NO. 22-___

In the
Supreme Court of the United States

RYAN J. WELTER, M.D., Ph.D.,

Petitioner,

v.

MASSACHUSETTS BOARD OF REGISTRATION IN MEDICINE,

Respondent.

On Petition for Writ of Certiorari
to the Massachusetts Supreme Judicial Court
(State Supreme Court Docket No. SJC-13236)

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a Legislature delegates authority to an occupational licensing board to prohibit "misleading" statements and conduct with "the capacity to deceive," but no statute or regulation provides any standards for applying those indeterminate requirements, does the Due Process Clause of the Fourteenth Amendment prevent the board from imposing career-ending sanctions based on its conclusion that a party's truthful statements have the potential to mislead and deceive, but with no evidence that the party acted with improper intent, or that the statements made were material or caused anyone harm?

RELATED PROCEEDINGS

- *Welter v. Bd. of Registration in Med.*,
  No. SJC-13236 (Mass. Oct. 20, 2022),
  reported at 490 Mass. 718.
- Reservation and Report,
  Welter v. Bd. of Registration in Med.,
  No. SJ-2021-0141 (Mass. Mar. 3, 2022),
  unpublished.
- Decision and Order,
  In re Welter, No. 2019-029
  (Mass. Bd. of Registration in Med. Mar. 11, 2021).
- Findings and Recommendations,
  Bd. of Registration in Med. v. Welter,
  No. RM-19-0282
  (Mass. Div. Admin. L. Appeals Oct. 20, 2020).

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INTRODUCTION

Respondent the Massachusetts Board of Registration in Medicine indefinitely suspended petitioner Dr. Ryan J. Welter from practicing his chosen profession because it concluded that truthful statements he made about his practice violated its regulatory prohibitions on "misleading" advertising and engaging in conduct with "the capacity to deceive." Under established common-law analogs, no punishment could have been imposed absent a showing of intent, knowledge, materiality, reliance, and damages. Under the Board's interpretation of its regulations, however, it did not need to satisfy any of those requirements. The Board thus imposed the extreme sanction of an indefinite suspension even though no evidence proved that Dr. Welter acted with improper intent or that the statements he made were material or caused anyone harm. Nor did the Board point to any statute or regulation setting forth standards that could have put Dr. Welter on notice of what the Board interpreted its regulations to require. The Board instead claimed that its regulations effectively function to create a strict liability regime, allowing it to impose career-ending penalties on any physician it deems to have run afoul of its indeterminate regulatory requirements.

Dr. Welter objected that, as applied to him, the Board's regulations violate his federal due process rights. To avoid rendering the regulations arbitrary and lacking in any rational basis, their terms must be interpreted consistent with common-law usage and meanings. Traditional common-law standards—and particularly the requirement that a culpable party act

with intent—safeguard due process by ensuring that punishment is imposed only when a party has fair notice of what the law requires.

Rejecting those time-tested protections, the Massachusetts Supreme Judicial Court held that there are no meaningful due process constraints on how the Board applies its regulations as long as a rational relationship exists between the regulations and the State's interest in protecting the public. The lower court never properly addressed whether the regulations were constitutional as applied, and never considered whether Dr. Welter had acted objectively reasonably or had fair notice of what the Board believes its regulations require. Instead, it granted the Board virtually boundless discretion to punish any physician who might say or do something that the Board later deems by its own lights to be potentially misleading or having the capacity to deceive.

The Board's actions represent an outrageous abuse of authority, and the Massachusetts Supreme Judicial Court's decision is a vexing departure from this Court's precedents and the essential rule-of-law principles they recognize. The deferential "substantial evidence" standard applied by the court below conflicts with the standards applied in decisions from other state courts of last resort, and the decision reflects broader confusion over how rational basis review should be applied when a Legislature regulates economic rights and liberties. This case also highlights the serious constitutional problems that arise when a Legislature delegates broad authority to licensing boards to intrude on private rights through the enforcement of vague and indeterminate

regulatory standards. The lower court's departures from constitutional requirements should not be allowed to stand.

This case also calls out for an exercise of this Court's supervisory authority because of the importance and recurring nature of the issues involved. This case is unusual because it raises an unadorned legal question that is not complicated by disputed facts, and because the injustice that has been caused by the lower court's abdication of any meaningful judicial oversight of the Board's actions is so clear. This case provides a straightforward vehicle for this Court to clarify the due process requirements that apply when a Legislature delegates broad authority to an agency or licensing board to enforce indeterminate regulatory requirements. It also provides an opportunity for the Court to clarify the important role that common-law standards play in protecting citizens' rights—including their liberty interests in pursuing their chosen profession without arbitrary interference by government-appointed officials.

For these reasons and the reasons set forth below, the Court should grant certiorari.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court is reported at 490 Mass. 718 and reproduced at App. 1. The unpublished report of the Single Justice of the Massachusetts Supreme Judicial Court is reproduced at App. 23. The decision of the Massachusetts Board of Registration in Medicine is reproduced at App. 26. The findings and

recommendations of the magistrate are reproduced at App. 32.

JURISDICTION

The Massachusetts Supreme Judicial Court issued its opinion on October 20, 2022. On December 29, 2022, Justice Jackson extended the time for filing this petition to and including March 20, 2023.

This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 1257, and under the All Writs Act, 28 U.S.C. § 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution's Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Section 2.07(11)(a) of Title 243 of the Code of Massachusetts Regulations states:

> A full licensee engaged in the practice of medicine may advertise for patients by means which are in the public interest. Advertising that is not in the public interest includes … "[a]dvertising that is false, deceptive, or misleading.

Section 1.03(5)(a)(10) of Title 243 of the Code of Massachusetts Regulations states:

> A complaint against a physician must allege that a licensee is practicing medicine in violation of law, regulations, or good and accepted medical practice and may be founded on … [p]racticing medicine deceitfully, or engaging in conduct which has the capacity to deceive or defraud.

