No. 19-6436

ORIGINAL

In The

# Supreme Court of the United States

BHARANIDHARAN PADMANABHAN M.D. Ph.D.
(Dr. Bharani)
*Petitioner,*

v.

DRUG ENFORCEMENT ADMINISTRATION
*Respondents.*

**On Petition for Writ of Certiorari**
**To The United States Court Of Appeals**
**For The District of Columbia Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The DEA relied exclusively on an internal agency precedent to declare that because private market actors on the Massachusetts medical board suspended the Petitioner's medical license, he lost "state authority to dispense" controlled substances and so his Drug Enforcement Administration registration must be revoked. Petitioner responded that DEA was required to comply with § 824 (a)(3) of the federal Controlled Substance Act (CSA), which requires DEA to comply with State law (Massachusetts General Laws ch. 94C § 7(f)) to determine whether the physician had indeed lost his "state authority to dispense."

State law divorces "state authority to dispense" from medical licensure and requires a specific statutory action by the Public Health Commissioner before a physician loses his "state authority to dispense." The DEA agreed that the Commissioner has not taken any action, then countered that a new state regulation (105 CMR 700.120) "automatically voided" Petitioner's "state authority to dispense," that "the automatic effect of the regulation is identical to that of an individualized proceeding" and State law is "irrelevant" prior to a taking of his liberty / property interest. The court of appeals agreed that an "automatic" taking of a liberty / property interest is in "harmony" with State law and the Fifth Amendment.

The questions presented are:

1. Are federal agencies exempt from complying with the Tenth Amendment such that they can deem State law "irrelevant" and violate the individual rights of Massachusetts persons?

2. Are "automatic" deprivations of liberty / property interests slipped in by a state agency's regulation truly in "harmony" with the plain text of State law, the Fifth Amendment's Due Process clause, and the ban against bills of attainder, and can DEA rely on one to defy the plain text of the federal Controlled Substance Act which requires compliance with State law itself?

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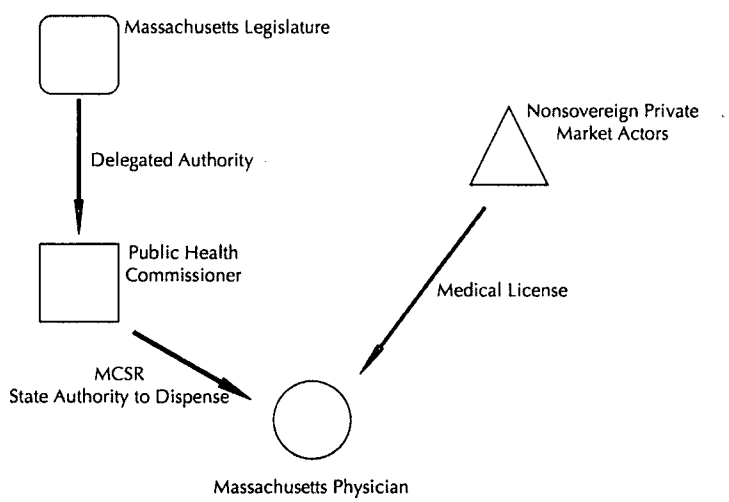
## CORPORATE DISCLOSURE STATEMENT

Petitioner Bharanidharan Padmanabhan MD PhD is an individual.

# PETITION FOR WRIT OF CERTIORARI

Every State has an entity that issues medical licenses to physicians. In Massachusetts this body is comprised of private market actors, is not under active State supervision and is not an arm of the State *per North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. ___ (2015)

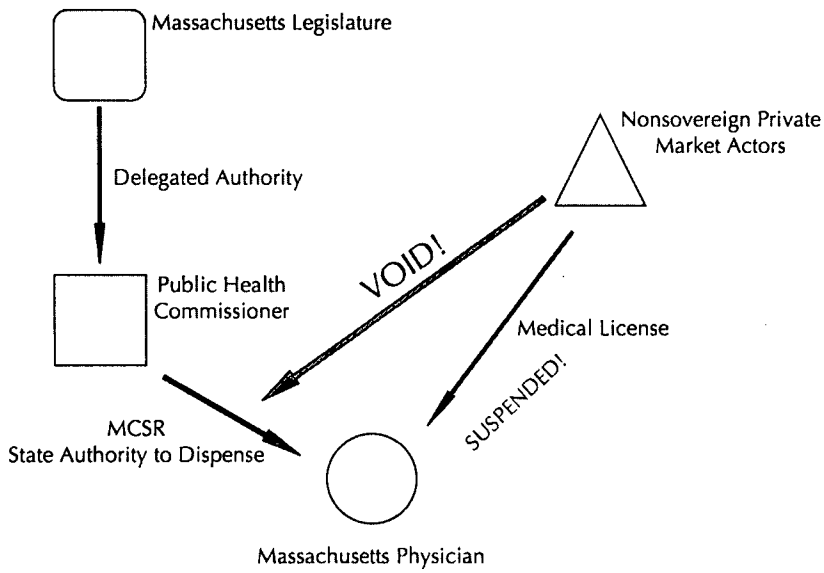
This case involves a second license issued by the Commonwealth of Massachusetts (State) to a doctor that allows him to write medical prescriptions. This license, the Massachusetts Controlled Substance Registration certificate (MCSR or registration), is issued by the State's Public Health Commissioner pursuant to State law, MGL ch. 94C § 7(f), and grants a physician "authority to dispense controlled substances." Without this second license from the State, a doctor cannot be employed as he cannot write any prescriptions, even if he carries an active medical license from the nonsovereign medical board, because in Massachusetts *all* medicines are controlled substances, including aspirin. Petitioner was granted this authority. This is the statutory framework in Massachusetts:



Most physicians are further required to obtain from the Drug Enforcement Administration a registration that allows them to dispense (write prescriptions for) medicines that have been listed as controlled substances by the DEA using its authority under the federal Controlled Substance Act. So, a doctor needs three separate registrations to earn a living: a medical license, a State controlled substance registration, and a DEA registration.

