ORIGINAL

App. No. 19A357

In the
Supreme Court of the United States

Bharanidharan Padmanabhan M.D. Ph.D
(Dr. Bharani)
v.
Drug Enforcement Administration

PETITIONER'S APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable John Roberts, as Circuit Justice for the DC Circuit:

Petitioner Dr. Bharani respectfully requests that the time to file a Petition for a Writ of Certiorari in this matter be extended for sixty days, up to and including October 25, 2019. The DC Circuit Appeals Court issued its opinion on March 28, 2019 and on May 29, 2019 denied a petition for re-hearing *en banc*. Absent an extension of time, the Petition would therefore be due on August 26, 2019. This Court has jurisdiction over this Application under 28 U.S.C. 1254 (1) and has authority to grant the requested relief under the All Writs Act, 28 U.S.C. 1651.

BACKGROUND

This case involves a license issued by the Commonwealth of Massachusetts to a doctor that allows him to write medical prescriptions. This license, named the Massachusetts Controlled Substance Registration Certificate ("MCSR", or "registration"), is issued pursuant to the plain text of a state law, MGL ch. 94C § 7(f), which also specifies in explicit detail the action required prior to a taking of this license ("registration") by the Public Health Commissioner:

> MGL ch. 94C § 7 - Registration of persons who manufacture, distribute, dispense or possess controlled substances:
> "(f) Notwithstanding any other provision of this section, the commissioner shall, upon receipt of the fee as hereinbefore provided, automatically issue to any physician, dentist, podiatrist or veterinarian who is duly authorized to practice his profession in the

> commonwealth a registration to dispense, other than for research pursuant to section eight, unless the registration of such physician, dentist, podiatrist, or veterinarian has been suspended or revoked pursuant to the provisions of sections thirteen or fourteen or unless said registration is denied for cause by the commissioner pursuant to the provisions of chapter thirty A. Such registration shall continue in full force and effect unless it is suspended or revoked, or unless it is recalled and a new registration issued in accordance with the rules and regulations of the commissioner."

The State Legislature explicitly recognized that this license, once issued, grants the doctor a protected property / liberty interest, becomes his means of earning a living (no MCSR = no writing prescriptions = no job), and thus respected the doctor's 5th Amendment due process rights. The Court has repeatedly held that ***shall means shall***. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013), *Sandoz Inc. v. Amgen Inc.*, 582 US _ (2017)

Massachusetts law divorces "State authority to dispense" from being licensed as a doctor and places it under a State office separate from a nonsovereign licensing board controlled by private market actors. The Petitioner's brief to the DC Circuit described how the two act separately and presented the example of Dr. Lee Macht whose "State authority to dispense" was suspended for six months by the Public Health Commissioner, *after a hearing in state Superior Court*, while his medical license remained fully active. Here is a diagram of the statutory framework in Massachusetts

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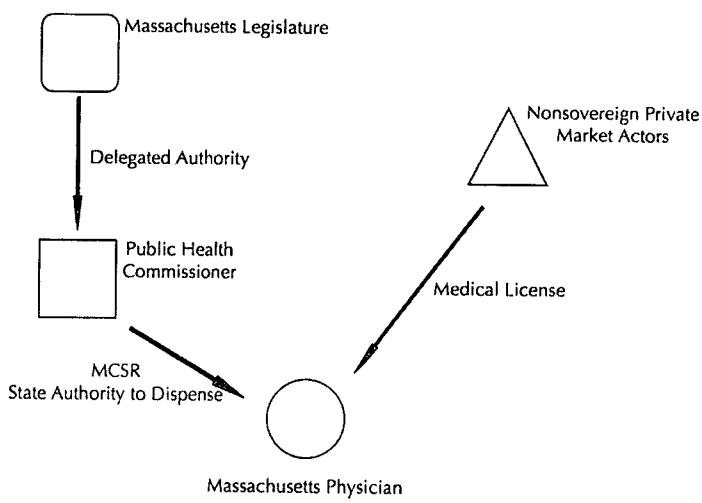

