IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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IN RE:	)	
	)	
MAXIMILIANO GABRIEL GLUZMAN,	)	
	)	
Petitioner,	)	
	)	No. M2016-02462-SC-BAR-BLE
v.	)	
	)	
TENNESSEE BOARD OF LAW EXAMINERS,	)	
	)	
Respondent.	)	

On Writ of Certiorari to the Tennessee Board of Law Examiners

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BRIEF OF RESPONDENT TENNESSEE BOARD OF LAW EXAMINERS

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ISSUES PRESENTED FOR REVIEW

I. Whether in denying of Petitioner Gluzman's application to take the bar examination the Board properly relied on the determination of its designated equivalency-evaluation service in finding that Mr. Gluzman's foreign-earned education was not substantially equivalent to the undergraduate and legal education requirements of Supreme Court Rule 7, §§ 2.01(a), 2.02(a), and 7.01(a).

II. Whether the determination of the educational requirement under section 7.01(a) by the evaluation services designated in Board Policy P-7.01 should be conclusive in all cases.

STATEMENT OF THE CASE AND FACTS

After earning his undergraduate and legal education in Argentina, *see* Transcript of Proceedings, June 2, 2016, at 14-15 [R. 257-58] and practicing law there for ten years [R. 304], Petitioner Maximiliano Gabriel Gluzman moved to Tennessee and earned an LL.M. degree while in residence at Vanderbilt University School of Law. [R. 254-58] Thereafter he applied to take the February 2016 Tennessee bar examination. *See* Petitioner's Application [R. 1-108].

Beginning with the July 2015 bar examination, the Board of Law Examiners required applicants who received their legal educations outside the United States to submit an educational-equivalency evaluation prepared by World Education Services (WES) or Educational Credential Evaluators (ECE). *See* Order Denying Petition [R. 325, n.2]. Mr. Gluzman chose to use WES. The WES report described his foreign-earned education as equivalent to a "[b]achelor's and master's degree from a regionally accredited institution" [R. 42] and noted that "[d]ue to the unified nature of the [five-year] program, it is not possible to differentiate between undergraduate and graduate study." [R. 44] More formally, the report indicated: "U.S. Equivalency: Bachelor's and master's degree" with a "Major/Specialization" in "Law." [R. 42] Although the WES report expressly recognized that a unified foreign degree can be equivalent to two separate U.S. degrees, *i.e.*, "Bachelor's and master's degree," the report did not find the equivalent of a J.D. degree from a law school accredited by the American Bar Association, whether earned in a unified program or not.

In reliance on the WES report, the Board found that Mr. Gluzman had not demonstrated that his Argentinian undergraduate and legal education were substantially equivalent to a Bachelor's degree and a J.D. degree from a law school accredited by the ABA, which are the requirements of Supreme Court Rule 7, §§ 2.01, 2.02, and 7.01. The Board, therefore, denied the

application. *See* Letter from Board to Mr. Gluzman dated February 5, 2016. [R. 153] The Board did not deny the application because he had earned only one unified degree rather than two separate degrees. [R. 393, n.2] Section 7.01 requires a foreign-earned education to be substantially equivalent to a Bachelor's degree *and* a J.D. degree, not the Bachelor's degree *and* master's degree reported by WES. Section 7.01, however, does not necessarily require two separate foreign-earned degrees, and the Board does not apply it as though it does.

Mr. Gluzman timely filed a Petition for Board Review [R. 109] and an accompanying Brief in Support [R. 112-32] with several exhibits [R. 133-206]. In response, the Board granted a hearing, which was held on June 2, 2016. *See* Transcript [R. 243-314] At the hearing Mr. Gluzman was represented by counsel, presented the testimony of two law professors from whom he had taken classes in the Vanderbilt LL.M. program, and submitted one additional exhibit in support of his position. [R. 245 (transcript index)]

Mr. Gluzman presented and argued at the hearing that an evaluation from an alternative service, Morningside Evaluations, one never designated by the Board, should be accepted as proof of satisfaction of the substantial-equivalence requirement of Rule 7.01(a). *See* Brief in Support at 4-5 [R. 116-17]; Morningside report [R. 137-38]; Transcript at 28-29 [R. 271-72]. The Morningside report opined that Mr. Gluzman's foreign-earned 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." [R. 137 (emphasis in original)] The Morningside report does not specifically state that Mr. Gluzman earned the equivalent of a J.D. degree "*from a regularly organized law school accredited by the ABA*," as required by Rule 7, §§ 7.01(a) and 2.02(a) (emphasis added).

Mr. Gluzman also presented the testimony of Daniel J. Gervais, Professor of Law at Vanderbilt Law School, and David Lee Hudson, Jr., Professor of Law at Nashville School of Law and an adjunct professor at Vanderbilt Law School. Both of these professors had taught Mr. Gluzman in the LL.M. program at Vanderbilt, and both testified that he was an exceptionally talented and conscientious student, that they believed he was at least as qualified to take the bar examination as students with a J.D. degree from a law school accredited by the ABA, and that they were firmly of the opinion that, given the opportunity, he would pass the Tennessee bar examination. *See* Transcript at 15 [R. 258], 19-20 [R. 262-63], 38-9 [R. 281-82] Professor Gervais also testified that in his opinion the evaluation performed by WES was flawed in its conversion of foreign-earned semester hours as compared to semester hours awarded by American schools.[1] *See* Transcript at 15-20 [R. 258-262]. Professors Gervais and Hudson also submitted affidavits. [R. 176 and 203] Neither testified about the reliability of the Morningside evaluation. *See* Transcript at 28-29 [R. 271-72].

