IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 33 MAP 2018

SARA LADD, SAMANTHA HARRIS, AND POCONO MOUNTAIN VACATION PROPERTIES, LLC,

Appellants,

v.

REAL ESTATE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA AND DEPARTMENT OF STATE (BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS) OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellees.

BRIEF FOR APPELLANTS

Appeal from the Order of the Commonwealth Court of Pennsylvania
Dated June 4, 2018, at No. 321 MD 2017

Joshua A. Windham*
Paul M. Sherman*
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
**Admitted pro hac vice*

Joshua D. Wolson (I.D. Number 084998)
Dilworth Paxson LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102
(215) 575-7295

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

On July 17, 2017, Appellants filed this action in the Commonwealth Court challenging the constitutionality of an application of Pennsylvania's Real Estate Licensing and Registration Act, 63 P.S. §§ 455.101, *et seq*. The Commonwealth Court had jurisdiction under 42 Pa.C.S. § 761(a)(1).

On June 4, 2018, the Commonwealth Court sustained Appellees' preliminary objection in the nature of a demurrer. Appellants appealed from the Commonwealth Court's Opinion and Order on July 2, 2018. This Honorable Court has jurisdiction under 42 Pa.C.S. § 723(a).

ORDER IN QUESTION

On June 4, 2018, a panel of the Commonwealth Court issued an Opinion and Order that concluded: "The preliminary objection based on demurrer is SUSTAINED, and the petition for review is DISMISSED with prejudice." The complete Opinion and Order by Judge P. Kevin Brobson is attached as Appendix A and reported as *Ladd v. Real Estate Comm'n of Commonwealth*, No. 321 M.D. 2017, 2018 WL 2465787 (Pa. Cmwlth. June 4, 2018).

SCOPE AND STANDARD OF REVIEW

This Court exercises *de novo*, plenary review of decisions sustaining preliminary objections in the nature of a demurrer. *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 434 (Pa. 2017). The question on a demurrer is "whether, on the facts averred, 'the law says with certainty that no recovery is possible.'" *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 56 (Pa. 2014) (citation omitted). This standard is "quite strict." *Gekas v. Shapp*, 364 A.2d 691, 693 (Pa. 1976).

The Court may sustain a demurrer "only when, based on the facts pleaded, it is clear and free from doubt that the [petitioner] will be unable to prove facts legally sufficient to establish a right to relief." *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 101 (Pa. 2008). "All doubts . . . are resolved in favor of overruling [the demurrer]." *Bundy v. Wetzel*, 184 A.3d 551, 556 (Pa. 2018).

STATEMENT OF THE QUESTIONS INVOLVED

Did the Commonwealth Court fail to correctly apply the Pennsylvania rational-basis test, as set forth by this Court in *Gambone v. Commonwealth*, 101 A.2d 634, 636–37 (Pa. 1954), and its progeny, by:

1. Failing to hold an occupational-licensing scheme to the same "means-ends" review under Article I, Section 1 of the Pennsylvania Constitution that this Court has uniformly applied to all other restrictions on the right to pursue a chosen occupation?

   [COMMONWEALTH COURT: DID NOT EXPRESSLY ADDRESS]

2. Sustaining Appellees' demurrer on the ground that, as applied to Appellant Ladd's vacation property management services, RELRA bore a "real and substantial relationship to the interest in protecting from abuse buyers and sellers of real estate," even though Appellant Ladd—who does not buy or sell real estate—credibly alleged that her services posed no such risk?

   [COMMONWEALTH COURT: DISAGREED]

3. Sustaining Appellees' demurrer without considering whether applying RELRA to Appellant Ladd's vacation property management services imposed burdens that were "unduly oppressive or patently beyond the necessities of the case"?

   [COMMONWEALTH COURT: DID NOT EXPRESSLY ADDRESS]

STATEMENT OF THE CASE

Appellant Sara Ladd is a New Jersey-based entrepreneur who, from 2013 to 2016, helped Pocono Mountain home owners post and coordinate short-term rentals on websites like Airbnb. Her goal was to save clients like Appellant Samantha Harris time and money by handling most of the logistical work they would otherwise have to perform to rent their properties out. And she was nothing but successful—that is, until the Commonwealth informed her that she could not continue working without a real-estate broker's license. This case is about whether the requirements for that license, as applied to Ms. Ladd, are unconstitutionally burdensome and excessive under Article I, Section 1 of the Pennsylvania Constitution.

Appellant Ladd's Novel Services

The real-estate industry has changed over the past century, and even more so in recent years. The rise of "Airbnb and similar 'sharing economy' websites ha[s] expanded the possible uses of a single-family dwelling and created new types of economic activity." *Reihner v. City of*

Scranton Zoning Hearing Bd., 176 A.3d 396, 403 (Pa. Cmwlth. 2017).[1] Ms. Ladd's vacation property management services, designed to make the online homesharing process as simple as possible, are a direct example of this development. (*See* R. 7a–14a ¶¶ 11–42 (describing services in detail)).

Ms. Ladd first realized the opportunities presented by the sharing economy when, in 2013, she was laid off from her longtime job as a desktop publisher and marketer. (R. 7a–8a ¶¶ 11–12, 9a ¶¶ 20–21). While her internet savvy allowed her to support herself as a contractor building and maintaining websites, Ms. Ladd knew she needed a more reliable source of income as she started looking towards retirement. (R. 8a ¶¶ 12–14). Opportunity knocked when friends began noticing that Ms. Ladd had a talent for coordinating online rentals for a pair of vacation cottages she owned in the Pocono Mountains. (R. 9a ¶¶ 20–21). When they began asking if she would help rent out their properties too, Ms. Ladd eagerly accepted. (R. 9a ¶ 21).

---

[1] *See also, e.g.*, *Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd.*, 164 A.3d 633, 642 (Pa. Cmwlth. 2017) (noting same), *appeal granted* 180 A.3d 367 (Pa. 2018); *Shvekh v. Zoning Hearing Bd. of Stroud Twp.*, 154 A.3d 408, 415 (Pa. Cmwlth. 2017) (same).

For the next three years, Ms. Ladd operated a modest vacation property management business. (R. 9a–12a ¶¶ 21–33, 13a–14a ¶¶ 39–42). With each client, she signed a simple agreement that set forth their respective responsibilities. (R. 10a–11a ¶¶ 26–28). A client first informed Ms. Ladd of the dates and rate at which they desired to rent the property. (R. 10a–11a ¶¶ 26, 28(b) & (d)). Next, Ms. Ladd posted that information on Airbnb and similar homesharing websites, and responded to inquiries from prospective renters. (R. 10a ¶¶ 27(b) & (c)). To make a reservation, the renter signed a rental agreement directly with the property owner. (R. 10a–11a ¶¶ 27(a) & 28(a)). Ms. Ladd was never a party to such agreements. (R. 10a ¶ 27(a)). At the end of the process, she handled all billing (including returning security deposits and remitting rents to her clients, less her own costs and commissions), and ensured the property was cleaned between renters. (R. 10a ¶¶ 27(d) & (e)).

During this period, Ms. Ladd intentionally limited the scope of her business. (R. 12a ¶¶ 29–33, 13a–14a ¶¶ 39–41). She focused her services exclusively on short-term rentals (rentals for less than 30 days), most of which lasted just a few days and cost just a few hundred dollars

at a time. (R. 5a ¶ 2 n.1, 12a ¶¶ 31–32). Moreover, Ms. Ladd never managed more than five properties at once and limited her services to neighbors in the Arrowhead Lake community (where her cottages were located) or the nearby area, so that she could devote to each client the time and attention she felt they deserved. (R. 9a ¶¶ 20–21, 12a ¶ 33, 13a–14a ¶¶ 39–41).

For Ms. Ladd, in her early 60s and trying to plan for retirement, vacation property management was the ideal part-time occupation. (R. 14a ¶ 42, 20a–21a ¶¶ 74 & 77). She could provide simple, quality services with just her laptop and an internet connection. (R. 13a–14a ¶¶ 40–41). She could support herself from home, which offered a degree of independence she has found increasingly valuable as she ages. (R. 8a ¶ 13, 13a–14a ¶¶ 40 & 42, 20a–21a ¶¶ 74 & 77). And her streamlined business model allowed her to earn a modest profit by avoiding the overhead associated with a physical office and employees. (R. 12a–13a ¶¶ 29–33 & 39–40). For these reasons, Ms. Ladd hoped (and still hopes) to support herself by providing these services well into retirement. (R.

14a ¶ 42, 20a–21a ¶¶ 74 & 77). But Pennsylvania's outdated real-estate licensing regime stands in her way.

Pennsylvania's Outdated Real-Estate Licensing Regime

In 2017, Ms. Ladd received a call from an investigator informing her that her vacation property management services constituted the practice of real estate, and that she would therefore need to obtain a broker's license to continue working. (R. 17a–18a ¶ 60). Ms. Ladd soon discovered that Pennsylvania's Real Estate Licensing and Registration Act, 63 P.S. §§ 455.101, *et seq.* (RELRA), defines a "broker" broadly to include not just people who buy and sell property and coordinate long-term leases, but also anyone who "undertakes to promote the . . . rental of real estate," including herself. (R. 18a ¶ 61).

