IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Maximiliano Gabriel Gluzman,	)	
	)	
Petitioner,	)	
	)	
v.	)	M2016-02462-SC-BAR-BLE
	)	
	)	
Tennessee Board of Law Examiners,	)	
	)	
	)	
Respondent.	)	

PETITIONER'S PRINCIPAL BRIEF IN SUPPORT OF HIS APPLICATION TO SIT FOR THE TENNESSEE BAR EXAM

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I. Table of Contents

II. TABLE OF AUTHORITIES

Cases

Statutes, Regulations, and Constitutional Provisions

Additional Authorities

III. Issues Presented for Review

A. Whether the Board acted contrary to law or arbitrarily in denying Mr. Gluzman's application to sit for the February 2016 bar examination when:

1. The Board applied an incorrect legal standard under Rule 7, § 7.01;

2. Application of the correct legal standard under Rule 7, § 7.01 would have resulted in Mr. Gluzman's application being granted;

3. The Board failed to exclude incompetent evidence from the record; and

4. The Board failed to adhere to its own procedural Rules by allowing a Board member to vote on Mr. Gluzman's case without either attending his hearing or reviewing the hearing transcript.

B. Whether Mr. Gluzman should be permitted to sit for the Tennessee Bar Exam as a matter of equity.

IV. Introduction

Maximiliano Gluzman is "obviously a very, very qualified" applicant to take the Tennessee Bar Exam.[1] In fact, having graduated Vanderbilt Law School with an almost unbelievable cumulative GPA of 3.919, he is "one of the very best students" ever to apply to take it.[2] Significantly, nobody—not even the Board of Law Examiners itself—seriously disputes this reality.[3]

Unfortunately, despite his thoroughly excellent academic credentials, Mr. Gluzman has been denied even the opportunity to *sit* for the Tennessee Bar Exam.[4] However, the Board's Order was based on an erroneous interpretation of Tennessee Supreme Rule 7, § 7.01 that the Board itself has since repudiated.[5] Significantly, the Board's Order was also plagued by two additional procedural errors that similarly merit reversal; specifically: (1) its failure to strike incompetent evidence from the record,[6] and (2) the fact that a Board member voted on Mr. Gluzman's case without attending his hearing or reviewing his hearing transcript.[7]

If the correct legal standard had been applied in this case, the Board would have concluded that Mr. Gluzman's foreign education was literally equivalent to the requirements of Rule 7, §§ 2.01 and 2.02. In the alternative, applying the correct legal standard to Mr. Gluzman's case would have compelled the conclusion

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[1] A.R. 282.
[2] A.R. 281.
[3] A.R. 282. *See also* A.R. 396 (acknowledging Mr. Gluzman's "uniformly superlative recommendations").
[4] A.R. 325–26.
[5] A.R. 393, n. 2. *See also In re: Petition to Amend Tennessee Supreme Court Rule 7, § 7.01*, Case No. ADM2017-00785 (hereinafter, "Appendix A"), n. 2 (noting that the Board has "amended its website to eliminate the [prior] reference to two degrees" since the instant appeal was filed).
[6] *See supra*, Section VI(A)(3).
[7] *See supra*, Section VI(A)(4). *See also* A.R. 347.

that Mr. Gluzman's foreign education was at least substantially equivalent to the requirements of Rule 7, §§ 2.01 and 2.02. Additionally, because Mr. Gluzman made a prima facie showing that he was qualified to take the bar exam under the requirements of Rule 7, the burden of production should have shifted to the Board to prove that he was not.

Further, in similar cases, other state supreme courts have cautioned that "[a]dmission rules are intended to weed out unqualified applicants, not to prevent qualified applicants from taking the bar." *In re O'Siochain*, 842 N.W.2d 763, 770 (Neb. 2014) (internal citations and quotations omitted). By preventing one of the most experienced, qualified, and academically accomplished foreign attorneys ever to graduate from Vanderbilt Law School the opportunity even to sit for the Tennessee Bar Exam, however, the Board's Order does just that. Consequently, if this Court concludes that Rule 7 does not permit Mr. Gluzman to sit for the Tennessee Bar Exam as it is presently written, then this Court should permit him to take the bar exam as a matter of equity.

For each of these reasons, the Board's Order denying Mr. Gluzman the opportunity to sit for the Tennessee Bar Exam should be REVERSED.

V. Statement of the Case

In 2001, Mr. Gluzman earned the foreign equivalent of a Bachelor of Arts (B.A.) degree in Legal Studies and a Juris Doctorate (J.D.) degree from Republica Argentina Universidad del Salvador—a highly selective university and law school

in Buenos Aires, Argentina.[8] In 2015, he enrolled at Vanderbilt Law School and graduated with a 3.919 GPA from Vanderbilt's LL.M. program.[9] After obtaining these degrees, Mr. Gluzman applied for permission to sit for the February 2016 Tennessee Bar Exam.[10]

On February 5, 2016—less than three weeks before he was scheduled to take the Tennessee Bar Exam—Mr. Gluzman received an email from the Executive Director of the Board of Law Examiners stating that: "you are not eligible for the February 2016 Tennessee Bar Examination or subsequent examination in Tennessee absent additional education."[11] Only one reason was provided.[12] Specifically, the Director informed Mr. Gluzman that his education: "d[id] not meet the requirements of Rule 7, . . . which requires a Bachelor's Degree or higher ***and*** a Juris Doctorate (J.D.) degree."[13]

Thereafter, Mr. Gluzman appealed to the full Board of Law Examiners for permission to sit for the Tennessee Bar Exam.[14] After conducting a hearing, the Board affirmed the Director's denial in a written Order dated October 13, 2016.[15] Specifically, the Board held that Mr. Gluzman had: "failed to meet the burden of proof to persuade the Board that [his] foreign education is substantially equivalent to the education required of applicants in the United States, to wit: a Bachelor's

[8] A.R. 137.
[9] A.R. 133.
[10] A.R. 15.
[11] A.R. 153.
[12] A.R. 153.
[13] A.R. 153.
[14] A.R. 109.
[15] A.R. 325–26.

Degree or higher ***and*** a post-secondary Juris Doctorate degree."[16] The Board further explained: "Tennessee requires education equivalent to an accredited U.S. Bachelor's Degree or higher *and* a degree from an ABA approved law school (J.D.)."[17] Finally, leaving no doubt whatsoever as to the Board's belief that two separate degrees were required of foreign applicants under Rule 7, the Board repeated explicitly that Rule 7, §§ 2.01 and 2.02 "require two degrees."[18]

Significantly, however—and as the Board itself now acknowledges[19]—Rule 7, § 7.01 actually does *not* require that foreign applicants obtain two degrees. Consequently, based on the Board's own repudiation of the standard that it applied to Mr. Gluzman's application alone, the Board's Order should be reversed.

VI. Statement of Facts

i. Mr. Gluzman's Legal and Undergraduate Education.

Maximiliano Gluzman is a 2015 graduate of Vanderbilt Law School, where he was awarded a Master of Laws (LL.M.) degree with a certificate in Law and Business.[20] Notably, approximately 90% of Mr. Gluzman's graded coursework at Vanderbilt pitted him against Vanderbilt's J.D. students,[21] who are among the most academically qualified law students in the entire country. Even so—and despite the additional fact that English is not his first language—Mr. Gluzman

[16] A.R. 325.
[17] A.R. 326.
[18] A.R. 325, n.1.
[19] A.R. 393, n. 2. *See also* Appendix A, n. 2 (noting that the Board has "amended its website to eliminate the [prior] reference to two degrees").
[20] A.R. 133–35.
[21] A.R. 303. *See also* A.R. 133.

graduated with an eye-popping cumulative Grade Point Average of 3.919, including a 4.0 GPA during his first semester.[22] Given his stellar academic performance, Mr. Gluzman was also placed on Vanderbilt's Dean's List during both semesters that he was enrolled.[23]

Mr. Gluzman's qualifications were readily apparent to those who taught him. For example, one law professor who testified on Mr. Gluzman's behalf described him as "one of the very best students I ever had the privilege of teaching in 20 years of teaching and 11 years of law teaching."[24] Another of Mr. Gluzman's law professors described him as "clearly top of the class."[25] In the proceedings below, even a member of the Board of Law Examiners stated on the record that Mr. Gluzman is "obviously a very, very qualified person."[26]

To those familiar with Mr. Gluzman's sterling record of academic and professional achievement, his success at Vanderbilt Law School did not come as a surprise. Prior to attending Vanderbilt, Mr. Gluzman was a successful and highly regarded attorney in Argentina for more than a decade, where he had practiced law since 2001.[27] Before that, Mr. Gluzman graduated with the foreign equivalent of a Bachelor of Arts in Legal Studies and a Juris Doctorate from Republica Argentina Universidad del Salvador—a highly selective university and law school in Buenos

[22] A.R. 303–04. *See also* A.R. 133.
[23] A.R. 133.
[24] A.R. 281.
[25] A.R. 256.
[26] A.R. 282.
[27] A.R. 304.

Aires, Argentina.[28] Having subsequently married a U.S. citizen, however, Mr. Gluzman immigrated to Tennessee and obtained his LL.M. degree at Vanderbilt so that he could live and work near his wife's business in Memphis.[29]

ii. The Executive Director's Initial Denial

Because he had earned the foreign equivalent of a B.A. and J.D. in Argentina, and because he had properly supplemented those credentials with an LL.M. degree from Vanderbilt Law School, Mr. Gluzman applied to take the February 2016 Tennessee Bar Exam under the provisions of Rule 7, § 7.01. Less than three weeks before the bar exam was scheduled, however, Mr. Gluzman received an unexpected email from the Executive Director of the Board of Law Examiners stating that: "you are not eligible for the February 2016 Tennessee Bar Examination or subsequent examination in Tennessee absent additional education."[30] Specifically, the Director told Mr. Gluzman that he "d[id] not meet the requirements of Rule 7, . . . which requires a Bachelor's Degree or higher ***and*** a Juris Doctorate (J.D.) degree."[31] This position also matched the guidance that the Board had posted publicly on its website, which stated that an applicant's foreign education "must include a degree that is equivalent to a Bachelor's degree or higher *followed by* a degree that is equivalent to a Juris Doctorate degree[.]"[32]

Significantly, the sole evidentiary basis for the Director's conclusion that Mr.

[28] A.R. 137.
[29] A.R. 307.
[30] A.R. 153.
[31] A.R. 153.
[32] A.R. 333.

Gluzman did not satisfy the requirements of Rule 7 was a foreign credential report completed by World Education Services ("WES").[33] The WES report specifically concluded that Mr. Gluzman's foreign education was "equivalent to a Bachelor's Degree and a Master's Degree in Law," which the Director deemed insufficient under Rule 7.[34] Curiously, however, the WES report was prepared anonymously, and it was also unsigned—rendering its author's credentials (if any) both unknown and unknowable.[35]

iii. Three Expert Witnesses State that Mr. Gluzman Satisfies Rule 7.

Following the Director's denial, Mr. Gluzman appealed to the full Board of Law Examiners for permission to sit for the Tennessee Bar Exam.[36] Mr. Gluzman's appeal was erroneously noticed as a "Request for Waiver" seeking "admission to the Tennessee Bar."[37] However, Mr. Gluzman's counsel made clear during his hearing that: "That actually is not the relief that Mr. Gluzman is seeking here today. He is merely seeking permission *to sit* for the coming Tennessee bar exam."[38]

Mr. Gluzman presented extensive evidence in support of his appeal before the Board, including nearly a dozen exhibits and the live testimony of three witnesses.[39] Most significantly, he presented the opinions of three separate experts who each concluded independently that he had satisfied the requirements of

[33] A.R. 153 (referencing the report contained at A.R. 167–74).
[34] A.R. 153.
[35] A.R. 167.
[36] A.R. 109–11.
[37] A.R. 207.
[38] A.R. 248 (emphasis added).
[39] A.R. 133–206; A.R. 243–314.