Following the hearing, Mr. Gluzman filed a Motion to Supplement Record with Post-Hearing Developments of Law and Fact [R. 315] along with exhibits [R. 318-24]. On October 13, 2016, the Board issued its Order Denying Petition to Reconsider Denial of Eligibility. [R. 325-26]

On December 12, 2016, Mr. Gluzman filed a Verified Petition for Review and Writ of Certiorari. [R. 339] The Board filed a Response in Opposition on January 17, 2017. [R. 292-97] On January 18, 2017, Mr. Gluzman filed a Reply. On January 23, 2017, the Board filed a Motion for Leave to File a Rejoinder (which was officially filed on January 25), and on January 24, 2017, Mr. Gluzman filed a Response to the Board's Rejoinder. [R. 569-71]

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[1] Professor Hudson did not purport to compare Mr. Gluzman's foreign-earned education to degrees earned in the United States. [R. 282, line 21 to R. 283, line 2]

On January 26, 2017, this Court granted the Petition, and the Clerk issued the Writ of Certiorari. [R. 575-76]

STANDARD OF REVIEW

The standard for a common law writ of certiorari is set forth in Tenn. Code Ann. § 27-8-101:

> The writ may be granted whenever authorized by law, and also in cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. . . .

Tenn. Code Ann. § 27-8-101.

Under the common law writ of certiorari, the scope of review is strictly limited to determining whether the inferior board or tribunal has (1) exceeded its jurisdiction, or (2) acted illegally, arbitrarily, or fraudulently. *Petition of Gant*, 937 S.W.2d 842, 844-45 (Tenn. 1996) (citing *McCallen v. City of Memphis*, 786 S.W.2d 633, 638 (Tenn. 1990)).

INTRODUCTION

Mr. Gluzman does not have, and never has had, a Tennessee law license. These proceedings arise from the Board of Law Examiner's denial of his application for an initial license. A license to practice law in Tennessee is a privilege, not a right. *Hughes v. Bd. of Prof'l Responsibility*, 259 S.W.3d 631, 641 (Tenn. 2008). Despite his argument that he has been denied both substantive and procedural due process, *see* Petitioner's Brief at 40 and 43-44, the rights, if they are rights at all, of an applicant for an initial law license are extremely limited.

A protected right in a professional license arises only after a license has been obtained. *See Graham v. New Jersey Real Estate Comm'n*, 524 A.2d 1321, 1324 (N.J. App. Div. 1987). A property interest entitled to procedural due process protection must be a "legitimate claim of entitlement," as opposed to an "abstract need or desire" or "unilateral expectation." *Mid-South Indoor Horse Racing, Inc. v. Tennessee State Racing Comm'n*, 798 S.W.2d 531, 540 (Tenn. Ct. App. 1990) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). An applicant for an initial professional license does "not have a constitutionally protected claim of entitlement" if the state licensing authority has discretion to grant or deny the application. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005); *Mid-South Indoor Racing*, 798 S.W.2d at 540.[2]

Section 7.01(a) expressly provides that an applicant with a foreign-earned education "*may qualify, in the discretion of the Board*, to take the bar examination, *provided that the applicant*

[2] Furthermore, state court rules that govern admission to the bar are matters of local policy. *See Jia v. Bd. of Bar Examiners*, 696 N.E.2d 131, 137 (Mass. 1998); *see also* NCBE and ABA Sec. of Legal Education and Admissions to the Bar, *Comprehensive Guide to Bar Admission Requirements 2017*, available at http://www.ncbex.org/publications/bar-admissions-guide/. They are not judgments on the merits of cases or controversies, and they are not entitled to full faith and credit in another state. *Teare v. Comm. On Admissions*, 566 A.2d 23, 28 (D.C. Ct. App. 1989). It is thus irrelevant that an applicant for an initial license in one state may have been admitted to the bar in another jurisdiction. *See Leis v. Flynt*, 439 U.S. 438, 443-44 (1979) (noting the "traditional authority of state courts to control who may be admitted to practice before them," and ruling that the denial of a *pro hac vice* application without a hearing, *id.*, 545 U.S. at 440-41, implicated no constitutionally protected rights. *Id.*, 545 U.S. at 444-45).

shall satisfy the Board that his or her undergraduate and legal education were substantially equivalent to the requirements of this Rule." Rule 7, § 7.01 (emphasis added). This Rule could not be more plain or unambiguous. The Board, which functions as the agent of this Court, has broad discretion, and the burden of persuasion rests entirely on the applicant. Therefore, Mr. Gluzman has no constitutionally protected claim of entitlement or property interest in a license that has not been issued.

