No. M2016-02462-SC-BAR-BLE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

MAXIMILIANO GABRIEL GLUZMAN,

Petitioner,

v.

TENNESSEE BOARD OF LAW EXAMINERS,

Respondent.

BRIEF OF PROPOSED *AMICI CURIAE* BEACON CENTER OF TENNESSEE, CATO INSTITUTE, AND GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER MAXIMILIANO GABRIEL GLUZMAN

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STATEMENT OF INTEREST

The Beacon Center of Tennessee is a non-profit, nonpartisan, and independent Section 501(c)(3) organization dedicated to providing expert empirical research and timely free market solutions to public policy issues in Tennessee. The Litigation Division, created in January of 2015, centers around economic liberty and property rights. Those interests are at stake here.

Furthermore, the Beacon Center's interest also includes the Right to Earn a Living Act, which the Order under consideration discounted as inapplicable. *See* Addendum. This Act reaffirmed the State's longstanding commitment to protecting the constitutional right to earn a living and required an audit of all entry-level regulations from executive agencies. Tenn. Pub. Ch. 1053 (2016) (now enacted as Tenn. Code Ann. § 4-5-501, *et seq.*). The Beacon Center championed the Act, and in conjunction with the National Federation for Independent Business published an in-depth guide to help legislators implement the new law. BEACON CENTER & NFIB, HOW-TO GUIDE: RIGHT TO EARN A LIVING ACT.[1] The Beacon Center has invested countless hours researching and studying the constitutional law underlying the Right to Earn a Living Act. The Beacon Center has engaged in active litigation on this front, filing two constitutional challenges to licenses on harmless

[1] Available at: http://www.beacontn.org/wp-content/uploads/2016/12/Beacon_HowToGuide_RightToEarnLiving_WEB.pdf (last viewed May 15, 2017).

occupations: shampooing, *Nutall v. Tennessee Bd. of Cosmetology*, Case No. 16-0455-III (20th Judicial District, TN); and horse massage, *Stowe v. Tennessee Bd. of Veterinary Medicine*, No. 17-232-IV (20th Judicial District, TN). Both of these cases are currently held in abeyance while repeal bills addressing these areas come into effect: HB0306/SB1194 (shampoo) and HB0537/SB049 (horse massage). For these reasons, the Beacon Center believes that it brings a useful viewpoint for this Court's consideration.

The Cato Institute is a nonpartisan public-policy research foundation established in 1977, located in Washington, D.C., and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs in courts around the country.

Cato is deeply concerned with the right to earn an honest living and the prevention of arbitrary government action — principles that undergird all state constitutions, including Tennessee's.

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual liberty through litigation, research papers, editorials, policy briefings, and forums. Through

its Scharf-Norton Center for Constitutional Litigation, the Institute litigates and occasionally files *amicus* briefs when its or its clients' objectives are directly implicated.

The Goldwater Institute seeks to enforce the features of our state and federal constitutions that protect individual rights, including the right to earn a living. To this end, the Institute is engaged in policy research and analysis pertaining to professional licensing and related issues. Additionally, the Goldwater Institute was the principal author and a chief advocate of the Right to Earn a Living Act, which was passed by the Arizona Legislature and signed into law by Arizona Governor Doug Ducey on April 5, 2017. S.B. 1437, 53rd Leg. (Ariz. 2017). Like Tennessee's Right to Earn a Living Act, Arizona's law codifies the economic liberty protections of the 14th Amendment of the U.S. Constitution and similar state constitutional provisions. *See id* at § 6(1) ("The right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference, is a fundamental civil right.") The law also requires "heightened judicial scrutiny to cases involving occupational licenses and the right to earn a living." *Id.* § 6(2); 41-1093.03. The Goldwater Institute will continue to provide research and analysis and advocate for the adoption of similar legislation throughout the country, including in Tennessee.

The Goldwater Institute is a non-partisan, tax-exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. It has no

parent corporation. It has issued no stock. It certifies that it has no parents, trusts, subsidiaries and/or affiliates that have issued shares or debt securities to the public.

For these reasons, *Amici* believe that they bring a useful viewpoint for this Court's consideration. In accordance with Tenn. R. App. P. 31(a), Tenn. R. App. P. 31(b), and Tenn. R. App. P. 29(b), six (6) separate copies of the amicus brief have been conditionally filed with the Court clerk in conjunction with the instant motion for leave to file an amicus brief in this cause.

SUMMARY OF THE ARGUMENT

A constitutional right hangs in the balance: Mr. Gluzman's right to earn an honest living, among his most sacred of rights — particularly in Tennessee.

Tennessee was founded out of nothing so much as the pursuit of economic opportunity. The state constitution reflects the special importance of the right to earn a living by embedding it in the "Law of the Land" Clause. This provision traces *directly* to the Magna Carta, a document itself primarily concerned with property rights and the right to earn a living. While federal courts tend to provide thin protections to this right under the U.S. Constitution, this Court has long protected it. In Tennessee, where the Court has long understood the right to be "fundamental," it merits special protection.

Importantly, the Tennessee legislature recently reaffirmed that the right was fundamental in the appropriately named "Right to Earn a Living Act." Yet the Order under review concluded that Mr. Gluzman's education was not "substantially equivalent" to a U.S. degree — discounting the right as somehow inapplicable and missing the significance of the Act as an unremarkable restatement of longstanding Tennessee constitutional doctrine.

