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M2022-00609-SC-WR-CV

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

Violaine Panasci, Esq,	)
	)
Petitioner,	)
	)
v.	)
	)
Tennessee Board of Law Examiners	)
	)
Respondent.	)

PETITION FOR A WRIT OF CERTIORARI PURSUANT TO TENNESSEE SUPREME COURT RULE 7 § 14.01 UNDER OATH OR AFFIRMATION AND MEMORANDUM OF LAW

THIS IS THE FIRST APPLICATION FOR EXTRAORDINARY RELIEF

Comes the petitioner, Violaine Panasci, through her attorney, and petitions this court for a Writ of Certiorari, as provided in Tennessee Supreme Court Rule 7, § 14.01, to review, set aside, and supersede the decision of the Board of Law Examiners, denying the Petitioner's request for admission to the bar and practice of law in the state of Tennessee, based upon the Memorandum of Law contained herein.

OATH

I, William C. Killian, after having been sworn according to law, hereby swear and affirm that the facts contained in this Petition for a Writ of Certiorari and Supersedeas are true to the best of my knowledge, information and belief, and that the Petitioner, Violaine Panasci, is justly entitled to the relief sought.

Further, the Affiant saith not.

William C. Killian
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Notary Oath

Subscribed and sworn to before me in my Presence, this 16th day of May 2022, a Notary Public in and for the County of Hamilton State of TN

Jen Burkhart
(Signature) Notary Public

My commission expires 1-5, 2025

JEN BURKHART
STATE OF TENNESSEE NOTARY PUBLIC
HAMILTON COUNTY

[Should this Court decide that an oral argument would be necessary for a resolution of this matter, then consider this Brief a request for oral argument. Otherwise, we believe this Brief provides adequate information for a favorable decision to Ms. Panasci.]

I. Table of Contents

II. Table of Authorities

Cases

Statutes, Regulations, and Constitutional Provisions

Additional Authorities

III. Issues Presented for Review

A. The Board acted contrary to law or arbitrarily in denying Ms. Panasci's Application for Admission on transferred Uniform Bar Exam score when:

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

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

3. The Board failed to adhere to the requirements of procedural and substantive due process guaranteed by the Tennessee Constitution and the United States Constitution.

B. Ms. Panasci should be granted Admission on transferred Uniform Bar Exam score as a matter of equity.

C. The Board violated Ms. Panasci's right to equal protection in denying Ms. Panasci's Application for Admission on transferred Uniform Bar Exam score.

IV. Introduction

Violaine Panasci is a highly qualified New York attorney and American citizen.[1] In fact, she graduated from Pace University's Elisabeth Haub School of Law with *summa cum laude* honors.[2] She also passed the Uniform Bar Exam ("UBE") on her first attempt, ranking in the 90th percentile.[3] Unfortunately, despite her exemplary professional and academic credentials, Ms. Panasci has been denied the privilege of practicing law in Tennessee on the grounds that Ms. Panasci's undergraduate and legal education were "not equivalent to the rigor of the requirements" for an undergraduate and legal degree in the United States.[4] However, the Board of Law Examiners' decision was based on an erroneous interpretation of Tenn. Sup. Ct. R. 7 § 7.01 ("Rule 7"). The Board's decision is also plagued by its failure to adhere to the Constitutional guarantees of Article I, Section 8 of the Tennessee Constitution, roughly analogous to the Fifth Amendment's Due Process clause as applied to the states through the Fourteenth Amendment.

If the correct legal standard had been applied in this case, the Board would have concluded that, based on the ample evidence provided, Ms. Panasci's foreign education was substantially superior to the requirements of Rule 7. Alternatively, applying the correct legal standard to Ms. Panasci's case would have compelled the conclusion that Ms. Panasci's foreign education was at least substantially equivalent, if not superior, to the requirements of Rule 7. Moreover, because Ms. Panasci made a *prima facie* showing that her foreign education is equivalent, if not superior, to the requirements of Rule 7, the burden of production should have shifted to the Board to prove that it was not.

[1] A.R. 26-7.
[2] A.R. 28.
[3] A.R. 23.
[4] A.R. 3.

Further, in similar cases, other state supreme courts have cautioned that "[a]dmission rules are intended to weed out unqualified applicants, not to prevent qualified applicants from taking the bar." *In re O'Siochain*, 842 N.W.2d 763, 770 (Neb. 2014) (internal citations and quotations omitted). However, the Board's decision does just that by preventing the admission of a foreign-educated American attorney who scored 39 points above the minimum passing total UBE scaled score in Tennessee.[5] Consequently, if this Court concludes that Rule 7 does not permit Ms. Panasci's admission in Tennessee, then this Court should waive such requirements as a matter of equity, as it has done several times before for applicants who were less qualified.

Finally, the Board unConstitutionally violated Ms. Panasci's right to Equal Protection guaranteed by the United States Constitution and Tennessee Constitution. First, the Board denied Ms. Panasci's application solely on the basis of a suspect classification. Without a compelling interest or narrow tailoring, the Board's application of Rule 7 cannot pass Constitutional muster under strict scrutiny review. *King–Bradwell P'ship v. Johnson Controls, Inc.*, 865 S.W.2d 18, 21 (Tenn.Ct.App.1993). Second, even if this Court applies rational review, the Board's application was an unConstitutional and irrational application of a state law that intentionally disadvantages foreign-educated American attorneys. *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993).

For each of these reasons, the Board's Order denying Ms. Panasci's admission on transferred UBE score should be REVERSED, and Ms. Panasci's application on admission on transferred UBE score should be granted because her education is at least substantially equivalent.

V. Statement of the Case

[5] A.R. 23. *See also*, *Minimum Scores*, ncbex.org, https://www.ncbex.org/exams/ube/score-portability/minimum-scores/ (last visited Apr. 27, 2022).

In 2019, Ms. Panasci earned a Bachelor of Civil Law degree (BCL) and a Juris Doctorate degree (J.D.) from the University of Ottawa – a highly respected law school in the capital of Canada.[6] Due to her academic achievements at the University of Ottawa, Ms. Panasci was awarded a full-tuition LL.M scholarship and a paid one-year fellowship by Pace University's Elisabeth Haub School of Law, which is ranked number one in the country for environmental law. Ms. Panasci graduated summa cum laude from Pace's LL.M program in 2020.[7] Shortly thereafter, Ms. Panasci sat for the October 2020 New York administration of the UBE and earned a total UBE scaled score of 309.[8]

In March 2021, Ms. Panasci applied for admission on transferred UBE score in Tennessee, where she resides. Although the minimum passing total UBE scaled score in Tennessee is a mere 270, on November 10, 2021, Ms. Panasci received an email from the Executive Director of the Board of Law Examiners, Lisa Perlen, stating that her application was denied on the sole basis that her degrees "do not **equate** to the requirements for a U.S. Bachelor's degree **and** J.D. degree."[9] Because "all of the credit hours earned at University of Ottawa are law courses," Ms. Perlen determined that Ms. Panasci's foreign education "is not **equivalent** to the rigor of the requirements for a law degree in the United States, which includes at least 3 years of general studies and another 3 years of law-related studies."[10]

Ms. Panasci, through counsel, timely appealed Ms. Perlen's decision to the Board of Law Examiners to rectify Ms. Perlen's erroneous interpretation of Rule 7.[11] On March 10, 2022, the

[6] A.R. 46.
[7] A.R. 28.
[8] A.R. 23.
[9] A.R. 3; *see also*, *Minimum Scores*, ncbex.org, https://www.ncbex.org/exams/ube/score-portability/minimum-scores/ (last visited Apr. 27, 2022).
[10] A.R. 3. Ms. Perlen effectively denied Ms. Panasci's application because her undergraduate degree contained too many law courses.
[11] A.R. 12-22.

Board affirmed Ms. Perlen's denial in a written order.[12] Although Ms. Panasci provided a Foreign Education Report performed by a National Association of Credential Evaluation Services ("NACES") member confirming the substantial equivalency of her undergraduate degree and J.D. degree, the Board held that "Ms. Panasci has not demonstrated **equivalence** to "**both** degrees."[13]

Rule 7, § 7.01 does not require that foreign applicants obtain two degrees, nor does it require that said degrees "equate" to U.S. degrees. Moreover, Rule 7, § 7.01 grants the Board broad discretion to deem a foreign applicant's education "substantially equivalent" based on all of the evidence provided, including but not limited to any Foreign-Education Report performed by a NACES member. *See* Tennessee Supreme Court Rule 7, § 7.01.

VI. Statement of the Facts

i. Ms. Panasci's Undergraduate and Legal Education.

a) Breakdown of Ms. Panasci's Education.

Before earning a joint BCL/J.D. degree from the University of Ottawa in 2019,[14] and a Pace LL.M with distinction in 2020,[15] Ms. Panasci earned a Diploma of College Studies (often abbreviated DCS, French: Diplôme d'études collégiales or DEC) in social sciences from Marianopolis College – a private English-language General and Professional Teaching College (often abbreviated CEGEP) in the province of Quebec that provides the first level of post-secondary education.[16] The Quebec education system is slightly different from the rest of North America. One aspect of its distinctness is that it is the only system that requires a college diploma before entering university.[17]

[12] A.R. 48-51.
[13] A.R. 50.
[14] A.R. 46.
[15] A.R. 28.
[16] A.R. 29-30, 33, 46.
[17] A.R. 29-30, 33.

Professor Daniel Gervais – Milton R. Underwood Chair in Law at Vanderbilt University – serving as an expert witness before this Court in the matter of *Maximiliano Gabriel Gluzman v. Tennessee Board of Law Examiner*, explained:

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

In re: Principal Brief for the Petitioner, Case No. M2016-02462-SC-BAR-BLE (Sup. Ct., August 4, 2017).

Before joining Vanderbilt Law School in 2008, Professor Gervais served as acting dean and vice-dean for research of the Common Law Section at the University of Ottawa, where Ms. Panasci attended law school.[18] Professor Gervais also received a CEGEP degree in Quebec and equally earned a joint BCL/J.D. degree, which substantiates the notion that highly qualified legal professionals in the state of Tennessee have pursued the same path as Ms. Panasci.[19] In his expert testimony, Mr. Gervais pointed out that students from "nine out of ten Canadian Provinces may hope to qualify to practice law in Tennessee."[20] The excluded province is Quebec. Quebec is the only province that requires students to obtain a post-secondary CEGEP degree before earning a

[18] A.R. 54.
[19] A.R. 55.
[20] A.R. 13; *In re: Principal Brief for the Petitioner*, Case No. M2016-02462-SC-BAR-BLE (Sup. Ct., August 4, 2017).

professional degree such as a law degree or a medical degree.[21] Admission to the joint BCL/J.D. program that Ms. Panasci attended is contingent upon the successful completion of a CEGEP degree of undergraduate level and/or undergraduate studies (for applicants in other provinces).[22] Further, a graduate from the University of Ottawa's BCL/J.D. program is eligible to take the bar exam in the province of Ontario and/or the province of Quebec.[23]

b) Ms. Panasci's total credit hours are at least equivalent to those obtained by Tennessee graduates.

