

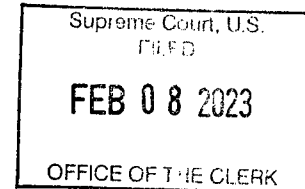
22-6829
No. _____

In the Supreme Court of the United States

Bharani Padmanabhan MD PhD
Petitioner

v.

Board of Registration in Medicine
Respondent



On Petition for a Writ of Certiorari
to the Massachusetts Appeals Court
(21-P-0527)

PETITION FOR A WRIT OF CERTIORARI

6 February 2023

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QUESTIONS PRESENTED

This Court has ruled that “Federal antitrust law is a central safeguard for the Nation’s free market structures. In this regard it is “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.” *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494 (2015)

Economic freedoms cannot do preserved as long as Massachusetts continues to claim that a trade association - controlled by active market participants and statutorily independent of executive branch control - is an arm of the sovereign.

The questions presented are:

1. Does Massachusetts’ grant of blanket sovereign immunity to the medical licensing board - knowing that by law it shall not be supervised by the Governor - violate the Nation’s free enterprise structure and the right of the people to economic freedom?
2. Does this Court’s ruling on the importance of the preservation of economic freedom extend to and apply within Massachusetts?

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This case is a good vehicle for the Court to extend the Party Presentation Principle to State courts, which the Massachusetts SJC has refused to do. The question is exceptionally important given the State court contravened this Court's clear guidance in *Sineneng-Smith* by *sua sponte* conjuring up a question that was not presented or briefed by either party or even by *amici*

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OPINIONS BELOW

The Massachusetts Supreme Judicial Court denied further appellate review of the Appeals Court decision in *Padmanabhan v. Board of Reg. in Medicine*, 21-P-0401 (June 13, 2022), which makes it the final ruling of the state's highest court. The unpublished opinion of the Massachusetts Appeals Court is presented at Appendix A. The unpublished opinion of the Massachusetts Trial Court is at Appendix B.

JURISDICTION

The date of the final state Supreme Court decision is September 12, 2022. This Court granted an application to extend time to February 9, 2023, to file this petition.

The jurisdiction of this Court is invoked under 28 U.S. Code § 1257(a).

SUPREME COURT PRINCIPLE INVOLVED

"Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494 (2015)

STATEMENT

Massachusetts repeatedly holds that its constitution, which predates the Commonwealth's accession to the United States, is superior to the federal

constitution, and it must override the rulings of this Court. For example, in *Commonwealth v. Donald Martin*, 444 Mass. 213 (2005) Massachusetts declared that the state has better Miranda protections than afforded by this Court.

At the same time, Massachusetts has repeatedly refused to recognize the primacy of this Court's rulings, such as the protections guaranteed by the First Amendment to the federal constitution. In 1944 Lilian Smith's anti-racism book *Strange Fruit* was banned by Massachusetts, and book seller Abraham Isenstadt was prosecuted and convicted of the crime of selling one copy of the book, under Massachusetts General Law chapter 276 § 28, a law which had been on the books from 1711 until 2011. *Commonwealth v. Isenstadt*, 318 Mass. 543 (1945)

This Court declared in 1966 that the federal constitution was supreme even in Massachusetts. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) But it was only in 2011 that Massachusetts finally rewrote that law after repeatedly losing in this Court and a federal court again ruled the law incompatible with the federal constitution - meaning it is Massachusetts that must give way, *American Booksellers Foundation v. Coakley*, No. 10-11165, 2010 WL 4273802, D. Mass. (2010), and citizens no longer faced prosecution for possessing or selling *Strange Fruit*. It took sixty years.

In 2008, this Court ruled in *District of Columbia v. Heller*, 554 U.S. 570 (2008) that the Second Amendment to the U.S. Constitution protects an individual's right to keep and bear arms—unconnected with service in a militia—for traditionally lawful purposes such as self-defense within the home.

Defying this, in 2014, the Massachusetts SJC ruled against Jaime Caetano and declared constitutional the blanket ban on possession of stun guns. This Court had to rule unanimously that the state court had defied *Heller's* clear ruling and violated federal freedoms. *Caetano v. Massachusetts*, 577 U.S. 411 (2016)

Similarly, in 2015, this Court ruled that "Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494 (2015)

This safeguard requires that when a state delegates licensing power to a licensing board controlled by active market participants that is statutorily exempt from active supervision by the Governor, it must desist from also granting it absolute sovereign immunity.