Pursuant to the doctrine of constitutional avoidance, and out of respect for the importance of the underlying right itself, the "substantial

equivalency" rule should be read with lenity. Although Mr. Gluzman's sterling educational qualifications are beyond reproach, if it is still unclear whether his education satisfies the state bar, the rule should be read to favor the liberty interest and permit his inclusion. Nor is his exclusion demonstrably necessary to protect the public; the tailored way of assessing Mr. Gluzman's competency would be to simply allow him to take the exam and settle the matter once and for all. That process would at once follow clearly stated legislative priorities and the constitutional principles that gave rise to the Right to Earn a Living Act.

ARGUMENT

The historic importance of the right to earn a living under the Tennessee Constitution is a crucial consideration necessarily involved in weighing the competing interpretations of the "substantially equivalent" rule. Tennessee recognizes that the right to earn a living is fundamental. The Order expressly discounted the importance of his fundamental right by dismissing the Right to Earn a Living Act as inapplicable to the analysis. This Court should provide special protection of the right to earn a living by applying the stated public policy therein and interpreting the rule with lenity so as to avoid unnecessarily burdening the exercise of a right. This means the Court should adopt a permissive interpretation of the substantial equivalency rule that would allow Mr. Gluzman to take the test unless his education is affirmatively determined *not to be* substantially equivalent. The test itself is designed to weed out unqualified professionals, so the more tailored approach would be to allow marginal applicants to take it and prove whether they indeed have sufficient legal background. This approach would be in keeping with the priorities stated in the Right to Earn a Living Act — and the historic importance this Court has attached to the right itself.

I. THE STATE OF TENNESSEE WAS SETTLED AND FOUNDED BY SEEKERS OF ECONOMIC OPPORTUNITY

Tennessee history provides an important backdrop to understanding the importance of economic liberty as a matter of state constitutional law. Tennessee was settled and founded out of a drive to provide a better life for

oneself and one's family. This defines the Tennessee experience and fully informed this State's founding principles.

The settlement of Tennessee began in the 1760s, at the close of the French and Indian War. Comprised mostly of backcountry folk from North Carolina and Virginia, as well as a small contingent from Pennsylvania, the early settlers clamored over the mountains seeking prosperity, "greedy after land." STANLEY J. FOLMSBEE, ET AL., TENNESSEE: A SHORT HISTORY 48. Starved for economic opportunity and "intrigued by glowing reports of the richness of western lands," they took advantage of specious loopholes in the prohibition on western settlement imposed by the Royal Proclamation of 1763 and settled along the Wautauga branch of the Holston River. *Id.* at 52. Among the early settlers was James Robertson, often celebrated as the "Father of Tennessee," a man who was "a firm believer in the basic principles of civil liberty and the right of self-government." *Id.* at 54.

The settlers were not only drawn westward by the promise of material wealth, but they were also pushed westward by corruption and cronyism in the colonies. Those frontiersmen who came from North Carolina were disgusted with conditions in the Granville district, a tract of land running the length of the present-day border between North Carolina and Virginia and extending sixty-five miles southward. *Granville Grant and District, in* ENCYCLOPEDIA OF NORTH CAROLINA (William S. Powell, ed., 2006). The district was controlled by the Earl of Granville, who refused to return his

land to the crown when North Carolina became a royal province in 1729. FOLMSBEE, *supra* at 52. Granville's land agents were notoriously corrupt, charging outrageous fees, willfully selling faulty titles, and bribing law enforcement. *Id.*; PAUL R. WONNING, SETTLING AMERICA — A PIONEER HISTORY OF AMERICA: AMERICAN PIONEER SETTLERS AND THE FRONTIER (2015).

The corruption of governmental officials and their abuse of the taxing power was a particular sore spot for North Carolinians. Western counties, underrepresented in the colonial assembly, were nonetheless forced to pay high taxes for an extravagant governor's mansion, which yielded dubious benefits to the frontiersmen. FOLMSBEE, *supra* at 52. Corrupt "courthouse rings" controlled local appointments and aggregated power for themselves, embezzling tax revenues for their personal gain. The corruption became so odious that a portion of the citizenry, dubbing themselves "Regulators," eventually rebelled against the courthouse rings and subjected officials to vigilantism and mob treatment. *Id.* at 53. Many of these Regulators, among them James Robertson, eventually abandoned North Carolina for greener pastures. They found them in Tennessee. *Id.* at 53-54.

Two desires then animated the settlement of Tennessee above all else: economic opportunity and self-governance. Those concerns were shortly to be prioritized into Tennessee's Constitution. In 1796, nearly a decade after Congress enacted the Northwest Ordinance providing for the admission of new states into the Union, territorial governor William Blount called for a

constitutional convention that would finally put Tennessee on the path to independent statehood after several previous aborted efforts. The convention produced the Constitution of 1796, purportedly described by Thomas Jefferson as "the least imperfect and most republican of the state constitutions." LEWIS L. LASKA, THE TENNESSEE STATE CONSTITUTION: A REFERENCE GUIDE 7 (1990).

