not dismissed. *See Zadeh*, No. 1:15-cv-598-RP (Docket Entry No. 40) (a doctor had standing when the Texas Medical Board searched and seized records in a similar manner and for similar purposes).

In *Zadeh*, the doctor owned the medical office that was searched, while Dr. Barry works at the Red Bluff Medical Clinic part-time and has no ownership interest in it. (Docket Entry No. 12, at ¶ 13). This fact is not critical to the standing issue, because the subpoena was directed to Dr. Barry himself. (Docket Entry No. 18-1, at 5).

The defendants also argue that Dr. Barry lacks standing because he has not adequately pleaded factual allegations showing a likelihood of future harm. (Docket Entry No. 15, at 5–6). As the defendants acknowledge, the redressability element is necessary only if the plaintiff seeks declaratory relief. *See Armstrong v. Turner Industries, Inc.*, 141 F.3d 554, 563 (5th Cir. 1998). Dr. Barry seeks only monetary relief. (Docket Entry No. 12). He need not plead or show a likelihood of future harm to have standing. And even if he did seek declaratory relief, the pleading supports a "realistic likelihood" that the Texas Medical Board will seek to serve another administrative subpoena instanter on him, given the ongoing State Office of Administrative Hearings proceedings against him. *See Brown v. Edwards*, 721 F.2d 1442, 1447 (5th Cir. 1984).

The motion to dismiss for lack of standing is denied except as to claims asserted on behalf of the patients whose records were searched and seized.

B. *Younger* Abstention

The defendants also argue that the court should abstain from hearing Dr. Barry's claims under the *Younger* doctrine. (Docket Entry No. 15, at 8–10).

Younger abstention might apply if Dr. Barry was seeking declaratory relief. *See Perez v. Texas Medical Board*, 556 F. App'x 341 (5th Cir. 2014). He does not. Because Dr. Barry seeks only monetary relief, (Docket Entry No. 12), *Younger* abstention is not a basis for dismissal. *Lewis v. Beddingfield*, 20 F.3d 123, 125 (5th Cir. 1994) (*Younger* abstention "is not applicable to a claim for damages").

C. The Official Capacity Claims

The defendants argue that Dr. Barry is barred from suing Mari Robinson in her official capacity, citing Eleventh Amendment immunity. (Docket Entry No. 15, at 6). Dr. Barry agrees and asks the court to strike claims against Robinson in her official capacity. (Docket Entry Nos. 17, at 13; 18, at 3). The amended complaint contains no claims against Robinson in her official capacity. (Docket Entry No. 12). Dr. Barry's request, and the motion to dismiss the official capacity claims, are both moot.

D. Qualified Immunity

Qualified immunity protects government officials "from 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "In reviewing a motion for summary judgment based on qualified immunity, [courts] undertake a two-step analysis." *Luna v. Mullenix*, 773 F.3d 712, 718 (5th Cir. 2014).

"First, [courts] ask whether the facts, taken in the light most favorable to the plaintiffs, show the officer's conduct violated a federal constitutional or statutory right." *Id.* (citing *Tolan*, 134 S. Ct. at 1865). "Second, [courts] ask 'whether the defendant's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* (quoting *Flores v. City of Palacios*, 381 F.3d 391, 395 (5th Cir. 2004)). "A court has discretion to decide which prong to consider first." *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013) (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). "Claims of qualified immunity must be evaluated in the light of what the officer knew at the time he acted, not on facts discovered subsequently." *Luna*, 773 F.3d at 718. But "[a]s the Supreme Court has recently reaffirmed, 'in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Id.* (quoting *Tolan*, 134 S. Ct. at 1863).

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Lytle v. Bexar County*, 560 F.3d 404, 410 (5th Cir. 2009) (quotations omitted). "When considering a defendant's entitlement to qualified immunity, [a court] must ask whether the law so clearly and unambiguously prohibited his conduct that 'every reasonable official would understand that what he is doing violates [the law].'" *Morgan v. Swanson*, 659 F.3d 359, 371–72 (5th Cir. 2011) (en banc) (quoting *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083, 2084 (2011)). "To answer that question in the affirmative, [the court] must be able to point to controlling authority—

or a 'robust consensus of persuasive authority'—that defines the contours of the right in question with a high degree of particularity." *Id.* (quoting *Al-Kidd*, 131 S. Ct. at 2084).

"Qualified immunity balances 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." *Id.* Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012) (quotations omitted). "[W]hile the Supreme Court has stated that 'courts should define the 'clearly established' right at issue on the basis of the 'specific context of the case,' it has also recently reminded [courts] that [they] 'must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions.'" *Luna*, 773 F.3d at 724–25 (quoting *Tolan*, 134 S.Ct. at 1866). A plaintiff has the burden of overcoming the qualified immunity defense. *Bennett v. City of Grand Prairie*, 883 F.2d 400, 408 (5th Cir. 1989).

