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 REPLY 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, Policies, Rules, and Regulations

Additional Authorities

III. Introduction

Nobody involved in this case—not even the Board of Law Examiners itself—disputes that Attorney[1] Maximiliano Gluzman is "obviously a very, very qualified person."[2] Notwithstanding his "obvious" qualifications, however, the Board has determined that Mr. Gluzman is not even qualified to *take* the Tennessee Bar Exam based on an interpretation of Tennessee Supreme Court Rule 7, § 7.01 that renders "students from the vast majority of countries around the world" ineligible as well.[3] Challenging that determination, Mr. Gluzman argued in his Principal Brief that his application to take the Tennessee Bar Exam should be granted because:

> A. The Board applied an incorrect legal standard in his case;[4]
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> B. Application of the correct legal standard would have resulted in his application being granted;[5]
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> C. The Board failed to exclude incompetent evidence from the record;[6]
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> D. 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;[7] and
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> E. Mr. Gluzman should be permitted to sit for the Tennessee Bar Exam as a matter of equity.[8]

The Board tortures the record in response to Mr. Gluzman's first claim of

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[1] *See* Respondent's Brief, p. 17 (noting Mr. Gluzman's "recent success on the New York bar examination").
[2] A.R. 282.
[3] A.R. 178, ¶ 17.
[4] Petitioner's Principal Brief, pp. 18–20.
[5] Petitioner's Principal Brief, pp. 20–39.
[6] Petitioner's Principal Brief, pp. 39–44.
[7] Petitioner's Principal Brief, pp. 44–47.
[8] Petitioner's Principal Brief, pp. 47–48.

error. Thereafter, the Board badly misreads his second argument, mischaracterizes his third, effectively concedes his fourth, and all but advocates for his fifth. For each of these reasons, the Board's Response is unpersuasive, and its Order denying Mr. Gluzman the opportunity to take the Tennessee Bar Exam should be REVERSED.

IV. Argument

A. The Board applied an incorrect legal standard in every single phase of Mr. Gluzman's proceeding and admits that it advertised that incorrect standard on its website.

The Board formally concedes that Tennessee Supreme Court Rule 7, § 7.01 "does not necessarily require two separate foreign-earned degrees."[9] As detailed in Mr. Gluzman's Principal Brief, however, each and every time the Board applied Section 7.01 in his case, it did so in accordance with its then-existing belief—prominently displayed on its own website—that foreign applicants *did* need to earn two separate degrees in order to be eligible to take the Tennessee Bar Exam.[10] Crucially, by applying that erroneous standard to Mr. Gluzman's application, the Board committed a legal error that falls neatly within the standard of review set forth in Tenn. Code Ann. § 27-8-101.

Until repudiating its former dual-degree position in its briefing before this Court, the Board's interpretation of Section 7.01 was never in doubt.[11] In fact, the Board even openly acknowledges that during the pendency of Mr. Gluzman's case,

[9] Respondent's Brief, p. 3.
[10] Petitioner's Principal Brief, p. 20 (citing A.R. 153; A.R. 333; and A.R. 325, n.1).
[11] Respondent's Brief, Exhibit A.

it advertised a dual-degree interpretation of Section 7.01 on its website that it now admits was "to the contrary" of the Rule's actual requirements[12]—an interpretation that it also scrubbed from www.tnble.org just three weeks after certiorari was granted in this case.[13] Despite this acknowledgement, however, the Board now attempts to argue with a straight face that it never actually ***applied*** its previous, publicly-stated position during Mr. Gluzman's proceedings.[14]

In addition to failing the laugh test, the Board's revisionist reading of the record "flunks the *Duck Test*. [It] says, in effect, that if it walks like a duck, swims like a duck, and quacks like a duck, it sure as heck isn't a duck." *Lake v. Neal*, 585 F.3d 1059, 1059 (7th Cir. 2009). The record, however, proves otherwise.

The crux of the Board's response to Mr. Gluzman's argument on this point is that in its Order, the Board merely stated that Section 7.01 "requires a Bachelor's Degree or higher ***and*** a Juris Doctorate (J.D.) degree."[15] According to the Board, this language does not clearly evidence that it actually "***appl[ied]***" a dual-degree requirement, because "the conjunction 'and' can have [more than one] meaning."[16] For several reasons, this contention is utterly without merit.

Even if it were true that "the conjunction 'and' can have [more than one] meaning"[17]—and candidly, the Petitioner is baffled by this assertion—the Board's

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[12] Respondent's Brief, p. 11, n. 4 ("While it is true that the Board's web site contained out-of-date language to the contrary, that language has since been change.").
[13] Respondent's Brief, Exhibit A.
[14] Respondent's Brief, p. 3 ("Section 7.01 . . . does not necessarily require two separate foreign-earned degrees, and the Board does not apply it as though it does.").
[15] A.R. 325.
[16] Respondent's Brief, p. 12 (emphasis added).
[17] Respondent's Brief, p. 12.

problem is that it also expressed its dual-degree position on several other occasions as well: all of which independently make clear that it was, in fact, applying a dual-degree requirement in Mr. Gluzman's case. In footnote one of its Order, for example, the Board expressly stated that Mr. Gluzman "**require[d] two degrees**" to qualify to take the bar exam.[18] Further, during the pendency of Mr. Gluzman's case, its interpretation of Section 7.01 was displayed prominently on the BLE's own website, which stated in a similarly unambiguous fashion that foreign applicants required one degree "followed by" another in order to qualify to take the Tennessee Bar Exam.[19]

Based on this record, this Court's ruling should reflect the uncontroversial conclusion that the Board actually said what it meant and meant what it said when it applied a dual degree standard in Mr. Gluzman's case. And because all parties to this case are now in complete agreement that that standard was wrong as a matter of law, the Board's Order should be reversed.