Ms. Ladd was shocked that RELRA swept her novel services into the same category as traditional real-estate practice. (R. 18a ¶ 62). Unlike most brokers, she did not help clients buy or sell property, facilitate the creation of landlord-tenant relationships, or commit clients to long-term leases. (R. 12a–13a ¶¶ 29–30 & 36–37). Unlike most brokers, she did not engage in complex transactions that took months or even years to

complete. (R. 12a–13a ¶¶ 31–32 & 36–38). And unlike most brokers, she did not handle the tens or hundreds of thousands of dollars typically involved in real-estate transactions. (R. 12a–13a ¶¶ 32 & 36–37).

Instead, as described above, Ms. Ladd's services were limited to short-term, low-cost home rentals—not unlike the conditions of a typical hotel stay. (R. 12a ¶¶ 31–32). In fact, the General Assembly even recognized this similarity when, in 2015, it expanded the Commonwealth's "hotel tax" to cover homesharing. *See* 72 Pa.C.S. § 7210 (imposing tax on "every occupancy of a room or rooms in a hotel in this Commonwealth, which tax shall be collected by the operator from the occupant"); 61 Pa. Code § 38.3 (defining "hotel" as any form of lodging "available to the public for periods of time less than 30 days").

Despite these differences, RELRA subjects Ms. Ladd's limited services to Pennsylvania's *most* onerous real-estate licensing requirements. (*See* R. 14a–17a ¶¶ 43–59 (setting forth requirements in detail)). To obtain a broker's license, Ms. Ladd would have to spend three years working for and sharing profits with an established broker;

take hundreds of hours of courses and pass two exams on real-estate practice; and open a brick-and-mortar office in Pennsylvania. (R. 14a–17a ¶¶ 43–59). These irrelevant and onerous requirements are far more burdensome than necessary to regulate Ms. Ladd's services. (R. 4a–5a ¶¶ 1–2, 18a–19a ¶¶ 63–66, 22a–23a ¶¶ 83–85).

First, to start RELRA's three-year apprenticeship, Ms. Ladd would have to obtain the consent of a sponsoring broker. 63 P.S. § 455.522(b). But nothing in RELRA requires the broker—or *any* broker—to consent. *See id.* §§ 455.511(4), 455.522(b), 455.603(a) (setting forth apprenticeship parameters but failing to include any such requirement). Moreover, even if a broker does consent, Ms. Ladd would then be forced to spend three years apprenticing with a broker who, under RELRA, is not required to help her meet any objective benchmarks or standards that would ensure her competence as a vacation property manager. *See id.* (setting forth same parameters but including no competency measures).

Second, to obtain a broker's license, Ms. Ladd would be forced to complete courses and exams both before *and* after the apprenticeship—

that is, over a period of at least three years. To start, she would have to complete 75 hours[2] of approved real-estate courses and take a "salesperson's license exam." *Id.* § 455.521(2). The two topics currently prescribed are "Real Estate Fundamentals" and "Real Estate Practice." 49 Pa. Code § 35.272(b)(2). Vacation property management, as described in the petition, is not included. (*Cf.* R. 7a–14a ¶¶ 11–42 (describing Ms. Ladd's distinct services)).

Then, after spending three years apprenticing as a salesperson, Ms. Ladd would have to complete an additional 240 hours of approved courses and pass a "broker's license examination." 63 P.S. § 455.511(3). The topics currently prescribed are "Real Estate Brokerage and Office Management," "Real Estate Law," "Real Estate Finance," "Real Estate Investment," "Residential Property Management," "Nonresidential Property Management," "Real Estate Sales," "Residential Construction," "Valuation of Residential Property," and "Valuation of Income-Producing Property." 49 Pa. Code § 35.271(b)(2). Again, vacation

[2] The legislature increased this number from 60 to 75 earlier this year. *See* P.L. 500, No. 75 § 2 (June 29, 2018).

property management is not included. (*Cf.* R. 7a–14a ¶¶ 11–42 (describing Ms. Ladd's distinct services)).

Finally, once Ms. Ladd met these requirements and obtained her license, she would be forced to open a brick-and-mortar office in Pennsylvania just to keep that license. 63 P.S. § 455.601(a).

All told, RELRA's requirements impose unreasonable and unnecessary burdens on Ms. Ladd's business. (R. 4a–5a ¶¶ 1–2, 18a–19a ¶¶ 63–66, 22a–23a ¶¶ 83–85). There is no reason to think that forcing Ms. Ladd to spend over three years of her life completing courses, exams, and an apprenticeship focused on traditional real-estate practice will make her a better vacation property manager. (R. 4a–5a ¶¶ 1–2, 18a–19a ¶¶ 63–66, 22a–23a ¶¶ 83–85). And requiring Ms. Ladd to open an office she does not need and cannot afford would defeat the point of running an online, home-based business. (R. 8a–9a ¶¶ 13 & 24, 13a–14a ¶¶ 40 & 42, 20a–21a ¶¶ 74 & 77).

This mismatch can be attributed, at least in part, to RELRA's historical origins. RELRA's definition of a "broker" dates back to the original Real Estate Broker's License Act of 1929—almost a century

before online homesharing platforms were even conceived—and Ms. Ladd's services would have been swept up under either law. *Compare* 63 P.S. § 455.201 (defining "broker" to include any person who, for another and for a fee, "undertakes to promote the . . . rental of real estate"), *with* P.L. 1216 § 2(a) (May 1, 1929) (defining "real estate broker" to include any person who, for another and for a fee, "shall . . . rent . . . the property of another").

And many of RELRA's core requirements have only expanded upon those imposed in 1929. *Compare* 63 P.S. §§ 455.511, .521–522, .601 (requiring applicants to spend three years working for a licensed broker, take hundreds of hours of courses and pass two exams, and maintain a brick-and-mortar office in Pennsylvania), *with* P.L. 1216 §§ 9(a), 12(d) (May 1, 1929) (requiring applicants to pass an examination on topics including real property, conveyances, mortgages, agreements of sale, and leases, and to maintain a brick-and-mortar office in Pennsylvania).

When the 1929 Act was enacted, real-estate practice was primarily focused on buying and selling property. *See Alford v. Raschiatore*, 63 A.2d 366, 368 (Pa. Super. 1949) (""The common knowledge on the subject,' of

which the Court must take judicial notice, is that [] probably the bulk of real estate transactions conducted by real estate agents or brokers . . . [involve] finding and introducing a party who is ready and willing to *sell* [to] a prospect who is ready, willing and able to *buy*." (emphasis added)). Hence this Court's recognition that the Act was designed to impose "comprehensive regulation of the business of *selling* real estate for others." *Verona v. Schenley Farms Co.*, 167 A. 317, 318 (Pa. 1933) (emphasis added). The goal was to "protect the public" in such sales "against imposition, dishonesty, and fraud." *Appeal of J. A. Young & Co.*, 160 A. 151, 157–58 (Pa. Super. 1932).

While RELRA replaced the 1929 Act, the core activities of real-estate practice—and thus, RELRA's primary purpose—remain the same.[3] As in 1929, most residential brokers today are still focused on buying and selling property. (R. 13a ¶¶ 37–38). Their practices are still devoted to long, complex transactions involving the transfer of permanent or long-term interests in real estate. (R. 13a ¶ 36). And at

[3] *See* 12 C.J.S. Brokers § 1 (noting that a "broker" is an agent who "bargains or carries on negotiations . . . relative to *sale or purchase* of any form of property" (emphasis added)).

least in the residential context, those transactions still typically involve buying and selling houses worth tens or hundreds of thousands of dollars. (R. 13a ¶ 37). That is the business model for which Pennsylvania's onerous broker-licensing requirements have always been designed.

The fact that RELRA now subjects Ms. Ladd's totally different services to the same requirements is not due to any considered determination that they pose the same risks as traditional real-estate practice. (*See* R. 5a ¶ 2) (alleging that forcing Ms. Ladd to obtain a broker's license merely to provide vacation property management services "does not protect the public from any real danger"). Instead, it appears that the legislature has simply failed to account for the fact that the world has changed since the Great Depression. As Ms. Ladd's situation demonstrates, that failure has real-world consequences.

The Destruction of Appellant Ladd's Business and This Lawsuit

Unable to bear RELRA's onerous costs, and unwilling to risk crippling fines and jail time, Ms. Ladd was forced to shut down her business. (R. 4a–5a ¶ 1, 19a ¶ 67). This was devastating for Ms. Ladd,

who loved her work and saw it as a promising means of supporting herself well into old age. (R. 14a ¶ 42, 20a–21a ¶¶ 74 & 77). Ms. Ladd's clients, including Appellant Harris, were similarly upset that they could no longer continue using the vacation property manager who they knew and trusted to provide excellent services. (R. 20a ¶¶ 69–70).

So on July 17, 2017, Appellants Ladd, Harris, and Pocono Mountain Vacation Properties (PMVP)[4] filed a petition for review seeking declaratory and injunctive relief against Appellees Pennsylvania Real Estate Commission and Pennsylvania Department of State (Bureau of Professional and Occupational Affairs). In the petition, Appellants alleged that RELRA's licensing requirements, as applied, were largely unrelated to Ms. Ladd's services and imposed excessive burdens on her substantive-due-process right to pursue a chosen occupation under Article I, Section 1 of the Pennsylvania Constitution. (R. 4a–5a ¶¶ 1–2, 18a–19a ¶¶ 63–66, 22a–23a ¶¶ 81–85). Appellants argue this fails both prongs of the Pennsylvania rational-basis test, as set forth by this Court

[4] PMVP is Ms. Ladd's vacation property management business; she is PMVP's sole owner/operator. (R. 7a ¶ 8).

in *Gambone v. Commonwealth*, 101 A.2d 634, 636–37 (Pa. 1954), and its progeny.