He also has no protected liberty interest. In *Butler v. Tennessee Board of Nursing*, No. M2016-00113-COA-R3-CV, 2016 WL 6248028 (Tenn. Ct. App. Oct. 25, 2016), an applicant for an initial nursing license claimed that his liberty interests were implicated by the denial of his application without the benefit of a contested case hearing. *Id.* at *7. Relying on Sixth Circuit authority, the Tennessee Court of Appeals ruled that the deprivation of a liberty interest is implicated only when the plaintiff can show that an untrue stigmatizing statement is made public in conjunction with the termination of employment, and that the only process then due is a post-termination name-clearing hearing. *See id.* at *7-8 (and cases cited therein). The court also noted that neither the parties nor the court had located any authority for the proposition that the denial of an initial license implicated an applicant's liberty interests. *Id.* at *8 n.3.

Here, the only statement the Board made about Mr. Gluzman is that his foreign-earned education was not substantially equivalent to a J.D. degree from an ABA-accredited law school. Furthermore, he had an evidentiary hearing, which is more process than was due by any constitutional standard. *See Butler*, 2016 WL 6248028 at *9.

ARGUMENT

I. THE BOARD PROPERLY DENIED MR. GLUZMAN'S APPLICATION TO SIT FOR THE TENNESSEE BAR EXAMINATION BASED UPON ITS OBJECTIVELY-STATED STANDARD FOR DETERMINING THE SUBSTANTIAL EQUIVALENCE OF A FOREIGN-EARNED LEGAL EDUCATION.

In addition to the undergraduate degree required by section 2.01(a), section 2.02(a) of Rule 7 requires an applicant for the bar examination to have "completed a course of instruction in and graduated from a regularly organized law school accredited by the ABA." In other words, an applicant educated in the United States must have an undergraduate degree and a J.D. degree from an ABA accredited law school. Section 7.01(a) provides that a foreign-earned education must be "substantially equivalent to the requirements of this Rule."

With its adoption of Board Policy P-7.01, and beginning with the July 2015 bar examination, the Board exercised its discretion by delegating the determination of substantial equivalency to one of the third-party evaluation services designated in the policy.[3] [R. 325, n.2]; *see also* Rule 7, § 12.05. With this exercise of its discretion the Board sought to objectify the "substantially equivalent" standard. The current version of Board Policy P-7.01 provides, in pertinent part:

> (a) Applicants who completed a course of study in and graduated from a law school in a foreign country must submit a comprehensive

[3] The evaluation of foreign-earned educational credentials is necessary in many contexts, and the delegation of that task to professional evaluation services is a common practice. The need for and reliance upon professional credential-evaluation services support an entire industry. *See* http://www.naces.org/ (cite for National Association of Credential Evaluation Services). Some executive-branch licensing authorities in Tennessee, for example, the Tennessee State Board of Accountancy and the Tennessee Board of Dentistry, rely on such services. *See https://www.tn.gov/commerce/article/accountancy-licensing-requirements-exams*; Tenn. Comp. R. & Regs. 0460-02-.03(2)(b) (requiring direct report from Educational Credential Evaluators, Inc. (www.ece.org)); *see also In re de Aponte*, 364 S.W.3d 176, 184 n.10 (Ky. 2012) (describing the use of private credential evaluation services by the State Bar of California). Curiously, unlike the services designated by Board Policy P-7.01, Morningside Evaluations does not appear to be a member of NACES or to be designated by any professional-licensing authority, at least not in Tennessee.

> evaluation (course-by-course evaluation, determination of equivalency, plus authentication of transcripts) from:
>
> > Center for Applied Research, Evaluation and Education, Inc. (www.iescaree.org)
> >
> > International Education Research Foundation, Inc. (www.ierf.org)
>
> (b) If an applicant was approved to sit for the July 2015 or February 2016 examination based on credentials from World Education Services (WES) or Education Credential Services [sic] (ECE), then new credentials do not need to be provided for subsequent examinations.
>
> (c) An applicant who . . . has applied for the July 2015 or February 2016 examination and has been denied eligibility on the basis of the credentials provided must seek a comprehensive evaluation from one of the two services listed in (a) above.

Board Policy P-7.01. [R. 563] This revised version was adopted in February 2016 and became effective with the July 2016 bar examination. Mr. Gluzman's application to take the February 2016 bar examination was governed by the earlier version in which the designated evaluation services were World Education Services (WES) and Educational Credential Evaluators (ECE). [R. 325, n.2] Mr. Gluzman chose to use WES. [R. 41-51]

A. The Evaluation Service Designated by Board Policy P-7.01 Determined that Mr. Gluzman's Foreign-Earned Education Was Not Substantially Equivalent to an Undergraduate Degree and a J.D. Degree Awarded by an ABA-Approved Law School.

WES opined that Mr. Gluzman's Argentinian education was the equivalent of a "[b]achelor's and master's degree from a regionally accredited institution" [R. 42] and noted that "[d]ue to the unified nature of the [five-year] program, it is not possible to differentiate between undergraduate and graduate study." [R. 44] More formally, the report indicated: "U.S. Equivalency: Bachelor's and master's degree" with a "Major/Specialization" in "Law." [R. 42] WES thus expressly recognized that a unified foreign-degree program can be equivalent to two

separate U.S. degrees, *i.e.*, "Bachelor's and master's degree," but the report does not find in Mr. Gluzman's foreign-earned education the equivalent of a J.D. degree from an ABA accredited law school, whether earned in a unified program or not.

