No. 22-940

In the Supreme Court of the United States

SHELDON SCHWARTZ M.D.,

Petitioner,

v.

MASSACHUSETTS BOARD
OF REGISTRATION IN MEDICINE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

Sheldon Schwartz M.D.
Petitioner Pro Se
5 Abernathy Road
Lexington, MA 02420
(781) 248-4313
sheldonschwartz46@gmail.com

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QUESTIONS PRESENTED

"The Fourteenth Amendment's Due Process Clause incorporates and renders applicable to the States Bill of Rights protections "fundamental to our scheme of ordered liberty," or "deeply rooted in this Nation's history and tradition." *McDonald v. Chicago*, 561 U.S. 742, 767 (alterations omitted)." *Timbs v. Indiana*, 586 U.S. ___ (2019)

For over one hundred years this Court has held that the right of a licensed professional to practice his chosen profession is a liberty right that could be reasonably regulated but not destroyed, and is entitled to protection in equity in the absence of an adequate remedy at law. *Truax v. Raich*, 239 U.S. 33 (1915)

The Massachusetts supreme court has declared that any action by the state's medical licensing board, which is statutorily exempt from any supervision by the Governor and comprises of five physicians and two laypersons, automatically meets rational basis review and the substantial evidence standard because the legislature had a rational basis to enact the board's enabling statute.

THE QUESTIONS PRESENTED ARE:

1. Is the taking of a physician's medical license, a liberty right protected by the common law, by a private board through a vast delegation claim unsupported by statute or regulation, and with no statutory replacement for common law protections, a violation of the Bill of Rights protections fundamental to our Nation's scheme of ordered liberty?

2. Is the taking of a physician's liberty right through the overruling of sworn testimony by an unsworn summary to the contrary, a violation of fundamental due process protections?

LIST OF PROCEEDINGS

Massachusetts Supreme Judicial Court
No. SJC-13292
Sheldon Schwartz v. Board of Registration in Medicine
Date of Final Opinion: October 27, 2022

Commonwealth Court of Massachusetts
Supreme Judicial Court for Suffolk County
No. SJ-2021-0231
Sheldon Schwartz, M.D. v.
Board of Registration in Medicine
Date of Final Decision: May 11, 2022

Commonwealth of Massachusetts Board of
Registration in Medicine
No. 2015-037 (RM-15-648)
In the Matter of Sheldon Schwartz, M.D.
Date of Final Decision: May 20, 2021

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OPINIONS BELOW

On October 27, 2022, the Massachusetts Supreme Judicial Court issued its full opinion which makes it the final ruling of the state's highest court. It is reported at *Schwartz v. Board of Registration in Medicine*, 490 Mass. 1025 (2022) and is presented in Appendix A at App.1a. The unpublished report of the SJC Single Justice is presented in Appendix B at App.12a.

JURISDICTION

The date of the final state Supreme Court decision is October 27, 2022. This Court granted an extension of time to March 27, 2023, to file this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), and has authority to grant the requested relief under the All Writs Act, 28 U.S.C. § 1651.

SUPREME COURT PRINCIPLE INVOLVED

"The right to earn a livelihood and to continue employment unmolested by efforts to enforce void enactments is entitled to protection in equity in the absence of an adequate remedy at law." *Truax v. Raich*, 239 U.S. 33 (1915) "If a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." *Timbs*

v. Indiana, 586 U.S. ___ (2019) "In deciding whether a right falls into either of these categories, the question is whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to this Nation's "scheme of ordered liberty."" *Dobbs v. Jackson*, 597 U.S. ___ (2022)

"It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts." *Alabama. Assoc. of Realtors v. U.S. Dept. of Health and Human Services*, 594 U.S. ___ (2021)