The appeal of the Tennessee Constitution to the liberty-loving sensibilities of the author of the Declaration of Independence is easily enough understood. It does, after all, go so far as to require revolution in the face of repression. *See Davis v. Davis*, 842 S.W.2d 588, 599 (Tenn. 1992). The longest article of the original constitution was Article Eleven, the Declaration of Rights, a thorough exposition of the natural rights philosophy that was the foundation of the Enlightenment era: rights pre-exist governments, and the primary purpose of government is to secure rights, not to bestow them. *See The Stratton v. The Morris*, 15 S.W. 87, 90 (Tenn. 1890) ("we must not commit the mistake in supposing that because individual rights are guarded and protected by [state constitutions], they must also be considered as owing their origin to them."). The principles there espoused represent "a classically American theory of the relationship between the government and its citizens, very much in accord with the thinking of our nation's founders." Glenn Harlan Reynolds, *"The Law of the Land": Tennessee Constitutional Law: The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case*

Study in Civic Republican Thought, 61 TENN. L. REV. 647, 652 (Winter 1994). The liberties safeguarded by the Declaration of Rights were "never [to] be violated on any pretense whatever. . . . [E]very thing in the bill of rights contained and every other right not hereby delegated, is excepted out of the general powers of government, and shall forever remain inviolate." TENN. CONST. art. 10, § 4.[2]

A primary guarantor of freedom in the Declaration of Rights is found in Section 8, commonly known as the "Law of the Land" Clause, which declares:

> That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

TENN. CONST. art. 1, § 8. This provision provides the bedrock for Tennessee's basic liberty protection and is roughly analogous to the Fourteenth Amendment's Due Process Clause. *State ex. Rel. Anglin v. Mitchell*, 596 S.W.2d 779, 786 (Tenn. 1980). Serving a similar role as the Fourteenth Amendment, this Court described due process as "the primary and indispensible foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." *Id.* (quoting *In re Gault*,

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[2] The vital importance of the Declaration was reemphasized when it was moved from Article 11 at the back of the constitution to Article 1 at the front. LEWIS L. LASKA, THE TENNESSEE STATE CONSTITUTION: A REFERENCE GUIDE 9-10 (1990).

387 U.S. 1, 20 (1967)). It's an imperfect analogy, however, with some tendency to obfuscate rather than elucidate in particular applications.

A deeper look into the Law of the Land Clause reveals that its distinctive text and historical background provide broader and more robust protection of liberty — especially economic liberty — than federal courts currently find in the Fourteenth Amendment. In particular, the Law of the Land Clause provides special protection for that which is at issue for Mr. Gluzman: his right to financially provide for himself and his family.

II. CONSISTENT WITH ITS ORIGINS IN THE MAGNA CARTA, THE RIGHT TO EARN A LIVING IS A FUNDAMENTAL RIGHT PROTECTED BY THE STATE CONSTITUTION'S LAW OF THE LAND CLAUSE

Because Mr. Gluzman lives in Tennessee and wishes to practice in Tennessee, the Tennessee Constitution stands at the fore. The Law of the Land Clause reflects Tennessee's unique history, is a direct descendent of the Magna Carta, and, like the Magna Carta, was intended to protect the right to earn a living. This Court describes it as a fundamental right, entitling it to special protection that exceeds the protection afforded to it under the Fourteenth Amendment.

A. The Law of the Land's relationship to the Magna Carta and protection of the right to earn a living.

The Law of the Land Clause has been in the Tennessee Constitution since its first iteration in 1796, but its roots run much deeper. The language traces directly to the "per legam" clause found in Chapter 29 of the Magna

Carta,[3] *see Anglin*, 596 S.W.2d at 786, which was primarily aimed at the protection of property rights. Paul J. Larkin Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 259-260 (2016). Further evidence of the importance of property rights in Article I, Section 8 is provided by the inclusion of a sturdy, old-English word, "freehold," as well as the word "property" itself.

Well over a century ago, this Court appeared to contemplate the ancient origins of the Law of the Land Clause when it described private property as a "sacred right," deriving not from "princes' edicts, concessions and charters, but it was the old fundamental law, springing from the original frame and constitution of the realm." *See The Stratton v. The Morris*, 15 S.W. 87, 90 (Tenn. 1890) (citation and quotation omitted). Likewise, the U.S. Supreme Court recognized that New Hampshire's Constitution, also containing a Law of the Land Clause, protects the "right to hold and possess property." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 624 (1819). In sum, the Law of the Land Clause is directly descended from the Magna Carta and the Magna Carta is primarily a guarantor of property rights.

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[3] The Fourteenth Amendment is often characterized as being similarly founded in the Magna Carta's per legem clause. *See, e.g., Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 32 (Tenn. 2000) (Barker, J., dissenting). However, while the phrase "law of the land" appeared in the Magna Carta in 1215, *See English Translation of Magna Carta*, BRITISH LIBRARY, https://perma.cc/DCY9-J3GF, the phrase "due process of the law" did not appear until a statute passed in 1354. *Sundquist*, 38 S.W.3d at 34 (Barker, J., dissenting). More to the point, the per legem clause is literally part of the Law of the Land Clause is literally derived from owing to the parallel syntax, to say nothing of its underlying priorities.

As it logically must, the right of private property includes the *means* of acquiring property, otherwise known as the right to earn a living. This was the understanding of English jurists. Sir Edward Coke, the attorney general for Queen Elizabeth, left behind legal writings that were "to be the training books for generations of lawyers, including Thomas Jefferson, John Adams, and John Marshall." Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 216 (2003). Coke wrote extensively in the Elizabethan age about the legal struggle between tradesman and the Crown over the right to freely practice, a battle for freedom that had, by then, *already* spanned centuries. He wrote that the Magna Carta, as well as English common law, "safeguarded the right of 'any man to use any trade thereby to maintain himself and his family.'" *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 116 (Tex. 2015) (Willett, J., concurring).