B. The Evidentiary Record Indicates that Mr. Gluzman's Foreign Education Satisfied Section 7.01.

Mr. Gluzman raised three distinct claims in support of his argument that applying the correct legal standard under Section 7.01 would have resulted in the Board granting his application to take the Tennessee Bar Exam. *First*, he argued that the evidence in the record supported a finding that his foreign education was

[18] A.R. 325, n. 1 (emphasis added).
[19] A.R. 333.

"literally" equivalent to an American B.A. and J.D.[20] *Second*, he argued that regardless of which foreign credential report was more reliable, the evidence in the record demonstrated that his foreign education was at least "substantially" equivalent to an American B.A. and J.D.[21] *Third*, Mr. Gluzman argued that because he made a prima facie showing that his foreign education satisfied the requirements of Section 7.01, the burden of production should have shifted to the Board to demonstrate that he did not.[22] In response, the Board fumbles Mr. Gluzman's first claim, ignores his second, and mischaracterizes his third.

1. The Morningside Report's conclusion is not actually in doubt.

In support of his claim that his foreign education was literally equivalent to an American B.A. and J.D. degree, Mr. Gluzman submitted an expert foreign credential evaluation report (hereinafter, the "Morningside Report") completed by Morningside Evaluations—a recognized leader in the foreign credential industry with expertise that was never impeached in the proceedings below.[23] That report

[20] Petitioner's Principal Brief, pp. 21–26.
[21] Petitioner's Principal Brief, pp. 26–32.
[22] Petitioner's Principal Brief, pp. 32–39.
[23] The Board improperly attempts to introduce new evidence in its brief that appears nowhere in the record for the purpose of impeaching Morningside Evaluations as a credentialing organization. *See* Respondent's Brief, p. 9, n. 3. This evidence is not properly before this court, because it is elementary that new evidence cannot be introduced at this stage in proceedings. *See, e.g.*, *State v. Smith*, 893 S.W.2d 908, 917 (Tenn. 1994) ("An appellate court may not permit the introduction of evidence in the first instance."); *Reinhart v. Geico Ins.*, No. M2009-01989-COA-R3-CV, 2010 WL 3852048, at *5 (Tenn. Ct. App. Sept. 28, 2010) ("To the extent [that the Appellees] allege facts which are not contained in the record, or which contradict the record, we may not even consider them."). *See also Schwarz v. Folloder*, 767 F.2d 125, 128 (5th Cir. 1985) ("It should go without saying that [an] attempt to introduce new evidence on appeal is totally improper.").

Critically, the evidence that *does* appear in the record regarding Morningside Evaluations' expertise as a credentialing service is uniformly favorable. This evidence appears specifically at A.R. 138 ("Morningside Evaluations and Consulting evaluates academic and experiential credentials and specializes in the evaluation of foreign credentials."); A.R. 271–72 (Vanderbilt Law Professor/Director of Vanderbilt's LL.M. program Daniel Gervais testifying that: "Morningside actually evaluated my own credentials years past

concluded, without any serious ambiguity, that "Maximiliano 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 education in the United States."[24] Based on the strength and reliability of this conclusion, Mr. Gluzman argued that he had attained the foreign equivalent of an American B.A. and J.D. degree, as Section 7.01 requires.

To the reasonable reader, the Morningside Report's conclusion that "Maximiliano 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 education in the United States" would indicate that Mr. Gluzman's foreign education was equivalent to an American B.A. and J.D.[25] The Board, however, is not so sure. Insisting that there is uncertainty on this point, the Board unsuccessfully attempts to split the atom by raising a newly-developed concern about the supposedly ambiguous meaning of the term "accredited institution of higher education." In support of its theory, the Board postulates—for the first time on appeal—that when the Morningside Report concluded that Mr. Gluzman's education was equivalent to an American B.A. and J.D. degree from "an accredited institution of higher education in the United States,"[26] it perhaps meant "[a]ccredited by . . . the Southern Association of Colleges and Schools," rather than

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when I was hired at Vanderbilt, because I had a number of foreign degrees. And they did a very, you know, decent job. . . . Vanderbilt used them in the past."); and A.R. 325 ("[Morningside Evaluations] specializes in evaluation of education for Visas").

[24] A.R. 137.

[25] A.R. 137.