STATEMENT OF THE CASE

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 . . . 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 . . . 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 massive difference between "shall supervise" and "shall consult," going by this Court's clear rulings on statutory interpretation. The legislature could not be clearer that it excluded the medical board from all other health-related boards. The space between the paragraphs is exactly as the legislature wrote it. The legislature barred the state Governor from actively supervising the medical board. "The authoritative statement is the statutory text." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005), *Southwest Airlines Co. v. Saxon*, 596 U.S. ___ (2022)

Per this Court's standard for statutory interpretation, and the teaching in *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494 (2015)("*NC Dental*"), it is impossible to legitimately conclude that the medical licensing board, the respondent here, is under active supervision by the state of Massachusetts and that it is an arm of the sovereign state. If one applies this Court's ruling in *NC Dental*, the respondent is a trade association controlled by market participants that is masquerading as a state agency.

This board, exempt by statute from active supervision by the executive branch, claims that the legislature has delegated it vast powers that allow it to indefinitely suspend any physician's licenses at will, because any action by this licensing board must be taken, automatically, without question, as being in the interest of public safety and authorized by its own regulations. At its core, this board says that its *ipse dixit* satisfies rational basis review.

The Massachusetts Supreme Judicial Court fully endorsed this position and did not analyze in what way the board's action was supported by even the internal Policy that it cited to issue its Statement of Allegations, let alone any state regulation or statute. Meaning, the state court did not do what this Court, in *Alabama. Assoc. of Realtors v. US Dept. of Health and Human Services*, 594 U.S. ___ (2021), said must happen.

Petitioner here, is an experienced physician who at one time was the youngest tenured faculty in the United States, and directed the team at Bristol Myers which discovered the first drug for HIV. Now in his 70s, he was the lone Internal Medicine day-physician

at a psychiatric hospital called Arbour HRI. Arbour's CEO retaliated against petitioner for his patient safety advocacy (though the CEO's actions were opposed by the medical staff), filed a false complaint with the respondent board, and deputed the hospital's own lawyer, Janet Barringer, to collude with board counsel James Paikos to rent the medical board's police powers. It was Barringer who selected the list of board witnesses, sent the board's subpoenas to them, informed them that she would be present when they testified, and met with the witnesses prior to the board hearing. Another physician testified that he found her involvement in a board proceeding to be "baffling." The hearing officer herself found the close collaboration between Barringer and Paikos to be questionable and wondered aloud who was running the hearing.

This independent licensing board has an Automatic Enforcement Policy in which it immediately seeks license suspension for any physician who runs afoul of a hospital CEO and is terminated from the hospital. *See infra.*

The board issued a statement of allegations which relied entirely on alleged violation of its Disruptive Physician Behavior Policy, which requires that the board must show patient harm before the matter rises to the level of board discipline. The respondent alleged that petitioner had loudly argued with another physician within earshot of one new patient and this caused patient harm.

At the lengthy administrative hearing, witnesses testified in support of petitioner's narrative, including the head nurse at the scene, and declared that no patient was present within earshot. The board's witnesses (including the physician with whom the petitioner

argued, and the social worker standing right next to the other social worker who did not testify, who all were present at the scene) did not testify in support of the board's narrative and could not remember a patient being present within earshot. No testimony exists in support of the allegation that petitioner was "disruptive" in the presence of a patient and caused patient harm.

The magistrate ruled that petitioner had been disruptive, based on an unsworn document supplied by the board, purporting to be its interview of the other social worker who did not testify, in which the board claimed that she said she saw a patient within earshot. The respondent claimed this automatically meant that the patient could potentially have been harmed by overhearing an argument between petitioner and another physician.

When the petitioner had challenged the introduction of the unsworn summary, the hearing officer had declared that the unsworn summary would be disregarded in favor of actual testimony. The hearing officer further ignored testimony from all the witnesses who testified that the respondent's summaries of their own interviews were inaccurate, slanted and unreliable.

The board then indefinitely suspended petitioner's medical license, even though it had reported to the federal government that no patient harm was involved.

The absence of patient harm automatically stripped the board of any jurisdiction or authority to issue even allegations let alone sanctions on violation of either its Disruptive policy or regulation 243 Code Mass. Regs.