The first step in the qualified immunity analysis is to determine whether Dr. Barry has alleged a Fourth Amendment violation. *See Luna*, 773 at 718; *Pearson*, 555 U.S. at 236 (asking first whether a right was violated "is often beneficial"). Under the Fourth Amendment, "searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable . . . subject only to a few specifically established and

well-delineated exceptions." *Arizona v. Grant*, 556 U.S. 332, 338 (2009). One exception to the warrant requirement is the administrative search, in which "special needs . . . make the warrant and probably-cause requirement impracticable," and where "the 'primary purpose' of the searches is '[d]istinguishable from the general interest in crime control.'" *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2452 (2015) (citations omitted); BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 162 (2017) ("Administrative searches are humdrum affairs that occur on a regular basis to make sure businesses are complying with applicable regulations.").

Although administrative searches may not require a warrant, "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.* An exception to the exception exists for administrative searches of businesses participating in "closely regulated" industries that "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." *Id.* at 2454 (quoting *Marshall v. Barlow's Inc.*, 436 U.S. 307, 313 (1978)).

Under the "closely regulated" exception, a warrantless exception is reasonable if there is a "'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made," if the warrantless inspection is "necessary to further [the] regulatory scheme," and if "the statute's

inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." *New York v. Burger*, 482 U.S. 691, 702–3 (1987) (quotations omitted). To satisfy the "adequate substitute" prong, "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.* at 703. The Supreme Court has identified four "closely regulated" industries: liquor sales, firearms dealing, mining, and running automobile junkyards. *Patel*, 135 S. Ct. at 2454–55. The practice of medicine is not included in this list.

As the court in *Zadeh* persuasively concluded, the medical profession is not a "closely regulated" industry. The court explained that:

> 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").

Zadeh, No. 1:15-cv-598-RP (Docket Entry No. 40, at 10).

Because the "closely regulated" exception does not apply, the search and seizure of the patient medical records under the subpoena is constitutional only if Dr. Barry had "an opportunity to obtain precompliance review before a neutral decisionmaker." *Patel*, 135 S. Ct. at 2452. Dr. Barry adequately alleges facts that show that no such opportunity was provided. When his attorney arrived at the clinic, she demanded that the defendants stop their records search and leave the premises. (Docket

Entry No. 12, at ¶ 31). The Board investigators refused. *Id.* at ¶¶ 35–36. Dr. Barry's counsel consistently challenged their authority to execute the subpoena. *Id.* at ¶¶ 39–43. And it was only after the investigators threatened to detain the clinic administrator that she acquiesced and complied with their demands. *Id.* at ¶¶ 44–45. Dr. Barry had no opportunity to obtain precompliance review, because the subpoena was executed immediately after service despite his protest and refusal to consent.

The factual allegations support the first step in the analysis of whether qualified immunity applies. The second step asks "whether the defendant's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known." *Luna*, 773 F.3d at 718 (quotation omitted). The question here is whether the administrative search, without opportunity to obtain precompliance review, was "clearly and unambiguously prohibited." *Morgan*, 659 F.3d at 371–72.

The opportunity for precompliance review has long been a requirement of administrative searches. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415, 104 S. Ct. 769, 773, 78 L. Ed. 2d 567 (1984) ("Thus although our cases make it clear that the Secretary of Labor 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."); *See v. City of Seattle*, 387 U.S. 541, 544–45 (1967). Because this controlling authority is longstanding, the defendant's alleged actions violated "clearly established statutory

or constitutional rights of which a reasonable person would have known." *Luna*, 773 F.3d at 718.

Even if the medical profession was a "closely regulated" industry, *see Beck v. Texas State Bd. of Dental Examiners*, 204 F.3d 629 (5th Cir. 2000) (the dental profession was a "closely regulated" industry in a factually analogous case), Dr. Barry still alleges a constitutional violation that was clearly established when the search occurred. Under *Burger*, a regulatory statute that allows warrantless searches of a "closely regulated" industry must provide a "constitutionally adequate substitute for a warrant." 482 U.S. at 702–03. To be an "adequate substitute," the regulatory scheme authorizing administrative searches of "closely regulated" industry businesses must satisfy two fundamental 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.* at 703.