B. Morningside Evaluations Also Failed to Determine that Mr. Gluzman's Foreign-Earned Education Was Substantially Equivalent to an Undergraduate Degree and a J.D. Degree from an ABA-Approved Law School.

Mr. Gluzman relies on an evaluation from Morningside Evaluations, an evaluation service never designated in Board Policy P-7.01, and argues that it should be accepted as proof of satisfaction of the substantial-equivalence requirement of Rule 7.01(a). *See* Brief in Support at 4-5 [R. 116-17]; Morningside report [R. 137-38]; Transcript at 28-29 [R. 271-72]. The Morningside report opined that Mr. Gluzman's foreign-earned 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." [R. 137 (emphasis in original)] But this begs the question: Accredited by whom—the Southern Association of Colleges and Schools? The Morningside report does not specifically state that Mr. Gluzman earned the equivalent of a J.D. degree *"from a regularly organized law school accredited by the ABA,"* which is the equivalence required by Rule 7, §§ 7.01(a) and 2.02(a) (emphasis added).

C. Mr. Gluzman's Objections to the Actions of the Board Are Without Merit.

The Board did not deny Mr. Gluzman's application because he failed to have the equivalent of separate undergraduate and J.D. degrees. [R. 393, n.2]; *see also* correspondence from Board to U.T. College of Law dated February 14, 2017 (copy attached as Exhibit "A").[4] Mr. Gluzman's

[4] While it is true that the Board's web site contained out-of-date language to the contrary, that language has since been changed. *See* Exhibit "A."

repeated assertions to the contrary are without foundation and ignore most of the text and all of the context of the Board's rulings.

The Board's letter dated 2/5/2016 [R. 153-54], and its Order issued October 13, 2016 [R. 325-26], both expressly acknowledge the WES finding that Mr. Gluzman's foreign-earned education was equivalent to "a Bachelor's Degree and a Master's Degree in Law." [R. 153 and 325] Both rulings also state that Rule 7.01(a) requires the equivalent of a Bachelor's degree "*and*" a J.D. degree. [R. 153 and 326 (emphasis in originals)] Mr. Gluzman insists, however, that emphasis on the conjunction "and" can have one, and only one meaning, and that it necessarily and conclusively proves that the Board denied his application because he did not have two separate degrees. This argument ignores not only the more obvious and sensible reading of the Board's rulings but also the conspicuous absence of a finding by either evaluation service that Mr. Gluzman's degrees are equivalent to a J.D. degree from an ABA-accredited law school, either as a stand-alone degree or one embodied in a unified degree program. Regardless of the number of Mr. Gluzman's degrees, he did not have the substantial equivalent of a J.D. degree from an ABA accredited law school. And that is why the Board denied his application.

Mr. Gluzman objects to the Board's consideration of the WES report because it is "anonymous," that is, unsigned by an individual, while the Morningside report is signed. Therefore, he posits, the WES report is incompetent while the Morningside report is conclusive. He then cries foul because the anonymous author of the WES report could not be deposed to test his qualifications and methods. These complaints lack merit. The Rules of Civil Procedure and Rules of Evidence do not apply in license application proceedings. *See* Rule 7, § 13.03(e). Applicants have no subpoena power, and if the Rules of Evidence did apply, both evaluation reports would be subject to hearsay objections. A purported signature on a document does not

cure that defect. Furthermore, the inability to go behind determinations of the Board or its agents during the application process is consistent with the process for grading the bar examination. Graders of the bar examination are "anonymous," and they are not perfect. But applicants who do not pass have no recourse except to retake the exam. Rule 7, § 14.04. Indeed, if failing applicants could subpoena Board records, identify graders, depose them, and then undertake to compare their failing examination papers to those of others who had passed, the bar examination process would be unreliable and unadministrable. And graders would be very hard to find.

Mr. Gluzman also complains that the name of one Board member who did not attend the hearing on June 2, 2016, appears in the signature block on the Board's Order Denying Petition. [R. 325-26] This is a harmless scrivener's error. Votes of five-to-nothing and four-to-nothing yield the same result.

D. The Board's Denial of Mr. Gluzman's Application Was Not Arbitrary, Illegal, or Beyond Its Jurisdiction.

Rule 7, § 13.03(e) provides that the Board "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."[5] The Board designated WES as an approved evaluation service when it adopted Board Policy P-7.01, which policy was then approved by this Court. *See* Rule 7, § 12.05(a). Accordingly, the Board's reliance on WES evaluation reports was more than just ordinary and necessary. [R. 264, lines 17-21; 289, lines 16-23] It was required by its own policy. Furthermore, a perusal of the hearing transcript reveals that various Board members voiced serious concerns about the substantial equivalence of Mr.

[5] Mr. Gluzman purports to cite Record authority for the proposition that the WES report was so unreliable that it "would not be accepted in any courtroom in Tennessee and should [not have] been given credence here. [R. 252]" *See* Petitioner's Brief at 41, n.140. The quotation, however, is merely an argument voiced by Mr. Gluzman's counsel at the June 2, 2016, hearing. [R. Amended 251 and 252, lines 4-6]

Gluzman's foreign-earned education [R. 284, lines 10-25; 285, lines 12-18; 300, lines 3-6], even as supplemented by his Vanderbilt LL.M. degree,[6] which consisted primarily of subjects not tested on the bar exam [R. 298, lines 2-14; 299, lines 9-12], and notwithstanding the glowing recommendations of two esteemed law professors.