Coke's histories tell of an upholsterer who dared to open a business before completing an apprenticeship, resulting in the ire and a lawsuit from the concerned trade guild that had erected legal barriers to entering the trade. He won. The case that became known as *Allen v. Tooley* 80 Eng. Rep. 1055 (K.B. 1614). Of the case, Coke observed: "it was lawful for any man to use any trade thereby to maintain himself and his family." Sandefur, 6 Chap. L. Rev. at 215. Thus, the upholsterer had a legal right to challenge and defeat this burden on his liberty. Coke also related a case about tailors up to the same game. Coke's comment on the legal opinion upholding the right to

practice: "at the common law, no man could be prohibited form working in any lawful trade, for the law doth abhors idleness, the mother of all evil." Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. Ill. U. L. Rev. 457, 460 (Summer 2004). Coke's histories document the long struggle that lead up to the recognition that the right to earn a living was exactly that: a right protected by the Magna Carta and the natural liberty of humankind.

Coke strongly influenced the Founders. He "exerted a strong influence on colonial law. . . . Consequently American lawyers [at the time of the Revolution] were well-informed about English constitutional principles," including the ones that recognized a right to earn a living. Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L.J. 585, 600, 614 (2009). Coke described these economic barriers as offensive to the Magna Carta itself, calling them a form a monopoly: "Generally all monopolies are against this great charter, because they are against the liberty and freedome of the subject, and against *the law of the land.*" Sandefur, 24 N. Ill. U. L. Rev. at 461 (emphasis added).

This should frame any understanding of the scope of the right to earn a living as recognized in Tennessee. The lineage of the Law of the Land Clause fully included the right to earn a living. Thus, the incorporation of the Magna Carta into the Law of the Land Clause likewise incorporated a substantive

right to earn a living. This right has deep historical resonance. It should not be lightly overlooked.

B. The Law of the Land Clause provides greater protection of liberty than the Due Process Clause. This Court has long recognized the right to earn a living as a fundamental right.

The Law of the Land's protection of liberty is greater than the protection provided by the Due Process Clause of the Fourteenth Amendment. The courts at one time viewed state and federal due process protections as synonymous. *See Newton v. Cox,* 878 S.W.2d 105, 110 (Tenn. 1994). If this notion ever took root, it was not to endure. In *Planned Parenthood of Middle Tenn. v. Sundquist* this Court rejected "any assertion that previous decisions suggesting . . . synonymity . . . of our constitution and the federal constitution require this court to interpret our constitution as coextensive to the United States Constitution." 38 S.W.3d 1, 14 (Tenn. 2000). Tennesseans are not relegated "to the lowest levels of constitutional protection, those guaranteed by the national constitution." *Id.* at 14-15 (citation and quotation omitted); *see also Merchants Bank v. State Wildlife Resources Agency*, 567 S.W.2d 476, 478-79 (Tenn. Ct. App. 1978) (due process claim proper under Tennessee Constitution but not federal). That the Tennessee Constitution protects liberty to a greater degree than its federal counterpart is no longer debatable. The parameters of this greater protection, however, are less well defined.

This Court instructs that Tennessee provides greater protection to that which is of "the utmost personal and intimate concern." *Sundquist*, 38 S.W.3d at 11. Those things "involving intimate questions of personal and family concern" are those that Tennessee affords greater protection. *Davis v. Davis*, 842 S.W.2d 588, 600 (Tenn. 1992); *see also State v. Hunt*, 450 A.2d 952, 965-968 (N.J. 1982) (Handler, J. concurring) (articulating a seven (7) factor test for determining when state constitution provides an independent source for protecting individual rights).[4] On any intuitive level, this must include the ability to care and provide for one's family. Most people live their lives as if this ranked among their highest priorities. Appropriately then, this Court's jurisprudence long reflected a deep concern for the importance of the right to earn a living.

The right to earn a living is intertwined with the very idea of property rights in the first place. James Madison referred to an unjust government as one that would deny to its citizens the "the free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so

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[4] Turning to this test, the text of the Law of the Land Clause is significantly different from the Due Process Clause of the Fourteenth Amendment. There are different structural and historical considerations. The Fourteenth Amendment was drafted *after* the Law of the Land Clause in the wake of the Civil War and Emancipation while the Law of the Land Clause reflected the concerns over Tennessee's pioneers. The Right to Earn a Living is a matter of particular concern in Tennessee. *See Yardley v. Hosp. Housekeeping Sys., LLC*, 470 S.W.3d 800, 806 (Tenn. 2015) ("This State has an interest in ensuring that its citizens have access to employment and the ability to earn a livelihood. ..."). As thoroughly exhibited above, Tennessee places this right in the center of its traditions. The public attitude certainly attaches great significance to this right, as the widespread public interest in the Beacon Center's cases regarding Tennessee's shampoo and horse massage laws forced quick legislative action.

called." James Madison, *Property* (Mar. 29, 1792) (emphasis added) (reprinted in 50 CORE AMERICAN DOCUMENTS (Christopher Burkett ed., Ashcroft Press, 2015)). This Court has described property rights in terms that accord it the utmost respect:

> The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense from its feeble force in the savage state to its full vigor and maturity among polished nations forms a very instructive portion of the history of civil society. The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself.

The Stratton, 15 S.W. at 90 (quoting 2 Kent's Com., pp. 318, 320).

Of singular importance to this Court then is the right to earn a living:

> The "liberty" contemplated in [the Law of the Land Clause] 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., 53 S.W. 955, 957 (Tenn. 1899) (emphasis added). This Court has left no doubt about how it prioritizes the right to earn a living, calling it a "*fundamental* one, protected from unreasonable interference by both state and federal constitutions." *Livesay v. Tennessee Bd. of Exam'rs in Watchmaking,* 322 S.W.2d 209, 213 (Tenn. 1959) (striking down licensure requirement for watchmakers) (emphasis added) (quotation and citation omitted); *accord Wright v. Wiles*, 117 S.W.2d 736, 738 (Tenn. 1937) (licensing photographers violates the "fundamental" right to engage in

lawful work). Recognition of this right as "fundamental" has crucial significance because fundamental rights "receive special protection" in Tennessee. *Sundquist*, 38 S.W.3d at 11.