The regulations do not define either "deceitfully" or "the capacity to deceive or defraud."

STATEMENT OF THE CASE

1. Dr. Welter has more than 20 years' experience practicing medicine. After earning a Ph.D. in biochemistry and molecular biology, followed by a M.D. Degree and a residency at Brown University, Dr. Welter obtained his license to practice medicine in Massachusetts in 2000. App. 3; *see also* Mass.SJC.-RA000476. His practice initially concentrated on family medicine, ranging from delivering babies to urgent care. *See* Mass.SJC.RA00482–484. In the mid-2000s, he began pursuing a second specialty—hair restoration—combining his scientific and doctoral training with his clinical experience. App. 36. Dr. Welter soon became highly respected in the field and eventually joined the distinguished International Society for Hair Restoration Surgery. *See* Mass.SJC.-RA000501.

In 2011, Dr. Clark Tan approached Dr. Welter about working with him. App. 3. Dr. Tan had earned his M.D. degree in the Philippines and was licensed as a plastic surgeon there. App. 38. He had also trained

for several years in New York with a renowned specialist in hair restoration. App. 42. (Like Dr. Welter, Dr. Tan was also a member of the International Society for Hair Restoration Surgery. *See* Mass.SJC.RA000504.) Because Dr. Tan completed his residency abroad, however, he could not be licensed to practice medicine in the United States without completing another residency here. App. 38. As a result, Dr. Tan's work was limited to clinically assisting the New York specialist and consulting with patients seeking hair restoration services, which he did for approximately ten years. App. 43.

After confirming Dr. Tan's training, experience, and references, Dr. Welter sought to determine the scope of permissible activities that Dr. Tan could perform in Massachusetts. He consulted with the Physician Practice Resource Center of the Massachusetts Medical Society, which referred him to the Board's "delegation" regulations. App. 42–43. At the time—and at all times relevant to this case—those regulations authorized licensed professionals to work with "a skilled professional or non-professional assistant to perform services in a manner consistent with accepted medical standards and appropriate to the assistant's skill." 243 Code Mass. Regs. § 2.07(4) (2005); *see* App. 79 n.3 (explaining the Board amended its regulations to "forbid any delegation of medical services" in 2019). The regulations indicated that such an arrangement was appropriate as long as the licensed professional remains "responsible for the medical services delegated to a skilled professional or non-professional assistant." App. 80.

After receiving guidance from the Massachusetts Medical Society, and consulting with an attorney, Dr. Welter hired Dr. Tan as a non-professional assistant. App. 42–43. Over the next six years, Dr. Tan assisted Dr. Welter in providing services to patients at his New England Center for Hair Restoration in North Attleboro, Massachusetts. Even though Dr. Tan was not licensed in the United States and therefore not permitted to provide unsupervised care to patients, there was no provision in Massachusetts law suggesting that he should be denied the respect and title afforded to someone of his experience and educational background. When someone graduates with a doctoral degree (whether in medicine or any other field), he or she has earned the right to use the title "doctor," a right that does not depend on whether a state board grants a license to practice medicine within the state. When working at the office under Dr. Welter's supervision, Dr. Tan thus introduced himself to staff and patients as "Dr. Tan," staff referred to him as "Dr. Tan," and his business cards correctly identified him as "Clark Tan, M.D." App. 40.

As his business grew, Dr. Welter hired a consultant to create a website for the office. The website contained hundreds of pages focused on Dr. Welter and his practice. It accurately referred to Dr. Welter as "board certified, trained and licensed to perform hair restoration procedures for men and women." App. 38–39.

In a section labeled "Our Hair Restoration Consultant," the website also contained a few pages describing Dr. Tan's work. The website accurately referred to Dr. Tan as "Dr. Tan" and as "Clark Tan,

M.D." In addition, Dr. Tan's website biography explained that "Dr. Tan received his medical degree from Far Eastern University Institute of Medicine," was a diplomate at East Avenue Medical Center, and had a sub-specialty in plastic surgery at Makati Medical Center. *See* App. 38. (Far Eastern University Institute is one of the Philippines' leading universities; East Avenue Medical Center is a hospital in Quezon City, Philippines; and the Makati Medical Center is one of Asia's top hospitals, located in Manila, Philippines). The website explained that "Dr. Ryan Welter and Dr. Clark Tan ha[d] gained recognition in the field of hair restoration for their surgical skills." App. 37. It indicated that the office's "surgeons" had been solving hair loss problems for years, that "Dr. Ryan Welter and Dr. Clark Tan [are] 'doctors' doctors," and that the office's "doctors" could help if patients were dissatisfied with services provided by other physicians. App. 37.

The statements included on the website were true. But like any website advertising professional services, it did not purport to be comprehensive. The website did not explain that Dr. Welter's certification was in family medicine. Nor did it explain that Dr. Tan was not licensed to practice medicine in the United States but was permitted to provide consulting services because he was practicing under Dr. Welter's supervision. Nonetheless, consistent with the Board's delegation regulations in effect at the time, Dr. Welter closely supervised Dr. Tan's work, and all procedures in the office occurred under Dr. Welter's in-person supervision. App. 43–44. Consent forms signed by patients indicated that they "authorize[d] Dr. Ryan Welter, his associate doctors and/or such assistants as

may be selected by him" to perform specified procedures. App. 41.

2. At some point during Dr. Tan's work with Dr. Welter, the Board's "delegation" regulations became a focus of controversy. Certain influential doctors objected to allowing licensed practitioners to work with skilled assistants under their supervision. They sought to make the Board's regulations more restrictive. In this context, Dr. Welter became a target of the Board's attention.