Tennessee Supreme Court Rule 7, § 7.01[40] and should receive permission to sit for the bar exam as a result.

First, Professor Daniel Gervais—the Faculty Director of Vanderbilt's LL.M. program[41]—concluded that: "In my opinion, Maximiliano's undergraduate education and legal education, including his LL.M. degree at Vanderbilt Law School, are substantially equivalent to an undergraduate education and legal education in the United States."[42] Further, responding to the Director's erroneous belief that a seven-year, dual-degree requirement was contemplated by Rule 7, Professor Gervais explained:

> Legal education [abroad] is different than in the United States. The programs typically take between five and seven years. Students spend much more time than the typical US law student on subjects such as legal history, philosophy, etc. in addition to learning subjects such as Contracts, Torts, Property, Procedure, Criminal Law, etc.
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> * * * *
>
> If the current average approach in the United States (a typically four-year undergraduate degree and three years of law school) is considered the only acceptable path, based on my knowledge and study of the worldwide situation, only the following foreign nationals may hope to qualify [to practice law in Tennessee] after completing an LLM: students from nine Canadian provinces, a few Australian students, and a few Japanese students.
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> In other words, requiring the exact same total number of years and/or credits as in the average US approach basically eliminates students from the vast majority of countries around the world from the opportunity to take

[40] A.R. 176–78; A.R. 278; A.R. 137.
[41] A.R. 176, ¶ 1.
[42] A.R. 258. *See also* A.R. 178, ¶ 21.

the Bar exam in the State of Tennessee.[43]

Second, Professor David L. Hudson, Jr.—who also teaches in Vanderbilt's LL.M. program[44]—concluded that: "I firmly believe with every fiber in my being that Mr. Gluzman is qualified to sit for the Tennessee bar exam."[45] Professor Hudson further explained that "I have taught more than 2,000 students in my teaching career," and "Mr. Gluzman was one of the very best students that I have ever had the privilege of teaching."[46]

Third, an expert foreign credential evaluator who conducts credential evaluations for a recognized leader in the industry conducted an exhaustive review of Mr. Gluzman's foreign credentials and concluded that Mr. Gluzman's foreign education was literally equivalent to an American Bachelor of Arts Degree and Juris Doctorate.[47] Specifically, on behalf of the foreign credentialing service Morningside Evaluations, Dr. Jonatan Jetlen, the inaugural Director of the graduate program for Strategic Design and Management at Parsons School of Design, concluded that:

> On the basis of the credibility of Republica Argentina Universidad del Salvador, and the hours of academic coursework, it is the judgment of Morningside Evaluations and Consulting that Maximiliano Gabriel Gluzman has attained the equivalent of a ***Bachelor of Arts degree in Legal Studies and a Juris Doctor degree*** from an accredited institution of higher

[43] A.R. 176–78, ¶¶ 7, 16–17.
[44] A.R. 278. *See also* A.R. 204.
[45] A.R. 282.
[46] A.R. 204.
[47] A.R. 137.

education in the United States.[48]

Of special note—and in sharp contrast to the WES report—none of these experts expressed their opinions anonymously. All three also detailed their respective credentials in written materials submitted to the Board.[49] Additionally, Professors Gervais and Hudson testified about and explained the reasons for their respective conclusions under oath and subject to cross-examination.[50] Similarly, the authorities and references upon which Dr. Jetlen's report was based were set forth in writing at the conclusion of his report.[51] It also goes without saying—or should—that as a professional representative of a credible credentialing institution, Professor Jetlen's report was signed by its author.[52]

iv. The Anonymous WES Report, and Mr. Gluzman's Motion to Exclude It.

Mr. Gluzman presented all three of these expert witnesses' conclusions in support of his application to sit for the bar exam.[53] Ultimately, however, the Board rejected each of them in favor of the aforementioned report completed by World Education Services.[54] The Board previously contracted with WES to evaluate foreign applicants' academic credentials, but it stopped using WES as its credential evaluation service during the pendency of Mr. Gluzman's case.[55]

As noted above, the WES report was prepared anonymously, and it was

[48] A.R. 137.
[49] A.R. 180–201; A.R. 203–04; A.R. 144–51.
[50] A.R. 254–86.
[51] A.R. 138.
[52] A.R. 138.
[53] A.R. 176–78; A.R. 278; A.R. 137.
[54] A.R. 325.
[55] A.R. 325, n. 2.

unsigned by its author.[56] Thus, the author of the WES report was (and still is) unknown, and his or her credentials (if any) are similarly unknown. Of note, when asked whether such anonymity was typical among professional foreign credential evaluators, Professor Gervais—the Director of Vanderbilt's LL.M., program—testified: "I have never seen an unsigned report; I have always seen a letter accompanied with the name of the person doing the evaluation."[57]

Because the WES report was prepared anonymously, Mr. Gluzman was also prevented from subpoenaing or cross-examining anyone regarding either the report's contents or the author's experience conducting foreign credential evaluations.[58] However, the anonymous author of the WES report did respond (also anonymously)[59] to Mr. Gluzman's concerns about the report's across-the-board reduction of his per-semester credit hours from 309 to 158[60]—a significant deficiency in the reliability of the WES report that Professor Gervais highlighted and persuasively deconstructed during his oral testimony before the Board.[61] Specifically, the anonymous author responded that he or she "would like to stress" that the report was not meant to be considered authoritative—emphasizing instead that it was merely "an advisory opinion" that was not meant to be "binding upon any institution, organization or individual perusing [it]."[62]

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[56] A.R. 215.
[57] A.R. 273.
[58] A.R. 251; A.R. 212.
[59] A.R. 239.
[60] *Compare* A.R. 45 (309 credit hours) *with* A.R. 44 (158 credit hours).
[61] *See* A.R. 258–61; *see also* A.R. 265–66.
[62] A.R. 239.

Based on the WES report's myriad deficiencies, Mr. Gluzman filed a motion to exclude it from the record as incompetent, anonymous, unreliable, untestable, and unsworn hearsay evidence.[63] Thereafter, Mr. Gluzman's motion to exclude was denied in a written order dated May 9, 2016.[64] According to the Board's order denying Mr. Gluzman's motion, the Board "determined that the report has probative value pursuant to Tenn. Sup. Ct. R. 7, Section 13.03(e)."[65] No further explanation was provided.[66]

v. Board Hearing.

On June 2, 2016, the Board held a hearing on Mr. Gluzman's application to sit for the Tennessee Bar Exam.[67] Only four of the Board's five members attended the hearing.[68] Pursuant to Board Policy P-7.01(b), the sole purpose of the hearing was to determine whether or not Mr. Gluzman could take an upcoming bar exam because he had satisfied the criteria required for the February 2016 bar exam.[69]

Mr. Gluzman presented three arguments in favor of his claim for eligibility. First, he argued that his foreign education was literally equivalent to the requirements of Rule 7, §§ 2.01 and 2.02.[70] Second, in the alternative, he argued

[63] A.R. 209–213.
[64] A.R. 240.
[65] A.R. 240.
[66] A.R. 240.
[67] A.R. 244–313.
[68] A.R. 244 ("Not present: Julian Bibb, Esq.").
[69] A.R. 570, n. 2 (citing Board Policy P-7.01(b) ("[The Board's newly-required credential evaluations are] a requirement for all foreign educated applicants, *unless you were approved to sit for the July 2015 or February 2016 examination using credentials approved for either of those examinations.*") (emphasis added)).
[70] A.R. 116–21.

that his foreign education was substantially equivalent to the requirements of Rule 7, §§ 2.01 and 2.02.[71] Third, Mr. Gluzman noted that he had made a prima facie showing that his foreign education satisfied the requirements of Rule 7, and he argued that that showing should be subject to a rebuttable presumption of correctness in order to safeguard—among other things—Tennesseans' fundamental civil right to earn a living.[72]

After Mr. Gluzman's hearing, the Board took the matter under advisement.[73] Tennessee Supreme Court Rule 7, § 13.03(l) provides that: "Any member participating in the decision without being present for the hearing shall read the transcript of the proceedings and the entire record before the Board." *Id.* However, the Board did not order a transcript of the hearing for the missing member to review before voting on Mr. Gluzman's case.[74]

vi. The Board's Order

The Board ultimately denied Mr. Gluzman's application to take the bar exam in a written Order dated October 13, 2016.[75] The Order was signed by all five Board members, including the member who had been absent.[76] According to the Order:

> The Board concludes that the Applicant has failed to meet the burden of proof to persuade the Board that Applicant's foreign education is substantially equivalent to the education required of applicants educated in the United States, to wit: a Bachelor's Degree or higher ***and***

[71] A.R. 121–25.
[72] A.R. 125–30.
[73] A.R. 310.
[74] A.R. 344–47.
[75] A.R. 325–26.
[76] A.R. 326.

a post-secondary Juris Doctorate degree.[77]

In a footnote, the Board further explained:

> Tenn. Sup. Ct. R. 7 was revised, effective Jan. 1, 2016. Prior to the revision, the educational requirement was found in Section 2.01 and required a Bachelor's Degree conferred prior to commencement of law school. Revised Rule 7, Sections 2.01 and 2.02 now require that conferral of a Bachelor's Degree or higher prior to graduation from law school, **but still require two degrees.**[78]

Thus, each and every time the Board applied the requirements of Tennessee Supreme Court Rule 7, § 7.01 to Mr. Gluzman's case, it did so in accordance with its belief—prominently displayed on its website—that an applicant's foreign education "must include a degree that is equivalent to a Bachelor's degree or higher *followed by* a degree that is equivalent to a Juris Doctorate degree."[79]

vii. The Board's Post-Order Repudiation of Its Dual-Degree Requirement

Following the Board's Order in this case, Vanderbilt Law School and the University of Tennessee College of Law filed a "Petition for Relief" in Mr. Gluzman's case.[80] The Law Schools' Petition expressed serious reservations about the Board's ruling against Mr. Gluzman and also expressed serious doubts about whether the Board's interpretation of Rule 7 was correct.[81] The Petition specifically urged the Board to "reconsider any *per se* rule requiring receipt of two degrees

[77] A.R. 325.
[78] A.R. 325, n. 2 (emphasis added).
[79] A.R. 333.
[80] A.R. 327–36.
[81] A.R. 332–36.

prior to the receipt of an LL.M. degree."[82]

According to the Law Schools' Petition: "The Board's Interpretation of § 7.01's already highly restrictive approach is problematic in several respects and effectively operates to exclude lawyers from most of the world from being eligible to sit for the Tennessee bar exam."[83] The Petition further explained that although Rule 7 itself did not contain any dual degree requirement, the Board had:

> [E]mphasized in its Order that a foreign-educated applicant has "the burden of proof to persuade the Board that the Applicant's foreign education is substantially equivalent to the education required of applicants educated in the United States, to wit: a Bachelor's Degree or higher ***and*** a post-secondary Juris Doctorate degree." In a footnote, the Board also refers to the rule for foreign educated applicants as "requir[ing] two degrees." In addition, the Board's recently updated website advises that an applicant's foreign education "must include a degree that is equivalent to a Bachelor's degree or higher *followed by* a degree that is equivalent to a Juris Doctorate degree."[84]

Shortly thereafter, the Board repudiated its prior position regarding a dual degree requirement. Specifically, the Board acknowledged in a footnote to a pleading before this Court that: "Rule 7 requires the foreign-earned education to be substantially equivalent to a Bachelor's degree and a J.D. degree, but it does not necessarily require two separate foreign-earned degrees."[85] The Board has since "amended its website to eliminate the [prior] reference to two degrees"[86] as well.