The Commonwealth Court's Decision and This Appeal

On August 17, 2017, Appellees filed preliminary objections, including an objection in the nature of a demurrer. (R. 29a–48a). On June 4, 2018, a three-judge panel of the Commonwealth Court[5] overruled most of Appellees' objections but sustained their objection in the nature of a demurrer. Appendix A at 14. Despite Appellants' plausible allegations that Ms. Ladd's services do not implicate the core concerns of real estate practice; that RELRA's licensing requirements were largely unrelated to her services; and that those requirements were unduly burdensome, the court concluded—without explaining why or how—that "RELRA bears a real and substantial relationship to the interest in protecting from abuse buyers and sellers of real estate." App. A at 12. This appeal followed.

[5] This case was heard before judges Leavitt, Brobson, and Cannon. App. A at 1.

SUMMARY OF THE ARGUMENT

A court may sustain a demurrer only when it appears with certainty that a claim cannot prevail. Here, Appellants made plausible allegations that Ms. Ladd's services do not implicate the core concerns of real-estate practice and that RELRA's onerous licensing requirements are both irrational and oppressive as applied to the work she actually performs. These allegations are sufficient to state a claim that RELRA violates Ms. Ladd's right to earn an honest living under Article I, Section 1 of the Pennsylvania Constitution.

The Commonwealth Court purported to sustain Appellees' demurrer on the ground that "RELRA bears a real and substantial relationship to the interest in protecting from abuse buyers and sellers of real estate." App. A at 12. Yet the court did not explain how subjecting vacation property managers like Ms. Ladd—whose services do not involve buying or selling property—to RELRA's burdensome requirements furthers that (or any other) goal. Nor did the court consider those burdens in light of their impact on Ms. Ladd and whether any less restrictive alternatives were available.

This was error. Section I below explains that to satisfy Article I, Section 1, RELRA's licensing requirements must meet both prongs of the "*Gambone* rational basis test," which—contrary to the Commonwealth Court's treatment—demands meaningful, fact-based review. Section II then explains that, taking the allegations in the petition as true, RELRA's requirements fail both prongs of that test as applied to Ms. Ladd. Because this is a plausible substantive-due-process claim, the demurrer must be overruled.

ARGUMENT FOR APPELLANTS

I. To Be Constitutional, RELRA Must Satisfy the *Gambone* Test.

The right to earn a living has been secured under Article I, Section 1 of the Pennsylvania Constitution since the Commonwealth's founding in 1776. That provision places strict limits on state power so that the rights of the people remain inviolate. Accordingly, this Court has long held that occupational restrictions must satisfy both prongs of what is now called the "*Gambone* rational basis test." First, they must have a real and substantial relationship to a legitimate government end. Second, they must not impose burdens that are unduly oppressive or patently

unnecessary. Contrary to the Commonwealth Court's treatment of the issues below, RELRA is no exception.

A. Under Article I, Section 1, Occupational Restrictions Must Satisfy the *Gambone* Test.

Article I, Section 1 of the Pennsylvania Constitution declares that every person is born with "certain inherent and indefeasible rights," including the right of "acquiring, possessing, and protecting property . . . and of pursuing their own happiness." Pa. Const. art. I, § 1. Implicit in the right to acquire property and pursue happiness is the right to pursue one's chosen occupation. *Nixon v. Commonwealth*, 839 A.2d 277, 288 (Pa. 2003).

This Court has repeatedly recognized that Section 1 provides greater protection for occupational freedom than the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Shoul v. Commonwealth*, 173 A.3d 669, 677 (Pa. 2017) (noting that "[t]his Court . . . applies what we have deemed a 'more restrictive' test" (quoting *Nixon*, 839 A.2d at 287 n.15)); *Pa. State Bd. of Pharm. v. Pastor*, 272 A.2d 487, 490 (Pa. 1971) (noting that "Pennsylvania . . . has scrutinized regulatory legislation

perhaps more closely than would the Supreme Court of the United States").

Given the Pennsylvania Constitution's unique history, this makes sense.[6] In 1776—a full decade before the ratification of the Bill of Rights—the Commonwealth's framers convened to establish a government "that would preserve and establish our liberties, and [] transmit them inviolate to posterity."[7] Inspired by the political philosophy of John Locke,[8] they ratified a constitution specifically "to enable . . . individuals . . . to enjoy their natural rights . . . and to promote their safety and happiness."[9]

To that end, the Constitution of 1776 included a Declaration of Rights proclaiming that "every[right] included in this article is exempted

---

[6] *Cf. Commonwealth v. Edmunds*, 586 A.2d 887, 894–95 (Pa. 1991) (noting that each provision of the Pennsylvania Constitution requires "an independent analysis").

[7] *Proceedings Relative to the Calling of the Conventions of 1776 and 1790*, at 43 (J. S. Wiestling ed. 1825).

[8] *See* John Locke, *Second Treatise of Civil Government* §§ 134–42, *in Two Treatises of Civil Government* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (explaining that all free people have certain inherent rights that they form governments to secure); *see also W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 515 A.2d 1331, 1334 (Pa. 1986) (noting Locke's influence on framers); *accord* J. Paul Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy* 147, 170, 176 (Octagon Books 1971) (1936) (same).

[9] *Proceedings*, *surpa* note 7, at 54.

out of the general powers of government and shall forever remain inviolate." Pa. Const. art. I, § 25. Unlike the federal Bill of Rights, which was added as "a later addendum" to the U.S. Constitution in 1791, the Declaration was "an organic part of the state's original constitution of 1776 and appeared (not coincidentally) first in that document." *Edmunds*, 586 A.2d at 896. The Declaration was thus intended to bear primary responsibility for protecting individual rights in Pennsylvania.[10]

The right to earn an honest living was among the "inviolate" rights secured in the Declaration. Section 1's emphasis on "*acquiring* . . . property" and "*pursuing* . . . happiness" dates back to the original draft of the provision.[11] This language—which emphasized activity and effort—

[10] *See Robinson Twp., Washington Cty. v. Commonwealth*, 83 A.3d 901, 947–48 (Pa. 2013) (explaining Declaration's primary role in protecting individual rights under Pennsylvania's constructional structure).

[11] *Proceedings*, *supra* note 7, at 55 (emphasis added). Section 1 was modeled off George Mason's original draft of the Virginia Declaration of Rights, which drew heavily from Locke's *Second Treatise*. Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1316–17 (2015). Just one year prior, Mason himself publicly echoed the Lockean principle that government becomes "oppress[ive]" when it extends beyond the protection of the public. *See* George Mason, *Remarks on Annual Elections for the Fairfax Independent Company*, *in To Secure the Blessings of Liberty: Rights in American History* 5 (Josephine F. Pacheco ed., George Mason Univ. Press 1993) (1775).

reflected the framers' shared commitment[12] to a Lockean political philosophy that recognized "labour" and "industry" as fundamental to human life[13]; to a Quaker ethic that valued "[i]ndustrious[ness]," "[l]aborious handicrafts," and "ingenious spirits"[14]; and to the common law maxim that "every man might use what trade he pleased."[15] Benjamin Franklin himself underscored this commitment when, as editor of the Constitution of 1776, he added "industry" to the list of principles for which legislators must "exact a due and constant Regard

---

[12] *Cf. Edmunds*, 586 A.2d at 896 (recognizing that the Constitution "reduce[d] to writing a deep history of unwritten legal and moral codes which had guided the colonists from the beginning of William Penn's charter in 1681").

[13] *See* Locke, *Second Treatise*, *supra* note 8, at §§ 25–51 (explaining same); *see also Bishop v. Piller*, 637 A.2d 976, 978 (Pa. 1994) (recognizing Locke's influence on Section 1).

[14] William Penn, *Some Account of the Province of Pennsylvania*, *in William Penn and the Founding of Pennsylvania: A Documentary History* § 15 (Jean R. Soderlund ed., Univ. of Pennsylvania Press 1983) (1681).

[15] William Blackstone, *Commentaries on the Laws of England*, vol. I, at 427 (Illinois: Univ. of Chicago Press 1979) (1765); *see also* Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* *181 (William S. Hein Co. 1986) (1797) (recognizing that under "the ancient and fundamentall [sic] laws of this kingdome . . . . a mans trade is accounted his life, because it maintaineth his life"); *see generally* Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 207–23 (2003) (setting forth common law right to earn a living and its influence on American Revolution).

. . . in making and executing such laws as are necessary for the good Govt. of the State."[16]

Despite multiple changes to Pennsylvania's Constitution over the years, Section 1's protections for occupational freedom have never wavered. Its text has remained "practically unchanged" since its adoption in 1776.[17] Early decisions of this Court consistently recognized that Section 1 secured the right to earn a living.[18] And today, the Court continues to emphasize that occupational freedom is not just "undeniably important," *Nixon*, 839 A.2d at 287, but "a distinguishing

---

[16] *Revisions of the Pennsylvania Declaration of Rights [Between 29 July 1776 and 15 August 1776]*, *Founders Online*, National Archives, last modified June 13, 2018, https://founders.archives.gov/documents/Franklin/01-22-02-0314. At the time, "industry" was synonymous with "[s]ystematic work or labour; habitual employment in some useful work," including "a trade or manufacture." *The Compact Edition of the Oxford English Dictionary*, vol. I, at 1423 (Oxford Univ. Press 1971).