Through the plain text of state law, the Legislature ensured due respect for the State's Public Health Commissioner and that this Officer is the sole State authority who may take the actions specified by State law regarding the taking of a doctor's

"State authority to dispense." The Legislature carefully did not delegate this decision and authority to a professional licensing board comprised of private market actors. The Court has declared that professional licensing boards comprised of private market actors that are not under "active State supervision" are not arms of the State. *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. ___ (2015). The professional medical licensing board in Massachusetts is not under "active State supervision" and is not an arm of the State. See http://www.mass.gov/governor/legislationexecorder/legislation/state-oversight-of-professional-licensing-boards.html

All we have in this case is a suspension of the Petitioner's medical license by four (total seven, three recused) private market actors on a nonsovereign licensing board that is ***not*** an arm of the State. The State Public Health Commissioner has **NOT** performed the statutorily-specified actions to take the Petitioner's MCSR ("registration") and thus this Petitioner's "State authority to dispense" continues, by law, in full force and effect.

The DEA issued a show cause notice based *exclusively* on agency precedent, which holds that suspension of a medical license by itself denotes "loss of State authority to dispense." DEA did ***not*** rely on any state law or regulation to demand, via summary disposition, that Petitioner's DEA certificate be revoked.

Petitioner responded that DEA could not prove as a matter of Massachusetts law that he had lost "State authority to dispense" and that, per both the 5th & 10th Amendments and the Federal Controlled Substance Act, DEA was required to comply with Massachusetts law. DEA's Administrative Law Judge ordered DEA to prove that Petitioner had indeed lost "State authority to dispense." At that point, uniquely and for the first time in 48 years, DEA cited a state ***regulation***, that even the State has never cited or relied on, to claim that Petitioner's MCSR

certificate ("registration") became ***automatically void*** the minute the private market actors on the licensing board suspended his medical license, and that state ***law*** is "**irrelevant**" :

> The Government filed its response in further support of its request for summary disposition on January 5, 2018. The Government argued that ''the formal status of Respondent's Massachusetts CSR Certificate is irrelevant to these proceedings, as any Massachusetts CSR Certificate which Respondent possessed became void as a matter of law the moment that Respondent's medical license was suspended'' pursuant to 105 Code of Massachusetts Regulations § 700.120 and Massachusetts General Laws Ch. 94C §§ 7(f), 9(a). Gov't Resp. Mot. at 4. On January 26, 2018, the Government filed a copy of Respondent's Massachusetts CSR Certificate. Gov't Mot for Leave, at . . . [5]. The Government does not ''dispute Respondent's assertion that he is in [physical] possession of a Massachusetts CSR Certificate and that the Massachusetts Department of Public Health has not yet taken action to revoke his certificate.'' . . . [Gov't Resp. Mot. at 5.] Rather, the Government argues that ''it is irrelevant whether formal action has been taken to revoke Respondent's Massachusetts CSR Certificate as it is already void . . . [for] the pendency of Respondent's [medical license] suspension.'' Id. at 6. Thus, while the Respondent does ''possess a Massachusetts CSR Certificate, [ ] he does not possess authority to handle controlled substances.''
>
> At this juncture, no dispute exists over the fact that the Respondent currently lacks state authority to handle controlled substances in the Commonwealth of Massachusetts because the Medical Board suspended his medical license, thus voiding his Massachusetts CSR Certificate. Because the Respondent lacks state authority at the present time, Agency precedent dictates that he is not entitled to maintain his DEA registration.
>
> > DEA Final Order 83 FR 155, Doc. 2018-17141, August 9, 2018

DEA's claim above that Petitioner's MCSR ("registration") was suspended ***pursuant to Massachusetts General Laws Ch. 94C § 7(f)***, is consciously false and only documents that, when forced by the ALJ to respond, DEA finally realized that they were required to claim compliance with state law. Up to that point DEA had relied ***exclusively*** on internal agency precedent. DEA then asserted as ***irrelevant*** everything that the elected State Legislature enacted as MGL ch. 94C § 7(f), asserted that private market actors on a licensing board can bypass the statutory action by the designated State Officer, and that an obscure, untested, recently discovered regulation that DEA has never cited before, trumps both state law and the 5th Amendment.