This Court has repeatedly stressed that the right to earn a living is a critical freedom guaranteed by the Tennessee Constitution. Echoing Madison, this Court recognized that property and the right to earn a living are one and the same, and of the utmost importance.

> Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property, and of all solid individual and national prosperity.

Harbison, 53 S.W. at 957 (quoting *Slaughter-House Cases*, 83 U.S. 36 (1873) (Swayne, J., dissenting)). In various contexts Tennessee courts have found ways to recognize the significance of the right. *See State v. AAA Aaron's Action Agency Bail Bonds*, 993 S.W.2d 81, 85 (Tenn. Crim. App. 1998) (right to earn a living "without unreasonable governmental interference is both a liberty and property interest"). Again, this point seems rather obvious to most people. Job and family are top priorities. Few would argue with Mr. Gluzman that the right to earn a living is central to their lives and certainly involves intimate questions of "personal and family concern," *Davis*, 842 S.W.2d at 600, making it the sort of right accorded special protection.

In both a modern and historic sense then, the right to earn a living has to be considered fundamental. It lies is at the heart of Tennessee's Law of the

Land Clause and its lineage to the Magna Carta. So the Law of the Land Clause provides 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. *See The Stratton*, 15 S.W. at 92. This Court has recognized this right in the past. This case provides another opportunity to affirm it once more regarding the application of the "substantial equivalency" rule to Mr. Gluzman.

C. The federal courts treat economic freedom differently under the Due Process Clause.

To underscore the importance of the right to earn a living in Tennessee, it should be viewed in contradistinction with the protection provided by federal courts under the Fourteenth Amendment. The Fourteenth Amendment was aimed primarily — though not entirely — at making full citizens out of newly emancipated slaves. *See Slaughter-House Cases*, 83 U.S. at 81. Under current law, economic liberty receive review under the deferential "rational basis test," meaning that regulation of economic rights will withstand constitutional challenge as long as it is conceivably rationally related to any legitimate government interests — regardless of whether the government actually had that interest in mind when passing the regulation. *See Craigmiles v. Giles*, 312 F.3d 220, 223-24 (6th Cir. 2002). In the early part of the 20th century, the Supreme Court displayed a willingness to apply substantive due process protections to strike down economic regulation. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L.

REV. 873. By the mid-1930s, however, the Supreme Court's decisions in *Nebbia v. New York* and *West Coast Hotel v. Parrish* signaled the end of meaningful federal review of economic measures. *See* Anthony B. Sanders, *The "New Judicial Federalism" Before its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for its Recent Decline*, 55 AM. U. L. REV. 457, 473 (2005); *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

But several states, Tennessee included, never lost their mooring to the tradition of the Magna Carta, and refused to abandon the notion that government must have sufficient justification — not merely a concocted rational basis that courts are powerless to scrutinize — to restrict economic liberty. Sanders, *supra*, at 475, 536. Note, for instance, that this Court cited the *dissent* in *Slaughter-House* in *Harbison*. 53 S.W. at 957. And, in a case with striking factual parallels, this Court distinguished the *Slaughter-House Cases* and reached an opposite result to invalidate a city ordinance giving exclusive rights for the slaughtering of animals in *Noe v. Mayor and Alderman of Town of Morristown*, 161 S.W. 485 (Tenn. 1913) (ordinance violated Tennessee's Antimonopolies Clause).

More recently, the Texas Supreme Court invalidated a restriction on the right of eyebrow threaders to earn a living under Texas's analogous Law of the Land Clause in *Patel*, 469 S.W.3d 69 (Tex. 2015) (discussed

throughout). The Texas Supreme Court squarely addressed the *Slaughter-House Cases*, concluding that those decisions did not so much denigrate economic liberty as is commonly supposed, but rather placed the primary responsibility for the protection of such "fundamental rights as the right to acquire and possess property and to pursue and obtain happiness and safety" with the states. *Id.* at 83. While the U.S. Supreme Court has not struck down an economic law on substantive grounds in a long time, economic liberty in Tennessee has survived long past the end of the *Lochner* era. *See Livesay*, 322 S.W.2d at 213; *Consumer's Gasoline Stations v. City of Pulaski*, 292 S.W.2d 735, 737 (Tenn. 1956); *State v. White*, 288 S.W.2d 428, 429-30 (Tenn. 1956); *Checker Cab Co. v. City of Johnson City*, 215 S.W.2d 335, 336-38 (Tenn. 1948); *State v. Greeson*, 124 S.W.2d 253 (Tenn. 1939); *Wright*, 117 S.W.2d at 738.[5]

Since the infamous Footnote Four in *U.S. v. Carolene Products Co.*, the U.S. Supreme Court has applied different analytical standards to different constitutional rights. *See U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). "Fundamental" rights, such as the right to freedom of speech and the right to travel between states, may not be restricted except where there is a compelling governmental interest which cannot be achieved through less restrictive means. JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL

[5] Interestingly, the same cannot be said of the federal circuit in which Tennessee resides. The Sixth Circuit has at least provided a modest level of due-process protection, striking down economic regulation on Fourteenth Amendment grounds when they have no purpose but to protect business incumbents. *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 702 (E.D. Ky. 2014).