Massachusetts law dictates that only the State Public Health Commissioner may suspend or revoke the registration that grants a physician "State authority to dispense controlled substances." After four private market actors on the medical board suspended the Petitioner's medical license, the DEA moved to summarily revoke the Petitioner's DEA registration, based *exclusively* on internal agency precedent, which holds that suspension of a medical license *per se* denotes "loss of State authority to dispense." Petitioner documented that pursuant to State law and the federal CSA, summary disposition in the absence of action by the State Commissioner violated both the Tenth Amendment and his due process rights. At this point, for the first time in 48 years, DEA declared that a new state regulation it discovered *after* filing for summary disposition, made State law "**irrelevant**," and that even in the absence of the *mandated* action by the Commissioner, the Petitioner's state registration had become "automatically void" because of the suspension of his medical license by the medical board. The DEA Administrator revoked the Petitioner's DEA registration. The DC Circuit declined to analyze the agency's claims, *cf. Flyers Rights Educ. Fund v. FAA*, 864 F.3d 738 (DC Cir. 2017),

and endorsed "automatic voidness," acquired police power, and deprivation of a protected property / liberty interest by a federal agency in defiance of an explicit State law that *mandates* what process is due prior to the taking and who alone must do the taking, which violated the Tenth Amendment and the individual rights of this Massachusetts physician. The DC Circuit endorsed this:




The DC Circuit's opinion defies this Court's rulings in *Bond I&II* and so totally defeats the statutory purpose as to warrant certiorari. *Bond v. United States*, 564 U.S. 211 (*Bond I*, 2011), *Bond v. United States*, 572 U.S. 844 (*Bond II*, 2014) 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, violates the very concept of states' rights, guts a founding principle of the United States, and rents the fabric of democracy given that the lower court endorsed contempt for the voters of Massachusetts. If one can endorse contempt for one law reserved to the States, one can easily do the same for

any other law reserved to the States. One would be hard-pressed to envisage a worse outcome for jurisprudence that affects every petitioner who seeks review of federal agency decisions, as the DC Circuit is the go-to court for that review. Certiorari by the Court is most essential to correct this injustice and clarify that all courts, federal agencies, and regulations, must comply with the Constitution regarding individual rights and federalism. Petitioner respectfully seeks a writ of certiorari to review this decision from the U.S. Court of Appeals for the DC Circuit.

## OPINION BELOW

The lower court's decision is reproduced in its entirety in Appx. 2-4. The DEA Administrator's Final Order, published in the Federal register, is reproduced in its entirety in Appx. 5-8.

## JURISDICTION

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*. The Chief Justice extended the time to file a petition to October 26, 2019. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment is reproduced in Appx. 1. The relevant portion of § 824 of the CSA is reproduced in Appx. 1 and also within this petition in the appropriate sections. The relevant portion of MGL ch 94C § 7(f) is reproduced in Appx. 1 and also within this petition in the appropriate sections.

## STATEMENT OF THE CASE

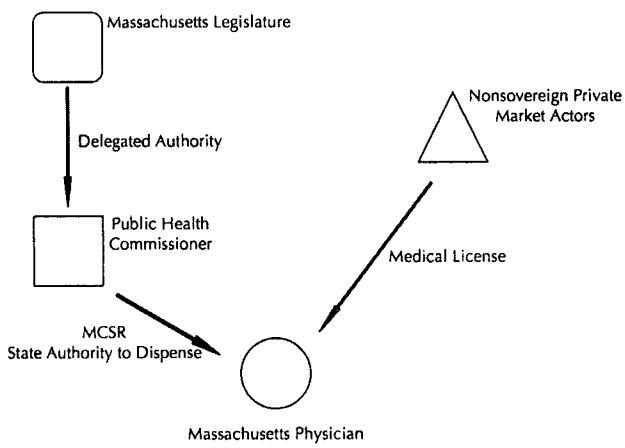
This case involves a license issued by the Commonwealth of Massachusetts to a doctor that allows him to write medical prescriptions. This license, named the Massachusetts Controlled Substance Registration Certificate ("MCSR", or "registration"), is issued pursuant to the plain text of a state law, Massachusetts General Laws ch. 94C § 7(f), which also *mandates* 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 MCS Registration = no writing prescriptions = no job), and thus respected the doctor's Fifth Amendment due process rights. Chapter 30A defines due process procedures. The Court has 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) The Massachusetts Supreme Court has so ruled as well:

"The distinction between 'may' and 'shall' is not lightly to be held to have been overlooked in legislation."

*City Bank & Trust Co. v. Board of Bank Incorporation*, 346 Mass. 29, 31 (1963), cited in *Adams v. City of Boston*, 461 Mass. 602 (2012)




Massachusetts law divorces "State authority to dispense" from a medical license and places it under a State office separate from a nonsovereign licensing board controlled by private market actors. In 1980, a Dr. Lee Macht's "State authority to dispense" was suspended for one year by the Public Health Commissioner, *after a hearing* in Superior Court, while his medical license remained fully active. Appx. 10 The Legislature declared the State's Public Health Commissioner is the sole State authority who may take the actions *mandated* by State law regarding the taking of a doctor's "State authority to dispense." The Legislature did ***not*** delegate this authority to private market actors on a licensing board. The Court has declared that 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 Massachusetts Governor has declared that the medical board is not under "active State supervision." It 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's Public Health Commissioner has ***not*** performed the statutorily-specified actions to revoke the Petitioner's state controlled substance registration and thus this Petitioner's "State authority to dispense" continues, by law, in full force and effect. Shall means shall. See Appx. 11

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 Massachusetts law or regulation to demand that Petitioner's DEA registration be revoked via summary disposition. Petitioner responded that as a matter of Massachusetts law his "State authority to dispense" continued in full force and effect, and that, *per* both the Fifth & Tenth Amendments as well as the CSA, DEA was mandated, obligated, to comply with Massachusetts law. DEA's own Administrative Law Judge ("ALJ") ordered DEA to prove that Petitioner had indeed lost "State authority to dispense." At that point, uniquely, and for the first time in the 48 years that DEA has been in existence, DEA scrambled to find authority and finally cited a 2014 state *regulation* (105 Code of Massachusetts Regulations 700.120, a new regulation that even the State has never relied on (see pg. 12 below, Appx. 9 and Appx. 11)) to claim that Petitioner's state 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 DEA Administrator promptly declared in the Federal Register:

> 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.