The regulatory scheme governing the Texas Medical Board's subpoena authority fails both requirements. First, while the Texas Medical 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, the Board "is not authorized to physically search or inspect a doctor's office." *Zadeh*, No. 1:15-cv-598-RP (Docket Entry No. 40, at 13). The allegations that the Board investigators physically searched the clinic and Dr. Barry's records, if proven, show that the search went beyond authority granted to the Board under § 153.007. The regulatory scheme could not and did not put Dr. Barry on notice that his records would

be searched in this unauthorized manner. Second, the regulatory scheme does not limit the Texas Medical Board's discretion. The statute imposes no restrictions on when and to whom subpoenas may be served. *See* TEX. OCC. CODE § 153.007.

The alleged search violates the Fourth Amendment even if the medical profession was a "closely regulated" industry. The defendants do not point to any law to dispute that the law on warrantless searches was clearly established at the time of the alleged search. *See Burger*, 482 U.S. at 703; *Zadeh*, No. 1:15-cv-598-RP (Docket Entry No. 40, at 21–22) (rejecting the argument that *Ellis v. Mississippi Dep't of Health*, 344 F. App'x 43 (5th Cir. 2009) or *Beck v. Texas State Bd. of Dental Examiners*, 204 F.3d 629 (5th Cir.2000), made it ambiguous whether a regulatory scheme could serve as an adequate substitute for a warrant when the search goes beyond the authority granted by the regulatory scheme).

The motion to dismiss the individual capacity § 1983 claims for violating the Fourth Amendment is denied.

E. Abuse-of-Process Claims

The defendants argue that Dr. Barry cannot allege claims for abuse of process, citing *Cevallos v. Silva*, 541 F. App'x 390, 394 (5th Cir. 2013) (per curiam). In *Cevallos*, the court held that an abuse-of-process claim "fail[s] as a matter of law unless founded in another constitutional right." *Id.* Dr. Barry alleges claims under the Fourth Amendment. He alleges that the defendants "intended the subpoena *instanter* to act

as a 'sneak-and-peek subpoena' in order to gain warrantless access to Plaintiff's medical records over contemporaneous objections from Plaintiff's legal counsel for the express purpose of identifying which records should be searched and seized." (Docket Entry No. 12, at ¶ 148). Dr. Barry also alleges that the defendants "recklessly violated Plaintiff's clearly established constitutional rights to remain free from warrantless searches and seizures." *Id.* at ¶ 153(d). Dr. Barry's abuse-of-process claims are not "freestanding," *Cevallos*, 541 F. App'x at 394, but are instead founded in the Fourth Amendment. They are not dismissed.

F. The Delegation-of-Subpoena-Authority Claims

Dr. Barry claims that Robinson "impermissibly re-delegated her subpoena and signature authority," and that Robinson, West, and Freshour caused Texas Medical Board personnel "to believe that they were permitted to sign subpoenas *instanter* without Defendant Robinson's approval." (Docket Entry No. 12, at ¶¶ 94, 98, 102). The defendants argue that Texas law expressly authorizes Robinson to delegate signature authority. The defendants are correct. *See* 22 TEX. ADMIN. CODE § 161.7 ("The executive director may delegate any responsibility or authority to an employee of the board . . . ."). To the extent that Dr. Barry's supervisory liability claims rely on this improper-delegation argument, they are dismissed, with prejudice and without leave to amend, because amendment would be futile.

IV. Conclusion

The defendants' motion to dismiss, (Docket No. 15), is granted in part and denied in part. Dr. Barry's claims asserting only the Fourth Amendment rights of his patients are dismissed. His claims that the defendants violated his own Fourth Amendment rights are not dismissed. *Younger* abstention does not apply. The motion to dismiss the claims against Mari Robinson in her official capacity is moot. The defendants are not entitled to qualified immunity in their individual capacities. Dr. Barry's abuse-of-process claim is not dismissed. To the extent that Dr. Barry's claims rely on an improper-delegation argument, they are dismissed, with prejudice and without leave to amend.

SIGNED on October 18, 2017, at Houston, Texas.

Lee H. Rosenthal

Chief United States District Judge

APPENDIX C

[Filed April 16, 2019]

459TH DISTRICT COURT
HEMAN MARION SWEATT TRAVIS
COUNTY COURTHOUSE
P. 0. BOX 1748
AUSTIN, TEXAS 78767

[contact information omitted]

April 16, 2019

Re: Cause No. D-1-GN-17-002301; *Courtney R. Morgan, MD. v. Texas Medical Board*

Dear Mr. Swate and Mr. Ross:

This Court heard your administrative appeal on February 19, 2019. Mr. Swate was present on behalf of appellant, Dr. Morgan. Mr. Ross represented appellee, the Texas Medical Board (TMB). Scott Freshour, the TMB's former General

Counsel, was also in attendance. After considering the pleadings, evidence, and arguments of counsel, I reverse and remand with the following guidance.