The Court must notice the absolute certainty in DEA's assertion that 'no dispute exists over the fact that the Respondent currently lacks state authority to handle controlled substances in the Commonwealth of Massachusetts ***because*** the Medical Board suspended his medical license, thus ***voiding*** his Massachusetts CSR Certificate.'

Petitioner is the first and only physician to bring to the attention of this Court that the DEA's contempt for the Massachusetts Legislature violates the 5th Amendment rights of Massachusetts physicians as well as their 10th Amendment rights.

The DC Circuit punted on an independent examination of the constitutional question:

> "Registration was voided by operation of 105 Code Mass. Regs. § 700.120, which states that such registration "is void if the registrant's underlying professional licensure on which the registration is based is suspended or revoked.""
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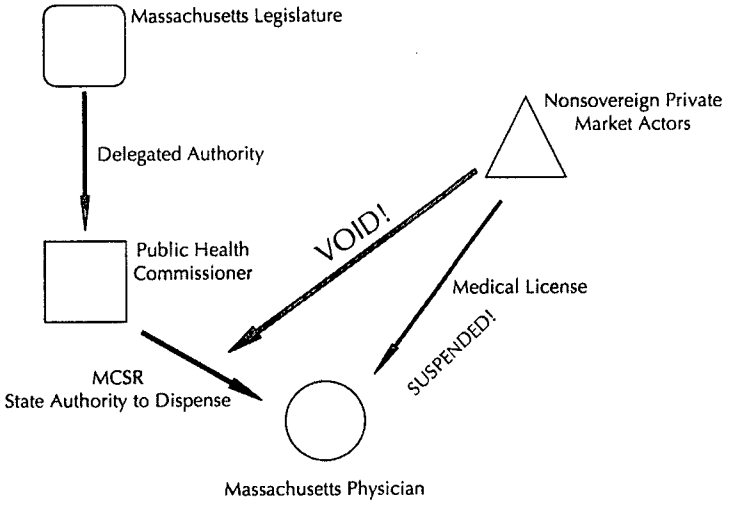
> > Panel opinion, pg. 2

Here is the diagram of what the DC Circuit endorsed :-



ARGUMENT

A. Petitioner has a protected property / liberty interest

Massachusetts law MGL ch. 94C § 7(f) allows the State's Public Health Commissioner to grant a license, called MCSR ("registration"), that allows doctors to write prescriptions. Like any other

license that is necessary for one to lawfully earn a living, this license, once issued, becomes a property / liberty interest that comes under the protections guaranteed by the 5th Amendment and may not be taken away without due process of law.

Protection of property / liberty interests from unlawful takings is so fundamental to our Constitution that the DC Circuit itself declared in *Ralls* that even a claim from the U.S. President of a national security concern was insufficient to overcome due process protections. *Ralls Corp. v. CFIUS*, 758 F.3d 296 (2014) *citing Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998), *Paul v. Davis*, 424 U.S. 693 (1976), *Mathews v. Eldridge*, 424 U.S. 319 (1976), *Lepre v. Dep't of Labor*, 275 F.3d 59 (D.C. Cir. 2001).

Petitioner here was due equal protection, on par with a Chinese company, but did not receive it. State law MGL ch. 94C § 7(f) recognizes the constitutional importance of 5th Amendment protections and provides an explicit process to be followed before this license ("registration") may be taken away by the State. "Such registration **shall** continue in full force and effect unless it is ***suspended*** or ***revoked***, OR unless it is recalled and a new registration issued in accordance with the rules and regulations of the commissioner." Only the Public Health Commissioner may revoke or suspend this license ("registration') and the Department of Public Health maintains a Medical Review Group for the specific purpose of an individualized proceeding prior to suspension or revocation. See Reply brief, exhibit 2. In this case here the Commissioner did *not* suspend or revoke the Petitioner's license.