§ 1.03(5)(a)(18) (2012) which requires proof of misconduct, meaning the indefinite suspension is void. *See infra.*

An indefinite suspension of a medical license has far-reaching and permanent impact on a physician's professional reputation and practice, even if later vacated. The harm is done, and results in an "excommunication" from a myriad associations, memberships, insurance rolls, hospital staffs, and of course Medicare. Being excluded from Medicare automatically makes a physician unemployable. The physician becomes *persona non grata.*

In this case this petitioner has suffered those deleterious consequences where even the board reported, under oath, to the federal government that not one patient was harmed and there was no adverse clinical implication.

Petitioner sought review of the respondent's final decision in the single justice session of the Massachusetts Supreme Judicial Court for Suffolk County, as provided by law. This is all that Single Justice Delila Wendlandt wrote about the jurisdiction issue: "The record amply supports the Board's finding that the petitioner engaged in disruptive conduct, 243 Code Mass. Regs. § 1.03(5)(a)(18), in violating its Disruptive Behavior Policy 01-01, and that the petitioner's conduct thus undermined public confidence in the practice of medicine." App.16a.

What remains notable is that the respondent never claimed that it did not need to prove disruptive behavior and its actions demonstrate that it thought it definitely needed to prove disruptive behavior, somehow, and

used the unsworn summary to overrule sworn testimony for this specific purpose.

The single justice's ruling thus came as a surprise to both petitioner and respondent. The judge's ruling relied on an *ex post facto* charge that was never presented at the hearing and ambushed this petitioner, who would easily have presented evidence to rebut the vague misconduct charge.

Then the full state supreme court first declared the board was not required to prove violation of the very policy it based its allegations on and said anyway "we do not agree with Schwartz that his behavior did not have an impact on patient care. When a patient overhears doctors arguing with each other, and hears a doctor state that he does not care that patients can hear the argument, there is an impact on patient care." App.7a.

The state court said this though all the testimony showed that no patient was within earshot, meaning the state court supported the *posthoc* use of the board's unsworn summary to override sworn testimony from all the witnesses.

What is most disturbing is that this is a fundamental violation of basic American law *per se*, and therefore must not be allowed to stand.

REASONS FOR GRANTING THE PETITION

This case is an ideal vehicle for this Court to clarify the due process requirements that private licensing boards that have been delegated broad powers by a state legislature must meet when taking away a liberty right, and reiterate that common law protections continue in force when regulations do not displace them with particularity.

This Court should grant certiorari also because otherwise the issues are destined to recur. Only certiorari would ensure that due process review and common-law protections remain effective restraints on arbitrary regulatory actions imposed by private occupational licensing boards exempt from executive branch supervision.

In our deeply rooted history and traditions, a physician's right to continue in his chosen profession unmolested by void enactments is a right essential to our Nation's scheme of ordered liberty. Traditionally our liberties have been protected in the common law, unless specifically dealt with by a particularized statute.

A right is a right and the exercise of a right does not require individuals to demonstrate to government officers some special need, *NY State Rifle and Pistol Association v. Bruen*, 597 U.S. ___ (2022)

This Court has already unanimously rejected this state's understanding and use of the term "disruptive" and declared that "disruptive" must not outweigh or overrule fundamental constitutional protections. *McCullen v. Coakley*, 573 U.S. ___ (2014)

And now, in this case, the state court has defied both traditional protections for liberty rights and a hundred years of this Court's clear rulings on the nature of this Nation's ordered liberty, to endorse unbridled usurpation of vast un-delegated powers by an independent licensing board that cannot, by law, be actively supervised by the Governor. *Truax v. Raich*, 239 U.S. 33 (1915), *Timbs v. Indiana*, 586 U.S. ___ (2019), *Alabama. Assoc. of Realtors v. US Dept. of Health and Human Services*, 594 U.S. ___ (2021)

Timbs was about a dusty Range Rover that sat for years in a police impound lot. How much more imperative then is the need to protect a practicing physician's medical license?