I. Issues Presented by Dr. Morgan.

1. Are the Texas Occupational Code§§ 168.001 and 168.002, concerning regulation of pain management clinics, unconstitutionally vague on its face in violation of the fifth and fourteenth amendments of the United States Constitution and the Texas Constitution, Article I, Section 19?

2. Did the Administrative Law Judge incorrectly interpret the Texas Occupational Code §§ 168.001 and 168.002, which define a pain management clinic and list exemptions, by applying an interpretation that is contrary to cannons of construction and legislative intent?

3. Can the TMB's staff use evidence from the "Fruit of the Poisonous Tree" in an administrative hearing?

II. Standard of Review.

Where, as here, a law authorizes review in a contested case but does not define the scope of judicial review, a "court may not substitute its judgment for

the judgment of the state agency on the weight of the evidence but: (1) may affirm the agency decision in whole or in part; and (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are [in relevant part]: (A) in violation of a constitutional or statutory provision ... (D) affected by other error of law."[1]

III. Texas Occupational Code§§ 168.001 and 168.002.

Texas Occupational Code§ 168.001 and§ 168.002 are not unconstitutionally vague. However, the ALJ misinterpreted and misapplied §168.001(1) in the underlying proceeding.

The primary concern in construing a statute is the express statutory language, which is construed according to its "plain and common meaning unless a contrary intention is apparent from the context or unless such a construction leads to absurd results."[2] The statute is read as a whole and interpreted to give effect to every part.[3]

Here, the Texas Occupational Code defines "Pain management clinic" as a "publicly or privately

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1 Tex. Gov't Code § 2001.174.

2 *Hegar v. Autohaus LP,* 514 S.W.3d 897,902 (Tex. App.—Austin 2017, pet. filed) (*quoting Presidio lndep . Sch. Dist. v. Scott,* 309 S.W.3d 927,930 (Tex. 2010)).

3 *Id.*

owned facility for which a majority of patients are issued on a *monthly* basis a prescription for opioids, benzodiazepines, barbiturates, or carisoprodol, but not including suboxone."[4]

Merriam-Webster's dictionary defined "monthly," in relevant part, as "occurring or appearing every month." It is clear from the "plain and common meaning" of the statute that the threshold requirement to require a facility to register as a pain management clinic should be more than one month. At a bare minimum, the TMB should present evidence that the facility in question issued the majority of their patients prescriptions for the substances listed in Tex. 0cc. Code§ 168.001(1) for at least two months.

Since the TMB did not present evidence that the facility in question issued the majority of their patients prescriptions for the substances listed in Tex. 0cc. Code§ 168.001(1) for at least two months, the evidence is not sufficient to support the ALJ's finding that Dr. Morgan's clinics qualified as pain management clinics and that he should have registered them as such.

IV. Excluded Evidence.

On Appeal, Dr. Morgan urges that evidence obtained in violation of the Texas and United States Constitutions must be excluded from administrative hearings. This Court remands this

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[4] Tex. Occ. Code § 168.00l (l) (emphasis added).

case to the Texas State Office of Administrative Hearings (SOAH) with instructions to hear evidence regarding the warrantless searches and determine, according to this Court's guidance, if the TMB's evidence, which was gained during those searches, should be excluded.

a. Relevant Facts and Procedural History.

On July 18, 2013, agents of the TMB, the Texas Department of Public Safety (DPS), and other law enforcement agencies executed administrative subpoenas on Dr. Morgan's two medical clinics, which were located in Victoria, Texas. Records gathered during the search were used to bring criminal charges against Dr. Morgan in state court in Victoria County.[5] On October 13, 2015, the state court, which was the 24th Judicial District Court (State Trial Court), granted a motion to suppress and entered findings of fact and conclusions of law regarding the motion. While Dr. Morgan's case was at SOAH, Dr. Morgan urged the Administrative Law Judge (ALJ), on multiple occasions, to take judicial notice of the State Trial Court's findings. The ALJ declined to do so, stating that: (1) the evidence was not relevant as "the standards in an administrative proceeding and criminal proceeding are different;" and (2) the

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[5] *See State of Texas* v. *Courtney Ricardo Morgan,* (Cause No. 14-28128-A).

district court considered a criminal action against Respondent to which the TMB was not a party.[6]

b. Summary of Relevant Findings of Fact and Conclusions of Law from the State Trial Court.