The Board explained in its initial denial that a six-year joint degree program "can be applied towards the requirements for both degrees."[24] At the University of Tennessee at Knoxville, a student who earns 90 credits in undergraduate coursework in addition to 89 credits earned toward a J.D. will be eligible for admission to the bar in Tennessee.[25] Ms. Panasci earned 58 credits from Marianopolis College.[26] The Board associates a portion of this degree with the U.S. equivalent of Grade 12. Following the implementation of the Tennessee Diploma Project in 2009, high school students must complete 22 credits in Grade 12.[27] This leaves Ms. Panasci with 36 credits from Marianopolis College. Ms. Panasci then obtained 129 credits from the University of Ottawa.[28] Finally, Ms. Panasci obtained 24 additional credits from the Elisabeth Haub School of Law at Pace University.[29] She obtained these credits **before** sitting for the bar exam. This leaves Ms. Panasci

[21] A.R. 29-30, 33-34.
[22] A.R. 33-34.
[23] A.R. 25.
[24] A.R. 2, footnote 2.
[25] A.R. 35-7.
[26] A.R. 14, 58.
[27] A.R. 14, 38.
[28] A.R. 53-66, 33-34; 35-7. Identical to the BA/J.D. program offered at the University of Tennessee at Knoxville, the BCL/J.D. program offered at the University of Ottawa allows students to participate in a joint degree program, wherein the classes that overlap between both degrees can be applied toward the requirements for both degrees.
[29] A.R. 59-60.

with a total of 189 credits, whereas an applicant, who is eligible for admission in Tennessee, only earns 179 credits at the University of Tennessee at Knoxville.

c) Ms. Panasci's education is equivalent to the rigor of the requirements for a law degree in the United States.

Ms. Panasci provided proof in her application for admission that she has taken over 47 law classes in both Canada and the United States.[30] These classes include the standard classes required to obtain a J.D. and substantially more:

1. Contracts
2. Torts
3. Property
4. Civil Procedure
5. Bankruptcy and Insolvency Law
6. Real Estate Transactions
7. Commercial Law
8. Wills and the Law of Succession
9. Criminal Law
10. Corporate Law
11. Professional Liability
12. Land Use Law
13. Family Law
14. Constitutional Law I
15. Constitutional Law II
16. Introduction to US Legal Research
17. Introduction to the American Legal System
18. Agricultural Law and the environment
19. Sustainable Development Law Survey
20. Climate adaptation and the Law
21. Sovereign Debt and Financial Crises
22. Studies in Common Law and Equity (Trusts under common law)
23. Foundations of Law
24. Property Law (under the civil law legal system)
25. Public Law, Fundamentals
26. Obligations I (i.e., contract law under the civil law legal system)
27. Obligations II
28. Obligations III
29. Judicial Law I (i.e., civil procedure under the civil law legal system)
30. Dispute Resolution
31. Administrative Law
32. Intellectual Property

[30] A.R. 6-7; 14-5, 46-7, 63-6.

33. Cyberlaw
34. Health Law
35. Children's Law
36. Successions (poor translation: inheritance law)
37. Environmental Law
38. Food Law
39. Selected issues in International law: Latin America and Canada
40. Legal Briefing
41. Human Rights in International Law
42. International Economic Law
43. International Environmental Law
44. International Human Rights Law
45. Private International Law
46. Rights and Freedoms
47. Family Patrimony Law

ii. *Ms. Panasci is an American attorney in good standing.*

An applicant who has studied in a foreign country may qualify to take the New York State bar exam by submitting to the New York State Board of Law Examiners satisfactory proof of education earned prior to the bar exam that is substantially equivalent both in duration and substance to the education provided by an accredited institution in the United States. N.Y. Comp. Codes R. & Regs. tit. 22, § 520.6. On March 6, 2020, after a thorough six-month-long review of Ms. Panasci's transcripts, and before Ms. Panasci completed her LL.M, the New York Board of Law Examiners determined that Ms. Panasci was eligible to sit for the UBE.[31]

On December 16, 2020, Ms. Panasci received a letter from the New York State Board of Law Examiners, congratulating her for passing the UBE on her first attempt, ranking in the 90th percentile out of the 4,319 successful candidates.[32] Ms. Panasci was duly licensed and admitted to practice law in New York on June 4, 2021 and is currently in good standing.[33]

iii. *Ms. Panasci is an active citizen of the United States and the State of Tennessee.*

[31] A.R. 24.
[32] A.R. 23; *see also*, Press release, New York Board of Law Examiners (Dec. 16, 2020), https://www.nybarexam.org/Press/OCT2020BarExamResults_PressRelease_12.16.2020.pdf
[33] A.R. 61-2.

Ms. Panasci is the daughter of an Italian-American oncologist and French-Canadian nurse. After graduating from Georgetown University, Ms. Panasci's father, Dr. Lawrence Panasci, moved to the city of Montreal in order to join the world-renowned McGill University and associated teaching hospital as the Director of Medical Oncology in 1980. Although she was born abroad, Ms. Panasci always dreamed of returning to the U.S. as a citizen. Moreover, Ms. Panasci longed to be connected with her family members, most of whom continue to reside in the U.S. Ms. Panasci first moved to New York, where opportunities presented themselves to her. Once she passed the UBE, Ms. Panasci relocated to Tennessee so that she could live and work near her significant other, who is a Tennessee native and Vanderbilt Oral and Maxillofacial Surgery resident. Ms. Panasci intended to move to Tennessee before applying for admission on UBE transfer. As a matter of fact, Ms. Panasci took the Multistate Professional Responsibility Examination (MPRE) in Nashville, Tennessee, despite having sat for the New York administration of the UBE.

Since moving to Tennessee in 2020, Ms. Panasci has been heavily involved in the local economy. She was hired by a local firm that dedicates at least 10% of its business to pro bono work and has volunteered her time as a mentor for numerous organizations, including but not limited to, the Nashville Entrepreneur Center, Launch Tennessee, Ag Launch, the Tennessee Small Business Development Center, and the Company Lab in Chattanooga.[34] She also joined the boards of the French American Chamber of Commerce of Tennessee and the Nashville Social Enterprise Alliance. Most recently, Ms. Panasci was elected as a director for the national Social Enterprise Alliance and honors Tennessee's social enterprises on a national level.

iv. *The Executive Director's Initial Denial.*

[34] A.R. 17.

On March 3rd, 2021, Ms. Panasci applied for admission on transferred UBE score under the provisions of Rule 7 § 7.01. On November 10, 2021, Ms. Panasci received an unexpected email from the Executive Director of the Board of Law Examiners, Lisa Perlen, stating that Ms. Panasci's foreign degrees "do not **equate** to the requirements for a U.S. Bachelor's degree **and** J.D. degree."[35]

The Director's analysis of Ms. Panasci record is riddled with contradictions. On the one hand, Ms. Perlen states, "the determination of substantial equivalence is not a de facto calculation of credit hours, nor is it a cursory review for multiple degrees," on the other, Ms. Perlen states, "the total credit hours earned for the Canadian J.D. fall short of the number of credit hours required for a J.D degree in the United States."[36] Moreover, Ms. Perlen acknowledges that Ms. Panasci obtained an LL.M degree in the U.S. prior to sitting for the UBE; however, without giving a reason, Ms. Perlen claims "that [the LL.M] does not factor in to a computation of substantially equivalent education under Tenn. Sup. Ct. R. 7, Sec. 7.01(a)."[37] All degrees earned before taking the bar examination should be included in the analysis of substantial equivalency under Rule 7. Tenn. Sup. Ct. R. 7 § 2.01.[38] Thus, each and every time the Board applied the requirements of Rule 7 to Ms. Panasci's case, it did so in accordance with its erroneous belief that an applicant's foreign education must include nothing less and nothing more than two degrees that are strictly equivalent to a U.S. Bachelor's degree and U.S. J.D. degree.

v. *The IEE Foreign-Education Report.*

The sole evidentiary basis for Ms. Perlen's conclusion that Ms. Panasci did not satisfy the requirements of Rule 7 was a Foreign-Education Report completed by International Education

[35] A.R. 3.
[36] A.R. 2-3.
[37] A.R. 2, footnote 2.
[38] "Bachelor's degree or higher."

Evaluations ("IEE"). The IEE report specifically concluded that Ms. Panasci's foreign education (i.e., not considering her LL.M.) is equivalent to: (1) a US high school diploma plus 1 year of undergraduate credit (2) "a first degree in law" [though Ms. Perlen conveniently left this "first degree in law" language out of her decision]/a Bachelor of Arts degree in Legal Studies," and, (3) a Master of Legal Studies degree – Ms. Perlen deemed these qualification to escape the requirement of Rule 7.[39] Curiously, however, the IEE report was prepared anonymously and was not signed – rendering its author's credentials (if any) both unknown and unknowable. Ms. Panasci, who was not offered a copy of the evaluation before it was sent to the Board, sought to ascertain the skillset of the anonymous author upon receipt of Ms. Perlen's decision; however, IEE refused to offer such information.[40] Rather, the CEO of IEE explained in an email:

> Note that IEE does not use the J.D. equivalency in any of our evaluations; again, this is standard in the credential evaluation field. We instead use the terminology "First professional degree in law" to signify that the degree qualified you to work in the law field in Canada. This is because there is no exact equivalency for many professional degrees in the US, including the J.D. as well as degrees in medicine, pharmacy, and physical therapy, among others. The "first professional degree" terminology is used for all such degrees. Here are some examples so that you can get a fuller picture of IEE's practice:
>
> • A law degree in the US is the Juris Doctor (J.D.). IEE equates an international law degree to the "First Professional Degree in Law" in the United States.
> • A pharmacy degree in the US is the Doctor of Pharmacy (PharmD). IEE equates an international pharmacy degree to the "First Professional Degree in Pharmacy" in the United States.
> • A physical therapy degree in the US is the Doctor of Physical Therapy (DPT). IEE equates an international physical therapy degree to the "First Professional Degree in Physical Therapy" in the United States.
> • A medicine degree in the US is the Doctor of Medicine (MD). IEE equates a medical degree to the "First Professional Degree in Medicine" in the United States.
>
> I hope that example of common IEE equivalencies for professional degrees was helpful. Since IEE's evaluation of your degree states "First Professional Degree in Law" it is correct according to our current policies and therefore cannot be changed. It also may be possible to seek a 2nd opinion from another evaluation agency, but

[39] A.R. 2, 5-8.
[40] A.R. 6-7, 52.

> I am not currently aware of any that use the term "Juris Doctor" in their equivalency (emphasis added).[41]

Following IEE's application of the NACES standards, it is impossible to obtain a report that concludes substantial equivalency to a J.D. For this reason, it is the Board's strict reliance on the wording of the IEE report that is at issue in Ms. Panasci's case.