PROTECTION LAW AND LITIGATION, § 6:1 (2016-2017 ed.). Constitutional rights that do not rise to the level of "fundamental" rights, including economic freedoms, may be restricted in much broader circumstances — wherever the restriction is rationally related to a legitimate government interest. The government may expressly contrive rationalizations post-hoc, and the courts do not ask if the means have a real tendency to advance the stated goal. *See Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698 (E.D. Ky. 2014); *accord FCC v. Beach Communications*, 508 U.S. 307, 315 (1993) ("it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature" or whether any genuine facts supported the action). Plausible justifications can "even [be] hypothesized by the court." *Am. Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 699 (6th Cir. 2011). The right to earn a living, if it can be called as much, gets third-rate treatment from the federal courts.

In contrast, this Court has recognized that the right to earn a living *is* a "fundamental one." *See Livesay*, 322 S.W.2d at 213; *see also Burford v. State*, 854 S.W.2d 204, 207 (Tenn. 1992) (Tennessee is "always free to expand the minimum level of protection mandated by the federal constitution"). That means quite a bit in Tennessee. After all, fundamental rights "receive special protection." *Sundquist*, 38 S.W.3d at 11.

This Court can maintain that legacy in this case.

III. THE ORDER SHOULD HAVE FACTORED IN THE IMPORTANCE OF MR. GLUZMAN'S FUNDAMENTAL RIGHT.

The Order mistakenly discounted the "Right to Earn a Living Act" as in applicable because it required only executive branch agencies to submit an audit of entry-level regulations. The audit was not why the Act was significant. What matters instead was its affirmance of the right to earn a living as a fundamental right in Tennessee. The right already existed as a constitutional matter; this Court should continue to reflect its primacy in Tennessee's founding principles by ratifying a presumption in favor of the liberty interest rather in favor of the restriction.

Indeed, the ambiguity inherent in the "substantial equivalency" rule ought to be resolved by favoring lenity under the rule of constitutional avoidance: unless Mr. Gluzman's foreign education is not substantially equivalent, he should be allowed to sit for the bar exam. With any doubt left, an appropriately tailored outcome would allow him to put his qualifications to the test by allowing him to take the test.

A. The Order erroneously dismissed the importance of the Right to Earn a Living Act.

Mr. Gluzman pointed to the Right to Earn a Living Act as a factor to consider in his favor. Order Den. Pet. to Recons. Den. of Eligibility (Oct. 13, 2016). The Order dismissed the Right to Earn a Living Act because its operative terms were not applicable to a judicial agency:

> The Board does not find this argument persuasive. The "Right to Earn Living Act" applies to Executive Branch agencies who

> issue licenses who issue licenses. The Board of Law Examiners is a Judicial Branch agency but the license is issued by the Tennessee Supreme Court. See Tenn. Sup. Ct. R. 7, Sec. 1.02.

Id.

The Right to Earn a Living Act, now codified at Tenn. Code Ann. § 4-5-501, essentially requires executive branch agencies to submit a copy of all of their entry regulations to the legislature to be reviewed to consider how necessary they are, whether they are intended to deny entry into a trade, and whether less burdensome means exist to protect the public. *See generally* Tenn. Code Ann. §§ 4-5-501, 502 (LexisNexis 2016). The requirement to submit entry-level regulations doesn't apply to a judicial agency — but that wasn't the only thing in the Act, or why the Act was relevant.

The legislative findings are what matters, not the submission-for-audit. An eventual audit isn't what Mr. Gluzman seeks; it wouldn't have helped him sit for the bar exam anyway. The Right to Earn a Living Act also contained legislative findings. They explicitly specify, "the right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference is a *fundamental* civil right." *See* Addendum, Public Chapter No. 1053 (2016) (emphasis added). The findings also recognize "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 . . . and to ensure that regulations of entry into

businesses, professions, and occupations are demonstrably necessary and narrowly tailored to legitimate health, safety, and welfare objectives." *Id.*

None of this broke new ground. As shown above, this Court long ago described the right as fundamental. If the Act did anything new, it took what was already a recognized, constitutional right, and *also* made it a civil right — before then making the public policy of the state to subject burdens upon it to a tailoring analysis. That's what matters, and it should not have been discounted. Preexisting constitutional principles incorporated in the Act ought to have guided the outcome of the case.

Mr. Gluzman's exercise of his right was impaired based on an Order that only concluded that it was no worse than unclear if his education was substantially equivalent. His education was not affirmatively discounted as failing to meet the "substantially equivalent" rule. The Order wrote that he had failed to "persuade the Board" that his education was substantially equivalent. Order Den. Pet. to Recons. Den. of Eligibility (Oct. 13, 2016). Mr. Gluzman was thus denied the opportunity to sit for the bar exam with the equivalency of his education *unresolved.*

The principles in the Right to Earn a Living Act could have provided a useful framework for interpreting a rule that obviously involves a certain measure of subjectivity, especially in Mr. Gluzman's case. In most cases, it won't matter. The applicant's foreign education will be substantially equivalent, or it won't. Some instances like this one will not present a clear

case. Mr. Gluzman carried his burden of showing that his education fell in the class of cases where it could reasonably be construed to be substantially equivalent. Yet the Order denied his request to take the exam. This represented a failure to appreciate the importance of what was at stake.

This is why Right to Earn a Living Act should have been consulted. It should have influenced the analysis in two (2) ways. **First**, if Mr. Gluzman's fundamental right was properly weighted, the correct way to interpret the substantially equivalent rule would be mindful of the doctrine of constitutional avoidance. The rule should be read with lenity, and when doubt exists, the interpretation should err on the side of the liberty interest. **Second**, in a judgment call, *any* kind of a tailoring analysis would lean towards allowing Mr. Gluzman to take the test — which is, after all, another means of determining whether his education really did vest him with the credentials to practice law.