The State Trial Court's findings of fact and conclusions of law offer this Court a well thought out and invaluable look at the evidence developed by that court while gathering testimony from members of the TMB and DPS. It provides enough data to sound alarms and warrant further fact-finding for the case-at-bar.[7] Of particular note, the State Trial Court:

- Stated that that there was ample evidence to suggest that the police either knew about or requested the search, finding "that there were several contacts

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[6] See 16.02.23 Order No. 8 - Denying Respondent's Motion for Judicial Notice. *See also* 16.07.06 Order No. 11 - Ruling on Objections (refusing judicial notice of "any orders of the 24th Judicial District Court, as rulings by that court are irrelevant to the pending administrative dispute.").

[7] It is worth noting that the United States District Court for the Southern District of Texas, Victoria Division, adopted the State Trial Court's findings of fact and conclusions of law for purposes of deciding on a motion to dismiss in a civil suit brought by Dr. Morgan against Mr. Freshour. *See Morgan* v. *Freshour,* No. 6:17-CV-0004, 2018 U.S. Dist. LEXIS 67315 (S.D. Tex. 2018).

between the TMB and DPS with regard to using the information secured as a result of the subpoena(s) to charge the defendant with a crime. The fact that a regulatory agency and law enforcement agencies are contacting each other and sharing information to conduct and coordinate a warrantless 'administrative search' is a cause of concern for this Court."[8]

• Found the testimony of the TMB investigator, Mary Chapman, to be "evasive when repeatedly pressed about whether the TMB coordinated with law enforcement to 'search' [Dr. Morgan's] business. Ms. Chapman's testimony was less than credible during the suppression hearing."[9]

• Found that there was an unusual show of force by law enforcement to serve the subpoena and that Dr. Morgan did not consent to the search of his business.[10]

• Noted that Dr. Morgan was "immediately served with notice of the actions of the TMB to ensure that there was no judicial oversight of the search by the TMB and law enforcement."[11]

• Found that there were "no facts

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8 16.02.10 R - Motion for Judicial Notice, Exhibit A, page 4-5.

9 *Id.* at 5.

10 *Id*

11 *Id* at 6.

presented that would lead to a reasonable conclusion that any evidence would have been destroyed or altered had law enforcement secured a search warrant for the business... "[12]

• Noted that "the actions of the TMB and law enforcement bordered on intimidation. It was not necessary for the service of subpoenas to display actions of intimidation such as the following: 1) having several law enforcement agencies present during the search, 2) seizing of phones, 3) prohibiting filming or photographing during the service of subpoenas, and 4) prohibiting employees from talking to other employees."[13]

• Found that "considering the totality of the circumstances surrounding the case at bar... [Dr. Morgan] did not intelligently and voluntarily consent to the search of his business." [14]

• Found that "the TMB acted with bad faith in partnering up with law enforcement to conduct the search of the defendant's business."[15]

• Found that "the TMB's interest in

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12 *Id.*

13 *Id.* at 7.

14 *Id*

15 *Id* at 8.

> serving the subpoenas upon [Dr. Morgan] was not a legitimate pursuit of its administrative authority but an exercise to circumvent both the Texas and US Constitutions' requirement for a warrant."[16]

c. Guidance on Determining Whether Evidence from Warrantless Searches Should Be Excluded.

In determining whether the evidence from the warrantless searches should be excluded from the case-at-bar, the controlling case is *Vara v. Sharp,* 880 S.W.2d 844 (Tex. App.-Austin 1994, no writ). In that case, in determining whether to apply the exclusionary rule to a civil proceeding, the Third Court of Appeals of Texas looked to determine whether "the benefit of achieving additional deterrence by applying the exclusionary rule in the instant case outweighs the societal costs imposed by the exclusion of critical evidence."[17] To do so, the Court weighed six factors. Those six factors as applied to the current case are examined below. It is also worth pointing out that, after the Third Court of Appeals weighed its six factors in *Vara,* it noted that Article I, Section 9 of the Texas Constitution would also have been applicable to exclude the relevant evidence in that case.

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16 *Id.*

17 *Vara* at 850.

In the case-at-bar, when gathering and reviewing evidence regarding the TMB's warrantless searches, the ALJ should look to the *Vara* court's guidance provided regarding both the Texas Constitution and the six factors enumerated.

Article I, **Section 9 of the Texas Constitution.** Specifically, the Third Court of Appeals stated that Article I, Section 9 of the Texas Constitution "guarantees the sanctity of the individual's home and person against unreasonable intrusion," and expands privacy rights of Texas citizens.[18] This supports a broader application of the exclusionary rule than that required by the United States Constitution and means that deterrence is not the primary concern for determining when to apply the exclusionary rule in Texas.[19] "This right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means."[20] The Third Court of Appeals concluded that, even if the Fourth Amendment did not "mandate application of the exclusionary rule" in *Vara,* such application was

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18 *Id.* at 853.