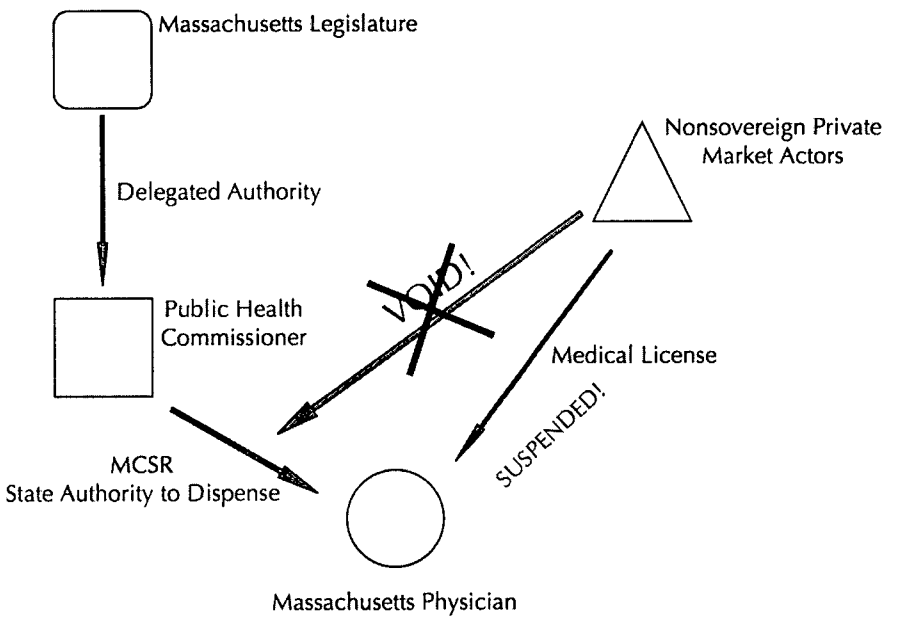
The claim of "automatic voidness" is repugnant to the Constitution and to the text of MGL ch. 94C § 7(f). And nowhere does the statute contemplate, even by implication, that the authority to declare this license ("registration") "void" rests with private market actors on a nonsovereign

licensing board. The Supreme Court has repeatedly held that ***shall means shall***. By defying the plain text of MGL ch. 94C § 7(f), DEA violated this Petitioner's protected rights under the 5th and 10th Amendments.

B. "Automatic voidness" is repugnant to the Constitution and has not been consented to by the people of Massachusetts

The people of Massachusetts, via their elected representatives, have never consented to the usurpation of their authority by private market actors on a nonsovereign licensing board and to the wielding of this authority by anyone other than the specific State Officer chosen by the elected legislature, the Public Health Commissioner.

Specifically, the people of Massachusetts have **never** consented to what the panel endorsed:



Contrary to the DC Circuit's claim of waiver, the Petitioner has repeatedly raised the repugnance of the ***automatic voidness*** claim at every stage of this process and pointed out that the DEA violated the 5th and 10th Amendments by not complying with Massachusetts law. The Petitioner's brief stated: "DEA also falsely claimed that a state *regulation* overrode the plain text

of a state *statute*." Pet. Brief pg. 17. Because a statute ***always*** overrides a regulation, and at all times DEA is required to comply with the **statutes**, Petitioner even stated in his reply brief, pg. 11, "This case does not need invalidation of an erroneous clause in a state regulation that defies the plain text and intent of the Legislature." No argument was freshly raised in the reply brief, which merely replied to DEA's breathtaking assertion in its brief that " *the automatic effect of the regulation is identical to that of an individualized proceeding."*

Any regulation that runs 100% contrary to what the elected legislature explicitly wrote into law, and is repugnant to the Constitution, is *void ab initio*. The DC Circuit plainly erred in opining that 105 CMR § 700.120 is in harmony with enabling statute MGL ch. 94C § 7(f), and that DEA did not violate the 5th and 10th Amendments when it claimed, entirely *post hoc* after being forced to cast about for some legal pretext for its unlawful taking, that the enabling State Law was ***irrelevant***. By declaring that regulation 105 CMR § 700.120 is in harmony with its enabling statute, the panel created entirely novel definitions for the terms "not inherently inconsistent" and "harmony." *Gonzales v. Oregon*, 546 U.S. 243 (2006) The Court must vacate and reverse the DC Circuit's opinion.