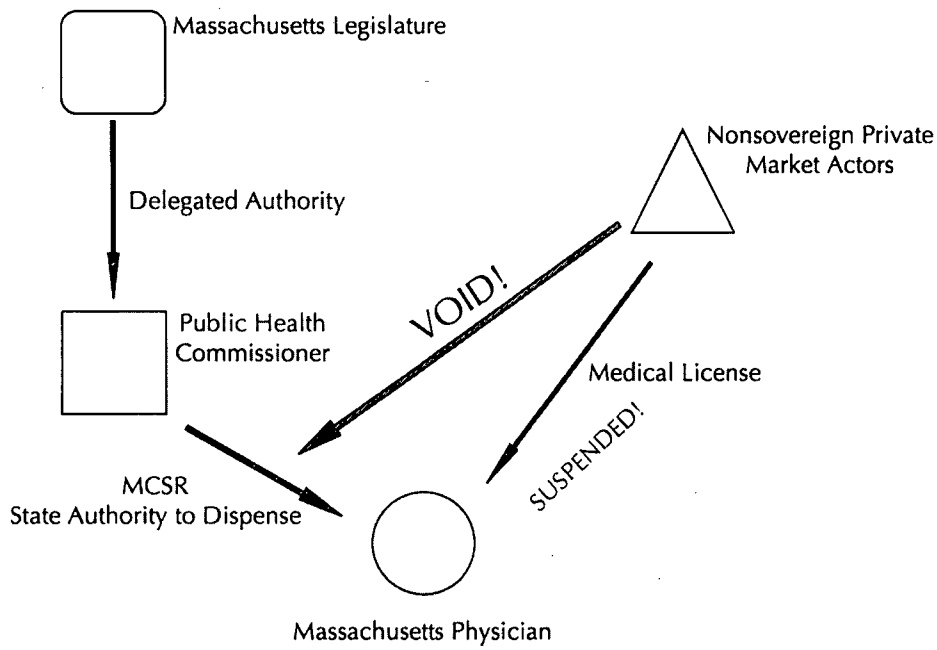
– DEA Final Order, 83 FR 155, Doc. 2018-17141, August 9, 2018 *emphasis added*

DEA asserted as **irrelevant** everything that the elected Legislature enacted as MGL ch. 94C § 7(f), asserted that private market actors on a licensing board can bypass the mandatory statutory action by the designated State Officer, and that an obscure, untested, recently discovered 2014 regulation that DEA has never cited before, trumps both State law and the Fifth 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 <u>because</u> the Medical Board suspended his medical license, <u>thus voiding</u> his Massachusetts CSR Certificate.*' The DC Circuit declined to perform an independent examination of the statutory text and endorsed this view:

> "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.""

Here is the diagram of what the DC Circuit endorsed:




## REASONS FOR GRANTING THE PETITION

### A. Petitioner Was Deprived Of A Property / Liberty Interest Through Violation Of The Tenth Amendment, Which Caused A Concrete, Particularized, Redressable Injury

Like any other license that is necessary for one to lawfully earn a living, the state registration, once issued, becomes a property / liberty interest that comes under the protections guaranteed by the Fifth Amendment and may not be taken

away without due process of law. Protection of property / liberty interests from unlawful deprivation 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-owned company deemed a national security threat, but did not receive it.

State law MGL ch. 94C § 7(f) recognizes the constitutional importance of Fifth Amendment protections and provides an explicit process to be followed before this 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 suspend or revoke this 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 pg. 12 below. In this case here the Commissioner did *not* suspend or revoke the Petitioner's license. The Court has repeatedly held that *shall means shall.* By defying the plain text of MGL ch. 94C § 7(f), DEA violated this Petitioner's individual rights under the Fifth and Tenth Amendments. In *Bond I* this Court ruled that federalism "protects the liberty of all persons within a State" and allows

all persons to object when the federal government upsets the constitutional balance between the National Government and the States and causes them injury that is "concrete, particular and redressable." *Bond v. United States*, 564 U.S. 211 (*Bond I*, 2011) Petitioner has standing and objects. The summary revocation of Petitioner's DEA registration in conscious violation of the Tenth Amendment, State law, and the Fifth Amendment, is an injury that is concrete, particular and redressable.

All physicians have to credential with numerous entities every two (2) years. One of the mandatory questions on credentialing forms is whether a physician's DEA certificate was surrendered or revoked. This is mandatorily reportable for the rest of a physician's professional life whenever he renews or applies for a medical license or privileges at medical facilities or acceptance by an insurance plan to see their patients. At any point, answering Yes to a question about revocation of a DEA registration can, and is, used to deny physicians licenses or privileges, regardless of why. Revocation of a DEA certificate of registration is associated with a massive stigma and reasonable persons immediately assume that the physician had violated federal drug laws by either distributing drugs outside of a legitimate medical purpose for money or by being a drug addict himself. This fate must not be inflicted on physicians *automatically*, without due process, as has been done to this Petitioner.