Under Rule 7, the Foreign-Education Report is meant to enable the Board to make an informed decision. Tenn. Sup. Ct. R. 7 § 7.01. The report itself should not have a conclusionary determination of each application before the Board. Indeed, the IEE report suggests that it is not authoritative—instead, it is labeled "an advisory opinion" that is in no way "binding on any U.S. institution, agency, or organization, each of which has the authority to make decisions that it chooses regarding the application of [IEE's] educational equivalencies."[42]

vi. *The IACEI Foreign-Education Report.*

Because IEE has only been a NACES member since May 2018, Ms. Panasci sought a second opinion from International Academic Credential Evaluators, Inc. ("IACEI"), a NACES member since 2006.[43] IACEI conducted an exhaustive review of Ms. Panasci's foreign credentials and concluded that Ms. Panasci's foreign education was literally equivalent to an American undergraduate degree and Juris Doctorate degree.[44] In sharp contrast to the IEE report, the author of the IACEI report detailed her respective credentials to the Board.[45] Not only did the IACEI report demonstrate that IEE's interpretation of NACES standards is flawed and should be excluded

[41] *Id*.
[42] A.R. 8.
[43] National Ass'n of Credential Evaluation Services, NACES.ORG, https://www.naces.org/members (last visited Apr. 25, 2022).
[44] A.R. 45-47. "a Bachelor's Degree or higher from a college on the approved list of the Southern Association of Colleges and Secondary Schools […] or any accreditation agency imposing at least substantially equivalent standards before taking his or her first bar examination." Tenn. Sup. Ct. R. 7 §§ 2.01.
[45] A.R. 47.

as incompetent evidence, but the IACEI report also confirmed that Ms. Panasci met the precise requirements of Rule 7.[46]

vii. *The Board's Order.*

Considering certain information was lacking, and other information was misapplied, Ms. Panasci afforded the Board an opportunity to rectify Ms. Perlen's arbitrary and capricious conclusion by submitting, through counsel, a formal petition requesting the Board to reverse its previous decision.[47] Ms. Panasci requested that the Board look at her application as a whole, rather than blindly abiding by the conclusion of one highly deficient IEE report.

On March 10, 2022, however, the Board affirmed Ms. Perlen's denial in a written order signed by all five members (the "Board's Order").[48] Ultimately, the Board found that the IACEI report did not "establish substantial equivalency to a U.S. Bachelor's degree **and** J.D. degree" and held that Ms. Panasci has not demonstrated equivalence to "**both** degrees."[49] The Board gave no reasoning as to why the IACEI report is deficient nor as to why it chose to stray away from the requirements of Rule 7.

viii. *Tennessee's ad hoc waiver practice.*

The Tennessee Board of Professional Responsibility has provided Ms. Panasci with proof of 153 foreign-educated attorneys who have been granted admission in Tennessee.[50] Eighty-six of these attorneys were educated in Korea, practice in Korea, and merely obtained admission to practice in Tennessee as a credential.[51] Chiefly, many of these attorneys studied in a civil law

[46] It is clear, by the IACEI report, that NACES members can use the term "J.D."
[47] A.R. 12-22.
[48] A.R. 48-51.
[49] A.R. 50.
[50] A.R. 53. This information is also generally accessible (see, Online Tennessee Attorney Directory, TBPR.ORG, https://www.tbpr.org/for-the-public/online-attorney-directory (last visited Apr. 28, 2022).
[51] A.R. 53; *See*, Attorney Details, TBPR.ORG, https://www.tbpr.org/attorneys/029318 (last visited Apr. 28, 2022).

system based on comprehensive legal codes and laws rooted in Roman law, as opposed to common law:

- Addis Ababa University (3 attorneys; Ethiopia)
- Autonomous University of Barcelona (1 attorney; Barcelona)
- Far Eastern University (1; Philippines)
- Hebrew University of Jerusalem (1; Israel)
- Hugh Wooding Law School (1; Trinidad and Tobago)
- Lomonosov Moscow State University (1; Russia)
- Mumbai University (2; India)
- Nigerian Law School (9; Nigeria)
- Osmania University Law School (1; India)
- Tanta University (1; Egypt)
- Universidad Catolica Andres Bello (1; Venezuela)
- University College of Rhodesia (1; Zimbabwe)
- University of Bucharest (1; Romania)
- University of Haifa (1; Israel)
- University of Helsinki (1; Finland)
- University of Nigeria (2; Nigeria)
- University of the Philippines (1; Philippines)

Ms. Panasci is also aware of a Tennessee attorney who was educated in the province of Quebec and obtained the same BCL/J.D degree as Ms. Panasci. *See*, Attorney Details, TBPR.ORG, https://www.tbpr.org/attorneys/028792 (last visited Apr. 25, 2022).

The Board has given no reasons as to why Ms. Panasci was not granted a similar discretionary waiver. This is particularly disturbing in light of the fact that at least one, Maximiliano Gluzman, and allegedly other similarly situated applicants, have been granted relief of the requirements of Rule 7 by this Court. *Gluzman,* No. M2016-02462-SC-BAR-BLE (Sup. Ct., August 4, 2017). Similar to Ms. Panasci, Mr. Gluzman, who had received a Bachelor of Arts and a J.D. in Argentina and an LL.M in the United States, was denied the opportunity to sit for the bar exam in Tennessee due to the substantially equivalent requirement. *Id*. This Court granted Mr. Gluzman's Petition for Writ of Certiorari and entered an order exercising its discretion to allow Mr. Gluzman to sit for the Tennessee bar examination without applying the requirements of Rule

7 or making a finding regarding the Board's decision. *Id.*[52] In doing so, the Board and this Court have made available to bar applicants who do not meet the requirements of Rule 7 an *ad hoc* procedure by which they may nevertheless seek admission.

VII. Summary of Arguments

The Board's Order erroneously held that Ms. Panasci did not satisfy the requirements of Rule 7 § 7.01. In reaching that conclusion, the Board applied an incorrect legal standard by holding that Rule 7 required two separate degrees in the strictest sense and by ignoring Rule 7's unambiguous requirement that merely "substantial" equivalence is sufficient. Whether the Board applied the proper legal standard under Rule 7 is a question of law that this Court reviews de novo. *See, e.g., Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs. Inc.*, 418 S.W.3d 547, 553 (Tenn. 2013) ("Statutory interpretation is a question of law, which we review de novo."). Had the Board applied the correct legal standard to her case, Ms. Panasci would have been granted admission on transferred UBE score. Three separate reasons militate in favor of this conclusion:

First, although Ms. Panasci's four degrees do not strictly fit the mold of "two degrees" obtained under a traditional framework in the U.S., Ms. Panasci's foreign education was substantially superior to the requirements of Rule 7 §§ 2.01 and 2.02.

Second, in the alternative, any reasonable interpretation of the term "substantially equivalent" compels the conclusion that Ms. Panasci's foreign education was at least substantially equivalent to the requirements of Rule 7 §§ 2.01 and 2.02.

Third, Ms. Panasci easily made a *prima facie* showing that her foreign education was substantially equivalent to the requirements of Rule 7 §§ 2.01 and 2.02. That showing should have been subject to a rebuttable presumption of correctness, which the Board did not rebut.

[52] Note that this decision was also made before Tennessee made a commitment to grant reciprocity to attorneys licensed in UBE jurisdictions.

During the proceedings below, the Board also failed to comport with the requirements of procedural due process guaranteed by Article I, Section 8 of the Tennessee Constitution, roughly analogous to the Fifth Amendment's Due Process clause as applied to the states through the Fourteenth Amendment (i) by making available to bar applicants who do not meet the requirements of Rule 7 an *ad hoc* procedure by which they may nevertheless seek admission, (ii) by failing to exclude incompetent evidence from the record, (iii) by failing to consider all of the competent evidence included in the reliable authored report by IACEI without adequate reasoning, and (iv) by discounting the importance of Ms. Panasci's fundamental right to practice law.

The Board's decision to include the IEE report and ignore the IACEI report is subject to review for abuse of discretion. *Biscan v. Brown*, 160 S.W.3d 462, 468 (Tenn. 2005) ("We review the trial court's decision to admit or exclude evidence by an abuse of discretion standard.") The Board's failure to comport with the requirements of procedural due process and substantive due process is subject to de novo review. De novo review is appropriate when reviewing Constitutional issues. *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009) (citing *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008)).

Moreover, independent of these issues, there is no legitimate doubt that Ms. Panasci is qualified to practice law in Tennessee. Consequently, this Court should permit Ms. Panasci to be admitted on transferred UBE score as a matter of equity pursuant to its exclusive and inherent authority to oversee attorney licensing in the State of Tennessee.

Finally, by categorically excluding Ms. Panasci from admission to the bar in Tennessee solely on the basis of Ms. Panasci's association with a foreign education system, the Board unconstitutionally violated Ms. Panasci's right to Equal Protection guaranteed by the United States Constitution and Tennessee Constitution.

VIII. Argument

A. The Board acted contrary to law or arbitrarily in denying Ms. Panasci's application on transferred UBE score.

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

Ms. Perlen, through the Board, initially denied Ms. Panasci's application on the basis that her education did "not **equate** to the requirements for a U.S. Bachelor's degree **and** J.D. degree."[53] Ms. Perlen and the Board's interpretation of Rule 7 is erroneous in four ways:

First, Rule 7 § 7.01 clearly states that foreign-educated applicants must satisfy the Board that their education was "substantially equivalent" to the educational requirements of Rule 7 §§ 2.01 and 2.02. It is undisputed that the legal standard is of substantial equivalency and not of equivalency; however, Ms. Perlen's consistently applied an erroneous equivalency standard during Ms. Panasci's case.[54]

Second, Rule 7 § 7.01 does not require foreign applicants to demonstrate substantial equivalency through proof of a specific number of degrees or credits. Pursuant to *Gluzman*, this Court clarified that the strict formality of two separate degrees is not required under Rule 7. *In re: Principal Brief for the Petitioner*, Case No. M2016-02462-SC-BAR-BLE (Sup. Ct., August 4, 2017). However, Ms. Perlen erroneously denied Ms. Panasci's application on the basis that she did not show two separate degrees with "total credit hours of study equivalent to those degrees in the United States."[55] The Board ultimately confirmed Ms. Perlen's wrongful application of Rule 7 in the Board's Order when it denied Ms. Panasci's formal petition on the basis that she did not satisfy the board of "both degrees."[56]

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[53] A.R. 3.
[54] A.R. 1-4.
[55] A.R. 2.
[56] A.R. 50.

Third, Ms. Perlen's decision and the Board's Order claim that Ms. Panasci has failed to establish "equivalency to a U.S. Bachelor's degree and J.D. degree."[57] Rule 7 does not require substantial equivalency to a "U.S. Bachelor's degree and J.D. degree," rather it requires substantial equivalency to: "a Bachelor's Degree or higher from a college on the approved list of the Southern Association of Colleges and Secondary Schools… or any accreditation agency imposing at least substantially equivalent standards" and "a J.D. Degree from a law school accredited by the ABA." Tenn. Sup. Ct. R. 7 §§ 2.01, 2.02 (emphasis added). Of note, the IACEI report provided this precise language as required by Rule 7.[58]

Fourth, in the Order on Petition, the Board erroneously states that it lacks the discretion to assess Ms. Panasci's education as a whole and refuses to look beyond the plain language of the incompetent IEE Foreign-Education Report. Most egregiously, the Board advises Ms. Panasci to bring this matter to this Court who has such discretion.