[26] *See* Respondent's Brief, pp. 3 & 11.

accredited by the ABA.[27] More specifically, the Board states:

> 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.' 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).[28]

This supposed ambiguity, of course, has never before been expressed by anyone involved in this case, and it also appears nowhere in the Board's Order.[29] There is also no evidence in the record that any Board member was even remotely confused about the Morningside Report's conclusion, and the Board does not cite any evidence to support its new theory. Consequently, this Court will scour the record in vain for even the slightest indication that anyone expressed any doubt whatsoever that the accrediting institution referred to in the Morningside Report meant anything other than the ABA—the one and only national accrediting institution for J.D. programs in the United States. In light of this glaring omission, Mr. Gluzman respectfully submits that if there had been any actual confusion about the Morningside Report's conclusion, one might reasonably expect to find evidence of such confusion in the record.

Notably, if the Board's concern were a serious one, it is also worth emphasizing that the same complaint could be levied with equal force at the WES

[27] Respondent's Brief, p. 11.
[28] Respondent's Brief, p. 3.
[29] A.R. 325–26.

Report—which does not specifically namecheck any American accreditation organization, either. Instead, like the Morningside Report, the report compiled by WES—which the Board deems reliable for purposes of the instant appeal, but with which it has since stopped doing business[30]—refers only to "a regionally accredited institution."[31] Thus, although the WES Report is seriously unreliable for several independent reasons, *see infra*, Section IV-C, the absence of specific magic words defining the precise meaning of the word "accredited" is not the reason why.

2. Mr. Gluzman's foreign education was at least substantially equivalent to an American B.A. and J.D. even based on the WES Report.

The Board flatly ignores the argument that Mr. Gluzman advanced on pages 26 through 32 of his Principal Brief. There, Mr. Gluzman made the unremarkable textual claim that this Court's use of the term "substantially equivalent" in Section 7.01 necessarily means that his foreign education need not have been "identical" to a comparable American legal education.[32] More specifically, Mr. Gluzman argued:

> [E]ven if Mr. Gluzman's education had been equivalent to a U.S. "Bachelor's and master's degree from a regionally accredited institution,"[33] 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.
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[30] Respondent's Brief, p. 18 ("WES is no longer in the mix.").
[31] A.R. 169.
[32] *See* Petitioner's Principal Brief, pp. 27–28.
[33] A.R. 169.

> 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.[34]

The Board's failure (or inability) to respond to this argument speaks volumes. The record in the instant case contains uncontroverted evidence that the Board's interpretation of Section 7.01 renders the rule "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.'"[35] In other words, as Professor Gervais testified, the problem with the Board's interpretation of Section 7.01 is that it "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."[36]

Mr. Gluzman submits—and he repeats again—that this absurd result could not realistically have been what this Court intended when it adopted Tennessee Supreme Court Rule 7, § 7.01.[37] Consequently, pursuant to familiar rules of statutory construction, Section 7.01 should not be interpreted in a manner that has the practical effect of rendering it useless.[38] The Board's contrary interpretation of

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[34] Petitioner's Principal Brief, pp. 27–28.
[35] Petitioner's Principal Brief, p. 30 (quoting A.R. 178, ¶ 16).
[36] A.R. 178, ¶ 17.
[37] *See, e.g., 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."). *See also State v. Brown*, 479 S.W.3d 200, 205 (Tenn. 2015) ("We presume that every word was used deliberately, that each word has a specific meaning and purpose, and that **the intent was not to enact a useless or absurd procedural rule**.") (emphasis added).
[38] *See, e.g., 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

Section 7.01 should be rejected accordingly. *Id*.

3. Nobody has ever argued that "the unregulated practice of law is a fundamental right."

Attempting to respond to Mr. Gluzman's claims (and *amici*'s claims, which are distinct) regarding the heightened protection accorded to the right to earn a living, the Board confidently declares that: "Mr. Gluzman's amici fail to establish that the unregulated practice of law is a fundamental right."[39] The Board further proclaims that "it is . . . obvious that there is no fundamental right to engage in the unregulated practice of law."[40] Obvious indeed: a reality that presumably explains why nobody—least of all Mr. Gluzman—has ever advanced this argument.

The Board's response severely mischaracterizes the arguments presented by both Mr. Gluzman and his *amici* in several regards. For one thing, the Board cartoonishly misrepresents the relief that Mr. Gluzman is seeking. As the Board knows well, Mr. Gluzman is not now seeking—and he has never previously sought—a "right to engage in the unregulated practice of law."[41] In fact, he is not even seeking a right to practice law at all. Instead, Mr. Gluzman is merely seeking permission "to *take* the Tennessee Bar Exam"[42]—an extremely onerous regulation with which every lawyer in this State is intimately (and sometimes traumatically) familiar.

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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.'").

[39] Respondent's Brief, p. 19.

[40] Respondent's Brief, p. 22.

[41] Respondent's Brief, p. 22.

[42] Petitioner's Principal Brief, p. 48 (emphasis added).

Further, Mr. Gluzman is not claiming a right to take the Tennessee Bar Exam free from the constraints of (rational) regulations. Instead, Mr. Gluzman has merely argued—correctly—that both the right to earn a living and the right to be free from raw economic protectionism receive heightened protection under, among other things: (1) Tennessee statutory law; (2) the Tennessee Constitution; and (3) the federal Constitution.[43] Mr. Gluzman has also observed that such heightened protection is supported by important and well-recognized public policy interests of this State, which have previously been articulated: (1) by this Court;[44] (2) by the Tennessee General Assembly;[45] and (3) repeatedly in the evidentiary record of this case itself.[46]

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[43] *See* Petitioner's Principal Brief, pp. 34–39 (citing *Harbison v. Knoxville Iron Co.*, 53 S.W. 955, 957 (Tenn. 1899) ("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 legitimate fruits thereof.") (emphasis added); 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); *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).