The WES evaluation report constitutes substantial and material evidence that supports the denial of Mr. Gluzman's application. The Board has no power to waive or modify the educational requirements established by this Court. *See* Rule 7, § 12.12. Since Policy P-7.01 was adopted and approved by this Court, the Board has no discretion to disregard the report of an evaluation service designated by that policy. Accordingly, the Board's reliance on the WES report, and its rejection of the Morningside report, which was chosen only because it was recommended by Vanderbilt [R. 290, lines 10-17], was not arbitrary or illegal. Therefore, under the applicable standard of review the decision of the Board should be affirmed.

II. ALLOWING AD-HOC WAIVERS OR EXCEPTIONS TO AN OBJECTIVELY DETERMINED EDUCATIONAL-EQUIVALENCY STANDARD IS NO MORE FAIR THAN A STRICT APPLICATION.

Two real issues are before this Court. The first is whether it should modify or clarify the "substantially equivalent" standard, which since the adoption of Board Policy P-7.01 is an objective standard determined by a professional evaluation service. The second is whether, and, if so, under what circumstances, a request for a waiver or exception should be entertained. The Board, of course, has no power or discretion to modify or waive the comparison standard or the underlying educational requirements. *See* Rule 7, § 12.12.

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[6] *See Teare*, 566 A.2d at 27 (noting that completion of an LL.M. program alone is not equivalent of a J.D. degree awarded by an ABA-accredited law school)

The issue of modification has been placed squarely before this Court in the *Petition to Amend Tennessee Supreme Court Rule 7, § 7.01*, ADM 2017-00785, filed jointly by the University of Tennessee and the Vanderbilt University schools of law. The Court will no doubt solicit comments from the bar and the public before responding to that petition, and the Board will reserve its comments on the modification issue until that time. The question to be answered here is whether, on an ad-hoc basis, to allow waivers or exceptions to the "substantially equivalent" standard, either as presently written or as it may be modified in the future.

A. This Court Is at Liberty To Adopt a Bright-Line, Rule-Based Approach or To Allow Ad-Hoc Waivers or Exceptions.

Courts throughout the country have struggled with the issue of whether to consider on a case-by-case basis waivers and exceptions to their stated educational standards for applicants to the bar. *Application of Collins-Bazant*, 578 N.W.2d 38, 42 (Neb. 1998). Compelling arguments support both approaches. As noted earlier, however, state court rules that govern admission to the bar are matters of local policy, *see* note 2, *supra,* so this Court may adopt whatever approach it deems the more desirable given the administrative factors that must, as a practical matter, be considered. *See Petition of Tenn. Bar Ass'n*, 539 S.W.2d 805, 807 (Tenn. 1976). This Court and others have taken both approaches in the past. *See Petition of Stayton*, 537 S.W.2d 703 (Tenn. 1976); *Florida Board of Bar Examiners: In re Hale*, 433 So.2d 969, 973 (Fla. 1983) (holding that the court would no longer grant waivers except for foreign law school graduates who later graduate with a J.D. or LL.B. degree from a law school accredited by the ABA or the American Association of Law Schools). Each of the authorities cited in this section includes lengthy and detailed discussions of the competing interests involved. A brief summary follows.

No rule is perfect. The inflexible application of any rule can lead to seemingly unfair outcomes in some circumstances. *de Aponte*, 364 S.W.3d at 183. On the other hand, another kind

of unfairness can result from ad-hoc exceptions or waivers, which can result in disparate treatment of similar cases, *see Teare*, 566 A.2d at 30-31, undermine the efficiency and confidence that flows from strict application, *de Aponte*, 364 S.W.3d at 184, cause the appearance of discrimination, *see In re Hale*, 433 So.2d at 971, and render toothless or unadministrable the rule itself. *de Aponte*, 364 S.W.3d at 183.

The evaluation of foreign-earned educational credentials, which may come from law schools in foreign countries whose legal systems are very different from our own, is especially difficult. *Teare*, 566 A.2d at 30-31. The task of making separate subjective equivalency evaluations of foreign-earned educational credentials would be time-consuming and financially burdensome and could impose serious administrative burdens on both this Court and the Board. *Id.* at 30 n.19. Indeed, the Board, which has neither the expertise nor the resources to undertake that task, adopted policy P-7.01 to avoid the burdens of ad-hoc determinations.[7] *See Jia*, 696 N.E.2d at 136 (noting that "foreign applicants present credentials of an immensely wide variety").

The primary purposes of policy P-7.01 are to relieve the Board of the necessity of making equivalency evaluations of the many varied and unfamiliar foreign-earned educational credentials it receives and to specify the objective criteria by which such determinations must be made. Here, despite the evaluation of a service not denoted by the Board's policy and the recommendations of two esteemed law professors, consideration of non-uniform criteria is exactly the kind of ad-hoc undertaking Board Policy P-7.01 is designed to pretermit. Any rule or policy that allows non-uniform ad-hoc determinations is difficult to administer and inherently subjective. *See In re Hale*,

[7] Unlike Rule 9, which governs proceedings of the Board of Professional Responsibility, Rule 7 does not provide for a pool of district committee members from whom a hearing panel of impartial decision-makers can be drawn, or for staff counsel to represent the position of the Board, or for procedural or evidentiary rules designed to resolve evidentiary conflicts in contested proceedings.