> Rule 7, §§ 2.01 and 2.02, in combination with Rule 7, § 3.05, do not appear to contemplate how additional, valuable education—such as an LL. M. from an ABA-accredited law school—might factor into educational equivalence under Rule 7, § 7.01(a). But the Board lacks the discretion to deem Ms. Panasci's education substantially equivalent based on her additional education in the LL. M. from Pace University. Had the Board possessed such discretion, **it would likely have exercised it here**. The Supreme Court does have such power and might, on further review, choose to deem her education to be substantially equivalent.[59]

However, in *Gluzman*, the Board argued that "[t]he Board, which functions as the agent of this Court, has **broad discretion**." *In re: Brief of Respondent Tennessee Board of Law Examiners*, Case No. ADM2017-00785. Rule 7 § 7.01(a) also clearly grants such discretion to the Board:

> An applicant who has completed a course of study in and graduated from a law school in a foreign jurisdiction, which law school was then recognized and approved by the competent accrediting agency of such jurisdiction, may qualify, **in the discretion of the Board**, to take the bar examination or for admission by

[57] A.R. 50.
[58] A.R. 45-47.
[59] A.R. 50.

> transferred UBE score under section 3.05, provided that the applicant shall satisfy the Board that his or her undergraduate education and legal education were substantially equivalent to the requirements of sections 2.01 and 2.02 of this Rule.

Per IEE's analysis of the NACES standards, if the Board categorically refuses to exercise such discretion, the Board's application of Rule 7 effectively denies admission to any foreign-educated applicant having obtained a report from IEE, a NACES member that appears on the list of organizations approved by this Court and the Board.

Simply put, the record reflects that: (i) Ms. Perlen, through the Board, denied Ms. Panasci's application for admission on transferred UBE score because she did not have two separate legal degrees that were strictly equivalent to a U.S. Bachelor's degree and J.D. degree, and (ii) the Board denied Ms. Panasci's formal petition because it erroneously believed it did not have the discretion to approve Ms. Panasci's application for admission. Accordingly, the Board acted contrary to law (i) by applying an equivalency standard to Ms. Panasci's application, (ii) by applying a dual-degree standard to Ms. Panasci's application, (iii) by requiring Ms. Panasci to establish equivalency of a "U.S." Bachelor's degree and J.D. degree contrary to Rule 7's requirements, and (iv) by erroneously believing it did not have the discretion that "it would likely have exercised" to review Ms. Panasci's education as a whole.

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

a. Ms. Panasci's foreign education was substantially superior to the requirements of Rule 7 §§ 2.01 and 2.02.

In support of Ms. Panasci's claim that her education was substantially superior to the requirements of Rule 7, Ms. Panasci introduced a Foreign Education Report performed by IACEI that confirmed that Ms. Panasci's foreign education was at least equivalent to a U.S. undergraduate degree and J.D. degree, both earned through education institutions that are "accredited by a

regional accreditation association."[60] In stark contrast to the incompetent IEE report, Dr. Linda Riley, the Director of IACEI, personally authored the report.[61] Dr. Riley has over 40 years of foreign credential evaluation experience, having served as Director of International Admissions at the University of North Texas (UNT), a position from which she retired in 2001. In that position, she was responsible for graduate and undergraduate international admissions. Prior to UNT, Dr. Riley was employed as a foreign credential evaluator and admissions counselor at the University of Nebraska at Omaha. Dr. Riley also served on the International Education Committee of the American Association of Collegiate Registrars and Admissions Officers (AACRAO) and was a chair of the Projects for International Educational Research (PIER) Committee of AACRAO and NAFSA. She is co-author of the Educational System of France published by AACRAO, co-author of the Educational System of Canada published by PIER, and other NAFSA publications. Dr. Riley also served as the Editor of the NAFSA wRAP newsletter (Recruitment, Admissions, and Preparation). *See*, International Academic Credential Evaluators, IACEI.NET, https://www.iacei.net/about-us (last visited Apr. 25, 2022). Chiefly, Dr. Riley, an expert in French and Canadian credential evaluation, provided significant affirmative evidence that Ms. Panasci satisfied the criteria set forth in Rule 7. The IACEI report alone should be considered sufficient to accept Ms. Panasci's application. *See, e.g.*, *Application of Collins-Bazant*, 578 N.W.2d 38, 44 (Neb. 1998) (stating that the "most important" factor in determining whether a foreign applicant is qualified to take the bar exam is whether "there is affirmative evidence in the record that [the applicant] received a legal education functionally equivalent to that available at an ABA-approved law school"). Additionally, because the incompetent, anonymous, unreliable, untestable, and unsworn hearsay report completed by IEE should have been excluded, Dr. Riley's Foreign-

[60] A.R. 45-7.
[61] *Id*.

Education Report is also the only admissible Foreign-Education Report provided to the Board. As such, this Court can confidently reverse the Board's decision on the strength of Dr. Riley's evaluation alone. *See, e.g.*, *Green v. Neeley*, No. M2006-00481-COA-R3CV, 2007 WL 1731726 (Tenn. Ct. App. June 15, 2007) (holding that uncorroborated hearsay cannot be the "sole evidence" provided in administrative proceedings).

The substance of Ms. Panasci's legal education also palpably supports the conclusion that she has more than satisfied the requirements of Rule 7. In comparable cases, for example, state supreme courts seeking to determine whether a foreign applicant's credentials were sufficient have focused on whether the applicant completed certain "core courses deemed minimally necessary to be a properly- trained attorney"—such as "civil procedure, contracts, Constitutional law, criminal law, evidence, family law, torts, professional responsibility, property, and trusts and estates." *See, e.g.*, *In re Brown*, 708 N.W.2d 251 (Neb. 2006) (internal citations and quotations omitted). Based on this consideration, foreign applicants have reasonably been denied admission when, for example, they had never taken legal courses that are typical of the coursework required to obtain an American Juris Doctor degree. *See, e.g.*, *Jia v. Bd. of Bar Examiners*, 696 N.E.2d 131, 137 (Mass. 1998) ("Of the core courses typically required of a Juris Doctor candidate, the petitioner successfully completed only one, contracts."). *See, also, In re Paniagua de Aponte*, 364 S.W.3d 176, 181 (Ky. 2012) ("The Applicant's course work, which focused on international and business law subjects, was doubly narrow, and was thus unlikely to give her a sense of American law as a whole. The only course she took that appears to fall into the core of American legal education, in the sense of being a subject of the bar exam, was her course on corporations."). In stark contrast, however, Ms. Panasci's education most certainly did "include exposure to a range of foundational substantive areas of law." *In re Brown*, 708 N.W.2d at 901. With respect to the aforementioned

foundational subjects such as "civil procedure, contracts, Constitutional law, criminal law, commercial law, family law, torts, professional responsibility, property, and trusts and estates," for example, Ms. Panasci has taken all of them. Ms. Panasci provided proof in her Application for Admission that she has taken over 47 courses of legal study in both Canada and the United States.[62] These include the standard classes required to obtain a U.S. J.D. and substantially more. Ms. Panasci also earned at least ten credits above the average graduate from the University of Tennessee at Knoxville's dual degree program.[63]

The contrast between Ms. Panasci's academic record and the academic records of unqualified foreign applicants becomes even more apparent when one considers that Ms. Panasci attended a North American university and studied English Common Law. The Canadian and American legal systems are arguably the most similar of any two countries in the world as a result of language, geography, history, economy, the common law, and culture. The two countries enjoy the largest two-way trade relationship anywhere globally by far. In addition, Ms. Panasci supplemented her Canadian coursework with a Pace Law School LL.M. degree that focused on American environmental law. To obtain her LL.M. degree, Ms. Panasci not only completed a majority of her graded course work in core American legal courses in which she competed against American law students, earning *summa cum laude* honors while doing so, but Ms. Panasci also worked as a legal fellow for the university.[64] As a legal fellow, Ms. Panasci supervised the client work of U.S. J.D. candidates in the Pace Pro Bono Food and Beverage Law clinic and assisted the clinic's director with teaching a seminar for the clinic participants. Ms. Panasci literally furthered the core

[62] A.R. 6-7; 14-5, 45-7.
[63] A.R. 12-22.
[64] A.R. 59-60; see also, Food and Agriculture Law LLM Graduate Fellow, https://law.pace.edu/sites/default/files/environmental/Food_and_Agriculture_Law_LLM_Graduate_Fellow_AY20-21.pdf.

curriculum at an ABA-approved law school. Consequently, Ms. Panasci's record of academic achievement is at least equivalent to a typical U.S. legal education, if not substantially superior. *Osakwe v. Bd. of Bar Examiners*, 858 N.E.2d 1077, 1083 (Mass. 2006) "A review of Osakwe's transcripts reveals that he has taken a wide array of courses, many of them offered as part of the core curriculum at ABA-approved law schools. His transcript from the University of Nigeria shows courses in property, torts, contracts, evidence, Constitutional law, land law, equity, jurisprudence, company law, international law, and commercial law. . . Osakwe has shown that he has sufficient education in and exposure to American law to satisfy our 'particular' analysis under S.J.C. Rule 3:01, § 3.4."); *Application of Schlittner*, 704 P.2d 1343, 1344 (Ariz. 1985) (approving foreign applicant who completed courses in which "the subjects taught were comparable to subjects taught in an American law school").

Above all, Ms. Panasci has successfully passed the UBE and is admitted to practice law in New York. Having scored 39 points above Tennessee's minimum passing total UBE scaled score, whereas only 41% of Tennessee's approved test-takers passed the recent administration of the UBE in February 2022, Ms. Panasci has offered undeniable affirmative evidence that her education gave her the necessary tools to succeed in the bar exam which is the very essence of Rule 7 and that she is more than qualified for admission to the bar in Tennessee. *See*, February 2022 Bar Exam, NCBEX.ORG, https://www.ncbex.org/statistics-and-research/bar-exam-results/ (last visited Apr. 27, 2022).

In sum: Ms. Panasci has provided affirmative evidence supporting a finding that her academic record is substantially superior to the requirements of Rule 7. It qualified her to sit for the UBE, it qualified her to pass the UBE on her first attempt and rank in the 90th percentile, it qualified her to be admitted to the bar in New York, and it should qualify her to be admitted to the bar in Tennessee

as a result. Based on the evidence provided, the Board should have come to this conclusion without the need to exercise discretion. In the alternative, the Board should have applied the discretion granted under Rule 7 to resolve any doubts about the equivalency of Ms. Panasci's education.

b. In the alternative, Ms. Panasci's education is substantially equivalent to the requirements of Rule 7 §§ 2.01 and 2.02.

Ms. Panasci provided two Foreign-Education Reports performed by NACES members to the Board. It is undisputed, even by the IEE report, that Ms. Panasci received the foreign equivalent of a U.S. J.D.[65] The reports disagree, however, on Ms. Panasci's undergraduate degree. For purposes of determining which of these reports is more reliable, it is worth noting that the IACEI report was the only authored report and Dr. Riley's qualifications, as stated above, suggest that the IACEI report is the most reliable. Reports performed by IEE have also been disregarded by reviewing courts in prior cases. *See, e.g.*, *Tisco Group, Inc. v. Napolitano,* No. 09-CV-10072, 2010 WL 3464314 (E.D. Mich. Aug. 30, 2010) ("the Court finds that the reports of IEE and FCSA do not establish a basis for the conclusions reached by IEE and FCSA in their respective reports"). There are no similar cases disregarding IACEI reports. Further, in *Gluzman*, this Court relied on an IACEI report over another NACES member report, substantiating the reliability of the company. No. M2016-02462-SC-BAR-BLE (Sup. Ct., August 4, 2017).