[44] *See Yardley v. Hosp. Housekeeping Sys., LLC*, 470 S.W.3d 800, 806 (Tenn. 2015) ("[t]his State has an interest in ensuring that its citizens have access to employment and the ability to earn a livelihood . . . .").

[45] *See* A.R. 319 ("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[.]").

[46] *See, e.g.*, A.R. 178, ¶ 18 ("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."); 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

A wealth of precedent—and precise citations to applicable authority—support these straightforward assertions, none of which the Board has even attempted to dispute. *Id.* As noted, Mr. Gluzman also does not invoke this authority to support a substantive right to take the bar exam, much less to practice law. Instead, based on the heightened protection accorded to the right to earn a living and the right to be free from economic protectionism, Mr. Gluzman has merely argued that because he "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."[47]

Admittedly, the Board's response vanquishes its constitutional straw man. Mr. Gluzman also does not dispute the Board's (correct) claim that he does not have a fundamental right to engage in the unregulated practice of law. However, the Board never even bothers to confront Mr. Gluzman's actual argument on this point, which is considerably more modest. Specifically, Mr. Gluzman has called for the adoption of a restrained burden-shifting framework that is commonplace under Tennessee law even when fundamental rights and public policy interests are not at stake.[48]

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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.").

[47] Petitioner's Principal Brief, p. 2. *See also, id.* at pp. 32–33.

[48] Petitioner's Principal Brief, p. 33–34 (citing *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,

Significantly, however, where—as here—fundamental rights and substantial public policy interests *are* at stake, such a burden-shifting framework is not only reasonable—it is necessary to avoid the risk of a constitutional conflict.[49] Thus, applying that framework to Mr. Gluzman's proceeding, the Board's Order should be reversed in the absence of satisfactory proof rebutting Mr. Gluzman's prima facie showing that he is eligible to sit for the Tennessee Bar Exam. In the instant case, though, because no such contrary evidence exists in the record, Mr. Gluzman's application to sit for the Tennessee Bar Exam should be granted.

C. The WES Report should have been excluded because it was unsworn, unsigned, incompetent, and utterly unreliable hearsay from an anonymous expert witness whose credentials were unknown and could not be tested.

A central argument to Mr. Gluzman's case is that the sole piece of evidence in the record that even *ostensibly*[50] indicated that he did not qualify under Section 7.01—the "expert" foreign credential report compiled by World Education Services

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)).

[49] *Cf. State v. Sliger*, 846 S.W.2d 262, 263 (Tenn. 1993) ("It is also our duty to adopt a construction which will . . . avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution.").

[50] As noted in Section IV-B-2, Mr. Gluzman qualifies to take the bar even based on the WES report.

(WES)—was so unreliable as to require exclusion. In support of that claim, Mr. Gluzman observed, among other things, that the WES Report represented unsworn, unsigned, and utterly unreliable hearsay evidence from an anonymous expert witness whose credentials were unknown.[51] Mr. Gluzman and one of his expert witnesses also pointed out that the WES Report contained a critical, outcome-determinative error regarding Mr. Gluzman's foreign credit hours that required further explanation but could not be explained under cross-examination due its author's anonymity.[52]

In support of Mr. Gluzman's argument that denying him the opportunity to sit for the Tennessee Bar Exam based solely on anonymous, erroneous, and uncorroborated hearsay evidence was fundamentally unfair, Mr. Gluzman further noted that our Court of Appeals has held that uncorroborated hearsay evidence cannot be the "sole evidence" relied upon in administrative proceedings.[53] In fact, multiple panels of the Court of Appeals have reached this conclusion in a variety of contexts when reviewing administrative proceedings for error under the same standard of review that applies to this case.[54]

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[51] *See generally*, Petitioner's Principal Brief, pp. 39–44.
[52] *See generally*, Petitioner's Principal Brief, pp. 39–44. *See also* A.R. 258–66.
[53] *Green v. Neeley*, No. M2006-00481-COA-R3CV, 2007 WL 1731726, at *5–6 (Tenn. Ct. App. June 15, 2007).
[54] *See, e.g., Johnson v. Neel*, No. 86-150-II, 1986 WL 14039, at *3 (Tenn. Ct. App. Dec. 12, 1986) ("hearsay testimony and documents may be used, if properly qualified for admission, to corroborate other testimony of the wrongful acts of the claimant, **but not as the sole evidence of his or her wrongful acts.**") (emphasis added); *Estate of Milton v. Comm'r, Tennessee Dep't of Employment Sec.*, No. 03A01-9710-CH-00449, 1998 WL 282919, at *2 (Tenn. Ct. App. May 19, 1998) ("Although hearsay is admissible in administrative hearings, **uncorroborated hearsay does not constitute substantial and material evidence.**") (emphasis added); *Goodwin v. Metro. Bd. of Health*, 656 S.W.2d 383, 388 (Tenn. Ct. App. 1983) **("uncorroborated hearsay or rumor would not constitute "substantial evidence"** where the scope of review was limited to a search for "substantial evidence.") (emphasis added); *Case v. Shelby Cty. Civil Serv. Merit Bd.*, 98 S.W.3d 167, 176 (Tenn. Ct. App. 2002) (noting that although "hearsay evidence