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[82] A.R. 327–28.
[83] A.R. 332.
[84] A.R. 333 (internal citations omitted).
[85] A.R. 393, n. 2.
[86] Appendix A, n. 2.

As a consequence of the Board's change in its interpretation of Rule 7, Vanderbilt and the University of Tennessee withdrew their Petition for Relief.[87] However, both law schools are still urging this Court to amend Rule 7 to provide further clarity to foreign applicants, in part because:

> For at least some period of time, the Board appeared to take the position that the term "substantially equivalent" required receipt of separate undergraduate and law degrees. The University of Tennessee College of Law actually had students withdraw from its LL.M. program for fear that their education would not satisfy this standard. . . . While the Board's recent clarification helps to alleviate some of the concerns associated with the interpretation of the rule, significant uncertainty remains.[88]

VII. Argument

The Board's Order erroneously held that Mr. Gluzman did not satisfy the requirements of Rule 7, § 7.01. In reaching that conclusion, the Board applied an incorrect legal standard under Rule 7 by holding that Mr. Gluzman required two foreign degrees and by ignoring Rule 7's unambiguous requirement that merely "substantial" equivalence is sufficient. Whether the Board applied the proper legal standard under Rule 7—a standard that, as noted, the Board itself now repudiates[89]—is a question of law that this Court reviews *de novo*. *See, e.g.*, *Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 553 (Tenn. 2013) ("Statutory interpretation is a question of law, which we

[87] Appendix A., p. 1.
[88] Appendix A, n. 2.
[89] A.R. 393, n. 2. *See also* Appendix A, n. 2.

review de novo."). Significantly, if the Board had applied the correct legal standard to his case, Mr. Gluzman would also have been permitted to take the Tennessee Bar Exam for the following three reasons:

First, application of the correct legal standard under Rule 7—which does *not* require two separate degrees[90]—militates in favor of the conclusion that Mr. Gluzman's foreign education was literally equivalent to an American B.A. and J.D. degree.

Second, in the alternative, any reasonable interpretation of the term "substantially" compels the conclusion that Mr. Gluzman's foreign education was at least substantially equivalent to an American B.A. and J.D. degree.

Third, because Mr. Gluzman made a prima facie showing that his foreign education satisfied the requirements of Rule 7, § 7.01, the burden of production should have shifted to the Board to demonstrate that he did not.

During the proceedings below, the Board also committed two procedural errors that independently merit reversal. *First*, the Board improperly failed to exclude incompetent evidence by declining to strike the anonymous, unreliable, untestable, and unsigned WES report from the record. *Second*, the Board failed to adhere to its own Rules by allowing a Board member to vote on Mr. Gluzman's case without either attending his hearing or reviewing the hearing transcript. The Board's decision to deny Mr. Gluzman's motion to exclude the WES report is subject to review for abuse of discretion. *Biscan v. Brown*, 160 S.W.3d 462, 468

[90] A.R. 393, n. 2.

(Tenn. 2005) ("We review the trial court's decision to admit or exclude evidence by an abuse of discretion standard."). However, permitting an unqualified member of a tribunal to cast a vote is a structural defect that merits automatic reversal. *Cottingham v. Cottingham*, 193 S.W.3d 531, 537 (Tenn. 2006) ("[S]tructural defects affect the framework of the trial from beginning to end and are not simply errors in the trial process.").

Finally, independent of these issues, there is no serious doubt that Mr. Gluzman is "obviously a very, very qualified" applicant to take the Tennessee Bar Exam.[91] Consequently, this Court should permit Mr. Gluzman to sit for the Tennessee Bar Exam as a matter of equity pursuant to its exclusive and inherent authority to oversee attorney licensing in the State of Tennessee.

A. The Board acted contrary to law or arbitrarily in denying Mr. Gluzman's application to sit for the February 2016 bar examination.

1. *The Board applied an incorrect legal standard under Rule 7, § 7.01.*

As Vanderbilt Law School and the University of Tennessee College of Law observed in the "Petition for Relief" that they filed in Mr. Gluzman's case,[92] the Board's Order erroneously held that Tennessee Supreme Rule 7, § 7.01 requires foreign applicants to prove that they earned "two degrees"[93]—"to wit: a Bachelor's Degree or higher ***and*** a post-secondary Juris Doctorate degree."[94] This interpretation of Rule 7 was also applied consistently during Mr. Gluzman's case

[91] A.R. 282.
[92] A.R. 327–36.
[93] A.R. 325, n.1.
[94] A.R. 325.

at every level of his application. For example, the Executive Director of the Board initially denied Mr. Gluzman's application to sit for the bar exam on the basis that his education: "d[id] not meet the requirements of Rule 7, . . . which requires a Bachelor's Degree or higher ***and*** a Juris Doctorate (J.D.) degree."[95] This position also matched the unambiguous guidance that the Board had posted on its public website, which previously stated that foreign applicants must have earned "a degree that is equivalent to a Bachelor's degree or higher *followed by* a degree that is equivalent to a Juris Doctorate degree."[96]

The Board has since repudiated its prior, consistently applied position that two degrees are required by Rule 7.01.[97] The Board has also "amended its website to eliminate the [prior] reference to two degrees."[98] Accordingly, the parties appear to be in agreement that applying a dual-degree requirement under Rule 7.01 would indeed be legal error. In an effort to insulate the Board's Order from reversal, however, the Board now argues that it has *always* adhered to the position that Rule 7.01 "does not necessarily require two separate foreign-earned degrees."[99]

The Board's claim that it has never adopted the legal position that its Director applied, that its website declared, and that its own Order sets forth (twice) is without merit. Tribunals "speak through their orders and judgments"—not the

[95] A.R. 153.
[96] A.R. 333.
[97] A.R. 393, n. 2. *See also* Appendix A, n. 2.
[98] Appendix A, n. 2.
[99] A.R. 393, n. 2.

positions adopted by their counsel on appeal. *Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595, 608 (Tenn. 2013). The Board's position should be rejected accordingly.

In the instant case, the record reflects plainly that: (i) the Director denied Mr. Gluzman's application to sit for the bar exam because he did not have two degrees;[100] (ii) the Board stated publicly on its website that two degrees were required;[101] and (iii) the Board denied Mr. Gluzman's application to sit for the bar exam because he did not have two degrees.[102] The Board has since acknowledged, however, that two degrees actually were not required of under Rule 7.[103] Accordingly, the Board acted contrary to law by applying a dual-degree standard to Mr. Gluzman's application that all parties now agree was error. Furthermore, if the correct legal standard had been applied to his case, Mr. Gluzman's application would have been granted.

2. *Application of the correct legal standard would have resulted in Mr. Gluzman's application being granted.*

If the Board had applied the correct legal standard under Tennessee Supreme Rule 7, § 7.01, then Mr. Gluzman's application would have been granted. Three separate reasons militate in favor of this conclusion:

First, although he did not earn two separate degrees, Mr. Gluzman's foreign

[100] A.R. 153.
[101] A.R. 333.
[102] A.R. 325, n.1.
[103] A.R. 393, n. 2. *See also* Appendix A, n. 2 (noting that the Board has "amended its website to eliminate the [prior] reference to two degrees.").

education was literally equivalent to an American B.A. and J.D. degree.

Second, in the alternative, any reasonable interpretation of the term "substantially" compels the conclusion that Mr. Gluzman's foreign education was at least substantially equivalent to an American B.A. and J.D. degree.

Third, during his hearing before the Board, Mr. Gluzman made a prima facie showing that his foreign education was substantially equivalent to the requirements of Rule 7, §§ 2.01 and 2.02. That showing should have been subject to a rebuttable presumption of correctness, which the Board did not rebut.

a. Mr. Gluzman's foreign education is literally equivalent to an American Bachelor of Arts and Juris Doctorate Degree

Tennessee Supreme Court Rule 7, § 7.01 provides that to be eligible for the Tennessee Bar Exam, an applicant who was educated abroad must demonstrate that his undergraduate and legal education were "substantial[ly] equivalent" to the requirements of Rule 7, §§ 2.01 and 2.02. In turn, these requirements require an applicant to earn a Bachelor's Degree and a Juris Doctorate degree. Fortunately for Mr. Gluzman, although he did not earn two "separate" degrees, his foreign education was nonetheless the literal equivalent of an American B.A. and J.D.

Most significantly, in support of Mr. Gluzman's claim that his foreign education was literally equivalent to an American B.A. and J.D., Mr. Gluzman introduced an expert foreign credential evaluation report completed by Dr. Jonatan Jelen of Morningside Evaluations.[104] (Two additional experts also

[104] A.R. 137–38.

testified that Mr. Gluzman satisfied the criteria of Rule 7, but they did not submit formal reports.[105]) Morningside Evaluations is an organization of "professors, evaluators, translators, and project managers" who are members of "the Association of International Educators, the National Association of Graduate Admissions Professionals (NAGAP), the American Association of Collegiate Registrars and Admissions Officers (AACRAO), the Council for Global Immigration (CFGI, formerly ACIP), and the American Translators Association (ATA), among other organizations."[106] Dr. Jelen in particular—whose extensive CV was attached to his evaluation[107]—is an Assistant Professor and the inaugural Director of the graduate program for Strategic Design and Management at Parsons School of Design.[108] In that role, he "regularly reviews the academic credentials of prospective applicants, transfer students, and prospective faculty" and "is relied upon to determine the academic equivalency of degrees and transcripts from educational systems outside the United States."[109]

After conducting a comprehensive review of Mr. Gluzman's foreign education, Dr. Jelen's essential conclusion was as follows:

> On the basis of the credibility of Republica Argentina Universidad del Salvador, and the hours of academic coursework, it is the judgment of Morningside Evaluations and Consulting that Maximiliano Gabriel Gluzman has attained the equivalent of ***a Bachelor of Arts degree in Legal Studies and a Juris Doctor degree*** from an accredited institution of higher

[105] A.R. 254–86.
[106] A.R. 116.
[107] A.R. 144–51.
[108] A.R. 140.
[109] A.R. 140.

education in the United States.[110]

Thus, Dr. Jelen's expert evaluation report provided significant, affirmative evidence that Mr. Gluzman satisfied the criteria set forth in Rule 7. That affirmative evidence alone should be considered sufficient to permit Mr. Gluzman to take the bar exam. *See, e.g.*, *Application of Collins-Bazant*, 578 N.W.2d 38, 44 (Neb. 1998) (stating that the "most important[]" factor in determining whether a foreign applicant is qualified to take the bar exam is whether "there is affirmative evidence in the record that [the applicant] received a legal education functionally equivalent to that available at an ABA-approved law school"). Additionally, because the incompetent, anonymous, unreliable, untestable, and unsworn hearsay report completed by WES should have been excluded,[111] Dr. Jelen's foreign credential evaluation is also the only admissible foreign credential report contained in the record. As such, this Board can confidently overturn the Board's Order on the strength of Dr. Jelen's evaluation alone. *See, e.g.*, *Green v. Neeley*, No. M2006-00481-COA-R3CV, 2007 WL 1731726, at *5–6 (Tenn. Ct. App. June 15, 2007) (holding that uncorroborated hearsay cannot be the "sole evidence" provided in administrative proceedings).