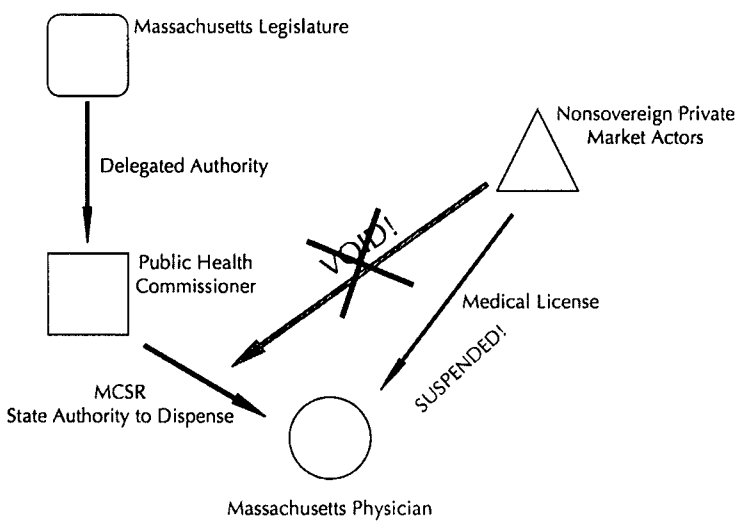
The Court has also ruled that a constitutional violation is complete at the time of deprivation. *Knick v. Township of Scott, Pennsylvania*, 588 U.S. ___ (2019)

The Petitioner awaits a concrete remedy from the Court, namely an order to DEA to return his DEA registration (BP7993290) back to him.

### B. The Decision Below Cannot Be Reconciled With The Constitution's Structural Protections Or With This Court's Precedent - "Automatic Voidness" Is Repugnant To The Constitution And Has Not Been Consented To By The People Of Massachusetts

The lower court endorsed the DEA's assertion:

> "Dr. Padmanabhan's only acknowledgment of the regulation is the conclusory assertion that a regulation may not "override the plain text of a state statute." Pet. Br. 17. As the Acting Administrator pointed out, however, "the statute and the regulation are not in conflict." 83 Fed. Reg. 39,787 n.6 (quotation marks omitted). Massachusetts law permits the Public Health Commissioner to promulgate regulations governing controlled substance regulations, and the regulation thus promulgated removes Dr. Padmanabhan's authorization to *handle* controlled substances in Massachusetts. See id. **Therefore, under state law, the automatic effect of the regulation is identical to that of an individualized proceeding.**"
>
> – Resp. brief, pg. 14, DC Circuit, *[emphasis added]*




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

people of Massachusetts have **never** consented to what the lower court endorsed, as seen in the diagram above, and have **never** consented to their Secretary of Health granting to private market actors a state police power that the people reserved to their Commissioner.

The DEA's newfound averment that "the automatic effect of the regulation is identical to that of an individualized proceeding" is contradicted by the State's own actions, despite the new 2014 regulation (105 CMR 700.120) brought in by Massachusetts Health Secretary John Polanowicz as his response to the 'opioid crisis' wherein the crisis would be solved by granting state police powers by fiat to private market actors on a nonsovereign licensing board and stripping physicians of due process rights conferred by the Fifth Amendment and State law so they can be easily blocked from earning a living as a physician, no questions asked. Appx. 9

> **700.120**: Void Registrations: A registration is void if the registrant's underlying professional licensure on which the registration is based is suspended or revoked.
>
> See https://www.mass.gov/files/documents/2019/06/18/jud-lib-105cmr700.pdf

In *Bond II*, the Court clearly ruled that the very concept of an "acquirable police power" is unconstitutional. *Bond v. United States*, 572 U.S. 844 (*Bond II*, 2014) Granting state police powers to private market actors on a nonsovereign licensing board through a departmental regulation is the implementation of exactly that - "acquirable police power," and in addition to being consciously, willfully, blatantly unconstitutional and totally antithetical to the fundamental tenets of the United States, the regulation also demonstrates Massachusetts Health Secretary

(and former corporate hospital executive) John Polanowicz's total contempt for the will of the elected Legislature. Secretary Polanowicz was on notice due to both *Larkin* and *Bond II* that he lacked the authority to grant a state police power to private market actors, but chose to do so anyway in order to harm physicians' due process protections. *Larkin v. Grendel's Den*, 459 U. S. 116 (1982) His successor, Secretary Marylou Sudders has continued to "amend" regulations to ensure physicians are stripped of all due process rights and that police powers granted to private market actors are enhanced. Public record requests reveal that no input was sought from the public, constitutional scholars or the physician community prior to new regulations being introduced in Massachusetts Register Issue 1275 in December 2014 with numerous statutory protections stripped, or when it was 'amended' by Secretary Sudders in 2017 and 2018. See Appx. 9

Every year the Massachusetts Dept. of Public Health files a mandatory report to the Legislature. Here is the full section on the state registration from the 2016 report, the latest available online:

> Massachusetts Controlled Substance Registration (MCSR):
>
> In order to provide accountability for controlled substances, Massachusetts General Laws, Chapter 94C, Section 7 and regulations of the Department of Public Health at 105 CMR 700.004 require every person who manufacturers, distributes, prescribes, administers, dispenses or possesses controlled substances to be registered with both the Department of Public Health, referred to as the Massachusetts Controlled Substance Registration (MCSR) and federal Drug Enforcement Administration for controlled Substances in Schedules II-V. In addition, Massachusetts law recognizes those prescription drugs that are not federally scheduled (Schedule VI) as controlled substances. The OPMDC is also responsible for automatically enrolling a person who obtains or renews an MCSR as a participant in the PMP. In