Attempting to respond to this argument, the Board insists that the WES Report should not have been excluded for four undeveloped reasons: (1) Because "[t]he Rules of Civil Procedure and Rules of Evidence do not apply in license application proceedings;" (2) Because "both evaluation reports would be subject to hearsay objections" if the Rules of Evidence applied; (3) Because "[a]pplicants have no subpoena power[;]" and (4) Because bar exam graders "would be very hard to find" if they could be subpoenaed.[55] Each of these responses lacks merit.

First, the fact that the Rules of Evidence do not apply to administrative proceedings does not mean that hearings before the Board are unmoored from any evidentiary standards whatsoever. Tennessee Supreme Court Rule 7, § 13.03(e) expressly provides that "[t]he Board may exclude incompetent . . . evidence." *Id.* Relying on this Rule, it is Mr. Gluzman's position that unsworn, unsigned, erroneous, and utterly unreliable hearsay evidence from an anonymous expert witness whose credentials are unknown and cannot be tested necessarily qualifies as "incompetent." *Id.* As such, the WES Report should have been excluded from consideration. *Id.*

Second, the Board's attempt to establish a false equivalence between the

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is generally admissible in administrative proceedings," precedent suggests that "an opportunity to cross-examine the source of the information" is required). *See also Miller v. Tennessee Bd. of Paroles*, No. 01A01-9806-CH-00293, 1999 WL 43263, at *6 (Tenn. Ct. App. Feb. 1, 1999) ("Administrative proceedings such as parole revocation hearings, no less than civil or criminal judicial proceedings, involve a search for the truth. Thus, when presented with hearsay evidence to prove a parole violation, hearing officers must satisfy themselves either that the evidence is, by its very nature, inherently reliable and the type of information commonly relied upon by reasonably prudent persons, *see generally State v. Wade*, 863 S.W.2d 406, 409 (Tenn.1993); Tenn. Code Ann. § 4-5-313(1) (1998), or that the evidence sought to be introduced has already been subjected to the same sort of adversarial questioning as live, in-person testimony.").

[55] Respondent's Brief, pp. 12–13.

WES Report and the Morningside Report is unpersuasive. It is true that neither report's author testified during Mr. Gluzman's hearing, meaning that both reports constituted hearsay. It is untrue, however, that the reports suffered from the same or even similar flaws with respect to their reliability—either in kind or in degree.

For example, the Morningside Report's author—Dr. Jonatan Jelen—was known to the Board, and his credentials and extensive experience conducting foreign credential evaluations were provided to the Board and incorporated into Mr. Gluzman's hearing record.[56] In contrast, the WES Report's author was and is anonymous, and the record contains no indication that its author had any experience conducting foreign credential evaluations whatsoever.[57]

Additionally, Dr. Jelen affirmed the contents of his report by signing his name to it.[58] In contrast, the WES Report's author did not sign his or her report in contravention of basic industry standards.[59] *See* A.R. 273 (Professor Gervais testifying that: "I have never seen an unsigned report; I have always seen a letter accompanied with the name of the person doing the evaluation.").

Furthermore, the WES Report's anonymous author himself (or herself) *emphasized that the report was not meant to be considered authoritative*—suggesting that even its author did not have confidence in its reliability.[60] Specifically, the anonymous author clarified that he or she "would like to stress"

[56] A.R. 138 & 140–51.
[57] A.R. 167.
[58] A.R. 138.
[59] A.R. 167.
[60] A.R. 239.

that the WES report was only "an advisory opinion" that was not meant to be "binding upon any institution, organization or individual perusing [it]."[61] By contrast, Dr. Jelen never denigrated the Morningside Report in this fashion.

Further still, the WES Report contained a glaring, outcome-determinative flaw that significantly affected its reliability and could not be explained or justified by anyone other than its author. Specifically, although Mr. Gluzman's foreign transcript reflected that he had completed 309 credit hours during his combined undergraduate and legal education,[62] the WES Report only gave him credit for completing 158 credit hours.[63] Substantial evidence was also introduced during Mr. Gluzman's hearing to suggest that such a reduction was in error.[64] By contrast, the Morningside Report did not suffer from this flaw.

In sum, although both expert reports constituted hearsay, the two reports differed starkly in terms of their reliability. While the Morningside Report was hearsay, the WES Report was ***anonymous*** hearsay. Further, the WES Report was ***uncorroborated*** hearsay that contained several other indicia of unreliability, from lacking credentials, to a lacking signature, to the lacking confidence of its own author, to a glaring substantive error that demanded further explanation. Accordingly, the Board's superficial response that "both evaluation reports would be subject to hearsay objections"[65] if the Rules of Evidence applied during

[61] A.R. 239.
[62] A.R. 45.
[63] A.R. 173.
[64] *See generally*, A.R. 258–65; A.R. 266 (Professor Gervais testifying that: "I'm very critical of the fact that they don't count certain credits when the student has done the work."). *See also* A.R. 566, ¶ 5.
[65] Respondent's Brief, p. 12.

administrative proceedings improperly attempts to create a false equivalence between the two reports, which contained dramatic differences in terms of their respective reliability.