The right "to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v. McElroy*, 360 U.S. 474, 492 (1959) In these United States it is totally settled 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 (1999), *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Meyer v. Nebraska*, 262 U.S. 330, 399 (1923) (the Fourteenth Amendment protects the freedom "to engage in any of the common occupations of life").

Justices on this Court have already expressed reservations about the scope of claimed legislative delegation to executive agencies and declared that they await the proper case to address this concern. This case is the ideal opportunity because the state supreme court has declared that the respondent has broad authority to indefinitely suspend a physician's

license because its enabling statute had a rational basis to generally promote the public interest.

It is particularly important here because the respondent is a private licensing board statutorily exempt from active supervision by the Governor, meaning abdication of judicial oversight and endorsement of broad delegation of power to a private entity has resulted in a private board enjoying absolute power.

A prior supreme court bench in Massachusetts fifty years ago already agreed with the basic American position that no entity has absolute power to take away liberty rights. "The right of the individual to engage in a lawful occupation is itself a right secured to him under both Constitutions. This right is subject to reasonable regulation in the public interest, but it cannot be destroyed." *Opinion of the Justices to the House of Representatives*, 332 Mass. 763 (1955)

The respondent operates under authority delegated by the state legislature, and is authorized to adopt regulations that comply with the state's Administrative Procedure Act and are limited to the authority specifically delegated to it. This delegation of power is required to be cabined and well-defined in order to prevent the usurpation of state police power by unelected boards, especially one that, by law, is outside of any control by the Governor. The state supreme court declined to implement any oversight.

"The Constitution may well preclude granting an administrative body unreviewable authority to make determinations implicating fundamental rights." *Zadvydas v. Davis*, 533 U.S. 678 (2001) This is particularly troubling when the absolute power is delegated to or claimed by a private board. This Court has declared

that private delegation is a concern and must be the subject of a future court ruling. *Texas v. Commissioner*, 596 U.S. ___ (2022)

This Court has also declared that government does not have complete power to regulate commercial speech. *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557 (1980)

Any law or regulation that destroys any individual's right to earn a living within a chosen profession does not meet due process standards if the action is arbitrary and lacks a rational basis, either on its face or as applied. This Court has repeatedly declared that 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 (1998)

Due process analysis thus, *perforce*, is required to always be adversarial to the government, which in this case is a private unsupervised licensing board operating under broad delegated power. The lower court failed to perform this adversarial analysis, instead chose the extremely deferential substantial evidence standard, and then claimed that because the legislature had a rational basis to set up the board in the first place, any action by the board automatically passes the rational basis test. This failed the standard re-emphasized in *Alabama. Assoc. of Realtors v. US Dept. of Health and Human Services*, 594 U.S. ___ (2021)

The unbridled usurpation of un-delegated power by an unelected unsupervised private board is un-American.

This court must grant certiorari and reverse.

I. THE STATE COURT DECISION CONFLICTS WITH THIS COURT'S RULINGS

1. The court should grant certiorari because the decision below runs totally counter to decades of rulings from this court on fundamental due process principles. This Court has repeatedly emphasized that statutory terms must be interpreted with common-law usage and standards unless the statute's text expressly points in a different direction. *Safeco Insurance Co. of Am. v. Burr*, 551 U.S. 47 (2007)

The statute and regulations cited by the respondent are broad and express general support for the public interest. They, however, do not take into account the protections in the common law for the physician's liberty rights and do not address specific circumstances in different cases, meaning the laws and regulations lack the particularity required for a statute to displace the Constitutionally-preserved, long-settled "common law tradition that usually aimed to ensure fair notice before any deprivation of life, liberty, or property could take place." *Sessions v. Dimaya*, 584 U.S. ___ (2018), *Connally v. General Construction Co.*, 269 U.S. 385 (1926)

This is particularly true for regulation 243 CMR § 1.03(5)(a)(18) that reads, in its entirety: "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 any of the following: Misconduct in the practice of medicine."