> some cases, it may be necessary to take action to revoke, suspend or not renew an individual practitioner's MCSR. Upon receipt of notification that a board of registration has suspended or revoked a registrant's authorization to practice, the OPMDC refers the case to the PMP Medical Review Group (MRG), and an investigation is conducted in accordance with the standards set forth in 105 CMR 700.105 through 700.120. Depending on the outcome, the OPMDC will move to suspend, terminate or refuse to renew the MCSR, including co-incidental activities and enrollment in the PMP.
>
> Available at https://www.mass.gov/lists/dph-annual-reports-and-legislatively-mandated-reports

In 2016 the Department of Public Health thus declared to the Massachusetts Legislature that they *do* perform an *individualized* investigation of any physician whose medical license has been suspended by the medical board before any *taking away* of his controlled substance registration is even contemplated. The Department agreed that it must "move" to "suspend, terminate or refuse to renew," in compliance with and tracking the specific language of, MGL ch. 94C § 7(f). The Department continues to inform registrants that unless their registration has been suspended or revoked, it continues in full force and effect. See Appx. 11 Despite Secretary Sudders, neither the Public Health Commissioner nor the Department of Public Health has ever declared a physician's registration to be "automatically void" based on the pleasure of private market actors on a medical board. The DEA Administrator is the first in the nation to do so. Worse, the DEA has claimed that the Standard Order of Authorities, and the requirement that a regulation must conform to its enabling statute, is a conclusory assertion:

> "Dr. Padmanabhan's only acknowledgment of the regulation is the conclusory assertion that a regulation may not "override the plain text of a state statute." *DEA's brief to the DC Circuit.*

Next DEA will claim a state regulation overrides State law and the US Constitution. In fact, that precisely is already DEA's legal position in this case: "it is **irrelevant** whether formal action has been taken to revoke Respondent's Massachusetts CSR Certificate as it is already void." This cannot be the law in the United States. "Automatic voidness" of a liberty / property interest is explicitly unconstitutional, and as unconstitutional as it can get. The Framers most certainly would be looping the proverbial loop now that DEA Administrator Uttam Dhillon has demonstrated such contempt for a fundamental, core, founding principle of the United States that the revolutionaries sacrificed their lives for. In *Cohens v. Virginia*, 19 U.S. 264 (1821) the Court ruled that state laws in opposition to federal laws are void. Regulations and agency precedents that are in opposition to both their enabling statute and the U.S. Constitution are equally void. *Pereira v. Sessions*, 585 U.S. ___ (2018), *Honeycutt v. United States*, 581 U.S. ___ (2017)

This Court has struck down unconstitutional practices in Massachusetts on numerous occasions. *Dinis v. Volpe*, 389 U. S. 570 (1968), *Caniffe v. Burg*, 405 U. S. 1034 (1972), *Smith v. Goguen*, 415 U. S. 566 (1974), *First Nat'l Bank v. Bellotti*, 435 U. S. 765 (1978), *Bellotti v. Baird*, 443 U. S. 622 (1979), *Globe Newspaper Co. v. Superior Court*, 457 U. S. 596 (1982), *Larkin v. Grendel's Den*, 459 U. S. 116 (1982), *West Lynn Creamery, Inc. v. Healy*, 512 U. S. 186 (1994), *Hurley v. Irish-American Gay Group*, 515 U. S. 557 (1995), *Lorillard Tobacco Co. v. Reilly*, 533 U. S. 525 (2001), *McCullen v. Coakley*, 573 U. S. ___ (2014)

The DC Circuit erred in accepting DEA at its word that 105 CMR 700.120

is in "harmony" with enabling statute MGL ch. 94C § 7(f), and that DEA did not violate the Fifth and Tenth Amendments when it claimed, after being forced to cast about for some legal pretext for its unlawful deprivation, that the enabling State law was "**irrelevant.**" By endorsing that regulation 105 CMR 700.120 is in harmony with its enabling statute, the lower court created novel definitions for the terms "not inherently inconsistent" and "harmony." *Gonzales v. Oregon*, 546 U.S. 243 (2006) Only this Court can correct these novel definitions that are at odds with the Court's repeated instructions on statutory interpretation and the requirement that regulations must comply with enabling statutes and the Constitution. Due to *Bond I&II* and *Knick*, the importance of federalism has recently broken into the consciousness of the courts but it clearly has not reached federal agencies yet, thereby making this Court's review imperative. Only this Court can ensure that federal agencies remain subject to the basic structural limits of the Constitution and they don't treat it merely as a paper tiger.

This Court has ruled that a constitutional violation is complete at the time of deprivation. *Knick v. Township of Scott, Pennsylvania*, 588 U.S. ___ (2019) The Petitioner awaits a concrete remedy from the Court, namely an order to DEA to return his DEA registration (BP7993290) back to him.

### C. This Case Is The Perfect Vehicle To Interpret § 824 (a)(3) In Terms Of The Tenth Amendment - The Decision Below Misapplies Basic Principles Of Statutory Construction

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]*

While the portion before the AND ~ *may* ~ refer to a medical license, the portion after the AND most certainly refers to a State controlled substance license. 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.'

One may legitimately interpret the plain text of § 824 (a) to refer *exclusively* to a State's controlled substance registration and not to a medical license, given that it concerns itself solely with "manufacturing, distribution or dispensing of controlled substances" and not with the practice of clinical medicine. Manufacturing and distribution are typically done by people who are not licensed physicians and we are required to resist the assumption that when Congress placed those words together in that specific sentence they did not know what they were doing. The Massachusetts Supreme Judicial Court certainly interpreted the Massachusetts Controlled Substance Act that way:

> ""Practitioner" is specially defined in Section 1 of G. L. c. 94C as "[a] physician, dentist, veterinarian, podiatrist, scientific investigator, or other person registered to distribute [or] dispense . . . a controlled substance in the

course of professional practice . . . ." The registration referred to in the definition of practitioner involves registration with the Commissioner of Public Health."
*Commonwealth v. Robert Chatfield-Taylor*, 399 Mass. 1 (1987)

For the SJC, as concerns the Massachusetts CSA, the 'definition of practitioner involves registration with the Commissioner of Public Health' and not a licensing board comprised of private market actors. If we go by the DEA's interpretation that State license in § 824 (a)(3) of the federal CSA refers exclusively to a *medical* license, then DEA must show that a Massachusetts physician had his medical license suspended ***and*** had his State controlled substance registration suspended / revoked by the Public Health Commissioner (the only "competent State authority" in Massachusetts) as required by State law, MGL ch. 94C § 7(f).