Third, the Board contends that "cry[ing] foul because the anonymous author of the WES report could not be deposed to test his [or her] qualifications and methods" is foul itself because "[a]pplicants have no subpoena power."[66] This contention is also meritless for several reasons.

For one thing, the Board's response is factually false. In reality, Tennessee Supreme Court Rule 7, § 13.03(i) *does* provide for subpoena power in Board proceedings, establishing that: "The Board may cause subpoenas to be issued for such witnesses as any party may in good faith and for good cause shown request in writing." *Id.* Additionally, given the extraordinary unreliability of the WES Report, *see supra*, pp. 15–17, Mr. Gluzman's complaint that he could not subpoena the report's author due to his or her anonymity—an objection that he voiced well in advance of his hearing in a written Motion to Exclude[67]—was certainly expressed both in good faith and with extremely good cause. *Id.*

Additionally, although the Board served as the arbiter of the proceedings below, it was also an opposing litigant. And significantly, unlike Mr. Gluzman's objection that the WES Report's author was not made available to testify (which,

[66] Respondent's Brief, p. 12.
[67] *See* A.R. 209–13. *See also* A.R. 212 (arguing that the WES Report's author "is anonymous, calling into question whether the individual who issued the report had any qualifications to do so, preventing Mr. Gluzman from testing the reliability of the report during his coming hearing, and suggesting that the report was not conducted in accordance with accepted industry practice.").

it bears emphasizing again, Mr. Gluzman timely raised in both a pre-hearing motion to exclude[68] and also during his hearing itself[69]), the Board has never once complained about the unavailability of the Morningside Report's author until filing its brief before this Court. Accordingly, even if both parties were prejudiced by the introduction of hearsay testimony during Mr. Gluzman's hearing, only the Board waived this claim. *See, e.g., State v. McCormick*, 494 S.W.3d 673, 680 (Tenn. 2016) ("arguments raised for the first time on appeal may be deemed waived.").

Fourth, the Board's perplexing reference to subpoenaing bar exam graders is not pertinent to this case. Tennessee Supreme Court Rule 7, § 13.02(a) creates a clear distinction between typical grievances—which may be subject to a hearing before the Board—and grievances related to "failure to pass the bar examination," which may not be. *See id.* ("Any person who is aggrieved by any action of the Board involving or arising from the enforcement of this Rule (***other than failure to pass the bar examination***) may petition the Board for such relief as is within the jurisdiction of the Board to grant.") (emphasis added). As such, the Board's suggestion that "graders would be very hard to find"[70] if the Board complied with the subpoena process established by Tennessee Supreme Court Rule 7, § 13.03(i) is puzzling, since all parties agree that that process will never apply to them.

Fifth and finally, where, as here, an evidentiary hearing on a contested

[68] A.R. 209–13.
[69] A.R. 251–52 ("I also cannot subpoena th[e WES Report's author] to test his credentials or the basis for that report, because we, again, don't know its author. The author is anonymous."). The Board has since filed an amended transcript to note that Mr. Gluzman's counsel is the person expressing this objection.
[70] Respondent's Brief, p. 13.

matter *is* granted, minimum procedural safeguards that are meant to ensure that the outcome of the proceeding is reliable ought to be respected. Thus, even if excluding the WES Report or affording Mr. Gluzman an opportunity to subpoena its author were not required remedies, precedent dictates that allowing the anonymous and uncorroborated WES Report to serve as the *sole* basis for denying Mr. Gluzman the opportunity to take the Tennessee Bar Exam was nonetheless improper.[71] The Board's decision should be reversed accordingly.

D. The fact that a Board member voted on Mr. Gluzman's case without either attending his hearing or reviewing the hearing transcript was not a scrivener's error.

The Board gives short shrift—just three short sentences—to another serious flaw in its proceeding: the fact that a Board Member voted on Mr. Gluzman's case without either attending his hearing or reviewing the hearing transcript.[72] There is, of course, no dispute that only four of the Board's five members attended Mr. Gluzman's hearing.[73] Nor does the Board dispute that Tennessee Supreme Court Rule 7, § 13.03(l) establishes 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*. And most importantly, the Board does not deny that it failed to order a transcript of Mr. Gluzman's hearing for the missing

[71] *Green*, 2007 WL 1731726, at *5–6 (Tenn. Ct. App. June 15, 2007). *See also Estate of Milton*, 1998 WL 282919, at *2 ("Although hearsay is admissible in administrative hearings, uncorroborated hearsay does not constitute substantial and material evidence."); *Taylor v. Clarksville Montgomery Cty. Sch. Sys.*, No. M2009-02116-COA-R3-CV, 2010 WL 3245281, at *4 (Tenn. Ct. App. Aug. 17, 2010) (stating the "general rule that hearsay is admissible in an administrative hearing [only] if (1) it is the type of material commonly relied upon by reasonably prudent persons in the conduct of their affairs and (2) it is corroborated and not the sole evidence of the act.").