[17] *Selsam*, *supra* note 8, at 259; *see also* Robert E. Woodside, *Pennsylvania Constitutional Law* 114 (1985) (noting that Section 1 has remained almost "identical" since the founding).

[18] *See, e.g.*, *Com. ex rel. Woodruff v. Humphrey*, 136 A. 213, 215 (Pa. 1927) (noting that the right of "acquiring, possessing, and protecting property" under Section 1 includes "pursuing one's business of [sic] profession"); *Walker v. Commonwealth*, 11 A. 623 (Pa. 1887) ("The right to follow any of the common occupations of life is an inalienable right."); *Godcharles & Co. v. Wigeman*, 6 A. 354, 356 (Pa. 1886) ("[A person] may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void."); *Drexel & Co. v. Commonwealth*, 46 Pa. 31, 36 (1863) ("Statutes which impose restrictions upon trade or common occupations . . . must be construed strictly.").

feature of our way of life in this country that may not be curtailed without due process of law," *Moore v. Jamieson*, 306 A.2d 283, 288 (Pa. 1973).[19]

At its core, Section 1 protects the freedom to pursue a productive, honest trade (i.e., a "lawful occupation"). *Nixon*, 839 A.2d at 288. Within this sphere, the right to earn a living is "inalienable." *Sec'y of Revenue v. John's Vending Corp.*, 309 A.2d 358, 361 (Pa. 1973). Activities that would injure or defraud others, on the other hand, may be regulated under the Commonwealth's "police power" to "protect the public health, safety, and welfare." *Nixon*, 839 A.2d at 286.

But as this Court made clear in *Gambone*, 101 A.2d at 636, "the [police] power is not unrestricted; its exercise, like that of all other governmental powers, is subject to constitutional limitations and judicial review."[20] In *Gambone*, the legislature passed a law banning gas stations

---

[19] The Superior Court has even gone so far as to call the right "fundamental." *Commonwealth v. Christopher*, 132 A.2d 714, 716 (Pa. Super. 1957). This is not without foundation. *See Robinson Twp., Washington Cty.*, 83 A.3d at 947 (referring to "rights reserved to the people in Article I of our Constitution" as "fundamental").

[20] *See also* Christopher G. Tiedeman, *Treatise on the Limitations of Police Power in the United States* §§ 85, 101 (1886) (discussing specific limitations on power to regulate pursuit of chosen occupations). This Court cited Tiedeman's treatise several times before *Gambone* was decided. *See, e.g.*, *Appeal of White*, 134 A. 409, 413 (Pa. 1926);

from posting fuel prices on signs over a certain size. *Id.* When a station challenged the law under Section 1, the Commonwealth claimed it was intended to prevent "fraudulent advertising of prices" and "price cutting." *Id.* But this Court held that these assertions—without more—were not sufficient to sustain the law.

The Court explained that "a law which *purports* to be an exercise of the police power" must satisfy a two-pronged test—it must:

> (1) "have a real and substantial relation to the objects sought to be attained"
>
> AND
>
> (2) "not be unreasonable, unduly oppressive or patently beyond the necessities of the case"

Id. at 636–37 (emphasis added).[21]

Titusville Amusement Co. v. Titusville Iron Works Co., 134 A. 481, 485 (Pa. 1926); *Commonwealth v. Fisher*, 62 A. 198, 201 (Pa. 1905).

[21] While deeply rooted in Pennsylvania's jurisprudence, this two-pronged formulation—considering both a law's connection to its purported ends *and* its oppressiveness in light of those ends—is not unique in state constitutional law. *See Md. Bd. of Pharm. v. Sav-A-Lot, Inc.* 311 A.2d 242, 251 (Md. 1973) (calling Maryland's test "virtually identical" to the *Gambone* test); *see also, e.g.*, *Jegley v. Picado*, 80 S.W.3d 332, 352 (Ark. 2002) (noting that an exercise of the police power must be (1) "reasonably necessary for the accomplishment of [a legitimate] purpose," and (2) "not unduly oppressive upon individuals" (citation omitted)); *Troiano v. Zoning Comm'n of Town of N. Branford*, 231 A.2d 536, 537 (Conn. 1967) (applying similar test); *Powell v. State*, 510 S.E.2d 18, 25 (Ga. 1998) (same); *Honomichi v. Valley View Swine, LLC*, 914 N.W.2d 223, 235 (Iowa 2018) (same); *Bruce v. Dir., Dep't of Chesapeake Bay*

Neither of the Commonwealth's justifications in *Gambone* satisfied this test. First, the Court found sign size wholly unrelated to both fraud and price-cutting, which failed prong one. *Id.* at 637. Second, the Court noted that these concerns could have been addressed much more directly by simply banning misleading statements (as the legislature had already done under the Penal Code) and forbidding prices below a certain floor, which failed prong two. *Id.*

While *Gambone* is today considered a landmark decision, it stands for a modest proposition: When the government restricts a person's cherished right to pursue a chosen occupation, mere assertions that the law has legitimate *ends* cannot satisfy Section 1. Instead, the law's *means* must also satisfy both prongs of the "*Gambone* rational basis test." *Nixon*, 839 A.2d at 289. That proposition is at the heart of Appellants' case.

B. The *Gambone* Test Demands Meaningful, Fact-Based Review.

According to this Court, the key difference between the *Gambone* test and the federal rational-basis test is "the degree of deference [each]

Affairs, 276 A.2d 200, 209 (Md. 1971) (same); *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015) (same); *Guimont v. Clarke*, 854 P.2d 1, 14 (Wash. 1993) (same).

affords to legislative judgment." *Shoul*, 173 A.3d at 677. Under the federal test, a law restricting economic liberty is presumed constitutional, and a plaintiff must "'negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.'" *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320–21 (1993)).[22] Under the *Gambone* test, by contrast, merely "assert[ing] reasons" for a law does not immunize it from further scrutiny. *Pastor*, 272 A.2d at 490. Instead, plaintiffs may—and regularly do—rebut those assertions by "adducing . . . evidence sufficient to overcome the presumption [of constitutionality]." *Warren v. City of Phila.*, 127 A.2d 703, 705 (Pa. 1956).

Indeed, under Pennsylvania's "more restrictive" test, *Shoul*, 173 A.3d at 667, the strength or weakness of a factual record is often

[22] While this Court has suggested that "this test may mean that in the federal courts the due process barrier to substantive legislation as to economic matters has been in effect removed," *Pastor*, 272 A.2d at 490, Appellants respectfully urge the Court to reconsider this characterization based upon a growing body of scholarship showing that the federal rational-basis test, both historically and in practice, *does* still require meaningful, fact-based review of economic regulations. *See, e.g.*, Katie R. Eyer, *The Canon of Rational Basis Review*, 93 Notre Dame L. Rev. 1317, 1351–56 (2018) (collecting cases); Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 Geo. J. L. & Pub. Pol'y 373, 382, 388–390 (2016) (same); Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity,"* 25 Geo. Mason U. C.R. L.J. 43, 53–67, 70–74 (2014) (same).

dispositive.[23] In *Commonwealth ex rel. Woodside v. Sun Ray Drug Co.*, 116 A.2d 833, 834–35 (Pa. 1955), for instance, "ice milk" producers were sued for selling a dairy product that did not contain the minimum butterfat content mandated under Pennsylvania's Ice Cream Law. The producers claimed the application of the law was unconstitutional under Article I, Section 1 because nobody disputed the safety of their product. *Id.* at 837. But the government claimed that, safety aside, the product nevertheless "create[d] a *possibility* of defrauding or deceiving the public in that the retailer *may* sell the base as ice cream." *Id.* at 838 (emphasis added).

As in *Gambone*, this Court put the government's assertion to the test. The Court noted that to justify exercising the police power, there must first *be* a legitimate evil to be prevented. *Id.* at 837. The U.S. Supreme Court's decision in *Carolene Products v. United States*, 323 U.S. 18

[23] *See, e.g.*, *Mahony v. Twp. of Hampton*, 651 A.2d 525, 527 (Pa. 1994) (justifications for restriction on private gas-well operators "not supported by the record"); *Adler v. Montefiore Hosp. Ass'n of W. Pa.*, 311 A.2d 634, 642 (Pa. 1973) (public hospital's policy denying physician access "amply supported by the record"); *Pastor*, 272 A.2d at 493 (state "produced no evidence" justifying ban on drug-price advertising); *Lutz v. Armour*, 151 A.2d 108, 111 (Pa. 1959) (record was "barren of any evidence" justifying restriction on private trash collectors); *Warren*, 127 A.2d at 705–06 (plaintiffs "adduced . . . evidence sufficient to overcome the presumption that the alleged emergency conditions" justifying rent-control ordinance actually existed); *Com. ex rel. Woodside v. Sun Ray Drug Co.*, 116 A.2d 833, 840 (Pa. 1955) (finding "no evidence in this record" supporting state's justifications for ban on milk-shake ingredient).

(1944), which featured actual evidence of "confusion with milk products," *id.* at 23, was one prominent example of this. *Woodside*, 116 A.2d at 838. But the Court distinguished *Carolene Products* because there was "no evidence in this record" of any confusion or deception, which meant the sale of the product could not be restricted. *Id.* at 840.