Either way, <u>for Massachusetts persons</u> (physicians, pharmacists, pharmaceutical manufacturers), proper interpretation of the plain text of § 824 (a)(3) cannot be reconciled with the DEA's claim that a *medical license* is the controlling document when it writes that "because the CSA requires that a physician possess state controlled substances authority in order to be deemed a practitioner, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices."

Statutory text reigns supreme. 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), *United States v. Gonzales*, 520 U.S. 1 (1997), *Honeycutt v. United States*, 581 U.S. ___ (2017), *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."), *O'Connor v. Oakhurst Dairy*, 851 F. 3d 69 (1st Cir. 2017)(For want of a comma we have this case.), *Murphy v. National Collegiate Athletic Association*, No. 16-476, 584 U.S. ___ (2018), *Smith v. Berryhill*, 587 U.S. __ (2019)

DEA instead declared that it is "beyond dispute" 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 then claimed that State law is "**irrelevant**."

DEA deliberately misdirects the courts by conflating the requirements for *obtaining* a Registration with the requirements for *taking* a Registration away, in order to focus attention on "*practitioner*" and away from "*and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing*

*of controlled substances.*" The DEA Acting Administrator's Final Order in the Federal Register in this case recorded the following:

> "On the basis of the Respondent's suspended medical license, the Government argued that the Respondent no longer meets the definition of "practi[ti]oner" under the Controlled Substances Act, 21 U.S.C. 802 (21), and under 21 U.S.C. 823(f), which "sets forth the requirements for obtaining a registration as a practi[ti]oner." Gov't Mot. at 4. As such, the Government argued that Respondent's . . . [registration] should be revoked."
>
> Again, in DEA's brief to the DC Circuit, page 12:
>
> "Specifically regarding Dr. Padmanabhan's state controlled substance registration, the Acting Administrator found that, under Mass. Gen. Laws ch. 94C § 7(f), Dr. Padmanabhan is not eligible for issuance of a controlled substances registration if he is not authorized to practice medicine."

But we weren't talking about *issuance*, were we? It is explicit in DEA's briefs that this conscious conflation underlies all of the 'loss of state authority' revocation actions that DEA has carried out nationwide for years. It is exclusively because this Petitioner raised a constitutional due process objection to this overt, official, enshrined agency policy, that DEA suddenly and uniquely felt the need to superficially deny it <u>while still clinging to that very claim</u> - *He is no longer deemed a practitioner and no longer meets the criteria to obtain a DEA certificate and so we will summarily revoke it with no need for due process.*

> "The Acting Administrator agreed with the ALJ that there was no conflict between the statute governing controlled substance registration (Mass. Gen. Laws ch. 94C, § 7(f)) and the regulation automatically voiding a registration on suspension of a medical license (105 Mass. Code Regs. § 700.120). 83 Fed. Reg. 83,786-87; see 83 Fed. Reg. at 39,787, n.6 (discussing the Public Health Commissioner's authority to promulgate 105 Mass Code § 700.120 and the distinct factual scenario the regulation addresses). Specifically, the statute pertains to MCSR Certificates issued to those "duly authorized to practice" medicine in Massachusetts. Id. The Acting Administrator found that Dr.

> Padmanabhan was *not currently eligible to **receive** a MCSR Certificate* under the statute because he is not authorized to practice medicine, and *the absence of evidence in the state records that Dr. Padmanabhan was authorized to handle controlled substances was "consistent with" the regulation voiding his state registration.* 83 Fed. Reg. 39,786-87."
>
> – Resp. brief, pg. 7-8, DC Circuit *[emphasis added]*

> Dr. Padmanabhan asserts that the DEA violated his due-process rights by engaging in "[d]eliberate conflation of requirements for registration with requirements for revocation." Pet. Br. 11. This argument misconstrues the record in this case. The passage Dr. Padmanabhan cites to support his argument is a portion of the Acting Administrator's adoption of the procedural history from the ALJ's recommendation. See Pet Br. 12 (citing 83 Fed. Reg. at 38,785). This passage is not a "deliberate conflation" of requirements. As the Acting Administrator discussed, because the CSA requires that a physician possess state controlled substances authority in order to be deemed a practitioner, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. See 83 Fed. Reg. 39,786; Hooper, 76 Fed. Reg. at 71,371–72; Sheran Arden Yeates, M.D., 71 Fed. Reg. 39,130-31 (July 11, 2006); Dominick A. Ricci, M.D., 58 Fed. Reg. 51,104-05 (Sept. 30, 1993); Bobby Watts, M.D., 53 Fed. Reg. 11,919-20 (April 11, 1988), Blanton, 43 Fed. Reg. at 27,617. The Acting Administrator applied the law properly. – Resp. brief, pg. 17-18, DC Circuit

It is vital for the Court to note that the DEA failed to cite a single case of a Massachusetts physician in its argument. All of the cases cited refer to other states with different State laws. In Massachusetts, a physician need ***not*** "possess state controlled substances authority in order to be deemed a practitioner[]" if, by practitioner, DEA means a physician. And because the State Public Health Commissioner has not suspended or revoked Petitioner's state controlled substances authority, he must be deemed a practitioner if by 'practitioner' one complies with the Massachusetts Supreme Court's ruling: "The registration referred

to in the definition of practitioner involves registration with the Commissioner of Public Health." *Commonwealth v. Robert Chatfield-Taylor*, 399 Mass. 1 (1987). DEA has already conceded in the lower court that the Public Health Commissioner has *not* suspended or revoked Petitioner's state controlled substance registration.