Crucially, the *substance* of Mr. Gluzman's legal education also bolsters the conclusion that he has satisfied the requirements of Rule 7. In comparable cases, for example, state supreme courts seeking to determine whether a foreign

[110] A.R. 137.
[111] *See infra*, Section VI(A)(3).

applicant's credentials were sufficient have focused on whether the applicant completed certain "core courses deemed minimally necessary to be a properly-trained attorney"—such as "civil procedure, contracts, constitutional law, criminal law, evidence, family law, torts, professional responsibility, property, and trusts and estates." *See, e.g.*, *In re Brown*, 270 Neb. 891, 901 (2006) (internal citations and quotations omitted). Based on this consideration, foreign applicants have reasonably been denied the opportunity to sit for U.S. bar exams when, for example, they had never taken legal courses that are typical of the coursework that is required to obtain an American Juris Doctorate degree. *See, e.g.*, *Jia v. Bd. of Bar Examiners*, 696 N.E.2d 131, 137 (Mass. 1998) ("Of the core courses typically required of a juris doctor candidate, the petitioner successfully completed only one, contracts."). *See also In re Paniagua de Aponte*, 364 S.W.3d 176, 181 (Ky. 2012) ("The Applicant's course work, which focused on international and business law subjects, was doubly narrow, and was thus unlikely to give her a sense of American law as a whole. The only course she took that appears to fall into the core of American legal education, in the sense of being a subject of the bar exam, was her course on corporations.").

In stark contrast, however, Mr. Gluzman's education most certainly <u>did</u> "include[] exposure to a range of foundational substantive areas of law." *In re Brown*, 270 Neb. at 901. With respect to the aforementioned foundational subjects such as "civil procedure, contracts, constitutional law, criminal law, evidence, family law, torts, professional responsibility, property, and trusts and estates," for

example, *id.*, Mr. Gluzman has taken courses in all of them.[112]

Of note, the contrast between Mr. Gluzman's academic record and the academic records of unqualified foreign applicants becomes even more apparent when one considers the fact that Mr. Gluzman supplemented his foreign coursework with a Vanderbilt Law School LL.M. degree that focused on American law.[113] To obtain his LL.M. degree, Mr. Gluzman largely eschewed international law classes and classes designed strictly for LL.M. students. Instead, he completed approximately 90% of his graded course work in core American legal courses in which he competed against American law students,[114] and he earned a cumulative GPA of 3.919 while doing so.[115] Thus, Mr. Gluzman completed Vanderbilt Law School courses in American Contracts, American Corporate Governance, American Corporations and Business Entities, American Federal Tax Law, American Professional Responsibility, American Securities Regulation, American Mergers and Acquisitions, and a general course on American Law.[116] According to one of his law professors, Mr. Gluzman also performed so well that "[i]f he were a J.D. student, he would be Order of the Coif."[117] Consequently, when combined with his foreign studies, Mr. Gluzman's record of academic achievement is at least equivalent to a typical U.S. legal education, if not more extensive. *Cf. Osakwe v. Bd. of Bar Examiners*, 858 N.E.2d 1077, 1083 (Mass. 2006) ("A review of Osakwe's

[112] A.R. 156–64.
[113] A.R. 134.
[114] A.R. 303–304. *See also* A.R. 133.
[115] A.R. 133.
[116] A.R. 133.
[117] A.R. 256.

transcripts reveals that he has taken a wide array of courses, many of them offered as part of the core curriculum at ABA-approved law schools. His transcript from the University of Nigeria shows courses in property, torts, contracts, evidence, constitutional law, land law, equity, jurisprudence, company law, international law, and commercial law. . . Osakwe has [] shown that he has sufficient education in and exposure to American law to satisfy our 'particular' analysis under S.J.C. Rule 3:01, § 3.4."); *Application of Schlittner*, 704 P.2d 1343, 1344 (Ariz. 1985) (approving foreign applicant who completed courses in which "the subjects taught were comparable to subjects taught in an American law school").

As such, Mr. Gluzman's foreign academic record is literally equivalent to a U.S. undergraduate and legal education, and it qualifies him to sit for the Tennessee bar exam. He should be permitted to do so as a result.

b. In the alternative, Mr. Gluzman's foreign education is substantially equivalent to an American B.A. and J.D.

It is undisputed, even by the WES report, that Mr. Gluzman received a "Titulo de Abogado" (Title of Attorney) degree in Argentina prior to receiving an LL.M. degree from Vanderbilt Law School in 2015.[118] The anonymous WES report relied on by the Board concluded that that degree was equivalent to a "Bachelor's and master's degree from a regionally accredited institution" with a "Major/Specialization [in] Law."[119] In contrast, Mr. Gluzman's expert foreign

[118] A.R. 169.
[119] A.R. 169.

credential evaluator concluded that his Argentinean degree was "the equivalent of a Bachelor of Arts degree in Legal Studies and a Juris Doctor degree from an accredited institution of higher education in the United States."[120] For purposes of determining which of these reports is more reliable, it is worth noting that the conclusions reached by WES have been disregarded by reviewing courts in prior cases. *See, e.g., Sunshine Rehab Servs., Inc. v. U.S. Citizenship & Immigration Servs.*, No. 09-13605, 2010 WL 3325442, at *3 (E.D. Mich. Aug. 20, 2010).

There is no doubt, however, that Mr. Gluzman's Argentinean education provided him with the credentials necessary to practice law in that country—something that he did successfully for more than a decade.[121] Thus, even if Mr. Gluzman's education had been equivalent to a U.S. "Bachelor's and master's degree from a regionally accredited institution,"[122] the Board's decision to deny Mr. Gluzman the opportunity to take the bar exam would ***still*** be in error. Specifically, even if the WES report were the more accurate credential evaluation of the two, Mr. Gluzman's foreign education would still be the "substantial" equivalent of an American legal education, which is all that Rule 7, § 7.01 requires.

As the University of Tennessee College of Law and Vanderbilt Law School observe in their Petition to Amend Tennessee Supreme Court Rule 7, § 7.01, "[t]he phrase 'substantially equivalent' is undefined in the rule," and "[t]he term

[120] A.R. 137 (emphasis omitted).
[121] A.R. 304.
[122] A.R. 169.

'substantially equivalent' is an inherently ambiguous phrase."[123] In the context applicable to Rule 7, however, Black's Law Dictionary defines "substantial" as "[c]ontaining the essence of a thing, . . . even if not the exact details."[124] This definition also comports with this Court's own use of the term "substantial" in the context of its "substantial compliance" jurisprudence, in which it has stated that "substantial" means "the essence of the thing to be accomplished.'" *Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 309 (Tenn. 2012) (quoting 3 Norman J. Singer & J.D. Singer, *Statutes and Statutory Construction* § 57:2 (7th ed. 2008)).

As applied to Rule 7, § 7.01, "the essence" of what the rule requires is a comprehensive undergraduate and legal education similar to the education completed by American bar applicants. Even taking the WES report at face value, Mr. Gluzman earned such an education. *Cf. In re Yisa*, 297 S.W.3d 573, 577 (Ky. 2009) ("Obviously, foreign applicants are not necessarily required to obtain a J.D., nor are they expected to have exactly the same legal education as they would have received at an American law school. If this were the rule, it would render SCR 2.014(3) completely meaningless."). As world-renowned legal scholar and Vanderbilt Law School Professor Daniel Gervais—himself a foreign-educated (Canadian) lawyer[125]—explained to the Board:

> Legal education [abroad] is different than in the United States. The programs typically take between five and seven years. Students spend much more time than the typical US law student on subjects such as legal history,

[123] Appendix A, p. 7.
[124] Black's Law Dictionary (10th ed. 2014).
[125] A.R. 180.

> philosophy, etc. in addition to learning subjects such as Contracts, Torts, Property, Procedure, Criminal Law, etc.
>
> * * * *
>
> If the current average approach in the United States (a typically four-year undergraduate degree and three years of law school) is considered the only acceptable path, based on my knowledge and study of the worldwide situation, only the following foreign nationals may hope to qualify [to practice law in Tennessee] after completing an LLM: students from nine Canadian provinces, a few Australian students, and a few Japanese students.
>
> In other words, requiring the exact same total number of years and/or credits as in the average US approach basically eliminates students from the vast majority of countries around the world from the opportunity to take the Bar exam in the State of Tennessee.[126]

It is this reality that compels the conclusion that Mr. Gluzman's foreign education satisfies the criteria of Rule 7. As Professor Gervais explains, a finding that Mr. Gluzman is not qualified to take the Tennessee bar exam because his foreign degree is not a precise reflection of the seven-year, dual-degree model that is customarily—although not uniformly[127]—utilized in the United States would also exclude the vast majority of foreign-educated attorneys in the world from practicing law in Tennessee.[128] *Cf. In re Yisa*, 297 S.W.3d at 573 ("The LL.B. degree is the most commonly awarded law degree outside the United States."). Thus, such

[126] A.R. 176–78, ¶¶ 7, 16–17.
[127] Notably, as a historical matter, not all U.S. law programs—or even law programs in Tennessee—have required compliance with this seven-year model. *See, e.g.*, *University of Tennessee program allows students to earn bachelor's, law degrees in 6 years*, ABC CHANNEL 6 (Jan. 8, 2016, 4:25PM), *available at* http://wate.com/2016/01/08/university-of-tennessee-program-allows-students-to-earn-bachelors-law-degrees-in-6-years/ ("Undergraduate students at the University of Tennessee will now be able to earn a bachelor's degree and a law degree in just six years, one less than usually required, under a new program.").
[128] A.R. 178, ¶ 17.

an interpretation would render Rule 7 substantively illusory and effectively meaningless for nearly every foreign attorney on the planet—excluding only those "students from nine Canadian provinces, a few Australian students, and a few Japanese students."[129]

This absurd result could not realistically have been what this Court intended when it adopted Tennessee Supreme Court Rule 7, § 7.01. *See State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000) ("we will not apply a particular interpretation to a statute if that interpretation would yield an absurd result."). Pursuant to familiar rules of statutory construction, Rule § 7.01 should not be interpreted in a manner that has the practical effect of reading its provisions out of existence. *See Midwestern Gas Transmission Co. v. Dunn*, No. M2005-00824-COA-R3-CV, 2006 WL 464113, at *7 (Tenn. Ct. App. Feb. 24, 2006) ("[I]f the statute does not convey a temporary right of entry to companies with the power of eminent domain, then it does nothing at all. We decline the property owners' invitation to read [the statute] out of existence under the guise of 'statutory interpretation.'"). The Board's interpretation of Rule § 7.01 should be rejected accordingly.

By requiring foreign applicants to demonstrate that they earned "two degrees" under a framework identical to the traditional legal education that American bar applicants receive in the United States,[130] the Board applied an incorrect legal standard to Mr. Gluzman's application. Instead, what matters for

[129] A.R. 178, ¶ 16.
[130] A.R. 325, n. 1.

purposes of § 7.01—indeed, the only thing that matters—is whether the *substance* of an applicant's foreign education is substantially equivalent to a U.S. legal education. And plainly, as three separate experts independently concluded, the substance of Mr. Gluzman's foreign education was indeed substantially equivalent to a U.S. legal education. *See, e.g.*, A.R. 137 (Dr. Jelen concluding that Mr. Gluzman's foreign education was "the equivalent of a Bachelor of Arts degree in Legal Studies and a Juris Doctor degree from an accredited institution of higher education in the United States"); A.R. 178 ¶ 21 (Professor Gervais concluding that "In my opinion, Maximiliano Gluzman's undergraduate education and legal education . . . are substantially equivalent to an undergraduate education and legal education in the United States."); A.R. 204 (Professor Hudson concluding that: "I firmly believe with every fiber in my being that Mr. Gluzman is qualified to sit for the Tennessee Bar Exam."). Under Rule 7, § 7.01, this is sufficient. *Cf. O'Siochain*, 842 N.W.2d at 770 ("Based on a de novo review, we conclude that O'Siochain [who, completed a 4–year Irish law and business program,] has met his burden of proving his law school education and experience were functionally equivalent to the education received at an ABA-approved law school and that as a result, a waiver of the educational qualifications requirement of § 3–105(A)(1)(b) is appropriate.").