This fact-based approach is consistent with this Court's longstanding approach to reviewing economic regulations: Under Section 1, the police power is constrained by its "raison d'etre." *Flynn v. Horst*, 51 A.2d 54, 60 (Pa. 1947). If an economic regulation is enacted to address an alleged threat to the public, its "validity depends on the *truth* of [that threat]." *Id.* (emphasis added). And even when a threat truly does exist, "[t]he *measure* of [the] police power must square with the *measure* of public necessity." *Id.* at 59 (citation omitted) (emphasis added). Both "truth" and "measure" are questions of fact.

C. RELRA's Licensing Requirements Are No Exception.

The Commonwealth Court purported to sustain Appellees' demurrer on the ground that RELRA satisfies the *Gambone* test. App. A at 12. But beyond identifying RELRA's purpose as "protect[ing] buyers

and sellers of real estate, the most expensive item many persons ever buy or sell, from abuse," App. A at 11 (citation omitted), the court failed to apply that test in any meaningful way. The court did not explain how Ms. Ladd's services implicate a concern about "buyers and sellers" of real estate, even though she has no involvement with such sales. (R. 12a ¶¶ 29–30). The court did not explain how applying RELRA's particular requirements to Ms. Ladd bore a "real and substantial relation" to that (or any other) purpose. And the court did not discuss whether the burdens imposed were "unduly burdensome or patently beyond the necessities of the case."

Instead, the court simply noted that "mere[]" licensing requirements are common "across many career fields"; expressed concern that meaningful constitutional scrutiny "would effectively upend the legitimacy of any requirement by the Commonwealth . . . for a professional license"; and distinguished this Court's decision in *Nixon* on the ground that RELRA does not impose "a blanket ban on certain individuals from working as real estate brokers." App. A at 11–14. Whatever the merits of these points—and as explained in Section II

below, there is none—they do not provide the sort of fact-based, means-ends review this Court's precedents require.

The Commonwealth Court appears to have been led astray by its belief that Pennsylvania law does not support the proposition that occupational-licensing laws, as applied, can fail the *Gambone* test. *See* App. A at 12 ("Petitioners do not cite to any case, nor is this Court aware of any, in which a Pennsylvania court has determined that a license requirement becomes unreasonable or oppressive for individuals who provide professional services, *like the services Petitioners admit Ladd provided*, but in a limited fashion." (emphasis in original)).[24]

The court was mistaken. In fact, the language of the *Gambone* test derives, in part, from a *licensing* case out of Pennsylvania: the U.S. Supreme Court's decision in *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105

[24] As discussed in Section II below, this misconstrues Appellants' argument. Appellants have never argued that Ms. Ladd merely provides less of the same services that traditional real-estate brokers provide. Instead, Appellants argue that Ms. Ladd provides services *totally different* from those provided by the vast majority of brokers, and that *those* services do not implicate RELRA's core concerns. *Cf. United Interchange, Inc. v. Spellacy*, 136 A.2d 801, 806 (Conn. 1957) ("This is not to imply that [real-estate] activities such as the plaintiffs carry on cannot, consistently with constitutional limitations, be regulated. That is not the issue in this case. Rather, the question for decision is whether this particular legislation is consistent with those limitations.").

(1928). There, the Court struck down a Pennsylvania law requiring drug-store owners to obtain a pharmacist license because ownership status had "no real or substantial relation to the public health," the law "create[d] an unreasonable and unnecessary restriction upon private business," and "[n]o facts [were] presented by the record . . . that properly could give rise to a different conclusion." *Id.* at 113. This Court then fully adopted the *Baldridge* decision to dispose of an identical challenge. *See George B. Evans, Inc. v. Baldridge*, 144 A. 97, 97 (Pa. 1928) (reaching "the same conclusion" on "all the material questions . . . as stated in *Liggett Co. v. Baldridge*").

In the 90 years since *Baldridge*, this Court has consistently applied what is now called the "*Gambone* rational basis test" to all forms of occupational regulation.[25] While the Court has not decided a case

[25] *See, e.g.*, *Shoul*, 173 A.3d at 677 (commercial driver's license disqualification); *Driscoll v. Corbett*, 69 A.3d 197, 204 (Pa. 2013) (mandatory retirement age for judges); *Khan v. State Bd. of Auctioneer Exam'rs*, 842 A.2d 936, 946 (Pa. 2004) (reciprocal-discipline provision for auctioneer license); *Nixon*, 839 A.2d at 286 (disqualification from employment in older-adult facilities); *Mahony*, 651 A.2d at 527 (restriction on private gas well operators); *Adler*, 311 A.2d at 641 (public hospital's policy denying physician access); *Pastor*, 272 A.2d at 491 (ban on advertising certain drug prices); *DePaul v. Kauffman*, 272 A.2d 500, 504 (Pa. 1971) (rent-withholding law); *Lutz*, 151 A.2d at 110 (restriction on private trash collectors); *Warren*, 127 A.2d at 705 (rent-control law); *Woodside*, 116 A.2d at 837 (dairy product restriction); *Cott Beverage Corp. v. Horst*, 110 A.2d 405, 407 (Pa. 1955) (ban on sale of non-alcoholic carbonated beverages); *see*

precisely like this one, the Commonwealth Court and Superior Court have each ruled for the petitioners in challenges to occupational-licensing laws under Article I, Section 1.[26] And this Court applied the *Gambone* test to reject certain justifications for a licensing-related penalty just last year. *See Shoul*, 173 A.3d at 680–81 (rejecting Commonwealth's arguments that law prohibiting drug offenders from obtaining commercial driver's licenses bore "real and substantial relationship" to highway safety).

Nor is this sort of scrutiny for occupational-licensing laws unusual. In scores of cases, state high courts have applied various forms of rational-basis review to find that particular licensing provisions—*including real-estate licensing requirements*—violated their independent

---

also, e.g. Olan Mills, Inc. v. City of Sharon, 92 A.2d 222, 224 (Pa. 1952) (applying similar test to transient retail business license fee); *Hertz Drivurself Stations v. Siggins*, 58 A.2d 464, 476 (Pa. 1948) (same for certificate-of-need requirement for rental cars); *Flynn*, 51 A.2d at 59–60 (same for oleomargarine licensing fee); *Commonwealth v. Zasloff*, 13 A.2d 67, 69 (Pa. 1940) (same for price-fixing law).

[26] *See, e.g.*, *Ass'n of Debt Settlement Cos. v. Dep't of Banking*, 977 A.2d 1257, 1277–79 (Pa. Cmwlth. 2009) (overruling demurrer where challenge to application of Debt Management Services Act was at "preliminary stage" and "there [was] no evidence to support" government's fraud-prevention rationale); *State Bd. of Podiatry Exam'rs v. Lerner*, 245 A.2d 669, 673 (Pa. Super. 1968) (striking down provision of Podiatry Act of 1956 requiring licensee to retake exam unless he renewed license within arbitrary time period).

constitutions.[27] Even the U.S. Supreme Court, and several other federal courts, have subjected licensing laws to meaningful constitutional scrutiny.[28] The Commonwealth Court was wrong to suggest otherwise.