So what is the standard for misconduct? The respondent claims that it is whatever the respondent

deems, and the state supreme court supported that position *soto voce*.

However, we already do have case law that has stepped in to define misconduct. On June 8, 2021, state administrative Chief Magistrate Ed McGrath ruled in *Board of Registration in Medicine v. Dr. Randall Bock*, RM-10-0356, an administrative board proceeding involving this same respondent, that the board is held to the state supreme court's precedential definition of misconduct: "Under *Hellman v. Board of Registration in Medicine*, 408 Mass. 800 (1989), "misconduct" means "willed and intentional . . .wrongdoing," to exclude an "error of judgment or lack of diligence." *Id.* at 804. *Hellman*'s definition of "misconduct" remains good law."

Hellman's definition of "misconduct" remains good law indeed. No testimony or evidence was presented in this petitioner's case that showed willed and intentional wrongdoing in the practice of medicine.

The respondent has filled this void by simply asserting that petitioner violated its Disruptive Physician Behavior policy, then used an unsworn summary to overrule sworn testimony, then claimed that it had proved to the satisfaction of the majority of the market participants that petitioner hence committed misconduct, which provides authority to indefinitely suspend the license.

It remains notable that at the same time the respondent declared truthfully to the federal government that there was no patient harm:

> "Is the adverse action specified in this report based on the Subject's professional competence or conduct, which adversely affected, or could

have adversely affected; the health or welfare of patient(s)?: NO" App.43a.

Not only was there no willful or intentional wrongdoing, the respondent itself declared that there was no patient harm at all, let alone error of judgment or negligence, when indefinitely suspending a physician's license. The indefinite suspension was imposed in the absence of any allegation even related to the practice of medicine, and even the claim of patient harm was contrived after the trial through a due process violation. The state supreme court fully supported this mendacity and undermined fundamental constitutional protections that have existed from the time of the *Magna Carta*.

This is precisely the type of unregulated power that this Court has repeatedly condemned, and the respondent private unsupervised licensing board's extreme sanction of indefinite suspensions on learned physicians who have fallen into disfavor with hospital CEOs is precisely the type of arbitrary action that the Constitution's due process requirements are supposed to protect against.

2. Historically, liberty rights are protected in the common law. Liberty rights may be restrained by specific statutes and regulations if they meet a public interest standard, which is usually subject to rational basis analysis. *A priori*, rational basis analysis requires that the analyzed statutes or regulations actually specify the restraint on pre-existing liberty rights and provide a rational basis for their restriction, both on their face and as applied to a particular case.

This is impossible in this case as no regulation exists that applies specifically to the petitioner's

"speech" that the respondent claimed caused patient harm, but then failed to prove with sworn testimony. Regulatory authority here can come into force only after the Policy violation is proved at a due process hearing with testimony and evidence. No such Policy violation was proved. Instead, the respondent claimed that an unsworn summary from a person who never testified, superseded sworn testimony which all contradicted the respondent's summary. In addition, the respondent did this after the hearing officer first assured petitioner that the unsworn summary would be disregarded because the respondent did not produce the social worker to testify.

The lower court failed to require the respondent to properly prove the Policy violation, declared that it simply did not matter if a violation of the Disruptive Behavior Policy was unproven because anyway the respondent has broad powers to discipline physicians for unspecified "misconduct," which too was not proved by testimony or evidence in this case, and no showing of "willed and intentional wrongdoing" was made. The entire edifice teeters on an assertion in one unsworn summary-written by the respondent-which was refuted by sworn testimony.

The respondent's claim of broad regulatory authority here is as lacking in credulity as the leap made by the CDC when it imposed its eviction moratorium on all landlords nationwide and claimed it had authority under a 1944 statute-§ 361(a) of the Public Health Service Act-which provides in part, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest ex-termination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous

infection to human beings, and other measures, as in his judgment may be necessary, but does not mention any authority to block private landlords from evicting delinquent renters from their properties. This Court called that a leap too far. *Alabama. Assoc. of Realtors v. U.S. Dept. of Health and Human Services*, 594 U.S. ___ (2021) So is this one.