Suddenly claiming compliance with a state *regulation* while violating a state *statute* does not absolve DEA of its violation of the Constitution, especially when the record is clear that DEA grasped at the ***automatic voidness*** straw only after being challenged by the Petitioner at the summary disposition stage within the agency, did not rely on that prong when filing for summary disposition in this case, and ***has never ever, as in ever, relied on that claim*** in even one single revocation case in Massachusetts previously.

DEA is required by the federal Controlled Substance Act to comply with **State law**. DEA chose to not do so in this case because it has never done so in 48 years. The regulation that DEA

discovered, after being challenged, did not even exist until 2014, but it still cannot save them because no regulation can allow DEA to escape mandated compliance with the plain text of the Controlled Substance Act, and State law.

C. DEA has never complied with the dictate of the federal Controlled Substance Act

The relevant section of the Act, 21 U.S.C. ch. 13 § 801 *et seq*, §824, "Denial, revocation, or suspension of registration" has an AND and an OR within:

> (3) *has had his State license or registration suspended, revoked, or denied by competent State authority* **AND** *is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances or list I chemicals* **OR** has had the suspension, revocation, or denial of his registration recommended by competent State authority
> [Emphasis added]

The portion before the AND refers to the medical license, the portion after the AND refers to State authority to dispense. Because the two are not the same in some states, such as in Massachusetts, Congress chose to ***NOT*** write: 'has had his State license or registration suspended, revoked, or denied by competent State authority ***meaning*** he is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances.' Pursuant to Federal law, DEA *must* show that a ***Massachusetts physician*** has had his medical license suspended **AND** has had his MCSR certificate ("registration") revoked by the Public Health Commissioner (the only "competent State authority" in Massachusetts) as required by State law, MGL ch. 94C § 7(f).

Statutory text reigns supreme where it is unambiguous, as here. For 100 years, the Court has held that all courts must be "guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary."

Standard Oil Co. of N. J. v. United States, 221 U. S. 1 (1911), *Maslenjak v. United States*, 582 U.S. ___ (2017), *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000)([W]hen the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms.), *Pereira v. Sessions*, 585 U.S. ____ (2018)("Unable to root its reading in the statutory text, the Government and dissent raise a number of practical concerns, but those concerns are meritless and do not justify departing from the statute's clear text.")

DEA instead declared that 'Respondent currently lacks state authority to handle controlled substances in the Commonwealth of Massachusetts ***because*** the Medical Board suspended his medical license, thus ***voiding*** his Massachusetts CSR Certificate[]' and that state law is ***irrelevant***. [Emphasis added]

This DEA action consciously violated the Federal Controlled Substance Act, which requires DEA to comply with State law, violated the State law in question (MGL ch. 94C § 7(f)), violated the 10th Amendment rights of Massachusetts physicians including the Petitioner here, *Bond v. United States*, 564 U.S. 211 (2011), and violated the Petitioner's 5th Amendment right to be free from a taking of his protected property / liberty interest without the statutorily-defined due process.

DEA has already conceded that the Massachusetts Public Health Commissioner has ***not*** suspended or revoked Petitioner's MCSR license ("registration").

The DC Circuit punted on the Petitioner's explicit invitation to perform the mandatory textual analysis of both Federal and State law, including the words "and" (federal), "full force and effect" (state) and "shall."