Beginning in 2016, three patients filed complaints against Dr. Welter. None of these patients suffered medical harm or injury. They nonetheless complained that Dr. Tan was not licensed to practice in the United States. Two of the patients were a married couple of physicians who practice in Massachusetts, *see* App. 39, and were fully capable of understanding the information provided by Dr. Welter and the website on Dr. Tan's background, education, and residency. The third patient was an employee of the state's sole medical malpractice insurer, who tried to blackmail Dr. Welter and appeared to have copied the complaint filed by the physician-patients. App. 59, 61–62. (Statements made by this patient were later shown to be inconsistent with medical records, App. 62, and his testimony was excluded from evidence as "not the sort of evidence on which reasonable people would rely in the conduct of serious affairs." App. 88.).

The complaints filed by the married physician-patients provided cover for the Board to tighten its delegation regulations, and the Board initiated a formal proceeding against Dr. Welter in May 2019. The Board's charges alleged that he had improperly

delegated medical services to Dr. Tan, fraudulently filed license renewal applications, and created and maintained false medical records. App. 94–95. The Board also alleged that Dr. Welter had engaged in misconduct and false, deceptive, or misleading advertising. App. 32. The Board did not allege that Dr. Welter violated any standard of care in the treatment of his patients. App. 34.

The matter was referred to the Massachusetts Division of Administrative Law Appeals for a hearing. The assigned magistrate found that the evidence failed to support the Board's "most serious" allegations. App. 6 n.6. Contrary to the Board's unfounded charges, Dr. Welter did not violate the delegation regulations, did not commit fraud when renewing his license, and did not create or maintain false or fraudulent records. *Id.* Nor did the Board prove its charge that Dr. Welter had engaged in "misconduct in the practice of medicine." 243 Code Mass. Regs. § 1.03(5)(a)(18); App. 34.

Despite rejecting the core of the Board's allegations and dismissing eight of its nine charges, however, the magistrate concluded that Dr. Welter had nonetheless violated two regulatory provisions: 243 Code Mass. Regs. § 2.07(11)(a), which prohibits "false, deceptive, or misleading" advertising, and 243 Code Mass. Regs. § 1.03(5)(a)(10), which prohibits "[p]racticing medicine deceitfully, or engaging in conduct which has the capacity to deceive or defraud."

The magistrate recommended that the Board discipline Dr. Welter for two reasons. First, the magistrate concluded that Dr. Welter's office website could mislead patients into believing that Dr. Tan was

licensed to practice in the United States. According to the magistrate, "[a]lthough the description of Tan's qualifications may have been technically accurate, even a careful reader might conclude that the East Avenue Medical Center, with its generic English name, is in the United States." App. 75. In the magistrate's view, failing to disclose where Dr. Tan studied and trained made the website misleading. The magistrate seemingly accepted the Board's novel assertion that an individual who has earned a doctor of medicine degree may not be referred to as "doctor" unless the state issues a license to practice medicine. The magistrate found that Dr. Tan's business cards, the consent forms used by Dr. Welter, and the conduct of his staff in referring to Dr. Tan as a doctor "created a false and misleading impression concerning Tan's licensure status." App. 79.

Second, the magistrate concluded that it was misleading not to disclose that Dr. Welter's board certification was in family medicine. According to the magistrate, "[a]lthough each element of the sentence [included on the website] is true by itself—Dr. Welter is board certified, he is trained in hair restoration procedures, and he does possess appropriate licensure to do those procedures—together the adjectives describing Dr. Welter convey the message that Dr. Welter is board-certified in hair restoration techniques, either as a surgeon or as a plastic surgeon." App. 76. The magistrate reached that conclusion even though no state in the United States recognizes a board certification specific to the field of hair restoration, and even though Dr. Welter's website contained no reference to "plastic surgeon" or "plastic surgery." App. 7.

The magistrate identified no regulation that would have put Dr. Welter on fair notice that his truthful statements and good-faith conduct would be deemed misleading or potentially deceitful. No evidence or findings established that Dr. Welter's statements were inherently misleading, or that they were material and caused harm to any patient. Nor did any evidence or findings establish that Dr. Welter had acted intentionally to violate the law or with poor moral character. Quite the opposite: the magistrate found that "the weight of the evidence" showed "that Dr. Welter did not intend to deceive the Board." App. 93. The magistrate also found that Dr. Welter had a reputation for honesty and integrity. App. 96. He had no history of discipline in his 20-year, blemish-free career. App. 95.

The evidence also showed that Dr. Welter tried to comply with the law and proactively adjusted his speech in response to objections. He changed the website after learning of the Board's concerns, removing all references to Dr. Tan, as well as any references to the practice being staffed by "doctors" (plural). App. 95. He also modified Dr. Tan's position and prevented him from having further direct contact with patients after learning that the Board disagreed with his efforts to comply with the existing delegation regulations—long before the Board issued any charges. *Id*.

But nothing could placate the Board. Despite no evidence of patient harm or any proof of improper intent, and despite having its core allegations rejected, the Board imposed an extraordinarily draconian penalty—indefinitely suspending Dr. Welter's license

to practice medicine. App. 28. It agreed to stay the suspension but only if Dr. Welter entered into an intrusive probation agreement under which the Board would oversee Dr. Welter's practice, forcing him to pay for ongoing monitoring of his credentialing applications, advertising, and media communications. App. 28–29. This take-it-or-leave-it probation agreement can be lifted only in the Board's sole discretion, and if the Board decides to re-impose the revocation Dr. Welter has no avenue for appeal. The agreement thus imposes a severe chill on Dr. Welter's daily speech because he has no notice of what remark or comment, no matter how innocent or innocuous, might be deemed misleading by the Board and result in his immediate (and indefinite) suspension.

The Board told Dr. Welter that he could petition to terminate the suspension after two years, but the harm caused to Dr. Welter and his reputation are irreparable unless the Board's decision is reversed. Even if the Board eventually lifts the suspension and terminates the probation agreement, the punishment imposed on Dr. Welter will remain as a permanent black mark on his record. The Board's sanction has harmed his reputation and prevents him from enrolling with insurance plans to be reimbursed for seeing his patients, easily joining the medical staff of hospitals, obtaining membership in professional societies, and serving as the federal government's Independent Medical Examiner for immigration cases, among other adverse consequences. It is no exaggeration to say that the indefinite suspension effectively excommunicates him from his chosen profession.