Because these organizations came to completely different conclusions while following the same NACES standards, the Board should not rely purely on the conclusions of either report but rather should review <u>all</u> the evidence provided by the applicant. In 2017, the University of Tennessee College of Law and Vanderbilt Law School observed in a petition to this Court filed in

[65] A.R. 2, 5-8, 46, 52. The anonymous IEE report that the Board relied on to deny Ms. Panasci's application concluded that Ms. Panasci's CEGEP degree was equivalent to "1 year of undergraduate credit" and that her joint BCL/J.D. degree was equivalent to a "first degree in law" plus a "Master of Legal Studies degree." Ms. Perlen conveniently omitted the "first degree in law" language in her decision to deny Ms. Panasci's application; however, this wording is of the utmost importance given that IEE equates the "first degree in law" to a U.S. J.D.

support of *Gluzman* that "[t]he phrase 'substantially equivalent' is undefined in the rule," and "[t]he term 'substantially equivalent' is an inherently ambiguous phrase."[66] *Petition to Amend Tennessee Supreme Court Rule 7, § 7.01*, Case No. ADM2017-00785. In the context applicable to Rule 7, however, Black's Law Dictionary defines "substantial" as "[c]ontaining the essence of a thing, . . . even if not the exact details." Black's Law Dictionary (10th ed. 2014). This definition also comports with this Court's own use of the term "substantial" in the context of its "substantial compliance" jurisprudence, in which it has stated that "substantial" means "the essence of the thing to be accomplished." *Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 309 (Tenn. 2012) (quoting 3 Norman J. Singer & J.D. Singer, Statutes and Statutory Construction § 57:2 (7th ed. 2008)). As applied to Rule 7 § 7.01, "the essence" of what the rule requires is a comprehensive course of study similar to the education completed by American bar applicants that adequately prepares these applicants for success in the bar exam. The Board of Professional Responsibility of the Supreme Court of Tennessee itself observed in its Spring 2018 Board Notes that the "essence" of what Rule 7 requires is qualification to pass the bar exam:

> Around 2005, Tennessee became known as a "gateway" state because the licensing rule did not require U.S. legal studies, residency in Tennessee, a basis of learning in English common law, or licensing in the home country or another jurisdiction. Pass rates for foreign-educated applicants from 2007 – 2010 never reached 30%. With 67 foreign-educated applicants sitting in 2008, 114 in 2009 and 123 in 2010, the impact of foreign-educated applicants on exam results was similar to the impact of results from a Tennessee law school.
>
> The Supreme Court amended Rule 7, Section 7.01, in August 2010 and again in July 2011. […] In 2015, the pass rate for foreign-educated applicants was 60%; in 2017, it was 40%. Fewer were qualifying to take the exam, but those who did qualify were more likely to pass the exam.

Board Notes Spring 2018, (TBPR), Mar. 15, 2018, at 2-6 (emphasis added).

Ms. Panasci's education meets the "essence" of what the rule requires for four reasons:

[66] *In re: Petition to Amend Tennessee Supreme Court Rule 7, § 7.01*, Case No. ADM2017-00785 at 7.

First, to reiterate, there is no doubt that Ms. Panasci's education prepared her for success in the bar exam.[67] Other supreme courts have cautioned that "[A]dmission rules are intended to weed out unqualified applicants, not to prevent qualified applicants from taking the bar." *In re O'Siochain*, 842 N.W.2d at 770. Unlike 59% of the applicants who qualified under Rule 7 to take the bar exam this year and failed to meet Tennessee's minimum passing total UBE scaled score, Ms. Panasci passed the bar exam in 2020. She is now a mature, serious, hardworking American attorney who had no problem finding employment in Tennessee and has practiced pending admission under the supervision of several esteemed Tennessee attorneys, such as Bill Killian, former presidentially appointed and Senate confirmed United States Attorney for the Eastern District of Tennessee. On this ground alone, Ms. Panasci's education is at least substantially equivalent to that of an attorney educated in the U.S. insofar as both individuals have received sufficient education to pass a standardized competency exam for the practice of law in the U.S.

Second, the IACEI report confirmed that Ms. Panasci completed a comprehensive undergraduate and legal education similar to the education completed by American bar applicants. On this ground alone, Ms. Panasci's has met her burden of proof under Rule 7.

Third, under IEE's application of the NACES standards, it is impossible for any foreign applicant to obtain a report that confirms substantial equivalency *ipsissimis verbis* to a "U.S. Bachelor's degree and J.D. degree."[68] Requiring an applicant to provide a Foreign-Education Report that confirms those exact two labels effectively denies admission to any foreign-educated applicant having obtained a report from IEE. This absurd result could not realistically have been what this Court intended when it adopted Tennessee Supreme Court Rule 7 § 7.01. *See State v. Flemming, 19 S.W.3d 195, 197* (Tenn. 2000) ("we will not apply a particular interpretation to a

[67] A.R. 23.
[68] A.R. 52.

statute if that interpretation would yield an absurd result."). Pursuant to familiar rules of statutory construction, Rule 7 § 7.01 should not be interpreted in a manner that has the practical effect of reading its provisions out of existence. *See Midwestern Gas Transmission Co. v. Dunn*, No. M2005-00824-COA-R3-CV, 2006 WL 464113 (Tenn. Ct. App. Feb. 24, 2006). It is this reality that further compels this Court to reverse the Board's decision that failed to review all of the evidence provided by Ms. Panasci.

Fourth, the Board refused to recognize Ms. Panasci's four degrees as substantially equivalent on the basis that her undergraduate studies were law-related; however, there are universities across the country that provide students with the option of pursuing a Bachelor's in legal studies before a J.D.[69] The University of Memphis, for example, offers an Accelerated BA/J.D. program and lists the Bachelor's in Legal Studies as an adequate program for students who expect to attend law school after graduation.[70]

What matters for purposes of Rule 7 § 7.01—indeed, the only thing that matters—is whether the substance of an applicant's foreign education is substantially equivalent to a U.S. legal education. Plainly, IACEI, this Board, and the record confirm that Ms. Panasci's foreign education was indeed substantially equivalent, if not substantially superior, to the framework required under Rule 7. Under Rule 7, § 7.01, this is sufficient. *See, e.g., In re O'Siochain*, 842 N.W.2d at 770 ("Based on a de novo review, we conclude that O'Siochain [who completed a 4–year Irish law and business program,] has met his burden of proving his law school education and experience were functionally equivalent to the education received at an ABA-approved law school and that as a result, a waiver of the educational qualifications requirement of § 3–105(A)(1)(b) is appropriate."). Lest there be any lingering doubt about either Ms. Panasci's academic qualifications or her

[69] A.R. 3.
[70] A.R. 39-41.

substantive knowledge of American law, all such concerns are easily put to rest by her demonstrated mastery of American law on the bar exam.[71]

c. Ms. Panasci has made a *prima facie* showing that her education satisfies the requirements of Rule 7.

Based on the evidence that Ms. Panasci submitted in support of her application for admission on transferred UBE score, Ms. Panasci easily made a *prima facie* showing that her education satisfied the requirements of Rule 7. Having done so, this Court should adopt a rebuttable presumption that Ms. Panasci was qualified under the requirements of Rule 7, § 7.01, and the burden of production should then shift to the Board to prove that she was not.

Notably, such a burden-shifting framework is commonplace under Tennessee law; adopting the same standard under § 7.01 would not be unusual. *See, e.g.*, *Chorost v. Chorost*, No. M2000-00251-COA-R3CV, 2003 WL 21392065 (Tenn. Ct. App. June 17, 2003) ("Once an obligor parent makes out a *prima facie* case for modifying his or her child support, the burden shifts to the custodial parent to prove that the requested modification is not warranted by the guidelines."); *State v. Mathias*, 687 S.W.2d 296, 298 (Tenn. Crim. App. 1985) ("In order to rely upon the defense of entrapment, the defendant must make out a *prima facie* case of entrapment, whereupon the burden shifts to the state to show beyond a reasonable doubt that the defendant had the predisposition to commit the crime."); *Altman v. Altman*, 181 S.W.3d 676, 682 (Tenn. Ct. App. 2005) ("The party claiming that dissipation has occurred has the burden of persuasion and the initial burden of production. After the party alleging dissipation establishes a *prima facie* case that marital funds have been dissipated, the burden shifts to the party who spent the money to present

[71] *See*, Uniform Bar Exam, NCBEX.ORG, https://www.ncbex.org/exams/ube/#:~:text=The%20UBE%20is%20designed%20to,admission%20in%20other%20UBE%20jurisdictions (last visited Apr. 28, 2022).("[t]he UBE is "designed to test knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law. It results in a portable score that can be used to apply for admission in other UBE jurisdictions.").

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 (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 their inability to pay. If the defendant makes a *prima facie* case of inability to pay, the burden will then shift to the petitioner to show that the respondent has the ability to pay.") (internal citations omitted).

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

First, Tennessee law contemplates "a fundamental civil right" to earn a living that is subject to significant Constitutional and statutory protection. As this Court has previously explained: "The 'liberty' contemplated in [the Tennessee Constitution] means not only the right of freedom from servitude, imprisonment, or physical restraint, but also the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, vocation, trade, or profession, to make all proper contracts in relation thereto, and to enjoy the legitimate fruits thereof." *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 53 S.W. 955 (1899), aff'd, 183 U.S. 13, 22 S. Ct. 1, 46 L. Ed. 55 (1901) (emphasis added). This Court has repeatedly affirmed Tennessee's established public policy favoring citizens' "access to employment and the ability to earn a livelihood." *Yardley v. Hosp. Housekeeping Sys., LLC*, 470 S.W.3d 800, 806 (Tenn. 2015). Having enacted The Right to Earn a Living Act in 2016, the Tennessee General Assembly has expressly

affirmed Tennesseans' fundamental right to earn a living as well. *See*, Right to Earn a Living Act. 2016 Tenn. Pub. Acts. 1053. (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). Such reform efforts continued in 2018 when both houses of the general assembly passed SB 2465, the Fresh Start Act (codified at Tenn. Code Ann. § 62-76-1). This bill prohibits licensing authorities from denying a license based on a criminal conviction that does not directly relate to the occupation for which that person is seeking a license. *See*, Fresh Start Act, Tenn. Pub. Acts. 793. Consequently, based on Tennessee's long and consistently established public policy affirming Tennesseans' right to earn a living, the Board should err on the side of permitting qualified American lawyers to practice law in Tennessee under Rule 7 § 7.01, rather than prohibiting them from doing so.