B. Mr. Gluzman's fundamental right should be respected by interpreting the "substantially equivalent" rule with lenity.

In considering competing interpretations, the courts should "adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfied the requirements of the Constitution." *State v. Sliger*, 846 S.W.2d 262, 263 (Tenn. 1993). "When faced with a choice between two constructions, one of which will sustain the validity of a statute and avoid a conflict with the Constitution, and another which renders the statute unconstitutional, we must choose the former."

Sundquist, 38 S.W.3d at 7; *see NFIB v. Sebelius*, 568 U.S. 519, 562 (2012) ("if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so."). The courts should always adopt a reasonable construction that avoids an impairment of the Constitution.

Mr. Gluzman's case is subject to different interpretations over whether his education was substantially equivalent. Mr. Gluzman — and his professors, and Vanderbilt University, and the University of Tennessee — believed his education was substantially equivalent. If he didn't, he would never have gone to the expense and hassle of getting an expensive LL.M. from Vanderbilt. The Order stopped short of disagreeing, implicitly recognizing that his education *might* be substantially equivalent. Thus, no real dispute exists that Mr. Gluzman met his burden of showing that his education could be reasonably construed as substantially equivalent. In such a case, the rule could have been read one of two ways: to the detriment or benefit of his fundamental right.

This is where the Right to Earn a Living Act should have influenced the outcome. The Tennessee legislature declared that the public interest was to favor the right of all individuals to pursue legitimate entrepreneurial and professional opportunities to the limits of their talent and ambition. Addendum, Public Chapter No. 1053 (2016). If the Order was consistent with the stated public interest, then it would have come down the other way.

Interpreting the rule with lenity would avoid burdening a fundamental constitutional right. Instead, when it was unclear one way or the other, the Order chose to *dis*favor his right. That represented a decision to err on the side of costing Mr. Gluzman's right to earn a living, countermanding the recently affirmed public policy and courting a constitutional clash. This outcome was not dictated by the rule itself, but was instead a choice about which way to err. The priorities espoused by the Right to Earn a Living should have been embraced, not shunted to the side.

In sum, if the absence of definitive proof is enough to take away a right, then the right weighs zero. Instead, the tie should go to the runner. The Order should have incorporated these priorities. They are the priorities of Tennessee.

C. The tailored way of ensuring Mr. Gluzman's fitness to practice would be to give him the chance to demonstrate his professional competency.

The Right to Earn a Living Act also declares it to be the "public interest to ensure" that regulations of entry into an occupation "are demonstrably necessary and narrowly tailored" to protecting the public. *See* Addendum, Public Chapter No. 1053 (2016). This too is not anything new. Legislation impinging on a fundamental right must be "precisely tailored." *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988). Why is it "demonstrably necessary," *see* Addendum, Public Chapter No. 1053 (2016), to exclude Mr.

Gluzman? It's not because his education was "demonstrably" nonequivalent. The Order didn't come down on either side.

There is a more tailored way of protecting the public from a possibly incompetent attorney. Mr. Gluzman, after all, is not demanding to be licensed. A significant test of his competency stands in his way. He just asks to take it. When it isn't clear if his education was substantially equivalent, the tailored way of determining if he is fit to practice law would be to simply allow him to sit for an exam designed to determine if he is fit to practice law. All Mr. Gluzman asks for is a chance.

There's no real countervailing interest. Reversing the Order wouldn't even *risk* licensing a possibly incompetent person. It risks allowing an incompetent person to take the exam. Presumably, if his education was not substantially equivalent, then he will fail (although it might perhaps be more impressive if he passed a bar exam in a foreign language with an inadequate education). The final test of his education *is* the test. That, in the end, is an appropriately tailored way to resolve any doubts about the equivalency of Mr. Gluzman's education that accords proper respect to the vitalness of his fundamental right.

Giving him this extra chance to resolve all doubts before he loses a dream he has worked so hard for is a fitting way to protect the public while respecting the importance of Mr. Gluzman's fundamental right to earn a living, a central liberty interest in Tennessee.

CONCLUSION

For the reasons stated in the petitioner's brief and this *Amici* brief, the Order denying Mr. Gluzman's application for permission to take the Tennessee Bar Exam should be reversed. He should be permitted to take the bar exam.

Dated: May 16 2017

Respectfully submitted,

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State of Tennessee

PUBLIC CHAPTER NO. 1053

SENATE BILL NO. 2469

By Green, Johnson, Roberts, Bell, Gresham, Stevens, Beavers, Bowling, Crowe, Dickerson, Niceley, Norris

Substituted for: House Bill No. 2201

By Daniel, Reedy, Sanderson, Zachary, Jerry Sexton, Terry, Hazlewood, Holt, Hardaway, Lynn

AN ACT to amend Tennessee Code Annotated, Title 4; Title 7; Title 38; Title 62; Title 63 and Title 67, relative to businesses, professions, and occupations.

WHEREAS, the right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference, is a fundamental civil right; and

WHEREAS, the freedom to earn an honest living traditionally has provided the surest means for economic mobility; and

WHEREAS, in recent years, many regulations of entry into businesses and professions have exceeded legitimate public purposes and have had the effect of arbitrarily limiting entry and reducing competition; and

WHEREAS, the burden of excessive regulation is borne most heavily by individuals outside the economic mainstream, for whom opportunities for economic advancement are curtailed; and

WHEREAS, 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; to provide the means for the vindication of this right; and to ensure that regulations of entry into businesses, professions, and occupations are demonstrably necessary and narrowly tailored to legitimate health, safety, and welfare objectives; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. This act shall be known and may be cited as the "Right to Earn a Living Act".