The DC Circuit abdicated its duty to properly examine this federal constitutional question, a question of first impression in that circuit. The DC Circuit has created idiosyncratic definitions for the terms "not inherently inconsistent" and "harmony" that defy long-established definitions. *Gonzales v. Oregon*, 546 U.S. 243 (2006), *Central United Life Ins. Co. v. Burwell*, 827 F.3d 70 (D.C. Cir. 2016)

The DC Circuit's opinion conflicts with a foundational principle of the United States, that an "automatic" taking without individualized due process is repugnant to the Constitution, and defies both binding Supreme Court rulings and current precedent in the DC Circuit itself. See *Ralls Corp. v. CFIUS*, 758 F.3d 296 (2014). This error is an issue of exceptional importance that deserves certiorari.

Certiorari is particularly important here because though Petitioner is the first to have litigated this question thus far, the violation reported here has been committed numerous times in the past, is assured to repeat, and the Court must rule that ***automatic*** takings of protected property / liberty interests, without individualized proceedings, especially at the pleasure of private market actors, are repugnant, anti-American, and *ultra vires*.

The Circuit's erroneous opinion officially establishes that federal agencies may deem state law ***irrelevant*** when it suits them, even when federal law requires their compliance. This is particularly vital given that the DC Circuit is the main go-to court for review of agency decisions.

As a matter of law, the taking of this Massachusetts Petitioner's DEA certificate (BP7993290) by summary disposition, based on the false claim of ***automatic*** "loss of State authority to dispense," violated his protected constitutional rights under the 5th and 10th Amendments. The Court must grant certiorari and reverse the DC Circuit's order.

REASONS FOR GRANTING AN EXTENSION OF TIME

The time to file a Petition for a Writ of Certiorari should be extended for sixty days for these reasons:

Petitioner represented himself *pro se* in the DC Circuit, went unheard, and needs representation by an attorney experienced in preparing briefs in this Court. This 10th Amendment case is exceptional and presents an extraordinarily important issue that warrants a carefully prepared Petition. Only the Supreme Court can and must rule on 10th Amendment issues. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), *Bond v. United States*, 564 U.S. 211 (2011)

Petitioner Dr. Bharani seeks certiorari on a question of first impression because the DC Circuit endorsed the "automatic" taking of a protected property / liberty interest without complying with an explicit state law that details what process is due prior to the taking and who alone must do the taking, thereby violating the 10th Amendment. The DC Circuit's opinion so totally defeats the statutory purpose as to warrant certiorari.

Allowing the DC Circuit's opinion to stand harms the United States in terms of who controls our institutions, encourages lawlessness by both federal agencies and private market actors, and rents the very fabric of democracy.

One would be hard-pressed to envisage a worse outcome for jurisprudence affecting every petitioner who seeks review of federal agency decisions. Review by the Court is thus essential. There is at minimum a substantial prospect that this Court will grant certiorari, and a substantial prospect of reversal given the severe blow to Constitutional protections and national public policy that the DC Circuit's opinion presents.

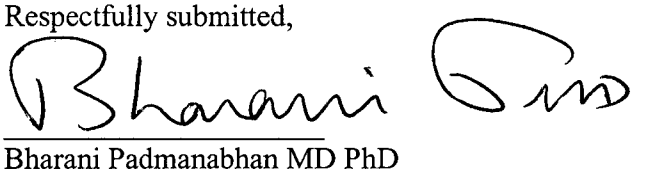
The Petitioner is working diligently to retain counsel with Supreme Court expertise to prepare the Petition. He has made continual efforts towards that end and even made a trip to Washington DC to personally visit law firms and seek an advocate. Because he is unable to dangle a $30,000 money order up front, it is taking longer than envisaged. The extension sought shall assist greatly in locating appropriate counsel.

No meaningful prejudice to any party would arise from the extension.

CONCLUSION

Based on the facts and legal arguments presented herein, this Application for extension of time to file a petition for certiorari must be granted and the time to file should be extended sixty days up to and including October 25, 2019, which is what the petitioner respectfully requests.

Respectfully submitted,



August 20, 2019

Bharani Padmanabhan MD PhD
(pro se for now)
30 Gardner Road #6A, Brookline MA 02445
617 566 6047, scleroplex@gmail.com