19 *Id.*

20 *Id. (quoting Tex. State Emps. Union v. Tex. Dep't of Mental Health & Mental Retardation,* 746 S.W.2d 203 (Tex. 1987).

required by the Texas Constitution.[21] Here, it seems likely that the TMB could easily have achieved their objective through "less intrusive, more reasonable means," as there exists an entire well-developed administrative process for the TMB to execute administrative subpoenas.

The Six Factors from *Vara v. Sharp.* The *Vara* factors are listed below as is this Court's guidance for the ALJ on remand.

(1) **Nature of the Search.** The absence of a warrant or the valid execution of a subpoena weighs in favor of applying the exclusionary rule.[22] Here, there was no valid warrant. Worse, the State Trial Court found "that there were several contacts between the TMB and DPS with regard to using the information secured as a result of the subpoena(s) to charge the defendant with a crime."[23]

With respect to valid execution of the subpoena, "[a]bsent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker."[24] Here, Dr. Morgan states he did not give consent and the State Trial Court

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21 *Vara* at 853.

22 *See Vara* at 850.

23 16.02. l OR - Motion for Judicial Notice, Exhibit A, page 4-5.

24 *Zadeh v. Robinson,* 902 F.3d 483 (5th Cir. *2018)(quoting Cotropia v. Chapman,* 721 F. App'x 354 (5th Cir. 20l *8)(quoting City of Los Angeles v. Patel,* 135 S. Ct. 2443, 2452 (2015)).

found that Dr. Morgan "did not intelligently and voluntarily consent to the search of his business."[25] Neither was Dr. Morgan given the opportunity to obtain precompliance review before a neutral decisionmaker. According to the State Trial Court, while there were no "facts presented that would lead to a reasonable conclusion that any evidence would have been destroyed or altered had law enforcement secured a search warrant for the business of the defendant," the Court believed that Dr. Morgan "was immediately served with notice of the actions of the TMB to ensure that there was no judicial oversight of the search by the TMB and law enforcement."[26]

Appellee's brief points to Tex. 0cc. Code §§ 153.007 and 22 Tex. Admin. Code, Chapters 179 and 187.8 as authority for service of administrative subpoenas. However, none of these authorities appear to permit TMB investigators to take records immediately or by force. Here, it is not just questionable whether the search of Dr. Morgan's clinic was necessary but whether it was even conducted pursuant to valid authority.

This factor weighs in favor of excluding evidence taken during the warrantless search of Dr. Morgan's office.

(2) Nature of the Proceeding. The proceeding in the underlying case is an administrative

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[25] 16.02.10 R- Motion for Judicial Notice, Exhibit A, page 7.

[26] 16.02.10 R - Motion for Judicial Notice, Exhibit A, page 6.

hearing where Dr. Morgan was charged with violations of the Texas Medical Practice Act (MPA) and Texas Medical Rules. As noted in *Vara,* "It is generally unlikely that application of the exclusionary rule to bar the evidence in a secondary civil proceeding will deter future Fourth Amendment violations." [27]

However, this Court's concern is that the TMB may have partnered up with law enforcement to circumvent both the Texas and US Constitutions' requirement for a warrant. More troubling is the notion that the TMB's bad behavior may not be limited to this case but instead may be part of a pattern. Certainly, there are a number of cases that involve the TMB engaging in the same behavior. In fact, in Appellant's Reply Brief, Dr. Morgan notes that there are at least five cases that have been filed against the TMB and its agents for similar warrantless searches. [28] Additionally, during oral argument in front of this Court, the TMB admitted that they still execute similar subpoenas in coordination with law enforcement.

As things stand, if the TMB's future coordinations with law enforcement result in exclusion of the evidence at the criminal trial, as it did in the case-at-bar, then the TMB may still use the evidence gathered to bring suit at SOAH. However, if the TMB is denied from using that evidence at SOAH then this Court believes that the

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[27] *Vara* at 851 (quoting *Wolfv. Commissioner,* 13 F.3d 189, 194 (6th Cir. 1993).

[28] See "Reply Brief of Appellant Courtney Morgan, M.D.," p. 34, fn 67.

exclusionary rule would have a tremendous and profound deterrent effect on the TMB and that the TMB would be far more likely to refrain from violating the Fourth Amendment in the future.

This factor weighs in favor of excluding evidence taken during the warrantless search of Dr. Morgan's office.