Even more crucially, § 824 (a)(3) never uses the word "practitioner" and refers solely to "registrant." Therefore, just as the Massachusetts Controlled Substance Act, the federal Controlled Substance Act deals solely with a person's registration to manufacture, distribute or dispense controlled substances. Because of the statutory framework in Massachusetts, for Massachusetts persons a *medical* license does not figure in that paragraph at all. DEA repeatedly conceal this fact so as to misdirect the courts (and physicians' attorneys) away from properly interpreting the plain text of that federal law.

Applying standard principles of interpretation to DEA's own statement, if DEA meant what it wrote here - "because the CSA requires that a physician possess state controlled substances authority in order to be deemed a practitioner, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices[,]" - it naturally follows that the Petitioner indeed remains a "practitioner" because the Public Health Commissioner never revoked "state authority to dispense" as required by State law.

In a due process procedure regarding a *taking*, there is no logical need to discuss the qualifications for *issuance*. The absurdity and fundamentally anti-

American nature of DEA's argument jumps out when using the analogy of real estate - *The owner of the land in question was not entitled to purchase the property and so we will take it.* Although the Petitioner put the analysis of the plain text of § 824 (a)(3) front and center in his challenge to the summary taking of his DEA Registration, DEA have steadfastly refused to discuss the importance of the "and" in § 824 (a)(3) of the CSA in even one of their pleadings. By engaging in the sleight-of-hand of consciously misdirecting attention to "practitioner," and away from both "registrant" and the "and" in §824 (a)(3) of the CSA, the DEA consciously misled the lower court, which erroneously assumed that DEA argues in good faith and failed to independently analyze the text of the law. Proper interpretation determines the meaning of words in a statute "by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), *United States v. Gonzales*, 520 U.S. 1 (1997), *Smith v. Berryhill*, 587 U.S. __ (2019)

Even earlier, the Show Cause Order used another word not mentioned in the statute, "handle," but DEA claimed it was following the authority of § 824 (a)(3) when it relied on "handle" to justify a summary taking of Petitioner's registration.

> "The Show Cause Order proposes the revocation of Respondent's Certificate of Registration on the ground that he does "not have authority to handle controlled substances in the Commonwealth of Massachusetts, the state in which . . .[he is] registered with the DEA." Id. at 1 (citing 21 U.S.C. 823(f) and 824(a)(3))." Final Order, Appx. 5

The record is clear that DEA *has never ever, as in ever, relied on the automatic voidness regulation* in even one single revocation case in Massachusetts

previously. Here is the relevant section from the DEA's Final Order, as published in the Federal Register, in the case of Dr. Yoon H. Choi, the Massachusetts physician whose DEA Registration was revoked immediately prior to the Petitioner's own:

> "On May 16, 2017, the Government filed its motion for summary disposition. Therein, the Government maintained that it is undisputed that Respondent lacks authority to dispense controlled substances in Massachusetts, the State in which he is registered, and that therefore, he "no longer meets the statutory definition of a practitioner." "Respondent did not file any pleadings in response to the Government's motion." "Accordingly, on June 5, 2017, the ALJ granted the Government's motion, finding it undisputed that Respondent's state "medical license is currently suspended" and that he "lacks state authorization to handle controlled substances in Massachusetts," the State in which he is registered." "As a consequence of the Board's Final Decision and Order, Respondent is not currently authorized to dispense controlled substances in Massachusetts, the State in which he is registered." *[emphasis added]*
>
> – Yoon H. Choi M.D. Final Decision and Order, 82 FR 206, October 25, 2017

It is vital for the Court to note the total absence, in the Choi Final Order, of *any* reliance on a state regulation, of *any* reliance on the Massachusetts Public Health Commissioner, or the breathtaking assertion that "*the automatic effect of the regulation is identical to that of an individualized proceeding.*"

DEA is required by the federal Controlled Substance Act to comply with State law, meaning Massachusetts law in this case. DEA chose to not do so in this case because it has never done so in 48 years, and would require DEA to deem internal precedent subservient to State law and the Tenth Amendment. This the DEA is not prepared to do. "As the Tenth Amendment confirms, all legislative power not conferred on Congress by the Constitution is reserved for the States." *Murphy v. National Collegiate Athletic Association*, 584 U.S. ___ (2018) It most certainly has

not been conferred on the DEA or on Mass. Health Secretary Marylou Sudders. The DC Circuit declined 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." *Smith v. Berryhill*, 587 U.S. __ (2019), *Hohn v. United States*, 524 U.S. 236 (1998), *Zuniga v. Barr*, No. 16-72982 (9th Cir. 2019). Even district courts have done this properly. *Menominee Indian Tribe v. DEA*, 15-cv-01378, 2016 WL 2997499 (ED Wisc. 2016)

The DC Circuit abdicated its duty to properly examine this federal constitutional question, a question of first impression in that circuit and in this Court. The DC Circuit has created fresh, idiosyncratic, definitions for the terms "not inherently inconsistent" and "harmony" that are entirely contrary to definitions long-employed within that same Circuit and in this Court. *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 defies 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, *Ralls Corp. v. CFIUS*, 758 F.3d 296 (2014).

In *Gonzales*, the Court ruled that the executive branch may *not* create a regulation that exceeded the authority delegated by the elected Legislature and may *not* violate the 10th Amendment rights of the States.