It remains impossible to conduct a rational basis analysis in the total absence of any relevant statute or regulation that remotely applied to the physician's speech here, especially where his speech was exclusively aimed at protecting patients from harm and he was representing all the doctors and ward nurses in that effort. In addition, the state's Departments of Mental Health and Public Health fully agreed with him and shut the hospital to new patient admissions, which is what the petitioner had asked the administrators to do.

Given this, it was a massive error to simply overrule common law protections for liberty rights and bless both the arbitrary taking of this petitioner's license and this respondent's claim that the regulation grants it broad powers to indefinitely suspend for anything it deems is misconduct without having to meet any standards such as *Hellman*.

Private rights were taken without due process. This Court should grant certiorari and reverse.

3. The respondent board's enabling statute defines it as consisting of seven persons, five of whom shall be physicians, and it is responsible for ensuring the standards of the medical profession in Massachusetts. To that end, the legislature made this board statutorily exempt from active supervision by any elected executive

branch official, and authorized it to promulgate regulations and hire assistants as needed to carry out its authorized statutory duties.

At no point did the legislature ever authorize this independent unsupervised board to exceed its authority without properly promulgating specific regulations in compliance with the notice and comment provisions of the state's Administrative Procedure Act.

The respondent never promulgated any regulation that applied to the speech at issue in this case, and crucially failed to incorporate the standard set by *Hellman* into the regulation it claims confers it broad authority to indefinitely suspend petitioner's medical license.

The respondent was under a legislative obligation to properly repromulgate 243 CMR 1.03(5)(a)(18) through the required notice and comment procedure and set forth with particular specificity that its standard for misconduct matches that defined by a previous bench of the state supreme court in *Hellman* back in 1989 already. It failed to do so.

The current bench of the state supreme court failed to analyze whether a rational basis existed for the use of 243 CMR 1.03(5)(a)(18) to impose an indefinite suspension on the petitioner. The current bench instead claimed the legislature had a rational basis for enacting the respondent's enabling statute back in 1979, and thus the respondent had broad authority to take whatever actions it chose in the name of protecting the public interest.

Even its own internal Disruptive Behavior Policy, last updated in 2001, restricts the respondent's authority to those (rare) instances where the "Disruptive" behavior

rises to the level of adversely impacting patient care, which automatically implies that it is the respondent's burden to first establish that patient harm has occurred, prior to claiming that the Policy was violated and thus a regulation conferred authority to seek sanctions.

This Policy standard is consistent with the legislature's view of the respondent's role *per se*-an organization that must be devoted to caring about patient harm and not about personnel relations between the CEO and physicians.

No legislature may dispense with multiple layers of structural constitutional protection. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), *Seila Law v. Consumer Financial Protection Bureau*, 591 U.S. ____ (2020) The legislature designated the state judiciary as the backstop to ensure due process is protected in board proceedings. Mass. Gen. Laws ch. 30A

The legislature thus never delegated vast open-ended powers to this respondent because it is entirely independent of any and all control by the state, and the legislature did not want an out-of-control tyrant, which it now is thanks to the state supreme court abdicating any oversight at all. The respondent has dealt with the lack of delegated authority by simply usurping it, knowing that it is statutorily free of the Governor's control. The lower court erred in failing to analyze this point, and instead wholeheartedly enabled the respondent's aim to usurp absolute, unquestionable, arbitrary powers and become a monarch of the realm.

The respondent's claim that it alone decides what is behavior that is disruptive enough to confer jurisdiction even in the sworn absence of patient harm,

regardless of the plain text of its own Policy, and what it deems is misconduct, in the absence of willed and intentional wrongdoing, and can permanently remove a physician from his profession and the medical marketplace at will is the definition of the unbridled usurpation of un-delegated power by an un-supervisable unelected private board.