Additionally, lest there be any lingering doubt about either Mr. Gluzman's academic qualifications or his substantive knowledge of American law, all such concerns are easily put to rest both by his demonstrated mastery of American law

at Vanderbilt Law School[131] and by the glowing recommendations that he received from his American law professors. *See, e.g.*, A.R. 176, ¶ 5 ("Mr. Gluzman was a student of mine during his studies at Vanderbilt. He was one of the very best LLM students. He is a mature, serious, hard-working law student with significant experience as a lawyer in Argentina."); A.R. 204 ("I have taught more than 2,000 students in my teaching career. Mr. Gluzman was one of the very best students that I have ever had the privilege of teaching."). And as a further precaution, of course, Mr. Gluzman will also be required to pass the bar exam for which he has applied. *Cf. In re O'Siochain*, 842 N.W.2d at 770 ("[A]dmission rules are intended to weed out unqualified applicants, not to prevent qualified applicants from taking the bar.") (internal citations and quotations omitted).

In sum, however, even on the Board's own evidence, Mr. Gluzman's foreign education was "substantially" equivalent to the requirements of Rule 7, §§ 2.01 and 2.02, and he is qualified to sit for the Tennessee bar exam as a result.

c. Mr. Gluzman has made a prima facie showing that his education satisfied the requirements of Rule 7.

Based on the evidence that Mr. Gluzman submitted in support of his application to take the Tennessee Bar Exam, Mr. Gluzman easily made a prima facie showing that his foreign education satisfied the requirements of Rule 7.[132] Having done so, this Court should adopt a rebuttable presumption that Mr.

[131] A.R. 133.
[132] *See generally*, A.R. 133–206.

Gluzman was qualified under the requirements of Rule 7, § 7.01, and the burden of production should then shift to the Board to prove that he was not.

Notably, such a burden-shifting framework is commonplace under Tennessee law, so adopting the same standard under § 7.01 would not be unusual. *See, e.g.*, *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777, 780 (Tenn. 2010) ("If an employee proves a prima facie case of discrimination or retaliation, the employee creates a rebuttable presumption that the employer unlawfully discriminated or retaliated against him or her. The burden of production [then] shifts to the employer to articulate a legitimate and nondiscriminatory or nonretaliatory reason for the action.") (internal citation omitted); *Chorost v. Chorost*, No. M2000-00251-COA-R3CV, 2003 WL 21392065, at *6 (Tenn. Ct. App. June 17, 2003) ("Once an obligor parent makes out a prima facie case for modifying his or her child support, the burden shifts to the custodial parent to prove that the requested modification is not warranted by the guidelines."); *State v. Mathias*, 687 S.W.2d 296, 298 (Tenn. Crim. App. 1985) ("In order to rely upon the defense of entrapment, the defendant must make out a prima facie case of entrapment, whereupon the burden shifts to the state to show beyond a reasonable doubt that the defendant had the predisposition to commit the crime."); *Altman v. Altman*, 181 S.W.3d 676, 682 (Tenn. Ct. App. 2005) ("The party claiming that dissipation has occurred has the burden of persuasion and the initial burden of production. After the party alleging dissipation establishes a prima facie case that marital funds have been dissipated, the burden shifts to the party who spent the money to present

evidence sufficient to show that the challenged expenditures were appropriate."); *State ex rel. Dep't of Soc. Servs. v. Wright*, 736 S.W.2d 84, 85 (Tenn. 1987) ("T.C.A. § 36–5–219(b) . . . states that a duly certified URESA petition 'shall create a presumption of the truthfulness of the facts alleged therein and prima facie evidence of the liability of the respondent and shall shift the burden of proof to such respondent.'"); *State ex rel. Johnson v. Newman*, No. E2014-02510-COA-R3-CV, 2015 WL 5602021, at *2 (Tenn. Ct. App. Sept. 23, 2015) ("To find civil contempt in a case such as this, the petitioner must establish that the defendant has failed to comply with a court order. Once done, the burden then shifts to the defendant to prove inability to pay. If the defendant makes a prima facie case of inability to pay, the burden will then shift to the petitioner to show that the respondent has the ability to pay.") (internal citations omitted).

Moreover, Tennessee public policy necessitates adopting such a burden-shifting framework in Rule 7, § 7.01 cases for at least four additional reasons:

First, Tennessee law contemplates "a fundamental civil right" to earn a living that is subject to significant constitutional and statutory protection.[133] As this Court has previously explained: "The 'liberty' contemplated in [the Tennessee Constitution] means not only the right of freedom from servitude, imprisonment, or physical restraint, *but also the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, vocation, trade, or profession*, to make all proper contracts in relation thereto, and to enjoy the

[133] A.R. 319.

legitimate fruits thereof." *Harbison v. Knoxville Iron Co.*, 53 S.W. 955, 957 (Tenn. 1899) (emphasis added). This Court has repeatedly—and recently—affirmed Tennessee's established public policy favoring citizens' "access to employment and the ability to earn a livelihood." *Yardley v. Hosp. Housekeeping Sys., LLC,* 470 S.W.3d 800, 806 (Tenn. 2015). Additionally, having enacted The Right to Earn a Living Act just last year, the Tennessee General Assembly has expressly affirmed Tennesseans' fundamental right to earn a living as well. *See* A.R. 319 (declaring that "the right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference, is a fundamental civil right," and proclaiming that "it is in the public interest to ensure the right of all individuals to pursue legitimate entrepreneurial and professional opportunities to the limits of their talent and ambition[.]") (codified at Tenn. Code Ann. § 4-5-501).

Consequently, based on Tennessee's long and consistently established public policy affirming Tennesseans' civil right to earn a living, the Board should err on the side of *permitting* qualified lawyers to practice law in Tennessee under Rule 7, § 7.01, rather than prohibiting them from doing so.

Second, "foreign-educated lawyers [can] do great things for both America and their home countries," and "business for the American legal services sector can grow by opening American law practice to more foreign-educated lawyers, and can thereby place the American market squarely in the stream of global commerce into which just about every other American business sector has entered." Jeffrey A. Van Detta, *A Bridge to the Practicing Bar of Foreign Nations: Online American*

Legal Studies Programs As Forums for the Rule of Law and As Pipelines to Bar-Qualifying LL.M. Programs in the United States, 10 S.C. J. INT'L L. & BUS. 63, 67–68 (Fall 2013). Similarly, introducing more foreign-educated attorneys into the legal industry significantly benefits Tennessee's economy. *See, e.g.*, A.R. 178, ¶ 18 ("On information and belief, Tennessee law firms and companies who have hired foreign-trained lawyers have greatly benefited and continue to benefit from hiring those students, as Tennessee increasingly becomes a global hub for international business."). Further, Tennessee law schools—in particular, Vanderbilt Law School and the University of Tennessee College of Law—generate significant revenue from their LL.M. programs, which foreign attorneys enroll in with the expectation that they will be permitted to take the Tennessee bar exam after graduating. *See, e.g.*, A.R. 178, ¶ 20 ("Over the past nine years (since 2007), on information and belief a total of 13 foreign students with an LLM degree from Vanderbilt University Law School applied for admission to the Tennessee Bar."); Appendix A, n. 2 ("For at least some period of time, the Board appeared to take the position that the term "substantially equivalent" required receipt of separate undergraduate and law degrees. The University of Tennessee College of Law actually had students withdraw from its LL.M. program for fear that their education would not satisfy this standard. . . . While the Board's recent clarification helps to alleviate some of the concerns associated with the interpretation of the rule, significant uncertainty remains."). Consequently, reasonable, predictable admissions standards that presumptively permit foreign applicants to take the bar exam once they have made

a prima facie showing that they are qualified to do so under Rule 7, § 7.01 would promote the economic well-being of the country, the state, and Tennessee's own law schools.

Third, denying a foreign-educated bar applicant who has made a credible showing that he is qualified to practice law in Tennessee even the opportunity to *sit* for the Tennessee Bar Exam gives rise to serious concerns about raw economic protectionism that may violate both the United States Constitution and the Tennessee Constitution. *See, e.g., Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (invalidating protectionist statute under the 14th Amendment's Due Process clause because "protecting a discrete interest group from economic competition is not a legitimate governmental purpose"); *Consumers Gasoline Stations v. City of Pulaski*, 292 S.W.2d 735, 737 (Tenn. 1956) ("Although [a] city may have the right to regulate [a] business, it does not have the right to exclude certain persons from engaging in the business while allowing others to do so. . . Being discriminatory in nature[, such a law] clearly violates Article I, Section 8 of the Constitution of Tennessee."). *See also* Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135 (2004) (arguing that protectionism inherent in foreign bar admission requirements violates Article IV's Privileges and Immunities Clause, the Fourteenth Amendment's Privileges or Immunities Clause, and the Dormant Commerce Clause). In fact, failing to guard Tennessee's bar application process against claims of protectionism could even subject the members of the Board of

Law Examiners to antitrust liability. Braden H. Boucek, *Banned from the Bar Exam*, BEACON CENTER OF TENNESSEE BLOG (Feb. 7, 2017), https://www.beacontn.org/banned-from-the-bar-exam/ ("In a recent Supreme Court development, the individuals who make up the board may now be held personally liable for their decisions. That is, they can be sued. The door for lawsuits to be filed against people on licensing boards who engage in anti-competitive activity is wide open. Whether the board members know it or not, no exception exists for lawyers who may be uniquely capable of, and therefore tempted into, rigging the regulatory landscape."). Accordingly, adopting a commonplace burden-shifting framework that would steer clear of such constitutional concerns would be worthwhile for both applicants and the Board of Law Examiners alike.

Fourth, "there is a significant community of émigrés . . . who need home-country trained lawyers admitted to practice in their adopted U.S. states." Van Detta, 10 S.C. J. INT'L L. & BUS. at 64. Additionally, given Middle Tennessee's substantial immigrant and refugee population, there is an overwhelming need to increase the number of competent bilingual attorneys available to residents in Middle Tennessee in particular. *See generally,* A.R. 206 ("[T]here is an ever increasing shortage of attorneys who have the necessary skills to work with th[e immigrant] and refugee population. Bilingual, culturally competent attorneys are a critical component of access to justice for this growing segment of our community. Based on the data found in the recent census, immigrant communities in Tennessee and the Southeast have a greater level of need than immigrant

communities in other parts of the U.S."). Consequently, ensuring that qualified foreign applicants like Mr. Gluzman are not unnecessarily prohibited from practicing law in Tennessee is essential to promoting access to justice for a significant proportion of Tennesseans. *See id.* ("We encourage you to consider seriously degrees and certifications from other countries before dismissing their merits. By counting these comparable recognitions as applicable and giving them their due credit, it resolves two issues: providing more qualified individuals to meet the growing need in the community, and allow[ing] talented, skilled individuals to practice in their field of study.").

With these four independent considerations in mind, a burden-shifting framework under Rule 7, § 7.01 is appropriate under circumstances where, as here, a foreign applicant has made a prima facie showing that he is qualified to sit for the Tennessee Bar Exam. Once an applicant has made such a showing, there should be a rebuttable presumption that the applicant satisfies the requirements of Rule 7, and the burden of production should then shift to the Board to prove that the applicant does not. Applying that standard to the instant case, in the absence of satisfactory proof rebutting Mr. Gluzman's prima facie showing that he is eligible to sit for the Tennessee bar exam, the Board's Order should be reversed, and Mr. Gluzman's petition to sit for the Tennessee Bar Exam should be granted.