> "If the Attorney General's argument were correct, his power to deregister necessarily would include the greater power to criminalize even the actions of registered physicians, whenever they engage in conduct he deems illegitimate. This power to criminalize—unlike his power over registration, which must be exercised only after considering five express statutory factors —would be unrestrained. It would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority to deregister a single physician or schedule a single drug, but to have given him, just by implication, authority to declare an entire class of activity outside "the course of professional practice," and therefore a criminal violation of the CSA. See *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U. S. 726, 744 (1973) ("In light of these specific grants of . . . authority, we are unwilling to construe the ambiguous provisions . . . to serve this purpose [of creating further authority]—a purpose for which it obviously was not intended")."
> *Gonzales v. Oregon*, 546 U.S. 243 (2006)

It is equally anomalous to claim that state regulation 105 CMR 700.120 was *authorized by implication* given that the text of the authorizing statute explicitly requires defined *action* to be taken by the Public Health Commissioner after an individualized due process proceeding that is compliant with MGL ch. 30A.

It is important to note that **DEA does not have authority to enforce a state regulation**. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), *Gonzales* supra. All DEA is authorized to do is follow the plain text of the State law, namely MGL ch. 94C § 7(f). The lower court claimed that the constitutional question was waived because it was 'first raised in the reply brief,' which is incorrect. Because DEA was not authorized to enforce state regulation 105 CMR 700.120, it was unnecessary for the DC Circuit to consider whether that regulation is constitutional or not. Petitioner made this point the focus of his objections before the ALJ but went unheard, which the Petitioner raised in the lower court as a

violation of the Court's *Cleavinger* standard for a proper judicial process. *Cleavinger v. Saxner*, 474 U.S. 193 (1985). The lower court instead agreed with the agency that State law is "**irrelevant**."

DEA is owed no deference when it comes to enforcing a state regulation. In fact DEA's action also violated the long-standing prohibition against violations of the Bill of Attainder Clause by enforcing a state regulation that stripped this physician of his due process rights and liberty / property interest. The Petitioner is the ***only*** physician in Massachusetts whose DEA registration was revoked on the claimed basis of a state regulation. U.S. Constitution, Article I, § 9(3): "No Bill of Attainder or ex post facto Law will be passed." The Court ruled that "not every act, legislative in form" can be considered "law." *Hurtado v. California*, 110 US 516 (1884). 105 CMR 700.120 is a regulation, not even an act of the State legislature.

In *Bond I&II* this Court ruled that federalism protects the individual from arbitrary power. The grant of state police power to private market actors, treating State law as "**irrelevant**," and the *automatic* taking of liberty / property interests, precisely meet the Court's definition of arbitrary power. This error is an issue of exceptional importance that deserves certiorari and reversal.

Only this Court, the defender of the Constitution, can protect individual liberty. This Court has ruled that a constitutional violation is complete at the time of deprivation. *Knick v. Township of Scott, Pennsylvania*, 588 U.S. ___ (2019) The Petitioner awaits a concrete remedy from the Court, namely an order to DEA to return his DEA registration (BP7993290) back to him.

### D. The Question Presented Raises Constitutional Issues Of Paramount Importance

This Tenth Amendment case is exceptional and presents an extraordinarily important issue of federalism that warrants certiorari in order to protect the Petitioner from nakedly arbitrary power. "In the precedents of this Court, the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances." *Bond I.* Only the Supreme Court can and must rule on Tenth Amendment issues. *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983), *Bond v. United States,* 564 U.S. 211 (*Bond I,* 2011) 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, as seen in the case of Dr. Yoon Choi and this Petitioner, and is assured to repeat in the absence of clear instructions from this Court, thus placing all Massachusetts physicians at grave risk of particularized economic harm.

The DC 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 dangerous given that the DC Circuit is the go-to court for review of federal agency decisions. This must not be allowed to stand. Certiorari is vital. The Court must rule that *automatic* deprivations of protected property / liberty interests without individualized proceedings, especially at the pleasure of private market actors, are repugnant, anti-American, *ultra vires.*

It bears repeating that DEA is owed no deference when it comes to enforcing a state regulation that violates the Bill of Attainder Clause by stripping this physician of his due process rights and liberty / property interest. The Petitioner is the ***only*** Massachusetts physician whose DEA registration was revoked on the claimed basis of this state regulation. U.S. Constitution, Article I, § 9(3): "No Bill of Attainder or ex post facto Law will be passed." The Court ruled that "not every act, legislative in form" can be considered "law." *Hurtado v. California*, 110 US 516 (1884). 105 CMR 700.120 is a regulation, not even an act of the State legislature.

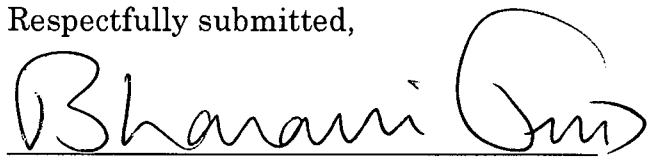
This Court has ruled that a constitutional violation is complete at the time of deprivation. *Knick v. Township of Scott, Pennsylvania*, No. 17-647, 588 U.S. ___ (2019) The Petitioner awaits relief from the Court, namely an order to DEA to return his DEA registration (BP7993290) back to him.

## CONCLUSION

The Petitioner worked diligently to retain counsel with Supreme Court expertise to prepare the Petition. He 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 was unable to dangle a $30,000 money order up front, it has proved impossible to engage appropriate counsel. Thus this petition is filed *pro se, in forma pauperis*, under Rule 33.2, and it is almost assured that the Solicitor General will decline to file a brief. Nonetheless, this petition is meritorious and it is vital that certiorari be granted, the lower court's opinion reversed summarily, and

individual liberty protected. The Petitioner respectfully requests a writ of certiorari from this Court.

Respectfully submitted,



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