Second, both the United States Constitution and the Tennessee Constitution incorporated several guarantees that were understood at the time of their ratification to descend from rights protected by Magna Carta. Magna Carta was a potent symbol of liberty and the natural rights of man against an oppressive or unjust government for 18th-century political thinkers like Benjamin Franklin, who pioneered the spirit of self-help in America and taught himself almost everything he knew with less than three years of formal schooling. Paul J. Larkin Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. PoL'Y 209, 259-260 (2016). In 1985, in *Supreme Court of New Hampshire v. Piper*, the Supreme Court of New Hampshire held that the lineage of the Privileges and Immunities Clause fully included the right to practice law because it is "important to the national economy" and because it "has a noncommercial role and duty." *Piper*,

470 U.S. 274 (1985). ("[T]he opportunity to practice law is a "fundamental" right within the meaning of *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978).") ("[t]he legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause.). *See, also, Nat'l Ass'n for the Advancement of Multijurisdictional Practice (NAAMJP) v. Castille*, 66 F. Supp. 3d 633 (E.D. Pa. 2014), *aff'd sub nom. Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Castille*, 799 F.3d 216 (3d Cir. 2015) ("Appellants are correct that the practice of law is a fundamental right for Privileges and Immunities purposes"). *See, also, Schoenefeld v. New York*, 748 F.3d 464 (C.A.2 (N.Y.), 2014) ("it appears that Section 470 discriminates against nonresident attorneys with respect to their fundamental right to practice law in the state and, by virtue of that fact, its limitations on non-resident attorneys implicate the Privileges and Immunities Clause."). Consequently, based on the United States' long and consistently established public policy affirming the view that the practice of law is a fundamental right, the Board should err on the side of permitting qualified lawyers to practice law in Tennessee under Rule 7 § 7.01, rather than prohibiting them from doing so.

Third, "business for the American legal services sector can grow by opening American law practice to more foreign-educated lawyers, and can thereby place the American market squarely in the stream of global commerce into which just about every other American business sector has entered." Jeffrey A. Van Detta, *A Bridge to the Practicing Bar of Foreign Nations: Online American Legal Studies Programs As Forums for the Rule of Law and As Pipelines to Bar-Qualifying LL.M. Programs in the United States*, 10 S.C. J. INT'L L. & BUS. 63, 67– 68 (Fall 2013). Tennessee is home to 1,000+ foreign-based businesses that have invested over $40.9 billion

in capital and employ more than 156,000 Tennesseans.[72] In 2021, the Tennessee Department of Economic and Community Development (TNECD) received 33 project commitments from foreign-owned businesses, resulting in 4,889 job commitments and $892 million in capital investment. These major foreign projects included French-owned Capgemini America Inc. (500 new jobs, $20.1 million in capital investment), among others. *Id*. Further, Canada and France both feature among the top 10 countries for Tennessee foreign direct investment. Together, the two countries own 160 establishments in the state, have employed 19,780 employees, and have generated $3,272,692,288 (Canada) plus $984,079,797 (France) in capital investment. *Id*. Chiefly, Tennessee has invested in a significant initiative to attract French businesses. It had even published an entire website in French at www.tnecd.com/france/.[73] On the TNECD webpage, the CEO & President of Schneider Electric, North America Operations, expresses her desire to preserve the company's commitment to the economic development of the state. *Id*. However, if the Board hinders the availability of French and North American educated U.S. lawyers in Tennessee, French and Canadian companies will be compelled to outsource their legal needs. As an active board member of the French Chamber of Commerce of Tennessee who is fluent in French and English, Ms. Panasci is heavily engaged with both French and Canadian companies that have relocated or are contemplating relocating to Tennessee. She is the ideal legal counsel for many of these companies. Consequently, reasonable and predictable admissions standards that presumptively admit foreign-educated American attorneys on transferred UBE score once they have made a *prima facie* showing that they are qualified to do so under Rule 7 § 7.01 would promote the economic well-being of the country and the state.

[72] *International Business*, TNECD.COM, https://tnecd.com/advantages/international/ (last visited Apr. 25, 2022).
[73] Nous Sommes Fiers de Servir la France, TNECD.COM, https://tnecd.com/france/ (last visited Apr. 25, 2022).

Fourth, the White House has ordered states to reduce the burden of occupational regulations in order to promote the free practice of commerce, lower consumer costs, and increase economic and geographic mobility. On December 14, 2020, former President Donald Trump signed an executive order on "Increasing Economic and Geographic Mobility" that built on his February 24, 2017 EO 13777 to alleviate regulatory burdens on occupational licensing. Exec. Order No. 13966, 85 Fed. Reg. 81777 (Dec. 14, 2020). The former president explains:

> Overly burdensome occupational licensing requirements can impede job creation and slow economic growth, which undermines our Nation's prosperity and the economic well-being of the American people. Such regulations can prevent American workers and job seekers from earning a living, maximizing their personal and economic potential, and achieving the American Dream. The purpose of this order is to reduce the burden of occupational regulations in order to promote the free practice of commerce, lower consumer costs, and increase economic and geographic mobility[.] [I]t is the policy of the United States Government to support occupational regulation reform throughout the Nation, building on occupational licensing reforms enacted most recently in Arizona, Florida, Iowa, Missouri, and South Dakota, guided by six principles:
>
> Principle 1. All recognized occupational licensure boards should be subject to active supervision of a designated governmental agency or office.
>
> ****
> Sec. 5. Definitions. For the purposes of this order:
> (a) "Active supervision" means:
> (i) reviewing proposed occupational licensure board rules, policies, or other regulatory actions that may restrict market competition prior to issuance;
> (ii) ensuring that any entity seeking to impose occupational licensing criteria adopts the criteria that are least restrictive to competition sufficient to protect consumers from significant and demonstrable harm to their health or safety[.]

Id.

President Biden upheld President Trump's occupational licensing ideals in Executive Order 14036, "Promoting Competition in the American Economy," signed on July 9, 2021, that sets forth 72 initiatives designed to address competition issues that the administration has identified as contributing to the harmful trends associated with corporate consolidation, decreased competition, and ultimately harming America's consumers, workers, and small businesses. Exec. Order No.

14036, 86 FR 36987 (Jul. 9, 2021). Specifically, President Biden encouraged the Federal Trade Commission ("FTC") to ban or limit unnecessary occupational licensing restrictions that impede economic mobility. In sum, U.S. public policy leans toward permitting U.S. lawyers to practice law in Tennessee once they have made a *prima facie* showing that they are qualified to do so under Rule 7 § 7.01 to promote the economic prosperity of the country.

Fifth, denying the comity application of a foreign-educated New York attorney who has made an indisputable showing that she is qualified to practice law in a UBE jurisdiction gives rise to serious concerns about raw economic protectionism that may violate both the United States Constitution and the Tennessee Constitution. *See, e.g., Craigmiles v. Giles*, 312 F.3d 220, 224, 2002 WL 31728831, (6th Cir. 2002) (invalidating protectionist statute under the 14th Amendment's Due Process Clause because "protecting a discrete interest group from economic competition is not a legitimate governmental purpose"); *Consumers Gasoline Stations v. City of Pulaski*, 292 S.W.2d 735, 737 (Tenn. 1956) ("Although [a] city may have the right to regulate [a] business, it does not have the right to exclude certain persons from engaging in the business while allowing others to do so. . . Being discriminatory in nature [,such a law] clearly violates Article I, Section 8 of the Constitution of Tennessee."). *See also,* Andrew M. Perlman, *A Bar Against Competition: The UnConstitutionality of Admission Rules for Out-of-State Lawyers*, 18 Geo. J. Legal Ethics 135 (2004) (arguing that protectionism inherent in foreign bar admission requirements violates Article IV's Privileges and Immunities Clause, the Fourteenth Amendment's Privileges or Immunities Clause, and the Dormant Commerce Clause). In fact, failing to guard Tennessee's bar application process against claims of protectionism could even subject the members of the Board of Law Examiners to antitrust liability. Braden H. Boucek, *Banned from the Bar Exam*, Beacon Center of Tennessee Blog (Feb. 7, 2017),

https://www.beacontn.org/banned-from-the-bar-exam/ ("In a recent Supreme Court development, the individuals who make up the board may now be held personally liable for their decisions. That is, they can be sued. The door for lawsuits to be filed against people on licensing boards who engage in anti-competitive activity is wide open. Whether the board members know it or not, no exception exists for lawyers who may be uniquely capable of, and therefore tempted into, rigging the regulatory landscape."). Further, the requirements of Rule 7 trespass 28 U.S.C § 1738. Every lawyer is admitted to the bar by a judgment of professional competence by an act and record of a state supreme court. Section 1738 commands that state supreme courts acts and records are entitled to full faith and credit. To overcome 28 U.S.C. § 1738, the *Rules Enabling Act*, and the Bill of Rights the Supreme Court should have the burden of proof to establish by clear and compelling evidence that the original state of licensing order of admission was secured by fraud, mistake, or duress. UBE jurisdictions are supposedly bound by a common undertaking – the transfer of bar exam scores. If the UBE is truly "portable" between Tennessee and New York, then deference should be afforded to the Board of Law Examiners of the state that assessed the foreign eligibility of an applicant's education prior to approving his or her application to sit for the UBE. The New York State Board of Law Examiners was satisfied that Ms. Panasci's education was substantially equivalent both in duration and substance to the traditional legal education that American bar applicants receive in the United States.[74] By going against the New York State Board of law examiners' decision and preventing the admission of a qualified U.S. citizen and attorney in Tennessee, the Board's Order on Admission risks upsetting the reciprocal unified process of bar admission, and violating the privileges and immunities clause of the US Constitution and 28 U.S.C § 1738. Accordingly, adopting a commonplace burden-shifting framework that would steer clear

[74] A.R. 24.

of such Constitutional concerns would be worthwhile for both applicants and the Board of Law Examiners alike.

Sixth, since 2008, the American Bar Association has included as one of its four goals to "[e]liminate Bias and Enhance Diversity," which includes two "objectives": "1. Promote full and equal participation in the association, our profession, and the justice system by all persons" and "2. Eliminate bias in the legal profession and the justice system." *See* Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 195, 201–02 & n.25 (2017). Both objectives are undermined by licensing requirements that disproportionately prevent bilingual French-Canadian American attorneys from becoming licensed in Tennessee. Consequently, ensuring that qualified foreign applicants like Ms. Panasci are not unnecessarily prohibited from practicing law in Tennessee is essential to promoting access to justice for all Tennesseans.

With these state and federal considerations in mind, a burden-shifting framework under Rule 7 § 7.01 is appropriate under circumstances where, as here, a foreign-educated US attorney has made a *prima facie* showing that she is qualified to practice in Tennessee. Once an applicant has made such a showing, there should be a rebuttable presumption that the applicant satisfies the requirements of Rule 7, and the burden of production should then shift to the Board to prove that the applicant does not. Applying that standard to the instant case, in the absence of satisfactory proof rebutting Ms. Panasci's *prima facie* showing that she is eligible for admission in Tennessee, the Board's Order should be reversed, and Ms. Panasci's petition be admitted to the bar in Tennessee should be granted.

3. *The Board failed to adhere the requirements of procedural and substantive due process guaranteed by the Tennessee Constitution and the United States Constitution.*

a. The Board did not provide Ms. Panasci adequate procedural rights prior to depriving her of the right to work in her chosen profession.