3. *The Board failed to exclude incompetent evidence from the record.*

The sole piece of evidence in the record that even ostensibly conflicted with Mr. Gluzman's claim that he satisfied Rule 7, § 7.01 was the anonymous foreign

credential evaluation report completed by World Education Services.[134] Mr. Gluzman filed a motion to exclude the WES report in advance of his hearing on the basis that it was incompetent, anonymous, unreliable, untestable, and unsworn hearsay.[135] Although the Board denied Mr. Gluzman's motion,[136] it also stopped doing business with WES during the pendency of Mr. Gluzman's case.[137]

The Board specifically denied Mr. Gluzman's motion to exclude the WES report from the record on the basis that it "ha[d] probative value pursuant to Tenn. Sup. Ct. R. 7, Section 13.03(e)."[138] In pertinent part, Rule 13.03(e) provides that:

> The Board shall not be bound by the rules of evidence applicable in a court, but it may admit and give probative effect to any evidence which in the judgment of the Board possesses such probative value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs. . . . The Board may exclude incompetent . . . . evidence.

Id.

If the WES report qualifies as evidence that "would entitle it to be accepted by reasonably prudent persons," however, then it is difficult to imagine what kind of evidence would <u>*not*</u> be so accepted. *Id.* The deficiencies in the WES report were so profound that its admission violated Due Process. As Mr. Gluzman complained in his motion, the report was not merely hearsay. Instead, it was <u>*anonymous*</u> hearsay—a deficiency that not only prohibited Mr. Gluzman from subpoenaing its

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[134] As noted in Section VI(A)(2)(b), *supra*, Mr. Gluzman still satisfies the requirements of Rule 7 even based on the conclusion reached by the WES report.
[135] A.R. 209–213.
[136] A.R. 240.
[137] A.R. 325, n. 2.
[138] A.R. 240.

author and questioning him or her about the report's contents, but which also prevented Mr. Gluzman from determining whether the report's author even had any experience conducting foreign credential evaluations at all.[139]

On its face, the anonymous WES report was so thoroughly devoid of reliability that it "would not be accepted in any courtroom in Tennessee and should not [have been] given credence here."[140] In the critical context of Mr. Gluzman's case, however, the fact that the Board refused to exclude the WES report from the record was inordinately indefensible. Here, as far as the Board was concerned, the WES report not only "had probative value"—instead, it dictated the outcome of Mr. Gluzman's entire case *regardless of what other evidence was submitted*. *See* A.R. 396 ("[D]espite the satisfactory equivalency evaluation of a service not denoted by the Board and the uniformly superlative recommendations of two esteemed law professors, consideration of these non-uniform criteria is exactly the kind of ad hoc determination Board Policy P-7.01 is designed to pretermit.").

Further, being able to question the author of the WES report regarding the report's reliability was essential under the unique and disputed facts of Mr. Gluzman's case. For one thing, the report's own author endeavored to minimize the report's reliability, stating that he or she "would like to stress" that the report was merely "an advisory opinion" that was not meant to be "binding upon any institution, organization or individual perusing [it]."[141] For another, the report

[139] A.R. 212.
[140] A.R. 252.
[141] A.R. 239.

conflicted with three other experts' conclusions, so its reliability was integral to this case's outcome. The WES report was also unsigned in contravention of industry standards and the organization's own prior practice,[142] thereby "calling its reliability into even further doubt and suggesting that it was not meant to be considered as evidence in a legal proceeding."[143]

Most importantly, though, the WES report contained a serious deficiency that only its author could explain or attempt to defend. Specifically, Mr. Gluzman's foreign transcript reflected that he had completed 309 credit hours during his combined undergraduate and legal education.[144] However, the WES report only gave him credit for completing 158 credit hours.[145] Although some modification may have been appropriate due to differences in the Argentinean and American education systems, applying a nearly 50% across-the-board reduction was not.

When Mr. Gluzman expressed concerns about the fact that the WES report discounted credit hours that he had most certainly completed, the anonymous WES author replied that "the number of credits indicated on our evaluation report corresponds to the normal full-time annual load (24 to 34 credits) carried by a student enrolled in a similar program at an institution in the United States."[146] Thus, the WES report effectively imposed a cap on the total number of credit hours that its author believed Mr. Gluzman could have completed if he had been enrolled

[142] A.R. 210.
[143] A.R. 212.
[144] A.R. 45.
[145] A.R. 44.
[146] A.R. 239.

"in a similar program" in the United States.[147]

As Professor Gervais detailed in his oral testimony before the Board, however: "Argentinean students take more credits per semester and typically three more per semester than the students in the United States."[148] Thus, with respect to the number of credit hours that students can complete in a given semester, Argentinean and American programs cannot reasonably be considered "similar."[149] Several reasons account for this difference, the most prominent one being that Argentinean students' "exams can be deferred, so they actually get the summer to review everything" and can "pack more into a semester."[150]

Based on this important difference between Argentinean and American higher education programs, Professor Gervais explained: "I'm very critical of the fact that [the WES report doesn't] count certain credits when the student has done the work."[151] He further stated: "I don't actually understand the logic of not counting certain credits per semester,"[152] and he described the WES report's methodology in this regard as "a red [flag]."[153]

In sum: Mr. Gluzman was entitled to subpoena and cross-examine the WES report's author and challenge him or her to justify the report's methodology. Because the report's author compiled it anonymously, however, Mr. Gluzman

[147] A.R. 239.
[148] A.R. 258–59.
[149] A.R. 239.
[150] A.R. 259. *See also* A.R. 261.
[151] A.R. 266.
[152] A.R. 261.
[153] A.R. 265. The transcript says "red light," which appears to be a transcription error. It's apparent from context that the speaker meant "red flag."

complained well in advance of his hearing that he could not do so, and he properly moved the Board to exclude the report from the record as a result.[154] Mr. Gluzman was also prevented from determining what experience, if any, the report's author had conducting foreign credential evaluations. And he was further prevented from determining whether the report's author had any prior experience evaluating the credentials of Argentinean students specifically, whose education system, Professor Gervais noted, is "unique."[155] Forcing Mr. Gluzman to proceed under these circumstances and requiring him to overcome an anonymous, unsigned, hearsay report whose author could not be impeached was an abuse of discretion that deprived Mr. Gluzman of a fair and reliable proceeding. The Board's Order should be reversed as a result.

4. *The Board failed to adhere to its own procedural Rules by allowing a Board member to vote on Mr. Gluzman's case without either attending his hearing or reviewing the hearing transcript.*

The Board also failed to adhere to its own rules by permitting a Board member to vote on Mr. Gluzman's case who had neither attended Mr. Gluzman's hearing nor reviewed the hearing transcript. The transcript of proceedings reflects that only four of the Board's five members were present during Mr. Gluzman's hearing.[156] Under these circumstances, if an absent member intends to vote on a case, Tennessee Supreme Court Rule 7, § 13.03(l) provides that: "Any member participating in the decision without being present for the hearing shall read the

[154] A.R. 209–13.
[155] A.R. 265–66.
[156] A.R. 244 ("Not present: Julian Bibb, Esq.").

transcript of the proceedings and the entire record before the Board." *Id.*

On October 13, 2016, the Board issued its Order denying Mr. Gluzman's application to sit for the Tennessee Bar Exam.[157] All five Board members signed the Order, including the member who had been absent.[158] However, the Board did not order a transcript of Mr. Gluzman's hearing for the missing member to review before voting on Mr. Gluzman's case.[159] As a consequence, the Board could not plausibly have complied with Tennessee Supreme Court Rule 7, § 13.03(l).

The record makes plain that the Board failed to order a transcript for the missing Board member to review before voting on Mr. Gluzman's case, because the Board itself acknowledged as much in writing.[160] On October 17, 2016—four days after the Board had issued its Order—counsel for Mr. Gluzman sent an email to the Board stating as follows: "If possible, I was just hoping to review the testimony of a couple of the witnesses before deciding whether or not to order the entire transcript. Did the Board not order a copy of its own?"[161] In response, the Board replied without equivocation: "We did not."[162]

It is self-evident that a judge cannot be qualified to cast a vote on a given case without having heard it. In other contexts, this Court has also observed that "[s]tructural defects affect the framework of the trial from beginning to end and are not simply errors in the trial process." *Cottingham*, 193 S.W.3d at 537.

[157] A.R. 326.
[158] A.R. 326.
[159] A.R. 344–47.
[160] A.R. 347.
[161] A.R. 346.
[162] A.R. 347.

Similarly, the United States Supreme Court has held that the Due Process Clause of the 14th Amendment is implicated by judicial disqualification claims. *See generally Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009). Although questions of this nature do not traditionally arise in the context of administrative proceedings, in criminal proceedings, this Court has held that "[s]tructural constitutional errors are not amenable to harmless error review, and therefore, they require automatic reversal when they occur." *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008). *Cf. Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927) (subjecting a trial court order to automatic reversal on judicial disqualification grounds under the Due Process Clause).

Importantly, "[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification. . . ." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986). With respect to the matter at bar, this Court has quite reasonably adopted such a standard for Rule 7 cases. Specifically, Tennessee Supreme Court Rule 7, § 13.03(l) provides that: "Any member participating in the decision without being present for the hearing ***shall read the transcript of the proceedings*** and the entire record before the Board." *Id.* (emphasis added). The natural corollary of this Rule is that a member who has *not* been present for a hearing and who has *not* read the transcript of the proceedings also is not authorized to "participat[e] in the decision." *Id.* Consequently, because Tennessee Supreme Court Rule 7, § 13.03(l) was violated in the instant case, the

Board's Order should be reversed.

B. Mr. Gluzman should be permitted to sit for the Tennessee Bar Exam as a matter of equity.

Finally, independent of the Board's Order in this case and the significant errors from which it resulted, there is no doubt that this Court has "exclusive and inherent authority" over attorney licensing in Tennessee. *Chong v. Tennessee Bd. of Law Examiners*, 481 S.W.3d 609, 610 (Tenn. 2015). This Court also has "original power to review the action[s] of the Board of Law Examiners in [both] interpreting *and applying*" its licensing rules. *Belmont v. Bd. of Law Examiners*, 511 S.W.2d 461, 462 (Tenn. 1974) (emphasis added).

In similar circumstances, other state supreme courts have used their authority to grant waivers to qualified applicants under circumstances when equity compels doing so. *See, e.g., Collins-Bazant*, 578 N.W.2d at 43 ("Of jurisdictions that allow for waivers of their rules of admission, most do so according to the view that in some instances a strict application of the rules would cause injustice. This view is based on the premise that rules of admission were not meant to prevent qualified applicants from taking the bar. Rather, the rules are intended to weed out unqualified applicants.") (internal citations omitted). As a general matter, such courts have "provide[d] relief from the operation of the rules of admission whenever it can be demonstrated that the rules operate in such a manner as to deny admission to a petitioner arbitrarily and for a reason unrelated to the essential purpose of the rule." *Application of Nort*, 96 Nev. 85, 96 (1980).