433 So. 2d at 971 (noting that the requirement of a J.D. degree from an ABA-accredited law school was adopted "in an effort to provide uniform and measureable standards" and that the court was "unequipped to make such [determinations] because of financial limitations and the press of judicial business").

Despite Mr. Gluzman's impressive background, stellar performance in the Vanderbilt LL.M program, and recent success on the New York bar examination, these accomplishments are no assurance that his basic legal education is substantially equivalent to that represented by a J.D. degree from an ABA-accredited law school. For example, the Kentucky Supreme Court recently declined to waive its educational requirements and denied permission to sit for the bar examination to an applicant who had earned a law degree and was admitted to practice in the Dominican Republic, had successfully passed the New York bar exam (on the first try) and had been admitted there, had been admitted to the federal bar in Indiana, and had earned an LL.M. degree from Georgetown University Law Center. *See de Aponte*, 364 S.W.3d at 177-184 (also noting that New York is "especially friendly to foreign applicants"); *see also Jia*, 696 N.E.2d at 136-37 (noting that two graduate degrees from an ABA-approved law school may not be equivalent to the legal education represented by a J.D. degree); *but see Osakwe v. Bd. of Bar Exam'rs*, 858 N.E.2d 1077, 1083 (Mass. 2006) (Nigerian-educated applicant allowed to sit for bar exam because of his exposure to common-law tradition and knowledge of American law); *In re Murray*, 821 N.W.2d 331, 335-36 (Minn. 2012) (waiving educational requirement under exceptional circumstances).

B. If Ad-Hoc Determinations Are To Be Considered, this Court Should Define the Appropriate Criteria.

A policy that allows any applicant who fails to receive a satisfactory evaluation report to apply for a waiver would be unadministrable. Therefore, if the Court elects to allow ad-hoc exceptions in special circumstances, it should also specify when and under what circumstances

requests for exceptions will be considered in the first instance, and also the procedures and criteria to be used in making those ad-hoc determinations.

For example, the Court might provide that waiver requests will be considered for foreign-educated applicants who have passed the bar examination in one or more other U.S. jurisdictions, or have been engaged in the full-time practice of law for some minimum number of years in other U.S. jurisdictions, or whose LL.M transcripts reflect that they have taken some minimum number of subjects that are tested on the Tennessee bar examination if they were not included in their foreign-earned legal education, or some combination of the foregoing. Another approach might be to allow applicants to request from the Board something in the nature of a private letter ruling—that is, a ruling applicable only to a specific applicant—specifying what additional courses in a J.D. or LL.M program must be successfully completed to satisfy the substantially-equivalent requirement. What the precise criteria might be are for this Court to decide. But those criteria should be specified for the benefit of both the Board and future applicants.

C. This Particular Applicant Has Another Remedy.

Rather than directly answer the waiver question while the *Petition to Amend Tennessee Supreme Court Rule 7, § 7.01*, ADM 2017-00785, is pending, the Court may choose to defer that issue and await the outcome of the broad-ranging deliberations that are likely to accompany those proceedings. Deferral of the issue will not leave this applicant without a remedy.

Mr. Gluzman was not allowed to take the February 2016 bar exam, but he has not yet applied to take any later exam. Whether this Court directly addresses the waiver question here or not, if Mr. Gluzman wishes to sit for a future exam he must reapply. [R. 310, line 20 through R. 311, line 12] Since February 2016, however, WES is no longer in the mix. The evaluation services designated in Board Policy P-7.01 have changed. [See section I above] So, fortuitously, Mr.

Gluzman has the opportunity to obtain an equivalency evaluation from one of the new services. In fact, at the hearing on June 2, 2016, two Board members verbally advised Mr. Gluzman that he could reapply and that by doing so he could use one of the two new services designated in revised Board Policy P-7.01. [R. 288, lines 13-19 and R. 309, line 13 through R. 312, line 7]

III. MR. GLUZMAN'S AMICI FAIL TO ESTABLISH THAT THE UNREGULATED PRACTICE OF LAW IS A FUNDAMENTAL RIGHT OR THAT THE BOARD'S RELIANCE ON ITS DESIGNATED EVALUATION SERVICE WAS ARBITRARY.

This case is not about broad or fundamental statutory or constitutional principles. It is about one applicant who does not like the outcome of one license-application proceeding. Even if the Board made a mistake, which it did not, no statutory or constitutional principle is at issue.

With rare exception not applicable here, Rule 7, § 2.02(a), requires applicants to have earned a J.D. degree from an ABA-accredited law school. This is an objective, non-discriminatory standard, and there is no legal principle that requires this Court to recognize any exceptions. *See In re Hale*, 433 So.2d at 969 n.1 and 972 (holding that the court would no longer consider petitions for waivers of its J.D. requirement).