4. Finally, the state supreme court used the lenient and totally deferential 'substantial' evidence standard which requires only more than a mere scintilla of evidence. *Biestek v. Berryhill*, 139 S.Ct. 1148 (2019), *Nasrallah v. Barr*, 140 S.Ct. 1683 (2020) This contrasts with the 'preponderance of evidence' standard used in other states and even with other boards in Massachusetts itself. This Court has ruled that no deference at all is appropriate when the agency fails to provide fair notice. *Kisor v. Wilkie*, 588 U.S. ___ (2019)

In fact, unlike physicians, convicted pedophiles in Massachusetts enjoy the protection of the 'clear and convincing' standard when the state supreme court reviews the decisions of the state's Sex Offender Registry Board that impact on a convicted sex offender's post-prison liberty rights and reclassification. *Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Board*, 473 Mass. 297 (2015)

Due process places a heightened burden of proof on the state in civil proceedings in which the individual liberty interests at stake are both 'particularly important' and 'more substantial than mere loss of money.' *Cooper v. Oklahoma*, 517 U.S. 348 (1996) The ability of a physician to practice medicine certainly qualifies.

Thus, petitioner does not grudge convicted sex offenders the higher 'clear and convincing' standard but wonders only why it does not apply equally to physicians' medical licenses.

This Court should grant certiorari.

II. A MASSIVELY DISPROPORTIONATE TAKING BASED ON A PROXY PROSECUTION BY A PRIVATE BOARD VIOLATES BASIC DUE PROCESS

The respondent has for many years implemented its Automatic Enforcement Policy ("AEP") whenever a physician is reported by a hospital as being terminated. This Policy intentionally violates its enabling statute. Whenever a hospital CEO reports to the board that he has terminated a physician, the respondent bypasses the independent investigation stage that is required by the enabling statute, and instead automatically refers the matter to its Enforcement Division to issue a statement of allegations and seek an indefinite license suspension.

Because this AEP violates both state law and due process under the common law, the respondent does not list this AEP on its public website, and fought this petitioner when he subpoenaed a former board counsel to testify about its existence and use, which she eventually did on the record.

> "SCHWARTZ: When a termination came to you, what was your policy? What was your *modus operandi* to handle that reported termination?
>
> RATHBONE: Well, I would follow the Board's policy on receiving reports from hospitals.
>
> SCHWARTZ: Which is?

> RATHBONE: Well, if a hospital reports a termination of a physician, it would be an automatic referral to the Enforcement Division.
>
> SCHWARTZ: So by definition, a hospital report is considered to be a matter that is turned over to the Enforcement Division?
>
> RATHBONE: That is not what I said.
>
> SCHWARTZ: What did you say?
>
> RATHBONE: I said if a hospital reported that the doctor had been terminated, that would be an automatic referral to Enforcement."

The operation of this Automatic Enforcement Policy and the impact of this respondent's official commitment to punishing physicians targeted by hospital CEOs is easily discerned from the marked contrast in sanctions imposed on physicians who committed actual violations of the exact same regulations and statutes but were not terminated by a hospital CEO.

In the case of a Dr. Halbert Miller (Adj. # 2015-009) who wrote multiple prescriptions for oxycodone and Ambien after the respondent revoked his license due to nonrenewal, the respondent declared that he had "violated 243 CMR 1.03(5)(a)(18) by committing misconduct in the practice of medicine," "violated 243 CMR 1.03(5)(a)8 by continuing to practice medicine while his registration was lapsed," "violated 243 CMR 1.03(5)(a)1 by fraudulently procuring the renewal of his certificate of registration," and "engaged in conduct that undermines the public confidence in the integrity of the medical profession pursuant to *Sugarman v. Board of Registration in Medicine*, 422 Mass. 338

(1996)"—for which the respondent imposed the sanction of a reprimand and a $2500 fine.

Regulation 243 CMR 1.03(5)(a)(18) is the exact regulation that the state court claimed granted broad powers to the respondent to indefinitely suspend this petitioner's license just on its say so.