(3) Whether the Proposed Use of Unconstitutionally Seized Material is Intersovereign or Intrasovereign. The *Vara* court stated that "[i]ntrasovereign cases are those where the officer that conducted the unconstitutional search is an agent of the same sovereign that seeks to use the evidence in a civil proceeding. Intersovereign cases are those where the evidence is seized by one sovereign's agents, and used in another sovereign's proceedings."[29] The Court explained that the exclusionary rule is generally applied when there are intrasovereign violations.[30]

Here, the proposed use of unconstitutionally seized material was intrasovereign. The TMB, a Texas governmental entity, coordinated with Texas law enforcement agencies in order to seize the evidence taken from Dr. Morgan's offices.

This factor weighs in favor of excluding evidence taken during the warrantless search of Dr. Morgan's office.

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29 *Vara* at 849.

30 *Id.*

(4) **Whether the Search and the Secondary Proceeding Were Initiated by the Same Agency.** In *Vara,* the Court notes that, where the search and the secondary administrative proceeding were not initiated by the same agency, this factor weighs against application of the exclusionary rule.[31] However, here the search of Dr. Morgan's office and the secondary administrative proceedings were both initiated by and under the authority of the TMB. Additionally, a TMB agent was part of the search.

This factor weighs in favor of excluding evidence taken during the warrantless search of Dr. Morgan's office.

(5) **Whether There is an Explicit and Demonstrable Understanding Between the Two Governmental Agencies.** When determining whether there is an explicit and demonstrable understanding between the two governmental agencies, one may look to the existence of a statutory regime.[32] Under the Texas Occupational Code, the TMB is required to report investigative information to the appropriate law enforcement agency and must cooperate with and assist law enforcement agencies who are conducting a criminal investigation of a doctor by providing relevant information.[33] It seems likely that, pursuant to statute, the TMB has closely coordinated with a number of enforcement agencies throughout the state. Additionally, the State Trial

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31 *Id.*at 852.

32 *Id.*

33 Tex. 0cc. Code § 164.007 (g) and (h).

Court noted that there was ample evidence to suggest that the police either knew about or requested the search, finding "that there were several contacts between the TMB and DPS with regard to using the information secured as a result of the subpoena(s) to charge the defendant with a crime."[34] In other words, the State Trial Court found that the TMB and law enforcement agencies were contacting each other and sharing information to conduct and coordinate a warrantless "administrative search."

This factor weighs in favor of excluding evidence taken during the warrantless search of Dr. Morgan's office.

(6) Whether the Secondary Proceeding Fell Within the "Zone of Primary Interest" of the Officers that Conducted the Search. "Where the relationship between the objectives of the law enforcement agency to which the officer belongs and the secondary proceedings is close, an inference may be drawn that the officers had the use of the evidence in the subsequent proceedings in mind when they made the seizure."[35] Here, the law enforcement agencies involved had as much of an interest in curbing the distribution of controlled substances as the TMB had in regulating its licensees who illegally distribute such substances. The secondary proceeding fell within the zone of primary interest of the officers that helped to conduct the search.

This factor weighs in favor of excluding

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[34] 16.02 .10 R- Motion for Judicial Notice, Exhibit A, page 4-5.

[35] *Vara* at 852 *(citing Wolf,* 13 F.3d at 195).

evidence taken during the warrantless search of Dr. Morgan's office.

V. Conclusion.

SOAH's Proposal for Decision and the TMB's Final Order are reversed and remanded to SOAH for further proceedings, which will follow the guidance contained in this letter and this Court's order.

Sincerely,

Maya Guerra Gamble

Presiding Judge 459th
District Court

cc: Ms. Velva L. Price, Travis County District Clerk

APPENDIX D

[Filed December 20, 2017]

SOAH DOCKET NO. 503-15-2821.DO

TEXAS MEDICAL BOARD,	§	
Petitioner,	§	BEFORE THE STATE
	§	OFFICE OF
v.	§	ADMINISTRATIVE
	§	HEARINGS
JOSEPH HASSAN ZADEH,	§	
Respondent	§	

ORDER NO. 13
DENYING RESPONDENT'S MOTION TO COMPEL

On December 6, 2017, Dr. Joseph Zadeh (Respondent) filed a Motion to Compel, seeking to compel the staff (Staff) of the Texas Medical Board (Board) to respond to four interrogatories and two requests for production (RFPs), and also seeking to compel production of documents in response to a number of document requests contained in three subpoenas duces tecum that Respondent served on witnesses who work with Staff. Staff filed its response on December 14, 2017. For the reasons stated below, the Administrative Law Judges (ALJs) will deny the Motion to Compel.