---

[27] *See, e.g.*, *United Interchange, Inc. v. Savage*, 342 P.2d 249, 252 (Cal. 1959) (real-estate brokers); *United Interchange, Inc. v. Spellacy*, 136 A.2d 801, 807 (Conn. 1957) (same); *Fla. Real Estate Comm'n v. McGregor*, 336 So. 2d 1156, 1160 (Fla. 1976) (same); *United Interchange, Inc. of Mass v. Harding*, 145 A.2d 94, 100 (Me. 1958) (same); *State v. Warren*, 189 S.E. 108, 110 (N.C. 1937) (same); *see also, e.g., State v. Lupo*, 984 So. 2d 395, 406 (Ala. 2007) (interior designers); *Lisenba v. Griffin*, 8 So. 2d 175, 177 (Ala. 1942) (barbers); *Buehman v. Bechtel*, 114 P.2d 227, 232 (Ariz. 1941) (photographers); *Abdoo v. City & Cty. of Denver*, 397 P.2d 222, 223 (Colo. 1964) (photographers); *Blumenthal v. Bd. of Med. Exam'rs*, 368 P.2d 101, 103 (Cal. 1962) (opticians); *Cleere v. Bullock*, 361 P.2d 616, 621 (Colo. 1961) (funeral directors); *Battaglia v. Moore*, 261 P.2d 1017, 1020 (Colo. 1953) (barbers); *Prouty v. Heron*, 255 P.2d 755, 758 (Colo. 1953) (engineers); *Gibson v. Bd. of Exam'rs of Embalmers*, 26 A.2d 783, 784 (Conn. 1942) (funeral directors); *Hart v. Bd. of Exam'rs of Embalmers*, 26 A.2d 780, 782 (Conn. 1942) (funeral directors); *State v. Leone*, 118 So. 2d 781, 783 (Fla. 1960) (pharmacists); *Sullivan v. DeCerb*, 23 So. 2d 571, 572 (Fla. 1945) (photographers); *Berry v. Summers*, 283 P.2d 1093, 1096 (Idaho 1955) (dental technicians); *Church v. State*, 646 N.E.2d 572, 580 (Ill. 1995) (private-alarm contractors); *People v. Johnson*, 369 N.E.2d 898, 903 (Ill. 1977) (plumbers); *People v. Masters*, 274 N.E.2d 12, 14 (Ill. 1971) (plumbers); *Gholson v. Engle*, 138 N.E.2d 508, 512 (Ill. 1956) (funeral directors); *Schroeder v. Binks*, 113 N.E.2d 169, 173 (Ill. 1953) (plumbers); *People v. Brown*, 95 N.E.2d 888, 899 (Ill. 1950) (plumbers); *Scully v. Hallihan*, 6 N.E.2d 176, 180 (Ill. 1936) (plumbers); *Cent. States Theatre Corp. v. Sar*, 66 N.W.2d 450, 454 (Iowa 1954) (movie houses); *Verzi v. Baltimore Cty.*, 635 A.2d 967, 975 (Md. 1994) (tow-truck operators); *Md. State Bd. of Barber Exam'rs v. Kuhn*, 312 A.2d 216, 225 (Md. 1973) (cosmetologists); *Bruce v. Dir., Dep't of Chesapeake Bay Affairs*, 276 A.2d 200, 213 (Md. 1971) (crabbers); *Dasch v. Jackson*, 183 A. 534, 542 (Md. 1936) (wallpaper hangers); *Schneider v. Duer*, 184 A. 914, 921 (Md. 1936) (barbers); *City of Havre de Grace v. Johnson*, 123 A. 65, 68 (Md. 1923) (for-hire drivers); *State v. Rice*, 80 A. 1026, 1031 (Md. 1911) (undertakers); *Johnson v. Ervin*, 285 N.W. 77, 80 (Minn. 1939) (cosmetologists); *Moore v. Grillis*, 39 So. 2d 505, 512 (Miss. 1949) (public accountants); *Garden Spot Mkt., Inc. v. Byrne*, 378 P.2d 220, 231 (Mont. 1963) (stamp traders); *State v. Canfield*, 277 P.2d 534, 534 (Mont. 1954) (photographers); *State v. Gleason*, 277 P.2d 530, 534 (Mont. 1954) (photographers); *Brackman v. Kruse*, 199 P.2d 971, 978 (Mont. 1948) (oleomargarine sellers); *In re Certificate of Need for Aston Park Hosp., Inc.*, 193 S.E.2d 729, 736 (N.C. 1973) (hospital construction); *Roller*

To be clear, the point is not that Appellants will ultimately prevail on the merits of this case. That is a question for a future court to resolve on a more fully developed factual record.[29] The point, rather, is that the

---

v. Allen, 96 S.E.2d 851, 859 (N.C. 1957) (tilers); *State v. Ballance*, 51 S.E.2d 731, 736 (N.C. 1949) (photographers); *Palmer v. Smith*, 51 S.E.2d 8, 12 (N.C. 1948) (opticians); *State v. Harris*, 6 S.E.2d 854, 866 (N.C. 1940) (dry cleaning); *State v. Biggs*, 46 S.E. 401, 402 (N.C. 1903) (homeopaths); *People v. Ringe*, 90 N.E. 451, 545 (N.Y. 1910) (funeral directors); *State v. Moore*, 13 A.2d 143, 148 (N.H. 1940) (truckers); *Moyant v. Borough of Paramus*, 154 A.2d 9, 21 (N.J. 1959) (solicitors); *Gilbert v. Town of Irvington*, 120 A.2d 114, 118 (N.J. 1956) (milk vendors); *Frecker v. City of Dayton*, 90 N.E.2d 851, 854 (Ohio 1950) (mobile-food vendors); *Whittle v. State Bd. of Exam'rs of Psychologists*, 483 P.2d 328, 330 (Okla. 1971) (psychologists); *Okla. City v. Poor*, 298 P.2d 459, 461 (Okla. 1956) (milk sellers); *State ex rel. Whetsel v. Wood*, 248 P.2d 612, 615 (Okla. 1952) (watchmakers); *City of Guthrie v. Pike & Long*, 243 P.2d 697, 701 (Okla. 1952) (retail merchants); *Hertz*, 58 A.2d at 478 (rental cars); *Flynn*, 51 A.2d at 60 (oleomargarine sellers); *Baldridge*, 144 A. at 97 (pharmacists); *Daniel v. Cruz*, 231 S.E.2d 293, 295 (S.C. 1977) (fortune tellers); *City of Sioux Falls v. Kadinger*, 50 N.W.2d 797, 800 (S.D. 1951) (plumbers); *Livesay v. Tenn. Bd. of Exam'rs in Watchmaking*, 322 S.W.2d 209, 213 (Tenn. 1959) (watchmakers); *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 91 (Tex. 2015) (eyebrow threaders); *Moore v. Sutton*, 39 S.E.2d 348, 352 (Va. 1946) (photographers);*Vt. Salvage Corp. v. St. Johnsbury*, 34 A.2d 188, 197 (Vt. 1943) (junkyards); *State v. Walker*, 92 P. 775, 776 (Wash. 1907) (barbers); *Thorne v. Roush*, 261 S.E.2d 72, 75 (W. Va. 1979) (barbers); *State ex rel. Week v. Wis. State Bd. of Exam'rs in Chiropractic*, 30 N.W.2d 187, 189 (Wis. 1947) (chiropractors).

[28] *See, e.g.*, *Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 239 (1957) (attorneys); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223–27 (5th Cir. 2013) (funeral directors); *Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008) (pest-control operators); *Craigmiles v. Giles*, 312 F.3d 220, 225–28 (6th Cir. 2002) (funeral directors); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1214–16 (D. Utah 2012) (hairbraiders); *Brantley v. Kuntz*, 98 F. Supp. 3d 884, 889–94 (W.D. Tex. 2015) (hairbraiding schools); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1117–18 & n.50 (S.D. Cal. 1999) (hairbraiders); *Brown v. Barry*, 710 F. Supp. 352, 355–56 (D.D.C. 1989) (bootblacks).

[29] *See Int'l Union of Operating Eng'rs, Local No. 66, AFL-CIO v. Linesville Const. Co.*, 322 A.2d 353, 356 (Pa. 1974) (noting that a petitioner has "no burden . . . to prove the cause of action" on a demurrer); *Uniontown Newspapers, Inc. v. Roberts*, 839 A.2d 185,

Commonwealth Court broke with established law, both in Pennsylvania and across the country, by holding that Appellants could not *possibly* prevail simply because this case involves a challenge to an occupational-licensing law. Whether or not Appellants are likely to succeed on the merits tomorrow, that is a position this Court must reject today.

II. On the Facts Pleaded, RELRA Fails the *Gambone* Test.

Appellants have alleged facts sufficient to show that RELRA fails both prongs of the *Gambone* test. Yet the Commonwealth Court sustained Appellees' demurrer on the ground that "RELRA bears a real and substantial relationship to the interest in protecting from abuse buyers and sellers of real estate." App. A at 12. This was error for two reasons. First, the court ignored Appellants' plausible allegations that Ms. Ladd does not help clients buy or sell property, and failed to explain how forcing her to meet RELRA's onerous licensing requirements would address the same (or even similar) concerns. Second, the court ignored Appellants' plausible allegations that RELRA's requirements are prohibitively and unnecessarily burdensome, and failed to discuss

198 (Pa. 2003) (calling it "premature" "[t]o resolve [factual] issues at [the demurrer] stage").

whether those burdens were justified by the necessities of the case. Because it is not "free and clear from doubt" that RELRA satisfies both prongs of the *Gambone* test, the demurrer must be overruled. *Mazur*, 961 A.2d at 101.

A. Appellants Have Pleaded Facts Sufficient to Show That, As Applied, RELRA's Licensing Requirements Fail Prong One of the *Gambone* Test.

To satisfy prong one of the *Gambone* test, RELRA must bear a "real and substantial relation" to a legitimate government end. *Gambone*, 101 A.2d at 637. This prong requires the Court to identify "the interest sought to be achieved" and to "scrutinize the relationship between the law (the means) and that interest (the end)." *Nixon*, 839 A.2d at 286–87. While the Court has not considered a licensing case precisely like this one, its precedents make clear that qualifications designed to protect particular consumers (e.g., "buyers and sellers of real estate"), but which fail to do so in any meaningful way, cannot satisfy prong one. *See, e.g.*, *Nixon*, 839 A.2d at 289 (striking down law disqualifying certain criminal offenders from employment in older-adult facilities where "there was simply no basis" to think it "protect[ed] the Commonwealth's vulnerable

citizens from those deemed incapable of safely providing for them"); *John's Vending*, 309 A.2d at 361 (striking down law revoking cigarette-dealer's license based on past offense where "[t]he facts before us here force us to conclude . . . that there is no material relevance between the past derelictions of this applicant and his present ability to perform duties required by the position").

The Commonwealth Court broke with this precedent, distinguishing this Court's decision in *Nixon* (and by extension, *John's Vending*) as applying only to "blanket bans on formerly convicted individuals," and thus, "inapposite." App. A at 13–14. But nothing in *Nixon* purported to cabin the *Gambone* test only to blanket employment bans. To the contrary, *Nixon* was just another application of the longstanding principle that *all* restrictions on the right to pursue a chosen occupation must satisfy the *Gambone* test. *See supra* pp. 34 n.25. Whether the basis for a restriction is failure to keep a clean criminal record or failure to meet certain licensing requirements, that principle remains the same.