The Board and this Court must accord foreign-educated U.S. citizens, who are admitted to the bar in a UBE state, a minimal level of procedural due process before depriving them of any protected property interest. *Gunasekera v. Irwin*, 551 F.3d 461, 467 (6th Cir. 2009); *Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999). The right to work in a chosen profession without unreasonable government interference is a property and liberty interest "protected by the Due Process Clause of the Fourteenth Amendment and Tenn. Const. art. I § 8." *Martin v. Sizemore*, 78 S.W.3d 249, 262 (Tenn. Ct. App. 2001) (citing *Greene v. McElroy*, 360 U.S. 474, 492 (1959). *See, also, State v. AAA Aaron's Action Agency Bail Bonds, Inc.*, 993 S.W.2d 81, 85 (Tenn. Crim. App. 1998); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972); *Gilbert v. Homar*, 520 U.S. 924, 932 (1997); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985). Further, since a professional license is a property right and liberty interest protected by Article I, Section 8 of the Tennessee Constitution and the Fourteenth Amendment of the United States Constitution, the grant or denial of a license must comport with the requirements of procedural due process. *Harbison*, 53 S.W. at 957.

Just because Ms. Panasci can continue to practice as an attorney (albeit limited to the practice in New York or the practice as an in-house attorney) does not mean that the Board's unConstitutional actions did not amount to the deprivation of a property right. Exclusion from an entire profession is not the threshold for determining a deprivation since an individual "has the right to be free from unauthorized actions of government officials which substantially impair h[er] property interest." *McElroy*, 360 U.S. at 493. *See, also, Thompson v. Tennessee Bd. of Nursing*, No. 3:05-0580, 2006 WL 1102657 (M.D. Tenn. Apr. 26, 2006). Moreover, the Board acknowledges the existence of extensive pre-deprivation procedures that allow applicants to

petition, both formally and informally, an order denying an application for admission on transferred UBE score. This suggests that the Board already considered that the loss suffered by an applicant when confronted with such an order amounted to a direct deprivation requiring due process. *Arnold v. Metro. Gov't of Nashville & Davidson Cty.*, No. CIV 3:09CV0163, 2009 WL 2430822 (M.D. Tenn. Aug. 6, 2009).

Procedural due process requires affording persons like Ms. Panasci a relatively level playing field in a contested case hearing. The Board should not be permitted to "maintain such an unfair strategic advantage that a pall is cast over the fairness of the proceeding." *In re Detention of Kortte*, 738 N.E.2d 983 (Ill. App. Ct. 2000). Thus, due process demands a fair trial before a neutral or unbiased decision-maker. *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997); *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *Ogrodowczyk v. Tennessee Bd. for Licensing Health Care Facilities*, 886 S.W.2d 246, 252–53 (Tenn.Ct.App.1994) (Cantrell, J., concurring). It also demands an appearance of fairness and the absence of probability of outside influence on the adjudication. *Utica Packing Co. v. Block*, 781 F.2d 71, 77–78 (6th Cir.1986).

Ms. Panasci's was not afforded a minimal level of procedural due process before being deprived of her protected property interest for at least two reasons:

First, in order to comply with due process, waivers of the requirements of Rule 7 should not be granted or denied arbitrarily or capriciously or without definable reasons or standards, but must be granted in accordance with due process guarantees. *Murphy v. Egan*, 498 F.Supp. 240 (1980). Here, this Court and the Board, acting as agent of this Court, have engaged in a "waiver practice" whereby the foreign-education requirements of Rule 7 have been waived for select foreign-educated applicants. These waivers are dispensed in a way which violates Ms. Panasci's due process rights under the Tennessee Constitution and the United States Constitution. *Id.*

The Board has given no reasons as to why Ms. Panasci, who has provided proof that she obtained an undergraduate degree and J.D. degree in North America, has not received a discretionary waiver similar to the ones granted to at least 29 foreign-educated attorneys admitted to practice law in Tennessee with civil law degrees from non-English jurisdictions. This is particularly disturbing in light of *Gluzman* which accentuates a very narrow vision of the ethics of the membership and practice of law and how problematically limited and perfunctory Rule 7 can be when issues arise. Bobbi Jo Boyd, *Embracing Our Pub. Purpose: A Value-Based Lawyer-Licensing Model*, 48 U. Mem. L. Rev. 351 (2017).

In *Murphy v. Egan,* a case strikingly similar to the one at hand, the plaintiff was a graduate of an unaccredited California law school. *Murphy,* 498 F.Supp. He was twice denied the opportunity to take the Pennsylvania bar examination due to a rule requiring applicants to have the functional equivalent of an education available from an ABA accredited institution. *Id*. Evidence was presented that a waiver of the requirement contemporaneous with Murphy's denial had been granted to at least one applicant who had not graduated from an ABA accredited institution. *Id*. The court determined that the Pennsylvania Board of Law Examiner's application of admission rules to the plaintiff was violative of Murphy's Fourteenth Amendment procedural due process right. The court's opinion is instructive:

> Waivers may not be granted or denied arbitrarily or capriciously, or without definable reasons or standards. In the absence of any guiding principles which may be pointed to as forming the basis of a waiver decision, there is no indication that due process has been adhered to. There is no intimation of the rational basis on which the Court's discretion has been exercised. Due process will not allow the exercise of unfettered discretion, or the use of improper criteria.

Id.

In sum, the Board and this Court have made available to bar applicants who do not meet the requirements of Rule 7 an *ad hoc* procedure by which they may nevertheless seek admission. Granting select applicants a discretionary waiver is arbitrary, and is not rationally related to the

State's interest of weeding out unqualified applicants. Rather, the Board and this Court appear to be unfair and influenced by bias in their application of Rule 7. The Board's decision thus deprived Ms. Panasci of the right to work in her chosen profession in Tennessee without due process and it should be reversed as a result.

Second, the Board failed to exclude incompetent evidence from the record and disregarded competent evidence provided in the record. The sole piece of evidence in the record that even ostensibly conflicted with Ms. Panasci's claim that she satisfied Rule 7 § 7.01 was the anonymous Foreign-Education Report completed by IEE. The deficiencies in the IEE report were so profound that its admission violated due process. The IEE report was anonymous hearsay—a deficiency that not only prohibited Mr. Panasci from questioning its author about the report's contents, but which also prevented Ms. Panasci from determining whether the report's author even had any experience conducting foreign credential evaluations at all.[75]

The anonymous IEE report, especially in light of the CEO of the company's negligible qualifications and understanding of NACES standards, is so thoroughly devoid of reliability that it would not be accepted in any courtroom in Tennessee and should not have been given credence here.[76] Being able to question the author of the IEE report regarding the report's reliability was essential under the unique and disputed facts of Ms. Panasci's case. In the critical context of Ms. Panasci's case, however, the fact that the Board utilized the IEE report to dictate the outcome of Ms. Panasci's entire case regardless of the additional evidence that was submitted is inordinately indefensible.

Further, Ms. Panasci provided an affirmative report to the Board performed by a NACES member with extensive experience evaluating the credentials of French and Canadian applicants.

[75] A.R. 8.
[76] A.R. 52.

This report alone should have satisfied any reasonable person that Ms. Panasci's education complied with the requirements of Rule 7. Forcing Ms. Panasci to overcome an anonymous, unsigned, hearsay report whose author could not be impeached and providing no reasoning for which the IACEI report was inadequate was an abuse of discretion that deprived Ms. Panasci of a fair and reliable proceeding. The Board's Order should be reversed as a result, and Ms. Panasci's application on admission on transferred UBE score should be granted.

b. The Board erroneously discounted the importance of Ms. Panasci's fundamental right to work in her chosen profession.

The due process clause guarantees more than just a fair procedural process. *Parks Properties v. Maury County*, 70 S.W.3d 735, 743 (Tenn. Ct. App. 2001) (citing *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)). The clause also bars "certain governmental actions regardless of the procedures used to implement them." *Id*. at 744 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 830 (1998) and *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). Thus, substantive due process protects against "acts of government officials that are so far beyond the outer limits of legitimate government that no amount of process could cure the deficiency." *Id*. (citing *Natale v. Town of Ridgefield*, 170 F.3d 258, 262-63 (2d. Cir. 1999)).

Because Ms. Panasci is a US citizen, lives in Tennessee, wishes to practice in Tennessee, and has no intention of leaving Tennessee, the Tennessee Constitution takes prominence. Article I, Section 8 of the Constitution of Tennessee, commonly known as "The Law of the Land" Clause, roughly analogous to the Fifth Amendment's Due Process clause as applied to the states through the Fourteenth Amendment, contemplates "a fundamental civil right" to earn a living that is subject to significant Constitutional and statutory protection. *State ex. Rel Anglin v. Mitchell*, 596 S.W.2d 779, 786 (Tenn.1980). It is an imperfect analogy, however, since this Court has interpreted the Law of the Land Clause consistent with Tennessee's historical background rooted in what Thomas

Jefferson purportedly calls "republican ideals" that favor limited government regulation of the economy to provide a broader and more robust protection of economic liberty than federal courts find in the Fourteenth Amendment. Lewis L. Laska, The Tennessee State Constitution: A Reference Guide 7 (1990). In particular, the Law of the Land Clause provides special protection for that which is at issue for Ms. Panasci: her right to financially provide for herself as a young professional. While Ms. Panasci has successfully returned to the U.S. in pursuit of her American dream, she must provide for herself financially as a young female attorney.

This Court has repeatedly affirmed Tennessee's established public policy favoring citizens' "access to employment and the ability to earn a livelihood." *Yardley*, 470 S.W.3d at 806; *See, also, Harbison*, 53 S.W. at 957 *Harbison*, 53 S.W. at 957 (Tenn. 1899). The Tennessee General Assembly has also expressly affirmed that the right the right to earn a living free from arbitrary or excessive government interference, "is a *fundamental* civil right." Right to Earn a Living Act. 2016 Tenn. Pub. Acts. 1053 (emphasis added) (codified at Tenn. Code Ann. § 4-5-501). Lest there be any lingering doubt about how Tennessee prioritizes the right to earn a living, all such concerns are easily put to rest by this Court in *Livesay v. Tennessee Bd. Of Exam'rs in Watchmaking,* calling it a "fundamental one, protected from unreasonable interference by both state and federal Constitutions." 204 Tenn. 500, 322 S.W.2d 209 (1959) (citing *State ex rel. Whetsel v. Wood*, 248 P.2d 612 (Okla. 1952)).

Other state Supreme Courts have also held that the practice of law is a fundamental right under the Privileges and Immunities Clause. *Piper*, 470 U.S. 274; *see, also*, *National Ass'n for the Advancement of Multijurisdiction Practice*, 799 F.3d at 216. Following *Piper, Supreme Court of Virginia v. Friedman,* squarely held that bar admission on motion for sister-state attorneys is a Constitutionally protected Privilege and Immunity. 487 U.S. 59 (1988). The Court concluded:

"[t]he issue instead is whether the State has burdened the right to practice law, a privilege protected by the Privileges and Immunities Clause, by discriminating among otherwise equally qualified applicants solely on the basis of citizenship or residency. We conclude it has." *Id*. at 67. The norm under the Privileges and Immunities Clause is comity, i.e. reciprocity. The Virginia Supreme Court stated, "we see no reason to assume that nonresident attorneys who, like Friedman, seek admission to the Virginia bar on motion will lack adequate incentives to remain abreast of changes in the law or to fulfill their civic duties." *Id*. at 69.