I. Discovery Requests Pertaining to Alleged Staff Cooperation with DEA

During the investigation preceding the Complaint that gave rise to this proceeding at the State Office of Administrative Hearings (SOAH), Staff served an "instanter subpoena " on Respondent dated October 22, 2013, seeking information about sixteen named patients.[135] At the same time, and apparently with some cooperation from Staff, the United States Dmg Enforcement Agency (DEA) was also investigating and seeking records from Respondent.[136] Respondent contends that this evinces a coordinated effort by Staff and the DEA to circumvent his Fourth Amendment rights against unreasonable search and seizure, and he argues that establishing such a constitutional violation would operate as an affirmative defense to Staff's claims against him in this case. Several of Respondent' s discovery requests to Staff and its witnesses go to this issue[…]

Even assuming Respondent could prove that Staff and the DEA conspired to conduct an investigation that violated his Fourth Amendment rights, he could not assert that constitutional violation as an affirmative defense at SOAH. ALJs lack the power of constitutional construction; they cannot determine the validity or constitutionality

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135 Motion to Compel, Ex. 1 1.

136 Motion to Compel, Exs. 10, 12.

of the Board's instanter subpoena or otherwise rule the Board's rules and actions unconstitutional.[137] Further, SOAH's authority is limited to what is set out in its enabling statute, and nothing in the statute gives SOAH ALJs the authority to decide the constitutionality or propriety of an agency's investigative actions before a contested case is referred to SOAH.[138] Rather, the legislature has explicitly stated that the purpose of the SOAH is to *"separate the adjudicative function from the investigative,* prosecutorial, and policymaking functions in the executive branch in relation to hearings that [SOAH] is authorized to conduct."[139] With these limitations on SOAH's jurisdictional authority, the ALJs are powerless to review Staff's conduct in carrying out the Board's investigatory function before the case was referred ed to SOAH.

Because Respondent cannot raise the alleged unconstitutionality of Staff's investigation (including its cooperation with the DEA) as an affirmative defense at SOAH, his discovery into those subjects is not relevant to this proceeding. Moreover, the information gathered and received during the investigation is, by statute, confidential and not

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137 *See City of Dallas v. Stewart,* 361 S.W.3d 562, 568 (Tex. 2012) (agencies "lack the ultimate power of constitutional construction"); *Texas State Bd. of Pharmacy v. Walgreen Texas Co.,* 520 S.W.2d 845, 848 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) ("Administrative agencies have no power to determine the constitutionality of statutes.").

138 Tex. Gov't Code ch. 2003.

139 Tex. Gov't Code § 2003.021(a) emphasis added).

subject to disclosure in discovery.[140] The portions of the Motion to Compel that seek information regarding the instanter subpoena and Staff's investigatory cooperation with the DEA are, therefore, **DENIED.**

[…]

[140] Tex. Occ. Code § 164.007(c).

APPENDIX E

[Filed November 13, 2018]

In the United States Court of Appeals for the Fifth Circuit

DOCTOR GENE N. BARRY,
Plaintiff-Appellee,
v.
SCOTT M. FRESHOUR, BELINDA WEST, MARI ROBINSON, ANNE RAUCH, MARY CHAPMAN, DEBBI HENNEKE
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
Civil Action No. H-17-1403 4:17-CV-1403

APPELLANTS' RESPONSE TO PETITION FOR REHEARING EN BANC

...

Instead of showing a violation of clearly established law, *City of Seattle* is simply inapplicable to the current situation. First, the Court did not find it problematic for the same governmental agency to be involved in issuing a subpoena and in executing it—it merely prohibited the same individual agent from both issuing and executing a search order. 387 U.S. at 544–45 ("[W]hile the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and en-forced [sic] by the inspector in the field . . . .")…

APPENDIX F

[Filed August 18, 2017]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Gene N. Barry, M.D., *Plaintiffs*,	§	
	§	
vs.	§	
	§	
Mari Robinson (in her individual capacity), Belinda West (in her individual capacity), Scott Freshour (in his individual capacity), Anne Rauch (in her individual capacity), Mary Chapman (in her individual capacity), and Debbi Henneke, *Defendants.*	§	CIVIL ACTION NO. 4:17-cv-1403

PLAINTIFF'S FIRST AMENDED COMPLAINT

…

55. Defendant Robinson's…plain incompetence or knowing violation of the law is exacerbated by the fact that she is an attorney licensed to practice law in the state of Texas.

…

60. In fact, Defendant Robinson (executive director of the TMB at all times relevant to this lawsuit) is unable to identify what would constitute a potential constitutionally adequate substitute for a search warrant and has already unequivocally testified (in another suit involving subpoenas *instanter*) that there is no predictive regularity as to who is going to receive a subpoena and who will not.

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