This Court now has an opportunity to correct the Commonwealth Court's error by deciding whether it appears "with certainty" that RELRA satisfies prong one. *Bruno*, 106 A.3d at 56 (citation omitted). As explained below, it does not. Ms. Ladd is a vacation property manager who helps clients post and coordinate short-term rentals online. (*See* R. 7a–14a ¶¶ 11–42 (describing services in detail)). She does not help clients buy or sell property, which is RELRA's chief concern. (R. 12a ¶¶ 29–30). Regardless, RELRA requires her to spend three years apprenticing with a broker; to take hundreds of hours of courses and two exams on real-estate practice; and to open a brick-and-mortar office in Pennsylvania, just to continue working. (*See* R. 14a–17a ¶¶ 43–59 (setting forth requirements in detail)). Because these onerous requirements are almost entirely unrelated to Ms. Ladd's actual services, (R. 4a–5a ¶¶ 1–2, 18a–19a ¶¶ 63–66, 22a–23a ¶¶ 81–85), the demurrer must be overruled.

1. As applied, RELRA's apprenticeship requirement fails prong one.

To continue working as a vacation property manager, RELRA requires Ms. Ladd to complete a three-year apprenticeship with a licensed real-estate broker. 63 P.S. § 455.511(4). The Commonwealth

Court offered zero analysis of this requirement, perhaps because this Court has not yet had occasion to consider any similar requirement. But while this issue may be relatively novel in Pennsylvania, prong one still requires that RELRA's apprenticeship bear a "real and substantial relation" to ensuring Ms. Ladd's competence in her actual business. *Gambone*, 101 A.2d at 637. RELRA's apprenticeship bears no such relationship.

Multiple state high court decisions striking down similar apprenticeship requirements on exactly these grounds offer persuasive authority on this front.[30] In *Church v. State*, 646 N.E.2d 572, 581 (Ill. 1995), for instance, the Illinois Supreme Court struck down a three-year apprenticeship for private alarm contractors where "employees . . .

---

[30] *See, e.g.*, *Blumenthal v. Bd. of Med. Exam'rs*, 368 P.2d 101, 105 (Cal. 1962) (dispensing opticians apprenticeship); *Church v. State*, 646 N.E.2d 572, 579–581 (Ill. 1995) (alarm contracting apprenticeship); *People v. Johnson*, 369 N.E.2d 898, 902 (Ill. 1977) (plumbing apprenticeship); *Gholson v. Engle*, 138 N.E.2d 508, 512 (Ill. 1956) (undertaking apprenticeship); *Schroeder v. Binks*, 113 N.E.2d 169, 173 (Ill. 1953); (plumbing apprenticeship); *People v. Brown*, 95 N.E.2d 888, 894 (Ill. 1950) (same); *State v. Rice*, 80 A. 1026, 1030 (Md. 1911) (embalming apprenticeship); *Johnson v. Ervin*, 285 N.W. 77, 80 (Minn. 1939) (barbering apprenticeship); *People v. Ringe*, 90 N.E. 451, 454 (N.Y. 1910) (undertaking apprenticeship); *City of Sioux Falls Kadinger*, 50 N.W.2d 797, 800 (S.D. 1951) (plumbing apprenticeship); *State v. Walker*, 92 P. 775, 776 (Wash. 1907) (barbering apprenticeship); *Thorne v. Roush*, 261 S.E.2d 72, 75 (W. Va. 1979) (same).

[were] not required by statute to receive *any* particular training" and there was "nothing to suggest that the nature and duration of employment required . . . [were] calculated to enhance the expertise of prospective licensees." In *Thorne v. Roush*, 261 S.E.2d 72, 75 (W. Va. 1979), similarly, the Supreme Court of Appeals of West Virginia struck down a one-year barbering apprenticeship that imposed no standards for measuring progress throughout the apprenticeship, and thus, "fail[ed] to contribute in any demonstrable way to the welfare of the public." And in *Gholson v. Engle*, 138 N.E.2d 508, 512 (Ill. 1956), the Illinois Supreme Court—after a full trial—struck down a law requiring funeral directors to complete a one-year embalming apprenticeship where the record demonstrated that "funeral director[s] [are] concerned primarily with the amenities of the funeral service," *not* the science of embalming bodies.

RELRA's apprenticeship requirement shares these deficiencies. As in *Church* and *Thorne*, RELRA's apprenticeship includes no objective standards or benchmarks that would ensure Ms. Ladd's progress towards greater competency as a vacation property manager. *See* 63 P.S. §§ 455.511(4), 455.522(b), 455.603(a) (setting forth apprenticeship

parameters but including no competency measures). And as in *Gholson*, RELRA would require Ms. Ladd to spend three years working for a broker just to continue providing *totally different* services at which she already excelled. (*See* R. 12a–13a ¶¶ 29–32 & 35 (alleging that unlike most brokers, Ms. Ladd does not help clients buy or sell property, create landlord-tenant relationships, or handle large sums of money), 13a ¶¶ 35–38 (alleging that the vast majority of brokers do not specialize in vacation property management), 14a ¶ 41, 20a ¶¶ 69–70 (noting clients' satisfaction with Ms. Ladd's services)). This fails prong one.

2. As applied, RELRA's instructional requirements fail prong one.

RELRA also requires Ms. Ladd to take hundreds of hours of courses and pass two exams on real-estate practice. 63 P.S. §§ 455.511, 521. As with the apprenticeship requirement, the Commonwealth Court made no effort to examine these requirements or their relevance to Ms. Ladd's services, and this Court has not considered the issue. But again, *Gambone* and its progeny are unambiguous: occupational qualifications must bear a "real and substantial relation" to the plaintiff's ability to provide safe, quality services. 101 A.2d at 637; *see Nixon*, 839 A.2d at 289

(striking down qualification unrelated to plaintiff's capacity to care for older adults). At least as applied to Ms. Ladd, RELRA's instructional requirements fail this test.

The Colorado Supreme Court applied this principle perfectly in *Cleere v. Bullock*, 361 P.2d 616, 616 (Colo. 1961), where the plaintiff challenged a licensing regime (similar to the one in *Gholson*) requiring her to spend one year at an approved embalming school to just work as a funeral director. At trial, the plaintiff demonstrated that such schools taught subjects focused on "the art of embalming," while her work was "mainly concerned with the various details of a funeral *other than* embalming." *Id.* at 617–18 (emphasis added). Because "the facts adduced at the trial" showed that "the prescribed training . . . [bore] no relation to the qualities which [her] occupation demand[ed]," the court struck it down. *Id.* at 619–21.

Numerous courts have reached similar conclusions in the context of another commonly licensed occupation: beauty services. In *Johnson v. Ervin*, 285 N.W. 77, 80 (Minn. 1939), for instance, the Minnesota Supreme Court overruled a demurrer where the plaintiff challenged a law

requiring licensed beauty culturists to spend 1,248 hours in barbering school (and two years apprenticing in a barber shop) just to trim hair. The court found it unreasonable, under both the state and federal due-process provisions, to require individuals who wanted to work primarily with women's hair to spend so much time "learning to shave men and trim their whiskers—a thing entirely foreign to the trade for which they desire to qualify, and having no relation to the health or safety of their patrons in their proposed occupation." *Id.*

The Maryland Court of Appeals took a similar approach in *Maryland State Board of Barber Examiners v. Kuhn*, 312 A.2d 216, 218 (Md. 1973), where a barber-licensing scheme prohibited licensed cosmetologists from cutting men's hair. Applying a "real and substantial" test analogous to *Gambone*'s first prong, the court weighed record evidence and concluded that because cosmetologists were permitted to cut women's hair with only 200 hours of hair-cutting instruction, and men's hair was no different, there could be no basis for requiring cosmetologists to complete further training—including 650

hours of additional hair-cutting instruction—just to cut men's hair. *Id.* at 219, 225.

Even federal courts, applying what this Court has described as a *less* restrictive form of rational-basis review, *Shoul*, 173 A.3d at 677, have struck down courses and exams shown to be largely irrelevant to the plaintiff's particular services. In 2012, the U.S. District Court for the District of Utah struck down an application of Utah's cosmetology/ barber licensing regime to African braiders where "1,400 to 1,600 of the 2,000 hours of the mandatory curriculum [were] irrelevant to African hairbraiding." *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1215–16 (D. Utah 2012). And in 1999, the U.S. District Court for the Southern District of California struck down an application of California's cosmetology licensing regime to African braiders who were required to take 1,600 hours of cosmetology training, only 110 of which were "possibly relevant" to African hairbraiding. *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1109, 1119–20 (S.D. Cal. 1999).[31]

[31] *See also Brantley v. Kuntz*, 98 F. Supp. 3d 884, 894 (W.D. Tex. 2015) (striking down application of Texas' expansive barber-school regulations to a school that taught only African braiding).

What all of these cases demonstrate is that instructional requirements *can* violate due process—especially under Pennsylvania's heightened test—if they do not bear a "real and substantial relation" to a person's ability to provide safe, competent services. Contrary to the Commonwealth Court's conclusory analysis, Appellants have alleged facts sufficient to show that RELRA's instructional requirements—at least as applied to Ms. Ladd—fail that test.