This massive difference in sanctions (reprimand vs. indefinite suspension) is based not on the stated violations of regulations but on its unstated, shadow, Automatic Enforcement Policy that the respondent operates on behalf of hospital CEOs. This AEP operated against this petitioner and not against Dr. Miller. The prosecution of this petitioner was a proxy prosecution with 243 CMR 1.03(5)(a)(18) and Disruptive Behavior serving merely as the pretextual proxy for the Automatic Enforcement Policy. *See* Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, GEORGETOWN LAW JOURNAL, VOL. 97, p. 1435 (2009)

The difference in outcomes resulting from this respondent's official paradigm cannot be unseen:

- Termination by CEO = AEP = Proxy prosecution = Indefinite suspension for unproved violation of 243 CMR 1.03(5)(a)(18) regardless of testimony *versus*
- No termination by CEO = No AEP = No proxy prosecution = Reprimand for proved violation of 243 CMR 1.03(5)(a)(18)

This is a classic example of the cronyism and regulatory capture associated with boards controlling licensing schemes outside of both executive and judicial control. *See* Philip Larkin, *Public Choice Theory and Occupational Licensing*, 39 HARVARD J.L. & PUB.

POLICY 209 (2016), Tzirel Klein, *Occupational Licensing: The Path to Reform through Federal Courts and State Legislatures*, 59 HARVARD J. ON LEGIS. 427 (2022), Ernesto Dal Bó, *Regulatory Capture: A Review*, OXFORD REVIEW OF ECONOMIC POLICY, 22 (2): 203–225 (2006), Richard A. Posner, *Theories of Economic Regulation,* 5 BELL J. ECON. & MGMT. SCI. 335 (1974), U.S. Senate Judiciary Committee, *Protecting the Public Interest: Understanding the Threat of Agency Capture* (August 2010)

Even the possibility of undue and undemocratic influence from agency capture warns against a deferential attitude. *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997), M. Elizabeth Magill, *Courts and Regulatory Capture*, VIRGINIA PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER NO. 2011-32.

When the AEP is used against a physician terminated by a CEO, not even the scintilla of substantial evidence is required to impose an indefinite suspension. This is *per se* arbitrary, *per se* violates due process, and *per se* deserves certiorari from this Court because the state supreme court has explicitly declared that it will not intervene to correct any actions by this respondent—a private licensing board that cannot be supervised by the Governor.

In *Texas v. Commissioner*, 596 U.S. ___ (2022) Justices Alito, Thomas and Gorsuch stated: "This case presents a fundamental question about the limits on the Federal Government's authority to delegate its powers to private actors. *See Department of Transportation v. Association of American Railroads*, 575 U.S. 43 (2015); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Unfortunately, the case presents threshold questions that

could complicate our review of that important question, but the statutory scheme at issue here points up the need to clarify the private non-delegation doctrine in an appropriate future case."

This case is that case, uncomplicated by any threshold questions. We have a legislature that delegated power to a private licensing board and exempted it from active supervision by the Governor, we have a state supreme court that totally abdicated even basic judicial oversight, and we have a private board that violates even its enabling statute through automatic license suspensions on behalf of hospitals in defiance of testimony and lack of evidence of any misconduct.

There can be no better case.

This Court should grant certiorari and issue its ruling on the important private non-delegation doctrine.

CONCLUSION

It is unacceptable for a State to defy, as a matter of law, Rights "deeply rooted in [our] history and tradition" that are essential to this Nation's "scheme of ordered liberty" and endorse a proxy prosecution by an unsupervised occupational licensing board. This petition must be granted in order to save the economic freedoms of the physicians of Massachusetts and the other states, and establish the supremacy of this Court.

Respectfully submitted under the pains and penalties of perjury,

Sheldon Schwartz M.D.
Petitioner Pro Se
5 Abernathy Road
Lexington, MA 02420
(781) 248-4313
sheldonschwartz46@gmail.com

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