The "substantially equivalent" standard of section 7.01(a) is the polar opposite of a higher or additional requirement. It is rather a special accommodation for foreign-educated applicants—an alternative path for applicants educated outside the United States. Those educated outside the U.S., like those educated here, are free to earn a J.D. degree from an ABA-accredited law school. Section 7.01(a) is an acknowledgement of the practical and economic difficulties foreign-educated applicants may encounter in pursuing that path. But those difficulties are imposed by life itself, not by this Court's educational requirements. This is the perspective that Mr. Gluzman's amici do not comprehend. And the amici's reliance on the Law of the Land Clause, Tenn. Const., Art. I, Sec. 8, and arguments about the fundamental right to make a living are wholly without merit.

"'The phrase 'the law of the land,' used in [Article I, Section 8] of our State Constitution, and the phrase, 'due process of law,' used in the [Fifth and Fourteenth Amendments to the United States Constitution], are synonymous phrases meaning one and the same thing. In consequence, article I, section 8 has consistently been interpreted as conferring identical due process protections as its federal counterparts." *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 407 (Tenn. 2013). As demonstrated in the Introduction, *supra*, as an applicant for an initial professional license Mr. Gluzman has no property or liberty interest here subject to Fourteenth Amendment procedural due process protection. Substantive due process forbids governmental action that deprives one of a fundamental constitutional guarantee or that is arbitrary or conscience-shocking in the constitutional sense. *See Mansell*, 417 S.W.3d at 409. Neither of those concepts is implicated here.

The real question here is whether the practice of law affects the public health, safety, or welfare. If it does, it is within the police power of the state to regulate. *See Bd. of Dispensing Opticians v. Eyear Corp.*, 218 Tenn. 60, 76, 400 S.W.2d 734, 741-42 (1966). The Constitution of 1870 divides state government into three distinct branches—executive, legislative, and judicial—and prohibits each branch from exercising a power conferred upon another branch. *Belmont v. Bd. of Law Examiners*, 511 S.W.2d 461, 463 (Tenn. 1974); Tenn. Const. Art II, Sec. 1 and 2. Obviously, a co-equal branch of state government, the judicial system, which depends for its orderly and efficient functions upon the professionalism of its officers, affects the public welfare. Regulation of the practice of law thus falls squarely within the state's police power.[8] *Eyear*, 400

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[8] Mr. Gluzman and his amici urge this Court to consider Tennessee's "Right to Earn a Living Act," codified at Tenn. Code Ann. § 4-5-501. By its terms the Act applies to executive-branch licensing authorities, not this Court. *See* Tenn. Code Ann. § 4-5-501(2). Even if the Act purported to apply to law licenses conferred by this Court, to the extent of any inconsistency with Rule 7 it would be unconstitutional as applied. *See Belmont*, 511 S.W.2d at 464.

S.W.3d at 741-42; *see also Estrin v. Moss*, 221 Tenn. 657, 664, 430 S.W.2d 345, 348 (1968); *Ford Motor Co. v. Pace*, 206 Tenn. 559, 564, 335 S.W.2d 360, 362 (1960). This Court has the inherent and exclusive power to regulate the practice of law, including the power to prescribe and administer rules pertaining to the licensing and admission of attorneys, *Smith County Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 333 (Tenn. 1984)); *Belmont*, 511 S.W.2d at 462, and the power to change or void any such rule. *Chong v. Tenn. Bd. of Law Examiners*, 481 S.W.3d 609, 610 (Tenn. 2015); *Petition of Tenn. Bar Ass'n*, 539 S.W.2d at 807.

Once it is established that the regulation of an occupation is within the police power, the specifics or extent of the regulation are matters of policy subject only to rational-basis scrutiny. "Our only purpose in such matters is to determine whether or not there is plausible reason for the enactment of such legislation. It is true that the Court at all times reserves the right to pass upon the constitutionality of a statute, but in doing so we do not inquire into the policy of the Legislature, that is, the factual background of why it acted as it did, if there is a plausible reason back of such legislation." *Eyear Corp.*, 400 S.W.2d at 741-42. In fact, "if there are any facts which reasonably can be conceived which sustain [the legislative act], it is our duty to sustain it." *Id.* at 742; *see also Dial-A-Page, Inc. v. Bissell*, 823 S.W.2d 202, 206 (Tenn. Ct. App. 1991). The United States Supreme Court has often stressed that the rational-basis test seeks to determine only whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001) (quoting *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)).

The amici cite *Livesay v. Board of Examiners in Watchmaking*, 204 Tenn. 500, 322 S.W.2d 209 (Tenn. 1959) for the proposition that the "right to work" is a "fundamental" right. This greatly overstates the state of the law. Each of *Ford Motor Company*, *Eyear*, and *Estrin* was decided after

Livesay and refers to it. *See Ford Motor Co.*, 335 S.W.2d at 362; *Eyear Corp.*, 400 S.W.2d at 742; *Estrin*, 430 S.W.2d at 350; *see also Chapdelaine v. Bd. of Examiners for Land Surveyors*, 541 S.W.2d 786 (Tenn. 1976) (upholding regulation of land surveying). In each instance, this Court distinguished *Livesay* as addressing a practice that does not implicate public health, safety, and welfare, unlike the various practices (motor vehicle dealing, optician practice, termite eradication, and land surveying) at issue in those cases. There is simply no authority in Tennessee law for the proposition that the practice of law is a "fundamental right" or that its regulation is reviewed under any standard other than the rational basis review that prevails under the federal constitution.