3. Dr. Welter filed a petition for review in the Massachusetts Supreme Judicial Court for Suffolk County, and a single Justice reserved and reported the matter to the full Massachusetts Supreme Judicial Court. App. 23–24. Before the Supreme Judicial Court, Dr. Welter argued that the indefinite suspension—with no showing that he had violated the traditional, common-law standards for fraud or deceit—was arbitrary in violation of his due process rights. *See* App. 9. He also argued that the Board had misinterpreted its regulations and that its decision was arbitrary and capricious. *Id*. In addition, the sanction of an indefinite suspension—never before imposed by the Board for this type of infraction—was both arbitrary and excessive. *Id*.

The Massachusetts Supreme Judicial Court affirmed the Board and rejected Dr. Welter's arguments. Although the court recognized that the right to engage in a lawful occupation is a liberty interest protected by the Fourteenth Amendment, it concluded that the Board had not violated Dr. Welter's due process rights because "the challenged regulations bear a real and substantial relation to a permissible legislative objective related to the general welfare." App. 11. Noting that the Board has "broad authority to regulate the conduct of the medical profession," including the ability to sanction physicians for conduct that "undermines public confidence in the integrity of the medical profession," the Supreme Judicial Court asserted that it was permissible for the Board to hold physicians to a high standard—without ever addressing whether the indeterminate standard imposed provides fair notice of what speech or conduct is permitted or forbidden. App. 12. It then concluded

that because the enabling statute broadly delegated authority to the Board to punish "false, deceptive, or misleading" conduct, there was no need for the Board to demonstrate intent, knowledge, materiality, reliance, or damages. *See* App. 15 ("we decline Welter's invitation to inject these elements from the common law where they are absent from the plain words of the regulations").

The Supreme Judicial Court further concluded that the Board's unprecedented sanction was supported by "substantial evidence" and neither arbitrary nor excessive because, in the Court's view, "Welter knew that Tan was not a licensed physician but nonetheless presented Tan in a manner to suggest to the public that Tan was licensed in the United States." App. 20. It made that assertion despite the magistrate making no finding that Dr. Welter intentionally deceived anyone. With no explanation, the Supreme Judicial Court accepted the Board's extreme position that an individual with a doctoral degree is not allowed to refer to himself as a "doctor" in Massachusetts unless the Board allows that speech by issuing a license to practice in the state.

The Massachusetts Supreme Judicial Court never addressed the core of Dr. Welter's constitutional arguments. Dr. Welter's objection is not that Massachusetts lacks legislative authority to regulate medical professions, but that—as applied to the category of truthful speech without reliance or intent to mislead at issue in this case—the Board's interpretation and enforcement of its regulations does not comply with due process. The Massachusetts Supreme Judicial Court has transformed a vague

regulatory obligation not to engage in misleading advertising into a strict liability offense to be enforced on a case-by-case basis in the Board's standardless discretion. Because the Board's regulations provide no notice of when truthful speech will later be deemed potentially "misleading" or "deceptive," and because Dr. Welter did not act with intent to mislead, engage in willful misconduct, or cause harm to any patient, the Board's indefinite suspension is precisely the type of arbitrary action that the Constitution's due process requirements are supposed to protect against.

REASONS TO GRANT THE PETITION

This case presents an ideal vehicle for clarifying the due process limits on regulatory actions by administrative agencies and the role that common-law standards serve in providing a constitutional baseline for determining when penalties may be imposed. These important issues arise frequently when a Legislature delegates broad authority to agencies to enforce vague regulatory requirements, and the agencies seek to achieve their preferred policy goals through ad hoc interpretations, articulated for the first time in enforcement actions, and through the imposition of severe penalties on citizens who have fallen into their disfavor. Without proper judicial oversight, the result is that agencies interpret indeterminate regulatory requirements to mean whatever they want, whenever they want.

I. The Decision Below Conflicts With This Court's Decisions.

The Court should grant certiorari because the decision below resolves an important federal question

in a way that conflicts with this Court's decisions. In particular, the lower court failed to consider the due process constraints that apply not only when evaluating regulatory provisions on their face but also when government-appointed officials enforce indeterminate regulatory provisions in particular cases. The lower court's doctrinal departures undermine fundamental constitutional protections.

The Due Process Clause of the Fourteenth Amendment prohibits a State from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Interpreting this provision, the Court has long recognized that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915). It is thus universally accepted that the "liberty component" of the Fourteenth Amendment includes "some generalized due process right to choose one's field of private employment … subject to reasonable government regulation." *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the Fourteenth Amendment protects the freedom "to engage in any of the common occupations of life"); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571–72 (1972). In short, the right "to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts" protected by the Constitution. *Greene v. McElroy*, 360 U.S. 474, 492 (1959).

When government seeks to impose restrictions on the rights of individuals to follow their chosen profession, judges have debated whether a strict or more relaxed standard of review should apply. *See Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 981 (5th Cir. 2022) (Ho, J., concurring), *petition for cert. filed*, No. 22-748 (U.S. Feb. 6, 2023); *Tiwari v. Friedlander*, 26 F.4th 355, 360 (6th Cir. 2022). It is nonetheless clear that, at a minimum, a law restricting an individual's right to earn a living within a chosen profession does not comply with due process if it is arbitrary and lacks a rational basis, either on its face or as applied. As this Court has emphasized, the "touchstone of due process is protection of the individual against arbitrary action of the government." *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998).