Accordingly, the Law of the Land Clause and the Fourteenth Amendment provide a substantive guarantee against arbitrary laws or laws that restrict "rights, privileges, or legal capacities in a manner before unknown to the law," including the fundamental right to earn a living and to practice in the profession of one's choosing. Fundamental rights "receive special protection" *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000). Consequently, the Board should err on the side of permitting qualified lawyers to practice law in Tennessee under Rule 7 § 7.01 rather than prohibiting them from doing so. Unfortunately, the Board erroneously discounted the importance of Ms. Panasci's fundamental right for two reasons:

First, if the absence of definitive proof is enough to take away a right, then the right is non-existent. As a general rule, courts have "provide[d] relief from the operation of the rules of admission whenever it can be demonstrated that the rules operate in such a manner as to deny admission to a petitioner arbitrarily and for a reason unrelated to the essential purpose of the rule." *Application of Nort*, 96 Nev. 85, 96 (1980). The principles in the Right to Earn a Living Act should have provided a useful framework for interpreting Rule 7. Ms. Panasci has offered proof that her education was reasonably construed as substantially equivalent by the New York Board of Law Examiners and IACEI. The Board's Order stopped short of disagreeing with such equivalency,

explicitly recognizing that her education is "likely" substantially equivalent.[77] Nevertheless, the Board's decision weighed to the detriment rather than to the benefit of her fundamental right. If the Board's Order were consistent with Tennessee's long-standing legacy to uphold the fundamental right to earn a living, the Board would have read the rule with lenity and would have avoided burdening Ms. Panasci's rights and freedoms. Because Ms. Panasci's case is subject to different interpretations over whether her education was substantially equivalent, interpreting Rule 7 with lenity would avoid burdening a fundamental Constitutional right. "[I]f a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). The priorities espoused by the Right to Earn a Living Act should have been embraced. Instead, the Board decided to err on the side of costing Ms. Panasci's fundamental right to earn a living, courting a Constitutional clash.

Second, under the Right to Earn a Living Act, the Constitution of Tennessee, and the Constitution of the United States, regulation of entry into an occupation are required to be "demonstrably necessary and narrowly tailored" to protecting the public. *See* Addendum, Public Chapter No. 1053; *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988). Bar examiners and state supreme courts are correctly emphatic that their core responsibility in licensing is to protect the public. Licensing, as an aspect of attorney regulation, should be undertaken in the public interest because "[a] lawyer should . . . help the bar regulate itself in the public interest." Model Rules of Prof'L Conduct, pmbl. The principle of public protection means that licensing requirements should be valid, that is, closely related to competency as a new attorney.

[77] A.R. 50.

It is not "demonstrably necessary" to exclude Ms. Panasci from the profession. Ms. Panasci's education is far from "demonstrably" nonequivalent. Further, Rule 7 § 7.01 is not the more tailored way of protecting the public from a possibly incompetent attorney. It excludes not only foreign-educated applicants who are not qualified to practice law in the U.S., but also excludes qualified foreign-educated American attorneys who have successfully passed the UBE. Tenn. Sup. Ct. R. 7 § 3.05 (A) (1) provides that:

> (a) Any applicant for admission who has taken the UBE in another jurisdiction may be admitted to the practice of law in [the State of Tennessee] by transferred UBE score, upon showing that the applicant:
> (1) has taken the entire UBE in a single administration in another jurisdiction and earned a total UBE scaled score equal to or greater than the score required to be achieved by Tennessee examination applicants and that such score has not expired as proved in section 4.07(c); […]

The UBE, and Tennessee's unique total UBE scaled score, <u>is</u> the test. When it isn't clear if her education was substantially equivalent, the tailored way of determining if she is fit to practice law would be to simply look at her UBE score. That, in the end, is an appropriately tailored way to resolve any doubts about the equivalency of Ms. Panasci's education that accords proper respect to the vitalness of her fundamental right and American dream that she has worked so hard for. For the reasons stated, the Board's Order should be reversed.

B. <u>Ms. Panasci should be granted Admission on transferred Uniform Bar Exam score as a matter of equity</u>.

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

Other state supreme courts have used their authority to grant waivers to qualified applicants under circumstances, such as the ones at bar, when equity compels doing so. *See, e.g.*, *Application of Collins-Bazant*, 578 N.W.2d at 43 ("Of jurisdictions that allow for waivers of their rules of admission, most do so according to the view that in some instances a strict application of the rules would cause injustice. This view is based on the premise that rules of admission were not meant to prevent qualified applicants from taking the bar. Rather, the rules are intended to weed out unqualified applicants.") (internal citations omitted). As a general matter, such courts have "provide[d] relief from the operation of the rules of admission whenever it can be demonstrated that the rules operate in such a manner as to deny admission to a petitioner arbitrarily and for a reason unrelated to the essential purpose of the rule." *Application of Nort*, 96 Nev. 85 at 96.This Court has also used such authority in the past. *See, e.g.*, *Gluzman*, No. M2016-02462-SC-BAR-BLE (Sup. Ct., August 4, 2017).

If Rule 7 § 7.01 in fact precludes Ms. Panasci from being admitted to the Tennessee Bar—and for the reasons set forth above, it does not—then her application merits relief from the strict operation of § 7.01. *Id.* "Admission rules are intended to weed out unqualified applicants, not to prevent qualified applicants from taking the bar." *In re O'Siochain*, 842 N.W.2d at 770 (internal citations and quotations omitted). In the instant case, however, the record—which features, among other things, Ms. Panasci's extensive legal education, her total UBE scaled score of 309, and her "additional, valuable education […] such as an LL.M. from an ABA-accredited law school"[78]—overwhelmingly supports the conclusion that she is indeed a qualified American attorney. In fact,

[78] A.R. 50.

the Board itself agrees that Ms. Panasci merits relief from the requirements of Rule 7 and has advised Ms. Panasci to request such relief from this Court.[79]

Ms. Panasci has provided proof to this Court that relief of the requirements of Rule 7 was granted to Mr. Gluzman and at least 153 other applicants, several of which obtained foreign legal degrees in jurisdictions that do not recognize the common law. Ms. Panasci obtained her first two legal degrees in Canada, a bilingual and common law jurisdiction. Further, she obtained her third legal degree in New York from an ABA accredited law school. Ms. Panasci's legal education is not a concern to the Board, each Foreign-Education Report provided to the Board confirmed that Ms. Panasci has earned a J.D.[80] Rather, the Board has pinned Ms. Panasci's expansive legal education against her, finding that her undergraduate degree contains too many "law-related studies" and an insufficient amount of "general studies."[81] The Board has done a disservice to the general public and the legal profession as a whole by shutting out an attorney who is qualified to practice in the two legal systems that prevail in the U.S.[82]"As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession." *See* Model Rules of Prof'L Conduct, pmbl. As a matter of equity, then, Ms. Panasci should be granted admission to practice in Tennessee.

C. <u>The Board violated Ms. Panasci's right to equal protection in denying Ms. Panasci's Application for Admission on transferred Uniform Bar Exam score.</u>

In denying Ms. Panasci's application solely on the basis of her Canadian upbringing, the Board employed the suspect classification of national origin as the basis for singling out Ms.

[79] *Id*. "Had the Board possessed such discretion; it would likely have exercised it here. The Supreme Court does have such power and might, on further review, choose to deem her education to be substantially equivalent."
[80] A.R. 5-8, 45-7, 52.
[81] A.R. 3.
[82] The State of Louisiana's legal system, for instance, has adopted a hybrid civil law and common law approach. Ilijana Todorovic, *The Uniqueness of Louisiana's Legal Heritage: A Historical Perspective*, 65 La. B.J. 378 (2018).

Panasci for differential and facially discriminatory treatment. Rule 7 § 7.01 and the Board's actions, as applied to Ms. Panasci, are subject to strict scrutiny under the federal and Tennessee Equal Protection Clause.[83] *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005). To survive strict scrutiny, the classification must be justified by a compelling state interest and narrow tailoring. *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *see, also*, *In re Griffiths*, 413 U.S. 717 (1973). One may argue that the State has a compelling interest in ensuring the integrity of the legal profession by making sure it does not authorize unqualified individuals from practicing law in the State. However, Rule 7 § 7.01 is not the least restrictive way to promote that interest. It reaches too broadly. It excludes not only those foreign-educated applicants who are not qualified to pass a bar exam and practice law in the U.S. but also excludes qualified foreign-educated American attorneys who have successfully passed the UBE. The Board's categorical exclusion is not the least restrictive means available to achieve its goals because it already has requirements in place, that do not take national origin into account, to prevent unqualified applicants from being admitted on transferred UBE score: a minimum passing total UBE scaled score. Because the Board has less restrictive means available, its policy cannot be considered narrowly tailored. The Board's facially discriminatory policy, as applied to Ms. Panasci, cannot pass Constitutional muster under this review.

Tennessee's licensing discrimination carried out under the guise of Rule 7 cannot even survive rational basis review. If it is irrational to disqualify a bar applicant for licensure because of oath as in *Schware v. Bd. of Bar Examiners*, 353 U.S. 232 (1957), or because they are Democrat or Republican, or black, or female, or gay, or Jew or Gentile, it is equally arbitrary and irrational

[83] Tennessee's equal protection guarantee is roughly coextensive with the equal protection provisions of the United States Constitution. *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005).

to disqualify an experienced attorney from admission based on their association with a French-Canadian school system.

For a law challenged under the Equal Protection Clause to survive rational basis review, differential treatment of similarly situated people must be rationally related to a legitimate government interest. *City of Cleburne, Tex. v. Cleburne Living Ctr*, 473 U.S. 432, 439 (1985); *State v. Tester*, 879 S.W.2d 823 (Tenn. 1994). To be rationally related, differential treatment cannot be arbitrary, *Bowman v. United States*, 564 F.3d 765, 772 (6th Cir. 2008), and "[t]here must be reasonable and substantial differences in the situation and circumstances of the persons placed in different classes." *Tester*, 879 S.W.2d at 829 (emphasis added); *see, also, Int'! Ass'n of Firefighters Local 3858 v. City of Germantown*, 98 F. Supp. 2d 939, 947-49 (W.D. Tenn. 2000). Indeed, the Board and this Court's *ad hoc* actions underscore the lack of substantial distinction between foreign-educated applicants and applicants educated in the United States. If the substantial equivalency requirements were really based on a substantial distinction between foreign-educated applicants and applicants educated in the United States, the Board and this Court would not have allowed the multitude of substantial equivalency waivers for foreign-educated applicants who lack Common law education.

IX. Conclusion

For the foregoing reasons, the Board's Order should be REVERSED, and Ms. Panasci's application for admission on transferred UBE score should be GRANTED. Ms. Panasci prays that this Court award Ms. Panasci's attorney's fees and costs associated with the filing of this Brief pursuant to Tenn. Sup. Ct. R. 7 § 14.02.

DATED this 6th day of May 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that an exact copy of this document has been served upon counsel for all parties at interest in this case via both email and United States Mail with sufficient postage thereon to carry same to its destination.

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This 6th day of May 2022.

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