Mr. Gluzman and his amici are merely second-guessing the Court's policy choices. Even if they were right about the wisdom of those policies, sub-optimal policy choices do not create constitutional grounds to invalidate regulations. "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Justice Holmes dissented from the *Lochner* Court's invalidation of a state law because "[i]t is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as" the one under review. *Id.* History has long since vindicated Justice Holmes. *See generally Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

It is perfectly obvious that the conduct and professionalism of officers of the courts impact the public welfare and that the regulation of the legal profession is thus within the police power of the state. Conversely, it is equally obvious that there is no fundamental right to engage in the unregulated practice of law. In fact, to do so is a crime. *See* Tenn. Code Ann. § 23-3-103. The contours and specifics of this Court's regulations are matters of local policy subject only to rational-

basis scrutiny. And it is additionally obvious that the Board's reliance on the evaluation of its designated evaluation service is not arbitrary.

CONCLUSION

For all of the foregoing reasons, the Board's denial of Mr. Gluzman's application to take the February 2016 bar examination should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief of Respondent Tennessee Board of Law Examiners has been served on the persons listed below by email and first class U.S. Mail addressed as follows:

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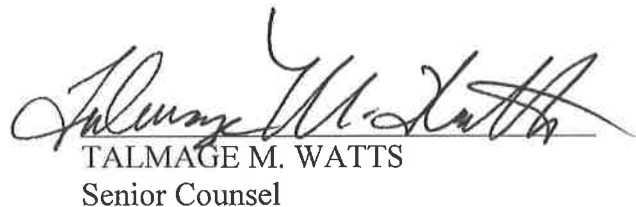
on this the 16th day of June, 2017.



TALMAGE M. WATTS
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APPENDIX

Exhibit A – Letter dated February 14, 2017, from Board to U.T. College of Law

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February 14, 2017

Melanie D. Wilson
Dean and Lindsay Young Distinguished
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Office of the Dean
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Re: Examinations of Foreign-Educated Lawyers

Dear Dean Wilson:

This letter is the Board's response to your letter requesting clarification of the Board's interpretation of the undergraduate and legal educational-equivalency requirements of SCR 7, subsection 7.01(a). More specifically, the question is whether the term "substantially equivalent" as used in that subsection necessarily requires applicants with foreign-earned educations to have earned two separate degrees, one being equivalent to a bachelor's degree and the other being equivalent to a J.D. degree. You also seek a change to the current language on the Board's website to clearly state the Board's position on the issue.

The precise question that you pose has not been ruled upon directly by the Tennessee Supreme Court. Ultimately it may be. The Board, however, does not interpret or apply subsection 7.01(a) to require two separate degrees to meet the "substantially equivalent" requirement. When the Court adopted Restated Rule 7, effective, January 1, 2016, it included changes to the education requirements of Article II. Under the current rule a bachelor's degree must be earned prior to taking the bar exam but not prior to beginning law school. This change allowed Tennessee law schools to begin "combined programs" for earning a bachelor's and a J.D. degree in a single, shorter program. This change also allows applicants with foreign-earned educations to satisfy the "substantial equivalent" requirement without the need to have earned two separate degrees.

Although the Board cannot guarantee that the Court will affirm its interpretation and application of the "substantially equivalent" requirement, the Board proposes the following change to the language on its website:

- **Educational Equivalency Requirement:** If your legal education was received in a country other than the United States, you must furnish information demonstrating that your ~~undergraduate and law school~~ post-secondary education was substantially equivalent to the requirements of Sections 2.01 and 2.02 of Rule 7 of the Rules of the Tennessee Supreme

Exhibit A

Court. This means that your foreign education degree(s) must be equivalent to ~~include a degree that is equivalent to~~ a Bachelor's degree or higher ~~followed by a degree that is equivalent to~~ and a Juris Doctorate degree, but this does not necessarily mean that two separate foreign-earned degrees are required. Proof of equivalence to both degrees must be shown. All foreign educated applicants will be required to submit a comprehensive, course-by-course evaluation of educational equivalency from either International Evaluation Services of the Center for Applied Research, Evaluation and Education, Inc. (www.iescaree.com - request the comprehensive report) or International Education Research Foundation (www.ierf.org - request the detail report with course level identification), in lieu of foreign transcripts. This is 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. See Tenn. Sup. Ct. R. 7 § 7.01(a).

- **NEW U.S. EDUCATION REQUIREMENTS**: In order to be eligible to sit for the bar examination, you must have been awarded an LL.M. for Practice of Law in the United States in addition to your foreign education. This is required even if you previously sat for or were approved to sit for the examination with less than an LL.M. degree. See Rule 7 §7.01(b).

- **CERTIFICATE OF DEAN**: The U.S. law school at which you earned your LL.M. must submit a completed Certification of Dean of Legal Studies U.S. on or before the deadline for filing applications. You must complete the first page of the form, have it notarized and send it to your U.S. law school. The form is available below.

Please let the undersigned know if you have any objections to the recommended language above.

Sincerely,

TENNESSEE BOARD OF LAW EXAMINERS

By: ______________________
Lisa Perlen, Executive Director

xc: Talmage Watts