Due process in the "substantive sense" limits "what the government may do in *both* its legislative *and* its executive capacities." *Id.* at 846 (emphasis added). A law that burdens liberty or property interests must on its face serve a rational connection to a legitimate government interest. *See Dandridge v. Williams*, 397 U.S. 471, 485 (1970). In addition, when a law imposes civil or criminal penalties for violations, it must define any offense with sufficient "definiteness" so that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499–500 (1982) (explaining that due process requires a "relatively strict test" to ensure adequate notice when civil

penalties are "quasi-criminal" in nature). Our Constitution "does not leave us at the mercy of [the government's] *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). The government has no legitimate interest in punishing citizens who do not have adequate notice of how to conform their conduct to the law or how the law will be applied in practice. *See Musser v. Utah*, 333 U.S. 95, 97 (1948) ("Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding.").

These principles are especially important when a Legislature delegates broad authority to an agency (or occupational licensing board) that then seeks to regulate speech or conduct through vague and indeterminate standards. That situation is particularly intolerable because agencies typically receive deference for their interpretations of their own regulations, *see* App. 19, but the ability to clarify the regulations "lies completely within the government's control." *United States v. Anzalone,* 766 F.2d 676, 682 (1st Cir. 1985). Moreover, when considering a broad delegation, the Court has recognized that a Legislature may not dispense with multiple layers of structural constitutional protections. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010); *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020). It may be appropriate to relax constitutional requirements on the front end—permitting a broad delegation of authority to administrative officials—but *only if* essential procedures are in place on the back end to cabin the agency's enforcement discretion and to protect the private rights at stake.

In considering the due process concerns that reinforce this Court's separation-of-powers jurisprudence, two principles are especially relevant in this case. First, statutory terms should be interpreted consistent with common-law standards unless the statute's text expressly points in a different direction. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 58 (2007); *Morissette v. United States*, 342 U.S. 246, 263 (1952). As this Court has explained, statutes that "invade the common law … are to be read with a presumption favoring the retention of long-established and familiar principles." *United States v. Texas*, 507 U.S. 529, 534 (1993). To "abrogate a common-law principle, a statute must 'speak directly' to the question addressed by the common law." *Id.* (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

A state court is not bound to apply these interpretive principles, of course. But constitutional due process serves as a backstop to protect citizens, and when a court allows regulators to depart from common-law standards, it risks a violation of the Constitution's due process protections. *Cf. Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (explaining that statutes are "sufficiently certain" for due process purposes when they "employ[] words or phrases having … a well-settled common law meaning"). Traditional common-law standards protect citizens' due process rights because they limit when a citizen may be held strictly liable for an offense by requiring proof of intent, reliance, materiality, and harm. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28–29 (1991) (Scalia, J., concurring in judgment) (discussing the Magna Charta's "law of the land" guarantee);

Bond v. United States, 572 U.S. 844, 857 (2014) (explaining that common-law standards are one of the "unexpressed presumptions" against which statutes are fairly interpreted). Interpreting statutes consistent with the common law thus ensures that citizens have adequate notice of what the law requires, both because common-law standards are well settled and because a party who acts with intent cannot claim to lack fair notice. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1224–28 (2018) (Gorsuch, J., concurring in part) (explaining that "the Constitution sought to preserve a common law tradition that usually aimed to ensure fair notice before any deprivation of life, liberty, or property could take place"). If a statute is not interpreted to incorporate common-law standards—and does not include its own sufficiently definite standards—the statute violates the "first essential of due process of law" because people of "common intelligence" will be forced to "guess at its meaning and differ as to its application." *Connally*, 269 U.S. at 391.

Second, if an executive branch agency wants to displace the common-law baseline, it must promulgate valid regulations through proper notice-and-comment procedures that set forth with sufficient definiteness the substantive obligations it seeks to impose *before* it tries to enforce them. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (regulated parties should not be required "to divine the agency's interpretations in advance or else be held liable when the agency announces its intepretations for the first time in an enforcement proceeding"); *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 631 (D.C. Cir. 2000) (to "provide the fair notice required by due process,"

an agency must "'put … language'" into its regulations before it can sanction a party for "its failure to comply with regulatory requirements"). An agency cannot create binding obligations with the "force and effect of law" by purporting to enforce its own unannounced interpretation of a regulation's vague and indeterminate terms. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2418, 2420 (2019) (recognizing concerns when an agency seeks to impose retroactive liability on parties without fair notice).

These administrative-law requirements are grounded in the essential due process principle that citizens cannot be punished for violating legal obligations of which they have not been given fair notice. *See Christopher*, 567 U.S. at 156. A statute or regulation that fails to provide adequate notice of what the law requires is not rationally related to any legitimate government interest.

The Massachusetts Supreme Judicial Court's decision upends these essential principles. Instead of considering whether a non-arbitrary, rational basis existed for imposing career-ending sanctions on Dr. Welter, the court merely concluded that the Legislature had a rational basis for generally regulating the medical profession and therefore the Board had broad authority to take whatever actions it desired to further that goal. App. 12. But it never considered whether the regulation's indeterminate prohibitions were applied in a rational, non-arbitrary way so as to ensure that Dr. Welter received fair notice of how to conform his speech and conduct to the Board's demands. Departing from this Court's teachings, the lower court also held that because the

statute did not expressly incorporate common-law standards, it would not interpret the regulation's terms consistent with their traditional common-law usage and understanding. *See* App. 15.

With no explanation how a licensed professional is to know when truthful statements will be branded misleading or potentially deceptive—and subject to the extreme penalty of an indefinite, potentially permanent suspension—the Massachusetts Supreme Judicial Court suggested that "[w]hether something is advertising 'that is' deceptive or misleading and whether conduct 'has the capacity to deceive' are objective inquiries that do not necessarily depend on intent, knowledge, materiality, or reliance." App. 15. Compounding its errors, the court then avoided undertaking any analysis into whether Dr. Welter acted objectively reasonably in compliance with the law, giving no weight to evidence showing that Dr. Welter appropriately referred to Dr. Tan as a doctor and that no reasonable patient would consider the truthful statements on Dr. Welter's website to be misleading when read in context. *Cf. Schware v. Bd. of Bar Examiners of State of N.M.*, 353 U.S. 232, 247 (1957) (holding that state violated due process because no evidence justified finding that petitioner was morally unfit to practice law). Instead, the lower court avoided any meaningful inquiry by deferring to the Board, asserting only that the Board has "broad authority to regulate," App. 12, and its decision was supported by "substantial evidence." App. 17.