If Rule 7, § 7.01 in fact precludes Mr. Gluzman from even taking the Tennessee Bar Exam—and for the reasons set forth above, it does not—then his application merits relief from the strict operation of § 7.01. *Id.* "Admission rules are intended to weed out unqualified applicants, not to prevent qualified applicants from taking the bar." *In re O'Siochain*, 842 N.W.2d at 770 (internal citations and quotations omitted). In the instant case, however, the record—which features, among other things, Mr. Gluzman's 3.919 GPA from Vanderbilt Law School[163]—overwhelmingly supports the conclusion that he is indeed a qualified applicant who has been prevented from taking the bar exam. In fact, even a Board member who voted to deny his application acknowledged that Mr. Gluzman is "obviously a very, very qualified person."[164] As a matter of equity, then, Mr. Gluzman should be granted permission to take the bar exam.

VIII. Conclusion

For the foregoing reasons, the Board's Order should be REVERSED, and Mr. Gluzman's application for permission to take the Tennessee Bar Exam should be GRANTED.

[163] A.R. 133.
[164] A.R. 282.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2017, a copy of the foregoing was sent via UPS, postage prepaid, and/or emailed to the following:

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_____
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Appendix A

CERTIFIED
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IN THE SUPREME COURT OF TENNESSEE

In re: PETITION TO AMEND TENNESSEE SUPREME COURT RULE 7, § 7.01)

No.: ADM2017-00785

PETITION TO AMEND TENNESSEE SUPREME COURT RULE 7, § 7.01 GOVERNING EDUCATIONAL REQUIREMENTS FOR ADMISSION TO THE BAR OF TENNESSEE

The University of Tennessee College of Law recently established an LL.M. degree designed so that foreign-educated lawyers who are eligible to be admitted to practice or who are admitted to practice in their foreign jurisdictions may gain the education needed to become eligible to sit for the bar exam in Tennessee (as well as other states with similar admission requirements). Vanderbilt Law School offers a similar LL.M. degree to foreign-educated lawyers. By an Order dated October 13, 2016, the Tennessee Board of Law Examiners ("the Board") denied the admission of an applicant to the bar from another country under Tennessee Supreme Court Rule 7, § 7.01, on the grounds that the applicant's undergraduate education and legal education were not substantially equivalent to the education received by applicants receiving their legal education in the United States. Order Denying Petition to Reconsider Denial of Eligibility, In re: Maximiliano Gabriel Gluzman, Case No. 16-p-4 (hereinafter "Order"). The University of Tennessee and Vanderbilt filed a joint petition with the Board, requesting that the Board reconsider its interpretation of § 7.01. The two schools have since withdrawn this petition because the Board clarified that its interpretation of § 7.01 does not require a foreign-educated applicant to obtain two separate foreign degrees.

Mr. Gluzman's case illustrates well the inadequacies of the current rule. He is an attorney with substantial practice experience in his home country who earned nearly a 4.0 grade

point average in Vanderbilt Law School's LL.M. program. If § 7.01 as currently enacted does not permit Mr. Gluzman even to sit for the Tennessee bar examination, then the Petitioners respectfully submit that the current rule operates to "prevent qualified applicants from taking the bar." In re Application of Gluckselig, 697 N.W.2d 686, 691 (Neb. 2005). If that is the case, the Petitioners respectfully suggest the rule should be changed.

Because the interpretation of § 7.01 impacts both the University of Tennessee College of Law and Vanderbilt Law School, the law schools respectfully petition this Court to amend § 7.01 to provide greater clarity to applicants and law schools regarding the admission requirements for foreign lawyers.

I. The Special Bar Admission Rules Regarding Foreign-Educated Lawyers

The underlying purpose of all bar admission rules is to ensure that bar applicants possess the requisite knowledge and skill to provide competent legal services within a state upon admission to the bar. Therefore, by their nature, bar admission rules exist to protect the public. See Jia v. Board of Bar Examiners, 696 N.E.2d 131, 139 (Mass. 1998) ("The scrutiny of each applicant's qualifications is delegated to the board to ensure that we admit to practice here only those applicants who are versed in our legal rules so that the public may rely on appropriately trained professionals to protect their interests."); People v. Adams, 243 P.3d 256, 266 (Colo. 2010) ("The purpose of the bar and our admission requirements is to protect the public from incompetent legal advice and representation."); Shortz v. Farrell, 193 A. 20, 24 (Pa. 1937) (explaining that the purpose of admission rules is "to assure to the public adequate protection in the pursuit of justice"). Foreign-educated lawyers who seek admission to the bar in a U.S. state present special concerns for courts given the potential differences in an applicant's educational

and professional background. States have taken a variety of approaches in their attempts to ensure that foreign-educated lawyers possess the requisite knowledge and skill to provide legal services to clients.

A. Practice-Focused Admission Rules

Some states focus on a foreign-educated lawyer's practice experience as a prerequisite to taking the state bar exam. These states either require a minimum number of years of active practice or establish a pathway to admission based on practice experience and completion of an LL.M. degree. For example, Wisconsin permits a foreign-educated lawyer to sit for the bar examination if the applicant received a legal education from a country whose jurisprudence is based on the principles of English common law, is a member of good standing in the bar of his or her home country, and was substantially engaged in the practice of law in a common-law jurisdiction for three of the preceding ten years. Wis. Sup. Ct. R. 40.05. In Pennsylvania, a lawyer who is a member in good standing in the bar of another country, has been engaged in the practice of law for three of the five preceding years, and who has competed an LL.M. degree in the U.S. is eligible to sit for the bar. Pa. Bar Admission Rules R. 205.

B. Education-Focused Rules

In some states, the fact that a foreign-educated lawyer has obtained an LL.M. degree from an accredited U.S. law school is, by itself, sufficient to permit the lawyer to sit for a bar examination. See Rules Governing Admission to the Alabama State Bar R. IV(B)(2)(d); Wisconsin Sup. Ct. R. 40.055(2).

The more common approach, however, is to focus on whether the *entirety* of a foreign lawyer's legal education – including the lawyer's first law degree *and* an LL.M. degree – is equivalent or substantially equivalent to that of a U.S. lawyer. For example, in New Hampshire,

a foreign-educated lawyer who has received a legal education in a country whose jurisprudence is based on English common law and who has completed an LL.M. degree is deemed to have received an education that is substantially equivalent in substance to that received by a lawyer educated in the U.S. Rules of the Supreme Court of the State of New Hampshire R. 42. In New York, a foreign-educated lawyer may sit for the bar exam based on a foreign legal education substantially equivalent to a U.S. legal education, without having to complete an LL.M. degree. Alternatively, if the applicant's foreign legal education is not substantially equivalent to the education received at an ABA-accredited law school, the applicant may cure any educational deficiencies through completion of an approved LL.M. degree. N.Y. Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law § 520.6(b)(1). Other states take a similar approach. See Maine Bar Admission Rules R. 11(A)(a)(3) & Maine Board of Bar Examiners Regulations for Determining Equivalence of Foreign Legal Education (establishing that a lawyer who received legal education in an English-speaking, common-law-based country and who completed an approved LL.M. degree has received the substantially equivalent education necessary to permit the applicant to sit for the bar examination), available at http://mainebarexaminers.org/foreign-legal-education/; Rules Governing Admission to the Bar of Maryland R. 19-201(b)(2) & Board Rule 7 (permitting a foreign-educated lawyer to sit for the bar examination upon a certification that the lawyer's original legal education combined with that of approved additional instruction in U.S. law is the equivalent of an LL.B or J.D. degree).

C. Hybrid Approaches

Some states have adopted a hybrid approach that establishes different paths for admission based upon the nature of the lawyer's original legal education, practice experience, and

completion of an LL.M. degree. For example, Texas establishes essentially four tracks for possible admission by a foreign educated lawyer, briefly summarized as follows:

> (1) an applicant who received a legal education that is substantially equivalent in terms of duration to that of a U.S. law school from an accredited school in a country whose jurisprudence is based on the principles of English common law and who has been engaged in the practice of law for three of the preceding five years is eligible to sit for the bar examination without having to pursue an LL.M. degree;
>
> (2) an applicant who received a legal education that was at least two years in duration from an accredited school in a country whose jurisprudence is based on the principles of English common law is eligible to sit for the bar if the applicant completes an approved LL.M degree;
>
> (3) an applicant who is authorized to practice law in a foreign jurisdiction whose jurisprudence is based on the principles of English common law but who does not satisfy the other requirements listed above is eligible to sit for the bar examination if the applicant completes an approved LL.M. degree; or
>
> (4) an applicant who received a legal education that is substantially equivalent in terms of duration to that of a U.S. law school at an accredited school in a country whose jurisprudence is not based on the principles of English common law is eligible to sit for the bar examination if the applicant is authorized to practice law in the other country and has completed an approved LL.M. degree.

Tex. R. Governing Admission to the Bar of Texas R. XIII.

Michigan has adopted a totality of the circumstances approach that takes into account a lawyer's original legal education, practice experience, and LL.M. degree. In Michigan, the Board of Law Examiners "may in its discretion permit applicants who do not possess a JD degree from an ABA-approved law school to take the examination based upon factors including, but not limited to, relevant legal education, such as an LLM degree from a reputable and qualified law school, and experience that otherwise qualifies the applicant to take the examination." Rules for the Mich. Board of Law Examiners R. 2(B). Foreign lawyers applying for admission to the bar in Vermont do not need to complete an LL.M. program if they completed a legal education equivalent to graduation from an accredited U.S. law school and

have been admitted to and remain in good standing with the bar of their home country. Rules of Admission to the Bar of the Vermont Supreme Court R. 8(b).

D. Tennessee

Tennessee takes an unusual approach to the issue of foreign-educated lawyers. Article VII of the Supreme Court Rules contains the educational requirements for foreign-educated lawyers. Section 7.01 provides that notwithstanding the requirements of § 2.01 (which requires a U.S. educated lawyer to have a bachelor's or higher degree and a law degree from an accredited school), an applicant who has completed a course of study in and graduated from an accredited law school in a foreign country may be eligible to sit for the bar examination if the applicant satisfies the Board "that his or her undergraduate education and legal education were substantially equivalent to the requirements of this Rule." Tenn. Sup. Ct. R. 7, §7.01(a). In addition, § 7.01 requires that the applicant must have received an LL.M. degree from a Tennessee law school approved by the Board or by an ABA-accredited law school. Id. §7.01(b).

This makes Tennessee one of the few states in the country to require that a foreign-educated applicant must attain both (1) a legal education that is "substantially equivalent" to that of a U.S.-educated lawyer *and* (2) an LL.M. degree from a U.S. law school.[1] Unlike most states that emphasize a lawyer's education in setting eligibility requirements for foreign-educated lawyers to take the bar exam, Tennessee does not treat an LL.M. degree as "curing" any deficiencies in the lawyer's original education, thereby rendering the lawyer's education substantially equivalent to that of a U.S.-educated lawyer. Instead, a foreign applicant must

[1] West Virginia also takes this approach. W. Va. Rules for the Admission to the Practice of Law R. 3.0(4).

attain an LL.M. degree from an accredited U.S. law school in addition to the applicant's original, substantially equivalent degree.

II. The Lack of Guidance Provided for in § 7.01 and by the Board of Law Examiners Creates Uncertainty for Applicants

Section 7.01 requires that an applicant "satisfy the Board that his or her undergraduate education and legal education were substantially equivalent to the requirements of this Rule." The phrase "substantially equivalent" is undefined in the rule. As such, the current language of § 7.01 poses difficult interpretive problems.