In 1979, Massachusetts passed the enabling statute which established the medical licensing board, the respondent here. General Laws chapter 13 § 10 is the respondent board's sole source of authority:

"There shall be a board of registration in medicine, in this section and section eleven called the board, consisting of seven persons appointed by the governor, who shall be residents of the commonwealth, five of whom shall be physicians registered under section two of chapter one hundred and twelve, or corresponding provisions of earlier laws, and two of whom shall be

representatives of the public, subject to the provisions of section nine B. Each member of the board shall serve for a term of three years.”

“The board shall adopt, amend, and rescind such rules and regulations as it deems necessary to carry out the provisions of this chapter; may appoint legal counsel and such assistants as may be required; may make contracts and arrangements for the performance of administrative and similar services required, or appropriate, in the performance of the duties of the board; and may adopt and publish rules of procedure and other regulations not inconsistent with other provisions of the General Laws.”

The legislature robustly ensured the medical board’s statutory independence from the state’s Governor by passing G.L. c. 112 § 1:

“The commissioner of public health shall supervise the work of the board of registration in nursing, the board of registration in pharmacy, the board of registration of physician assistants, the board of registration of perfusionists, the board of registration of nursing home administrators, the board of registration in dentistry and the board of registration of respiratory therapists. He shall recommend changes in the methods of conducting examinations and transacting business, and shall make such reports to the governor as he may require or the director may deem expedient. The commissioner of public health shall consult with the chair of the board of registration in medicine concerning the operations of the board.”

There is a world of difference between “shall supervise” and “shall consult,”

going by this Court's clear rulings on statutory interpretation. The legislature made the state Governor's relationship with the medical board wholly different from the Governor's relationship with all non-medical boards, such as nursing or pharmacy.

The state legislature specifically ensured the medical board's financial independence:

"G.L. c.10 § 35M: Board of Registration in Medicine Trust Fund.

There shall be established upon the books of the commonwealth a separate fund to be known as the Board of Registration in Medicine Trust Fund to be used, without prior appropriation, by the board of registration in medicine established in section 10 of chapter 13. Forty per cent of the revenues collected by said board shall be deposited into said trust fund; provided however, that 100 per cent of revenues collected by the board that are generated by any increase in the licensing fee occurring after January 1, 2002 shall be deposited into said trust fund. All monies deposited into said fund shall be expended exclusively by the board for its operations and administration. The board may incur expenses, and the comptroller may certify for payment, amounts in anticipation of expected receipts; but no expenditure shall be made from said fund which shall cause said fund to be in deficit at the close of a fiscal year."

Finally, the state legislature further declared in G.L. c.13 § 9C:

"The members of the boards of registration shall be public employees for the purposes of chapter 258 for all acts or omissions within the scope of their

duties as board members.”

This means that the board members are not covered by sovereign immunity for any intentional torts that they commit outside of the scope of their duties as board members.

In November 2019, petitioner filed with respondent - the board, which consists solely of seven persons - a petition to reinstate his medical license. Petitioner emailed each of the members individually so they were aware of his petition, the direness of his situation, and their duty to act. They all fully knew. The board ministerially acts on such petitions within thirty (30) days. The board did not act on his, and as of this filing, the board has failed to act for a total of three years.

After waiting seven months and fifteen days, petitioner filed suit for violation of his rights under the Federal and Massachusetts constitutions. On behalf of the board, the Commonwealth appeared in court and claimed the suit against the board members was actually against the Commonwealth because “it” is a sovereign arm of the Commonwealth; the Commonwealth said “it” cannot be sued because “it” is not a person; and said the Commonwealth is not responsible for intentional torts committed by its employees - the board members here.

Sovereign immunity derives from British common law doctrine that the King could do no wrong. It persists in Massachusetts, while general immunity was abolished in newer states like Alaska and Washington.

At oral argument the case boiled down to the plain text of the enabling statute and whether the case caption should have listed “The Board” or the names

of the members individually. Petitioner took the position that the enabling statute allowed him to list The Board because it consists of only the seven appointed members and nothing else, that it is not a public instrumentality or body corporate, that it does not exist outside of the appointed members.

On behalf of the respondent, the Commonwealth's lawyer, Michael Shiposh, presented this argument to the trial court: "Just briefly, Your Honor. The Board of Registration in Medicine under Chapter 13, Section 9 serves in the Department of Public Health. In addition to that under 30A, Section 1, the definition of agency includes boards, like the Board of Registration in Medicine. And that's why there are so many Court opinions that have concluded which are cited in the reply materials concluded at the Board of Registration whether in medicine or other Boards of Registration is an agency for purposes of this analysis. And so whether it's under Chapter, you know, whether the -- the words are saying explicitly this isn't an agency for purposes of sovereign immunity may not be the case, but it is an agency under the law."