SECTION 2. Tennessee Code Annotated, Title 4, Chapter 5, is amended by adding the following language as a new part:

4-5-501. As used in this part:

(1) "Entry regulation" means:

(A) Any rule promulgated by a licensing authority for the purpose of regulating an occupational or professional group, including, but not limited to, any rule prescribing qualifications or requirements for a person's entry into, or continued participation in, any business, trade, profession, or occupation in this state; or

(B) Any policy or practice of a licensing authority that is established, adopted, or implemented by a licensing authority for the purpose of regulating an occupational or professional group, including, but not limited to, any policy or practice relating to the qualifications or requirements of a person's entry into, or continued participation in, any business, trade, profession, or occupation in this state; and

(2) "Licensing authority" means any state regulatory board, commission, council, or committee in the executive branch of state government established by

statute or rule that issues any license, certificate, registration, certification, permit, or other similar document for the purpose of entry into, or regulation of, any occupational or professional group. "Licensing authority" does not include any state regulatory board, commission, council, or committee that regulates a person under title 63 or title 68, chapter 11 or 140.

4-5-502.

(a)(1) No later than December 31, 2016, each licensing authority shall submit a copy of all existing or pending entry regulations pertaining to the licensing authority and an aggregate list of such entry regulations to the chairs of the government operations committees of the senate and house of representatives. The committees shall conduct a study of such entry regulations and may, at the committees' discretion, conduct a hearing regarding the entry regulations submitted by any licensing authority. The committees shall issue a joint report regarding the committees' findings and recommendations to the general assembly no later than January 1, 2018.

(2) After January 1, 2018, each licensing authority shall, prior to the next occurring hearing regarding the licensing authority held pursuant to § 4-29-104, submit to the chairs of the government operations committees of the senate and house of representatives a copy of any entry regulation promulgated by or relating to the licensing authority after the date of the submission pursuant to subdivision (a)(1). The appropriate subcommittees of the government operations committees shall consider the licensing authority's submission as part of the governmental entity review process and shall take any action relative to subsections (b)-(d) as a joint evaluation committee. Prior to each subsequent hearing held pursuant to § 4-29-104, the licensing authority shall submit any entry regulation promulgated or adopted after the submission for the previous hearing.

(3) In addition to the process established in subdivisions (a)(1) and (2), the chairs of the government operations committees of the senate and house of representatives may request that a licensing authority present specific entry regulations for the committees' review pursuant to this section at any meeting of the committees.

(4) Notwithstanding this subsection (a), the governor or the commissioner of any department created pursuant to title 4, chapter 3, relative to a licensing authority attached to the commissioner's department, may request the chairs of the government operations committees of the senate and house of representatives to review, at the committees' discretion, specific entry regulations pursuant to this section.

(b) During a review of entry regulations pursuant to this section, the government operations committees shall consider whether:

(1) The entry regulations are required by state or federal law;

(2) The entry regulations are necessary to protect the public health, safety, or welfare;

(3) The purpose or effect of the entry regulations is to unnecessarily inhibit competition or arbitrarily deny entry into a business, trade, profession, or occupation;

(4) The intended purpose of the entry regulations could be accomplished by less restrictive or burdensome means; and

(5) The entry regulations are outside of the scope of the licensing authority's statutory authority to promulgate or adopt entry regulations.

(c) The government operations committees may express the committees' disapproval of an entry regulation promulgated or adopted by the licensing authority by voting to request that the licensing authority amend or repeal the entry regulation promulgated or adopted by the licensing authority if the committees determine during a review that the entry regulation:

(1) Is not required by state or federal law; and

(2)(A) Is unnecessary to protect the public health, safety, or welfare;

(B) Is for the purpose or has the effect of unnecessarily inhibiting competition;

(C) Arbitrarily denies entry into a business, trade, profession, or occupation;

(D) With respect to its intended purpose, could be accomplished by less restrictive or burdensome means, including, but not limited to, certification, registration, bonding or insurance, inspections, or an action under the Tennessee Consumer Protection Act of 1977, compiled in title 47, chapter 18, part 1; or

(E) Is outside of the scope of the licensing authority's statutory authority to promulgate or adopt entry regulations.

(d)(1) Notice of the disapproval of an entry regulation promulgated or adopted by a licensing authority shall be posted by the secretary of state, to the administrative register on the secretary of state's web site, as soon as possible after the committee meeting in which such action was taken.

(2) If a licensing authority fails to initiate compliance with any recommendation of the government operations committees issued pursuant to subsection (c) within ninety (90) days of the issuance of the recommendation, or fails to comply with the request within a reasonable period of time, the committees may vote to request the general assembly to suspend any or all of such licensing authority's rulemaking authority for any reasonable period of time or with respect to any particular subject matter, by legislative enactment.

(e) Except as provided in subdivision (a)(2), for the purposes of reviewing any entry regulation of a licensing authority and making final recommendations under this section, the government operations committees may meet jointly or separately and, at the discretion of the chair of either committee, may form subcommittees for such purposes.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.

SENATE BILL NO. 2469

PASSED: April 20, 2016

RON RAMSEY
SPEAKER OF THE SENATE

BETH HARWELL, *SPEAKER*
HOUSE OF REPRESENTATIVES

APPROVED this 20th day of April 2016

BILL HASLAM, *GOVERNOR*

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon the following, by the following means:

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Dated: May 16 2017

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