The result was to eviscerate Dr. Welter's liberty interests without due process. By failing to evaluate whether Massachusetts law was applied fairly and in

a non-arbitrary manner, the Supreme Judicial Court allowed the Board to hide behind a broad delegation of regulatory authority and deferential standards of review without ever assessing the due process concerns that arise when government seeks to enforce vague and indeterminate regulatory standards. From the Supreme Judicial Court's perspective, as long as prohibiting potentially misleading statements can be said to serve a public interest, the Board is free to take a "we'll know it when we see it" approach to imposing career-ending sanctions on physicians whose truthful speech the Board later deems to be misleading or potentially deceptive.

II. The Decision Below Conflicts With Decisions From Other State Courts.

The Court should also grant review because the Massachusetts Supreme Judicial Court's decision conflicts with decisions from other state courts of last resort in at least two ways: First, it relied on a deferential substantial evidence standard, adding to a split in authority over the standard that governs when evaluating a federal due process claim under the rational basis test. Second, it failed to consider whether the Board's application of state regulations satisfied due process, focusing only on whether the regulations on their face serve a legitimate governmental interest. The lower court's permissive approach is especially concerning because it is one of the Nation's most respected and storied state courts. If the decision below is not corrected, it is likely to have precedential aftershocks that reverberate beyond this particular case.

Other state courts of last resort have recognized that rational basis review is deferential but not toothless, especially when regulations are deployed to deny a citizen the right to engage in a chosen profession. *See Nguyen v. Washington*, 29 P.3d 689, 690 n.3 (Wash. 2001) (en banc) (citing cases and noting the deep split in authority). The lower courts have thus debated whether the Constitution requires a reviewing court to apply a preponderance-of-evidence or a clear-and-convincing evidence standard in light of the important liberty interests at stake. *See id.*; *see also In re Miller*, 989 A.2d 982, 992 (Vt. 2009) (noting split in authority). Courts that have applied a "more exacting burden" have understood that the "[l]oss or suspension" of a "physician's license destroys his or her ability to practice medicine, diminishes the doctor's standing in both the medical and lay communities, and deprives the doctor of the benefit of a degree for which he or she has spent countless hours and probably tens (if not hundreds) of thousands of dollars pursuing." *Nguyen*, 29 P.3d at 693–94; *see also Painter v. Hallingbye*, 489 P.3d 684, 690 (Wyo. 2021) (holding that board must "prove disciplinary proceedings in professional licensure cases by clear and convincing evidence").

The Massachusetts Supreme Judicial Court's decision is at odds with these conflicting lines of authority, as it applied an even more permissive "substantial evidence" standard. App. 17; *but see* App. 13 n.10 (listing other cases that purportedly apply "similarly high standards"). That standard looks only to whether a "reasonable mind might accept" the evidence available "as adequate to support a conclusion." App. 17–18. The substantial evidence

standard is an extremely deferential standard, as the "threshold for such evidentiary sufficiency is not high." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). It requires only "more than a mere scintilla of evidence" and "may be less than a preponderance." *Pearson v. Colvin*, 810 F.3d 204, 207 (4th Cir. 2015); *Austin v. Kijakazi*, 52 F.4th 723, 728 (8th Cir. 2022) ("Substantial evidence means 'less than a preponderance ….'"); *see also Nasrallah v. Barr*, 140 S. Ct. 1683, 1692 (2020) (noting that under the substantial evidence standard an agency's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary").

While the substantial evidence standard is often applied when reviewing the reasonableness of an agency's fact-finding, it is unsuitable for evaluating the case-specific due process concerns that arise when an agency seeks to impose career-ending penalties on targeted individuals. *See Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (noting that "due process places a heightened burden of proof … in civil proceedings in which the individual interests at stake … are both particularly important and more substantial than mere loss of money"); *see also Kisor*, 139 S. Ct. at 2418 (no deference is appropriate when an agency fails to provide fair notice). That is particularly true where, as here, those penalties are imposed based on indefinite regulations that neither incorporate the elements of common-law analogs nor provide their own alternative, sufficiently definite standards.

The permissive standard applied by the Massachusetts Supreme Judicial Court reinforces its failure to analyze with adequate focus whether the

sanctions imposed in the particular circumstances of Dr. Welter's case served a legitimate government interest. That too conflicts with other state court decisions, where courts have held that rational basis review requires more than just tying a regulation's general purpose to a public health-and-safety concern. *Cf.* App. 12–13 (asserting that "[h]olding physicians to a high standard in their advertising and other conduct" is related to protecting "'the image of the medical profession'").

In *Baffoni v. Rhode Island*, 373 A.2d 184 (R.I. 1977), for instance, the Rhode Island Supreme Court considered the due process concerns raised by state licensing requirements for individuals who perform hair removal through electrolysis. The court acknowledged that electrolysis is subject to "reasonable regulation" because of the state's interest in protecting public health and safety. *Id.* at 187. But unlike the Massachusetts Supreme Judicial Court, the Rhode Island Supreme Court did not end its inquiry there. Instead, it recognized that the "power to regulate … must be exercised within the bounds established by our Federal Constitution, including the requirement that liberty and property not be taken from a person unless due process of law is accorded [to] him." *Id.* at 187–88. The court then struck down the regulations as lacking any rational basis because they prohibited an out-of-state practitioner from obtaining an in-state certification unless she repeated her training under the supervision of a licensed in-state practitioner. *Id.* at 188. It was unreasonable to conclude that the practitioner was any less qualified merely because "the source of her knowledge was an out-of-state school," finding that there was "no

relation between the knowledge necessary to practice electrolysis and the location at which the knowledge is obtained." *Id*. at 188–89.