The judge accepted this and dismissed the complaint without analyzing the enabling statute as required. The Appeals Court panel summarily affirmed based on a 1990 First Circuit decision that predates this Court's 2015 ruling in *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494 (2015), and declined to perform the required analysis of the enabling statute and laws to determine whether this board is an arm of the sovereign or not.

Here is the sum total of the First Circuit's 1990 ruling: "Sovereign Immunity:

The district court held that the Eleventh Amendment bars plaintiff's claims for damages against the Board and the Board members and their staff in their official capacities. On appeal, plaintiff has not challenged this aspect of the district court's ruling, and we decline, therefore, to disturb it." *Bettencourt*, 904 F.2d 772 (1990)

Here is the sum total of the district court's analysis in *Bettencourt v. Board of Registration in Medicine*, 721 F. Supp. 382 (1989): "The Board of Registration is a state agency and the Commonwealth of Massachusetts has not consented to be sued in federal court. The bar applies whether the relief sought is legal or equitable. Insofar as he seeks damages from the Board members in their official capacities, plaintiff's suit in effect is a suit against the state and is also barred."

Based on just this, the Massachusetts court has granted sovereign immunity to this respondent and allowed a trade association - controlled by active market participants where the Governor is statutorily barred from exercising any supervision at all over this trade association - to pose as an arm of the sovereign, and allowed the respondent to violate the Nation's free market structure in defiance of both this Court and the state legislature.

The Supreme Judicial Court denied an application for Further Appellate Review and the Appeals Court decision became the final ruling of the state's highest court.

REASONS FOR GRANTING THE PETITION

The Commonwealth continues to claim in court that the respondent is an arm of the sovereign and thus the members of the board are immune from suit itself, in even purely antitrust cases. See for example *Bock v. Sloane et al*, 1:22-cv-10905, D. Mass. (2022).

The Massachusetts court defied this Court's emphatic ruling that the Nation's free market structure and economic freedom is as important as our fundamental personal freedoms.

"The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules."
North Carolina Board of Dental Examiners v. Federal Trade Commission,
574 U.S. 494 (2015)

The refusal by Massachusetts to conform to this Court's required analysis of whether a licensing board is a trade association controlled by market participants or is an arm of the sovereign Commonwealth under direct executive branch control, directly violates a central safeguard for the Nation's free market structure, and violates economic freedom.

In order to enable regulatory capture and antitrust actions by a trade association and help cloak it falsely as an arm of the sovereign, the state court defied this Court's clear guidance on statutory interpretation, ignored the plain meaning of the term "consisting of seven persons" and stayed wholly silent on the legislature's explicit choice of the term "consult" when it comes to the medical board

as opposed to the term “supervise” which it chose to apply to all non-medical boards, such as nursing, pharmacy etc. All of that cannot be inadvertence.

“The authoritative statement is the statutory text.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)

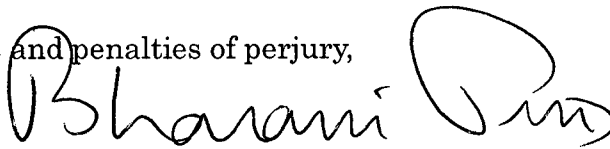
“We interpret this language according to its “‘ordinary, contemporary, common meaning.’” *Sandifer v. United States Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); see also *New Prime Inc. v. Oliveira*, 586 U. S. ___, ___–___ (2019) (slip op., at 6–7). To discern that ordinary meaning, those words “‘must be read’” and interpreted “‘in their context,’” not in isolation. *Parker Drilling Management Services, Ltd. v. Newton*, 587 U. S. ___, ___ (2019) (slip op., at 5) (quoting *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 101 (2012)).” *Southwest Airlines Co. v. Saxon*, 596 U.S. ___ (2022)

The defiance by the state court, of the Nation’s free market structure and this Court’s clear rulings, was intentional, just as in *Isenstadt* and in *Caetano*. Claiming reliance on a 1990 federal ruling while ignoring a 2016 ruling from the same First Circuit - which is current law in this circuit for determining whether or not an entity is an arm of the sovereign - was equally intentional. *Grajales v. Puerto Rico Ports Authority*, 831 F.3d 11 (1st Cir. 2016), *Holmes v. Garvey*, 1:15-cv-13196-GAO, D.Mass. (2017)

CONCLUSION

It is unacceptable for an unsupervisable private body to enjoy sovereign immunity. This petition must be granted in order to save the economic freedoms of the people of Massachusetts and establish the supremacy of this Court.

Signed under the pains and penalties of perjury,


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7 February 2023

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