[72] *See* Respondent's Brief, p. 13.

[73] A.R. 244 ("Not present: Julian Bibb, Esq.").

Board Member to review before voting on his case.[74] The Board also does not contest Mr. Gluzman's argument that if the missing Board Member *did* vote on his case, the error would be structural in nature and subject to automatic reversal.[75]

Instead, even though the Board's Order itself specifies that the missing Board Member voted on Mr. Gluzman's case,[76] the Board attempts to respond to this illegality by claiming that its Order contains a mere "scrivener's error."[77] Thus, notwithstanding what it stated in its own Order, the Board intimates that the missing Board member did not *actually* vote in Mr. Gluzman's case. There is, however, no evidence in the record to support this assertion, and the Board does not attempt to cite any. There is also significant reason to doubt that the Board's assertion in this regard is accurate.

Mr. Gluzman has previously complained in the instant Reply Brief that the Board is prohibited from introducing new evidence at this stage in proceedings. *See* note 23, *supra* (citing *Smith*, 893 S.W.2d at 917 ("An appellate court may not permit the introduction of evidence in the first instance.")). Even so, the Board has managed to violate this basic rule in almost every pleading that it has filed before this Court, having, among other things: (1) appended a new, post-Order document to its brief that it cites as evidence and styles as "Exhibit A";[78] (2) cited unintroduced evidence in its brief that is not in the record and is not subject to

[74] A.R. 344–47. *See also* A.R. 326 (noting that Julian Bibb voted on Mr. Gluzman's case).
[75] *See* Petitioner's Principal Brief, pp. 44–47.
[76] A.R. 326.
[77] Respondent's Brief, p. 13.
[78] *See* Respondent's Brief, Exhibit A.

judicial notice;[79] (3) filed an untimely motion to amend the hearing transcript after Petitioner's Principal Brief was filed, and then cited its amended transcript even before the amendment was permitted;[80] and, of special note: (4) appended a post-Order affidavit from a Board Member as an evidentiary exhibit to its Response to Mr. Gluzman's Verified Petition for Review and Writ of Certiorari.[81]

Significantly, however, despite the Board's clear comfort introducing new evidence at this stage in proceedings—*including introducing new, post-Order evidentiary affidavits from Board Members*[82]—the Board has never once attempted to introduce evidence to support its claim that its Order contains a scrivener's error. And critically, unlike the new evidence that the Board *has* attempted to introduce in its pleadings before this Court, an affidavit from the absent Board member attesting to the supposed scrivener's error in its Order may actually have been appropriate. *See, e.g., Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers, AFL-CIO v. Murata Erie N. Am.*, Inc., 980 F.2d 889, 907 (3d Cir. 1992) ("Under the doctrine of scrivener's error, the mistake of a scrivener in drafting a document may be reformed based upon parol evidence, provided the evidence is clear, precise, convincing and of the most satisfactory character that a mistake has occurred . . . .") (internal quotation marks omitted). Notably, the Board has not attempted to correct the supposed scrivener's error

[79] *See, e.g.,* Respondent's Brief, p. 9, n. 3.
[80] *See* Respondent's June 6, 2017 Motion to Supplement the Record; Respondent's Brief, p. 13, n. 5.
[81] A.R. 565–67.
[82] A.R. 565–67.

under Tenn. R. App. P. 24(e), either, which establishes the procedure that would have been required to correct such an error in the record. *Id.* Thus, having failed either to cite evidence or introduce new evidence in support of its theory that the structural error contained in the Board's Order was a scrivener's error, the Board's response must be rejected.

E. Mr. Gluzman qualifies for equitable waiver under any standard.

The final claim that Mr. Gluzman raised—which the Board generously characterizes as one of his "real issues"[83]—is that he should be permitted to sit for the bar exam as a matter of equity.[84] The Board's response acknowledges that "compelling arguments" support the concept of equitable waivers in appropriate cases.[85] However, it worries that "unfairness can result from ad-hoc exceptions or waivers,"[86] so it requests that this Court specify the criteria appropriate for such waivers "for the benefit of both the Board and future applicants."[87] The Board then goes on to recommend several possible waiver criteria, such as having "passed the bar examination in one or more other U.S. jurisdictions."[88]

With respect to Mr. Gluzman's application, however, the precise criteria formulated for such a waiver process almost do not matter. Regardless of the applicable waiver procedure, at a minimum, anyone who is "obviously a very, very

[83] Respondent's Brief, p. 14.
[84] Petitioner's Principal Brief, pp. 47–48.
[85] Respondent's Brief, p. 15.
[86] Respondent's Brief, p. 16.
[87] Respondent's Brief, p. 18.
[88] Respondent's Brief, p. 18.

qualified person" would certainly have to qualify.[89] For his part, Mr. Gluzman falls into this category based on any metric—even based on the Board's own assessment of his talent. *See id.* *See also* Respondent's Brief, p. 17 (noting "Mr. Gluzman's impressive background, stellar performance in the Vanderbilt LL.M. program, and recent success on the New York bar examination"). Mr. Gluzman's application to sit for the Tennessee Bar Exam as a matter of equity should be granted as a result.