When considering whether a regulation has a rational basis, other state courts have considered not only whether the regulation *on its face* serves a legitimate government interest but also whether the regulation has been *applied* and *enforced* in a reasonable, non-arbitrary fashion. For instance, in *Shoul v. Pennsylvania*, 173 A.3d 669 (Pa. 2017), the Pennsylvania Supreme Court considered whether a lifetime disqualification from holding a commercial driver's license following a felony conviction violated an individual's due process rights. Although the court recognized that a more "'restrictive' test" applied under Pennsylvania law than federal law, *id.* at 677, it still recognized that it was obliged to consider how the state regulation was applied in the case before it. The court carefully evaluated the regulation as enforced to ensure a rational relationship between the penalty imposed and the policy goal the regulation purportedly furthered. *Id* at 319–20.

Similarly, in *City of Columbus v. Becher*, 180 N.E.2d 836 (Ohio 1962), the Ohio Supreme Court took the same approach when affirming a lower court decision voiding an ordinance prohibiting "audible sounds to the annoyance of the inhabitants this city." *Id.* at 837. While recognizing the ordinance itself was "too indefinite and too broad," the Court went on to address why the ordinance was unreasonable as enforced against an operator of a dog hospital. *Id.* The Court concluded that the benefits of animal hospitals, "as applied to defendant and his hospital, in the

circumstances shown to exist, outweigh the annoyance occasioned to some persons by the noises coming from the hospital." *Id*. at 838; *see also City of Columbus v. Becher*, 184 N.E.2d 617, 619–20 (Ohio Ct. App. 1961) (noting ordinance was "arbitrary and unreasonable" because it "would drive this defendant out of business"); *Department of Financial Institutions v. General Finance Corp.*, 86 N.E.2d 444, 449–50 (Ind. 1949) (holding that while a statute's "general purposes" could be lawfully accomplished, as applied it was "unreasonable and arbitrary").

None of these cases can be reconciled with the Massachusetts Supreme Judicial Court's decision because none of them ended the due process analysis based only on the conclusion that a regulation on its face had some rational relationship to a valid government interest. Nor did they uphold the regulator's sanction decision merely because some evidence in the record arguably could support it. Instead, other state courts have taken their oversight role more seriously, applying a meaningful standard of review and carefully examining whether a regulation as enforced against a particular individual satisfies the requirements of due process.

III. The Serious, Recurring Issues Raised in This Case Are Worthy of Review.

Certiorari is also warranted because this case raises recurring issues of particular importance. Because there are no material facts in dispute, this case presents a particularly clean vehicle to provide guidance to the lower courts.

First, there is substantial disagreement over the proper application of the rational basis test to economic regulation, especially in light of the administrative state's continuing growth at both the federal and state levels. The confusing inconsistencies in this Court's formulation of the rational-basis test have long been recognized. *See Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124, 133 (1999) (Stevens, J., dissenting). Moreover, respected judges have more recently urged the Court to clarify the law, focusing on whether economic liberties should be treated as fundamental rights subject to strict scrutiny. *See Golden Glow*, 52 F.4th at 981 (Ho, J., concurring); *see also Tiwari*, 26 F.4th at 360. As courts have explained, abdicating judicial oversight over economic regulation often results in the "subjugat[ion of] the common good and individual liberty" to the economic whims of interest group politics. *Hettinga v. United States*, 677 F.3d 471, 482–83 (D.C. Cir. 2012) (Brown, J., concurring). That is precisely what happened here, where Dr. Welter was used as a politically expedient justification for tightening the Board's "delegation" regulations in response to lobbying by powerful interests.

Granting review would ensure that due process review remains a meaningful constraint on arbitrary regulatory action, and it would also resolve confusion in the lower courts without requiring this Court to wade into the intractable debate over what rights should be deemed "fundamental." There is an essential difference between, on the one hand, recognizing a Legislature's authority to regulate future private conduct when there is a rational basis for the legislation, and on the other, disregarding the

separation-of-powers concerns that arise when a Legislature does not make those difficult legislative choices itself but instead delegates broad authority to administrative agencies (or occupational licensing boards) to enforce indeterminate regulatory requirements. Whatever the Legislature's powers to restrict economic liberties, the same deferential standard should not apply when executive branch officials seek to enforce regulatory requirements with no determinate standards. This case thus provides an opportunity for the Court to clarify that, when considering whether a regulation violates due process, a reviewing court must consider whether the regulation is being enforced and applied with fair notice and in a non-arbitrary manner.

Second, addressing the important baseline that common-law standards provide to protect against arbitrary regulatory action would help clarify the scope of permissible legislative delegations to administrative agencies (and occupational licensing boards). Several members of this Court have expressed concern about the scope of legislative delegations, but have not yet identified an appropriate opportunity to draw an operational line between the exercise of legislative powers and the permissible execution of the laws. *See United States v. Gundy*, 139 S. Ct. 2116, 2132–35 (2019) (Gorsuch, J., dissenting); *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 67–70 (2015) (Thomas, J., concurring). This case provides that opportunity. Absent such a line, agencies are left to promulgate their own indeterminate regulations that they may enforce with open-ended discretion, without any obligation to fill in the gaps before imposing sanctions against the unwary.