The term "substantially equivalent" is an inherently ambiguous phrase. Most states that incorporate the phrase into their admissions rules provide at least some clarification as to its meaning. For example, Vermont's rule lists a number of factors to consider in making the equivalence determination, including whether the foreign law school's graduates are regularly admitted to the practice of law in that country. Rules of Admission to the Bar of the Vermont Supreme Court R. 8(c)(3). New York's rule explains that there must be substantial equivalence both in terms of the duration of the original education and in terms of the course of study. N.Y. Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law § 520.6(b)(1)(i)(a)(b). New York's rule also makes plain that a foreign degree is only substantially equivalent to a J.D. where the country in question is one whose jurisprudence is based on English common law principles. Id. While Texas requires substantial equivalence in terms of duration, its admission rule does not expressly require equivalence in terms of areas of study. Instead, it requires that the education be based on English common law principles. Tex. R. Governing Admission to the Bar of Texas R. XIII § 3.

Unfortunately, the failure to define the term "substantially equivalent" opens a host of difficult interpretive issues under § 7.01for prospective applicants and schools that offer LL.M. degrees. Applicants and law schools are unable to predict with any measure of assurance whether an applicant's prior background will satisfy the standard. The Tennessee Board of Law Examiners also provides only limited guidance on the issue.[2]

According to its website, the Board has delegated its responsibility under Rule 7 to two outside private companies. http://www.tnble.org/tnlaw/first-time/how-to-apply (emphasis added) (last visited March 8, 2017). Foreign applicants are required to submit material to one of these two companies so that the company can assess whether their prior backgrounds satisfy the substantial equivalence requirement. Unfortunately, the website provides no clarification as to what criteria these private companies will use to determine substantial equivalence. Nor is it clear from the website whether determination by one of these companies definitively establishes substantial equivalence or whether the Board still retains the discretion to overrule that determination. Thus, applicants must undertake the costs and burdens associated with submitting

[2] In its October 13, 2016 Order denying the application of Mr. Gluzman, the Board appeared to take the position that § 7.01 requires that an applicant who has received a legal education in another country must have obtained *two* separate degrees prior to receiving an LL.M. from a law school in the United States: a Bachelor's Degree or higher *and* a post-secondary Juris Doctorate degree or equivalent. Order at 1-2. In addition, the Board's website advised that an applicant's foreign education "must include a degree that is equivalent to a Bachelor's degree or higher *followed by* a degree that is equivalent to a Juris Doctorate degree." http://www.tnble.org/tnlaw/first-time/how-to-apply (emphasis added) (visited Feb. 9, 2017). Thus, for at least some period of time, the Board appeared to take the position that the term "substantially equivalent" required receipt of separate undergraduate and law degrees. The University of Tennessee College of Law actually had students withdraw from its LL.M. program for fear that their prior education would not satisfy this standard. However, the Board has recently indicated in a brief filed with this Court that two prior degrees are not, in fact, required. Response of Tennessee Board of Law Examiners in Opposition to Verified Petition for Review and Writ of Certiorari, n.2. The Board has also amended its website to eliminate the reference to two degrees. While the Board's recent clarification helps to alleviate some of the concerns associated with the interpretation of the rule, significant uncertainty remains.

their material for review without any guidance as to whether their backgrounds might satisfy Rule 7's substantial equivalence language.

In short, the current rule provides insufficient guidance for applicants who are contemplating their careers and law schools which offer LL.M. programs on the issue of what qualifies as a substantially equivalent education. Clear guidance is needed because foreign-educated lawyers need to know whether they will be allowed to take the bar examination before they invest the time and money necessary to complete an LL.M. program.

III. This Court Should Amend § 7.01

In light of the substantial problems associated with current language, this Court should amend § 7.01 to remove the "substantially equivalent" language. As the Nebraska Supreme Court has put it well, "admission rules [are] intended to 'weed' out unqualified applicants, not to prevent qualified applicants from taking the bar." In re Application of Gluckselig, 697 N.W.2d 686, 691 (Neb. 2005). Section 7.01 should not be drafted in a way that weeds out qualified applicants, either because would-be applicants choose not to apply given the uncertainties of the process or because those applying the "substantially equivalent" language apply the language in a manner different than this Court intended.

It bears emphasizing that in virtually every state (including Tennessee), a foreign-educated applicant is required to pass the bar exam before the applicant can be admitted to the bar. Thus, the bar exam itself serves as a means of helping to ensure that a foreign lawyer is familiar with U.S. and Tennessee legal principles. Therefore, the language of § 7.01 should further this Court's legitimate interest in protecting the public from incompetent legal advice and representation while taking into account the reality that any applicant gaining admission under

§ 7.01 will, by definition, have already received a law degree, completed a rigorous LL.M. program,[3] and passed the bar examination.

As discussed, courts in other jurisdictions have taken a number of approaches in ensuring that their admission rules weed out only those foreign-educated lawyers who are unqualified to practice law. Some have imposed a prior practice requirement – either standing alone or in conjunction with a requirement that a foreign-educated lawyer obtain an LL.M. degree. See supra Part I.A. Others have focused on education as the means to ensure that foreign applicants possess the requisite knowledge and allow an LL.M. degree to cure any deficiencies in the applicant's original legal education. See supra Part I.B. But, as these other rules illustrate, the substantial equivalence standard is unnecessary and unhelpful in furthering this Court's compelling interest in protecting the public.

The Court has numerous options from which to choose. Petitioners respectfully offer three suggestions. The first, based on Texas' admission rule, is a hybrid approach that takes into account education and practice experience as prerequisites for taking the Tennessee bar exam. The second, based on Pennsylvania's admission rule, is focused primarily on practice experience

[3] Among other requirements, §7.01(b) requires an LL.M. program to "prepare[] students for admission to the Bar and for effective and responsible participation in the United States legal profession." The Master of Laws (LL.M.) in United States Business Law at the University of Tennessee College of Law involves a demanding course of study, requiring a total of at least 24 credit hours. Students are required to take a course on legal research, analysis, and writing as well as Professional Responsibility and a general course on American law called Structure and Operation of the American Legal System. Students are also required to take two subjects – Business Associations and Secured Transactions – which are routinely tested on the Tennessee bar exam. Finally, students are required to take several courses related to U.S. business law (*e.g.*, Fundamentals of Federal Income Tax). See http://law.utk.edu/academics/llm/. Likewise, Vanderbilt Law School's LL.M. degree requires students to take a minimum of 24 credit hours, including two LL.M.-specific courses: Life of the Law and Introduction to Legal Research, Writing and Analysis in the United States. In all of their other courses, they are jointly enrolled with J.D. students in conventional law school classes.

and completion of an LL.M. program.[4] The third would retain the current "substantially equivalent" language but add language that clarifies its meaning.

A. The Hybrid Approach

Should it choose, this Court could amend this portion of § 7.01(a) to better further its goal of ensuring an adequate foundation for taking the Tennessee Bar Examination. Specifically, the law schools suggest the following language, based on the approach of Texas:

> (a) Notwithstanding the provisions of sections 2.01 and 2.02 of this Rule, an applicant who has completed a course of study in and graduated from a law school in a foreign country, which law school was then recognized and approved by the competent accrediting agency of such country, may take the bar examination, in any one of the following circumstances:
>
> (1) the Applicant:
>
> (A) has completed a course of study at a foreign law school that is accredited in the jurisdiction where it is located, and the course of study is:
>
> (i) based on the principles of English common law; and
>
> (ii) substantially equivalent in duration to the legal education provided by a law school accredited by the ABA or approved by the Board;
>
> (B) is authorized to practice law in a foreign jurisdiction or another state; and
>
> (C) has been actively and substantially engaged in the lawful practice of law for at least three of the last five years immediately preceding the Applicant's most recent Application;
>
> (2) the Applicant:
>
> (A) has completed a course of study at a foreign law school that is accredited in the jurisdiction where it is located, and the course of study is:
>
> (i) based on the principles of English common law; and
>
> (ii) at least two years in duration; and

[4] In making these changes, the Court should also clarify that the amendments should apply to students currently enrolled in an LL.M. program.

(B) has completed an LL.M. degree that meets the curricular requirements of § 7.01(b) of this Rule; and

(C) is authorized to practice law in a foreign jurisdiction or in another state; or

(3) the Applicant

(A) has completed a course of study at a foreign law school that is accredited in the jurisdiction where it is located, and the course of study is:

(i) not based on the principles of English common law; but

(ii) is substantially equivalent in duration to the legal education provided by a law school accredited by the ABA or approved by the Board;

(B) has completed an LL.M. degree that meets the curricular requirements of § 7.01(b) of this Rule; and

(C) is authorized to practice law in a foreign jurisdiction or in another state.

Applicants shall furnish such additional information as may be required by the Board to enable the Board to determine the applicant's eligibility for such admission.

This proposed amendment directly furthers the Court's ultimate goal of ensuring that foreign-educated lawyers are adequately prepared to sit for the Tennessee bar exam by recognizing that such preparation may be attained in any number of ways. In addition, the proposed amendment furthers this goal in a narrowly-tailored manner. Finally, the proposed amendment provides clear guidance to applicants that enables them to make an informed choice as to whether they wish to invest the time and money required to pursue an LL.M. degree.

B. The Practice-Focused Approach

Alternatively, the law schools suggest the following language, based on the approach in Pennsylvania:

(a) Notwithstanding the provisions of sections 2.01 and 2.02 of this Rule, an applicant who has completed a course of study in and graduated from a law school in a foreign country, which law school was then recognized and approved by the

competent accrediting agency of such country, may qualify, in the discretion of the Board, to take the bar examination if the applicant:

(1) has been admitted to practice law in and is in good standing at the bar of a foreign country or another state, as evidenced by a certificate from the highest court or agency of such foreign country or state having jurisdiction over admission to the bar and the practice of law;

(2) has for a period of three of the last five years immediately preceding the date of filing of the application for admission to the Tennessee bar engaged in the active practice of law in such foreign country or another state. For purposes of this paragraph, the phrase "engaged in the active practice of law" shall, to the extent feasible, be construed in a manner consistent with the definition of the phrase as it appears elsewhere in this Rule. The practice of law must be performed in a foreign country or state in which the applicant was admitted to practice law or in a foreign country or state that affirmatively permitted such activity by a lawyer not admitted in that jurisdiction. The term "practice of law" shall not include providing legal services when such services as undertaken constituted the unauthorized practice of law in the foreign country or state in which the legal services were performed or in the foreign country or state in which the clients receiving the unauthorized services were located; and

(3) has completed an LL.M. degree that meets the curricular requirements of § 7.01(b) of this Rule;

This proposed language reflects the reality that a combination of practice experience and additional education grounded in U.S. law is adequate to ensure that foreign lawyers have the necessary knowledge and skills to sit for the Tennessee bar examination and ultimately provide legal services in the state. In addition, the proposed amendment has the advantage of simplicity.

C. Clarification to the "Substantially Equivalent" Language

Should this Court choose not to amend the rule as suggested above, the Court should at least provide some clarity to the "substantially equivalent" language. For example, the Court could clarify that the term should be construed to mean that an applicant has received a legal education from a foreign law school that satisfies the prerequisites for admission to the bar in the other country and whose graduates are regularly admitted to practice law in that jurisdiction. Such an applicant possesses an educational background that is substantially equivalent to that of

a lawyer educated in the U.S. (who is eligible for admission under §§ 2.01 and 2.02 of this Court's Rule 7 regarding licensing of attorneys) insofar as both individuals have received the education generally considered necessary to begin the competent practice of law within their respective countries.

Respectfully submitted, this 20th day of April 2017,

VANDERBILT UNIVERSITY

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2017, a copy of the foregoing has been served on the persons listed by first class U.S. Mail addressed as follows:

Lisa Perlen
Executive Director
Tennessee Board of Law Examiners
511 Union Street, Suite 525
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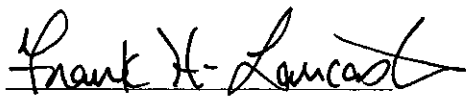

Frank H. Lancaster