F. Mr. Gluzman does not have an adequate alternative remedy, and the judiciary cannot opt out of resolving live cases or controversies.

Attempting to avoid a ruling on this case, the Board offers two final, contrary arguments. Each is unpersuasive.

First, the Board argues that reapplying to take the bar exam under the Board's newly established criteria constitutes an adequate remedy within the meaning of Tenn. Code Ann. § 27-8-101.[90] Second, the Board argues that this Court should simply decline to rule on Mr. Gluzman's pending claim for an equitable waiver and "await the outcome of the broad-ranging deliberations that are likely to accompany" Vanderbilt Law School's and the University of Tennessee College of Law's *Petition to Amend Section 7.01* instead.[91] For the reasons that follow, however, neither of these arguments is legally supportable.

1. Reapplying under changed criteria is not an "adequate remedy."

As a threshold matter, the Board's argument that Mr. Gluzman has an

[89] A.R. 282.
[90] Respondent's Brief, p. 18.
[91] Respondent's Brief, p. 18.

adequate, alternative remedy available to him has already been raised by the Board unsuccessfully[92] and rejected by this very Court.[93] This argument also remains as groundless now as it was before.

In its Response in Opposition to Mr. Gluzman's Verified Petition for Review and Writ of Certiorari, the Board argued that the instant case was "not ripe"[94] for review in this Court under Tenn. Code Ann. § 27-8-101 because Mr. Gluzman "continues to have a plain, speedy, and adequate remedy before the Board."[95] More specifically, the Board argued, a writ of certiorari should not issue because Mr. Gluzman could reapply to take the bar exam under the new criteria that it had established for foreign applicants while his case was pending.[96] Upon review, this Court rejected the Board's argument and granted certiorari.[97]

The Board's claim about the supposed adequacy of Mr. Gluzman's alternative remedy was wrong then, and it is wrong now. As Mr. Gluzman argued while his Petition for a Writ of Certiorari was pending, this case appeals the Board's erroneous determination that he did not qualify to sit for the bar *under the requirements that applied to the February 2016 bar exam.*[98] Mr. Gluzman contends that he was qualified under those requirements, while the Board insists that he was not. Further, if Mr. Gluzman *did* qualify under the requirements that

[92] A.R. 392.
[93] A.R. 574.
[94] A.R. 397.
[95] A.R. 392.
[96] A.R. 395 ("Mr. Gluzman must obtain an equivalency evaluation from one of the new services. This is his remedy before the Board.").
[97] A.R. 574.
[98] A.R. 570.

applied to the February 2016 bar exam, then the Board's own policy states unequivocally that obtaining new credentials is unnecessary.[99] Consequently, Mr. Gluzman is entitled to have this live case and controversy adjudicated, and the fact that his qualifications *under the criteria applicable to the February 2016 bar exam* will never again be addressed in any subsequent proceeding continues to render the Board's claim that he has an adequate alternative remedy inaccurate.

2. Courts must decide the cases brought before them.

The Board's related contention that this Court should simply "choose to defer" a ruling on Mr. Gluzman's claim that he should receive an equitable waiver is similarly without merit.[100] "The power to fully and finally adjudicate cases and controversies is constitutionally assigned to the judiciary of this state[.]" *Jackson v. Smith*, 387 S.W.3d 486, 494 (Tenn. 2012). Thus, barring a genuine jurisdictional or prudential bar to justiciability, "courts ***must decide the cases brought before them*** based on the law existing at the time of their decisions and on the facts presented to them." *Id.* (emphasis added). As such, the Board's suggestion that this Court simply abandon its judicial obligations under Article VI of our State's Constitution is baseless.

Equally improper is the Board's flagrant and callous disregard for the extended hardship that it has visited upon Mr. Gluzman and his family by

[99] *See* Respondent's Brief, Exhibit A, p. 1 (specifying that under Board Policy P-7.01(b), "[The Board's new credential rules 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.***") (partial emphasis added). *See also* A.R. 563; A.R. 570, n. 2.
[100] Respondent's Brief, p. 18.

preventing him from taking the one exam necessary to work in a profession that he is so clearly qualified to join. After paying tuition and graduating with a ridiculous 3.919 GPA from Vanderbilt Law School's LL.M. program,[101] Mr. Gluzman has been irrationally prevented from earning a living and providing for his Memphis-based family since February of 2016—when the Board unexpectedly rejected his application just weeks before the bar exam was scheduled to take place[102] and then refunded only half of his examination fee.[103] And while the Board itself may be indifferent to having this Court "defer th[e] issue and await the outcome of the broad-ranging deliberations that are likely to accompany [the proposed changes to Section 7.01]],"[104] Mr. Gluzman is not. To the contrary, Mr. Gluzman wants to earn a living and provide for his family now, and he is entitled to have every claim presented in this appeal adjudicated. The Board's suggestion that this Court should simply "choose to defer" a ruling on this case should be rejected accordingly.[105]

V. Conclusion

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

[101] A.R. 133.
[102] A.R. 103.
[103] A.R. 108.
[104] Respondent's Brief, p. 18.
[105] Respondent's Brief, p. 18.

Respectfully submitted,

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