One important step toward developing a suitably robust non-delegation doctrine would be to recognize that when a Legislature delegates broad authority to an agency to enforce vague regulatory requirements, the Legislature cannot allow the agency to escape other structural constitutional constraints necessary to safeguard private rights and ensure accountability. *Cf. Free Enter. Fund*, 561 U.S. at 501 (recognizing problems of allowing agencies to escape multiple levels of constitutional protections). When an agency seeks to impose civil or criminal penalties, it must either apply common-law standards—which ensure that liability is imposed only on parties with culpable intent and notice of what the law requires—or if the agency intends to deviate from that baseline, it must promulgate regulations through a proper process that results in providing adequate notice of what conduct is prohibited. *See United States v. Minker*, 350 U.S. 179, 187–88 (1956) (when an "ambiguously worded power" is delegated to an agency to regulate, any "doubt" must be "resolved in the citizen's favor"). No executive branch agency or licensing board should be allowed to turn vague regulations into a strict liability trap, with penalties imposed based on the regulator's idiosyncratic view of what might count as misleading or potentially deceptive speech. *See* The Federalist No. 47, at 302 (Madison) (noting "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates); 1 William Blackstone, Commentaries on the Laws of England 146 (1765) (same).

The need to take account of common-law standards is especially important given the growth of federal and state laws that delegate to executive

branch officials broad authority to police potentially misleading speech and deceptive conduct. *See, e.g.,* Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 U. Kan. L. Rev. 209, 238 (2016) (discussing growth of state consumer protection laws that do not provide notice of what conduct is prohibited); *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 222 (5th Cir. 2022) (Jones, J., concurring) (expessing concern that "vague command" that a federal agency police "'unfair, deceptive or abusive act[s] or practice[s]'" operates as a "blank check for broad regulation"). If administrative agencies can punish truthful speech merely because it is arguably misleading or has the capacity to deceive—with no showing that the speaker is acting with improper intent—speech will be chilled in the guise of regulating conduct.

That is why this Court has "rejected the 'highly paternalistic' view that government has complete power to … regulate commercial speech." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980). Commercial speech does not lose constitutional protection merely because it communicates what a regulator might later deem to be "an incomplete version of the relevant facts." *Id.* Commercial speech is protected unless it is "inherently" misleading or has proven misleading in practice. *See In re R.M.J.*, 455 U.S. 191, 203 (1982); *Ibanez v. Fla. Dep't of Bus. & Pro. Regul.*, 512 U.S. 136, 144–45 (1994). The Board has never made that demanding showing here. Nor could it. There was nothing inherently misleading about Dr. Welter

referring to a doctor by his proper title or not explaining that his certified area of speciality was in family medicine.

Fourth, the issues in this case are not isolated. The Board is notorious for arbitrarily imposing summary and indefinite suspensions, and for escaping meaningful oversight by the Massachusetts courts. *See* Kris Olson, *Decisions show overreach by M.D. licensing board*, 49 Mass. Lawyers Weekly No. 31 (Aug. 3, 2020). More broadly, abuse by state licensing boards is a growing concern across the country. Bureau of Labor statistics show that in 2022, approximately 25 percent of the workforce ware required to obtain an occupational certification or license. *See* U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey* (2023), https://www.bls.gov/cps/cpsaat53.htm.

The need for this Court's intervention is particularly important because the Board's disciplinary decisions are not subject to oversight by the state's Governor or other executive branch officials. *See* Mass. Gen. Laws ch. 112, § 1 (requiring that the commissioner of public health only "consult" with but not "supervise" the Board). That leaves the judicial branch as the only viable avenue for relief. *See* 801 Code Mass. Regs. § 1.01(13) (providing for judicial review by any party "aggrieved by a final decision"). Because the Board's decisions are applied to individual physicians, there is no meaningful political check on the Board's actions. *See* The Federalist No. 84, at 512 (Hamilton) (explaining why individual punishments that are "less public, and less striking," are "therefore a more dangerous engine of arbitrary

government"). As noted above, however, the Massachusetts Supreme Judicial Court has taken such a deferential approach to constitutional rights that it has abdicated its duty to oversee the Board's disciplinary actions.

That abdication is particularly dangerous here because the Board is a private trade association controlled by private market actors. *See* Mass. Gen. Laws ch. 13, § 10 (requiring that five of seven members of Board be registered physicians); *see also N.C. Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 514 (2015) (noting concerns when state delegates regulatory power to market participants). The private delegation raises well-understood conflict-of-interest concerns, as licensing boards are often subject to regulatory capture, which makes legislative reform "difficult, if not impossible." Tzirel Klein, *Occupational Licensing: The Path to Reform Through Federal Courts and State Legislatures*, 59 Harv. J. on Legis. 427, 438–39 (2022); Paul J. Larkin, Jr., *Public Choice Theory & Occupational Licensing*, 39 Harv. J.L. & Pub. Pol'y 209, 243 (2016*)* ("licensing schemes are a classic vehicle for cronyism"). Private delegations to occupational licensing boards to enforce vague regulatory standards thus heighten the need to ensure that citizens' due process rights are protected. *See Texas v. Commissioner*, 142 S. Ct. 1308, 1308 (Mem.) (2022) (statement of Alito, J., concurring in denial of certiorari) (noting "the need to clarify the private non-delegation doctrine"). With no meaningful oversight provided by state courts to ensure compliance with federal constitutional requirements, physicians in Massachusetts subject to

the Board's oversight have nowhere to turn but this Court.

Fifth, the Court should grant review to remedy the injustice caused by the extreme punishment imposed on Dr. Welter. As the sole provider for his spouse and eight children, Dr. Welter's life has been turned upside down. He remains subject to onerous reporting requirements and prior restraints on his speech backed up by the threat of an immediate (and potentially indefinite) suspension if he does anything that might offend the Board. *See* Philip Hamburger, *Getting Permission*, 101 Nw. U. L. Rev. 405 (2007) (discussing abuse of licensing requirements that act as prior restraints on speech). But the Board has never articulated any valid reason or rational basis for subjecting Dr. Welter to these excessive penalties, particularly given his good-faith efforts to comply with its shifting requirements. Its actions are the epitome of arbitrary government action that the Constitution is supposed to protect against.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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