Appellants have alleged that vacation property management is far different from traditional real-estate practice. (R. 12a–13a ¶¶ 29–32 & 35–40, 18a–19a ¶¶ 63–66). Yet the vast majority of topics prescribed for RELRA's courses and exams are framed in broad "real estate" language that bears no obvious relation to Ms. Ladd's services. *Compare* 63 P.S. §§ 455.511, 521; 49 Pa. Code §§ 35.271–272 (setting forth topics), *with* (R. 7a–14a ¶¶ 11–42 (describing Ms. Ladd's distinct services)). Given this apparent mismatch, Appellants are entitled to the reasonable inference that the vast majority of RELRA's instructional requirements are simply irrelevant to Ms. Ladd's work. *See William Penn Sch. Dist.*, 170 A.3d at 425 (noting that the Court must "read [the petition] in the light

most favorable to [Appellants]"). At this early stage, that is more than sufficient to survive a demurrer.

3. As applied, RELRA's brick-and-mortar office requirement fails prong one.

Finally, RELRA requires Ms. Ladd to open a brick-and-mortar office in Pennsylvania. 63 P.S. § 455.601(a). Once more, the Commonwealth Court did not discuss the provision, and this Court has not considered brick-and-mortar requirements under *Gambone*'s first prong. But one look at the petition reveals that imposing a century-old office requirement on Ms. Ladd's online, home-based business has nothing to do with her actual services. (*See* R. 9a–10a ¶¶ 20, 23 & 27, 12a–14a ¶ 31, 40 & 42 (describing Ms. Ladd's business model)).

Even so, one potential basis for imposing such a requirement was addressed in *Verzi v. Baltimore County*, 635 A.2d 967, 968 (Md. 1994), where the plaintiff challenged a county licensing scheme requiring tow-truck operators to have a "place of business" within the county. In that case, the county asserted the requirement was meant to protect the public from fraud by out-of-county operators. *Id.* at 974. But the Maryland Court of Appeals—applying a "real and substantial" test

analogous to *Gambone*'s first prong—rejected that justification because the county was fully capable of enforcing its ethical rules regardless of the physical location of the operator. *Id.*

Another potential basis was addressed in *Frazier v. Heebe*, 482 U.S. 641, 643 (1987), where the plaintiff challenged the U.S. District Court for the Eastern District of Louisiana's rule that attorneys seeking admission to its bar must reside or have a physical office in Louisiana. *Id.* The District Court claimed the rule "facilitate[d] the efficient administration of justice" because non-residents were less competent than resident attorneys. *Id.* at 646. But the U.S. Supreme Court rejected that rationale, "find[ing] the in-state office requirement unnecessary and irrational" because "the location of a lawyer's office simply has nothing to do with his or her intellectual ability or experience in litigating cases in Federal District Court." *Id.* at 649.[32]

These persuasive cases suggest that brick-and-mortar requirements failing to address genuine enforcement or competency concerns may fail the sort of rationality analysis that *Gambone*'s first

[32] While the plaintiff made constitutional arguments, the Court opted to resolve the case solely under its "supervisory authority." *Frazier*, 482 U.S. at 645.

prong requires. And here, there is every reason to think RELRA's requirement fails on both scores.

The Commonwealth is perfectly capable, as in *Verzi*, of regulating Ms. Ladd at her home address (her actual "office"). Indeed, RELRA successfully holds other, more limited real-estate professionals to its code of professional conduct without subjecting them to this brick-and-mortar requirement. *See, e.g.*, 63 P.S. §§ 455.551 (builder-owner salespeople), 455.591 (timeshare salespeople). And more broadly, Pennsylvania's Unfair Trade Practices and Consumer Protection Law prevents even out-of-state actors from engaging in "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade." 73 P.S. § 201-3; *see Danganan v. Guardian Prot. Servs.*, 179 A.3d 9, 16 (Pa. 2018) (applying law to out-of-state actors). Requiring Ms. Ladd to rent superfluous office space adds nothing to these tools.

So too for any purported competency concerns. Appellants have alleged that Ms. Ladd can provide high-quality vacation property management services from her home in New Jersey with nothing more than her laptop and internet access. (R. 4a–5a ¶ 1, 9a ¶ 24, 13a–14a

¶¶ 40–41, 18a ¶ 63, 20a ¶ 69, 21a ¶ 78). And as in *Frazier*, there is no reason to think that requiring Ms. Ladd to open a brick-and-mortar office would make her better at work she was already performing perfectly well without such an office. (R. 4a–5a ¶ 1, 9a ¶ 24, 13a–14a ¶¶ 40–41, 18a ¶ 63, 20a ¶ 69, 21a ¶ 78). This fails prong one.

Given these infirmities, it is unsurprising that the Commonwealth Court failed to articulate a "real and substantial" relationship between RELRA's broker-licensing requirements and Ms. Ladd's services. On the facts alleged, there is none.

B. Appellants Have Pleaded Facts Sufficient to Show That, As Applied, RELRA's Licensing Requirements Fail Prong Two of the *Gambone* Test.

RELRA also fails *Gambone*'s distinct second prong. Under this prong, occupational restrictions must "not be unreasonable, unduly oppressive or patently beyond the necessities of the case." *Gambone*, 101 A.2d at 637. This principle requires the Court to "weigh the rights infringed upon by the law against the interest sought to be achieved by it." *Nixon*, 839 A.2d at 286. A law that regulates an occupation "by

means which sweep unnecessarily broadly" fails prong two. *Adler*, 311 A.2d at 640 (citation omitted).

The Commonwealth Court did not even bother to discuss prong two. But under this Court's precedents, it is an essential component of the *Gambone* test. *See, e.g.*, *Shoul*, 173 A.3d at 680 (test condemns laws "which plainly go[] too far allegedly in pursuit of some legitimate purpose"); *Mahony*, 651 A.2d at 528 (test condemns prohibitory business regulations where "less drastic and intrusive alternative[s]" are available); *Gambone*, 101 A.2d at 637 (test condemns laws imposing "unusual and unnecessary restrictions upon lawful occupations"); *see also Zasloff*, 13 A.2d at 70 (Article I, Section 1 condemns restrictions "obviously unnecessary in their severity and comprehensiveness for the accomplishment of the object to be attained").

Indeed, *Gambone*'s second prong is dispositive here. As explained below, even assuming a "real and substantial relation" between RELRA's licensing requirements and vacation property management, Appellants have also alleged that RELRA imposes disproportionate burdens on Ms. Ladd's ability to earn a living. (R. 5a ¶ 2, 18a–19a ¶¶ 63–

66, 23a ¶ 84). Moreover, there are a number of reasonable alternative means of regulating Ms. Ladd's services that would achieve the Commonwealth's stated objectives at only a fraction of the burdens currently imposed. *See supra* pp. 51. This fails prong two.

1. As applied, RELRA's apprenticeship requirement fails prong two.

RELRA's apprenticeship requirement conditions Ms. Ladd's ability to work on the unfettered say-so of licensed brokers, then forces her to bear the immense burden of spending three years in financial subordination to them. (*See* R. 19a ¶ 66 (noting that RELRA sets up a "guild-style" system controlled by established brokers)). This fails *Gambone*'s second prong in two ways. First, it is "unduly oppressive or patently beyond the necessities of the case." *Gambone*, 101 A.2d at 637. Second, there are a number of "less drastic and intrusive alternative" means of achieving RELRA's purported ends that undercut the necessity of imposing so burdensome a requirement. *Mahony*, 651 A.2d at 528.

Numerous state high courts have offered persuasive reasons why apprenticeship requirements conditioning a person's ability to work on the mere will of existing licensees is constitutionally oppressive. In

Blumenthal v. Board of Medical Examiners, 368 P.2d 101, 104–05 (Cal. 1962), for example, the California Supreme Court struck down a five-year apprenticeship requirement for opticians because it "confer[ed] upon presently licensed dispensing opticians the unlimited and unguided power to exclude from their profession any or all persons," giving established opticians "virtually absolute economic control over those employees who are required to serve under them in order to attain future professional objectives."

The same issue arose in *People v. Brown*, 95 N.E.2d 888, 892 (Ill. 1950), where the Illinois Supreme Court invalidated a licensing scheme requiring journeyman plumbers to spend five years working under master plumbers before they could work for themselves. Not only was the sheer length of the apprenticeship disproportionate to the "actual realities" of plumbing, *id.* at 896, but the fact that a person's ability to enter the industry depended on the consent of licensed plumbers made the law fundamentally arbitrary:

> No matter how well qualified a person may be by instruction and training, he can never of his own free will and choice become a certified registered plumber's apprentice, a journeyman plumber or master plumber,

> unless a licensed master plumber so wills. The act does not load a licensed master plumber with the obligation of employing a person who desires to enter into an apprenticeship. The refusal to employ one as an apprentice need not be based upon any valid reason. It may be an arbitrary refusal, it may be a refusal predicated upon an understanding between master plumbers to limit the number of apprentices learning the trade, and it may be upon one, or some, of the facts of race, color or creed.

Id. at 893–94. Similar examples abound.[33]

RELRA's apprenticeship requirement presents the same concerns. (R. 19a ¶ 66). To start the apprenticeship, Ms. Ladd would first have to obtain the consent of a sponsoring broker. 63 P.S. § 455.522(b). But nothing in RELRA requires the broker—or *any* broker—to consent. *See id.* §§ 455.511(4), 455.522(b), 455.603(a) (setting forth apprenticeship parameters but failing to include any such requirement). And even if a broker does consent, the broker would then enjoy complete control over Ms. Ladd's work and profits during the course of the apprenticeship. *Id.*

[33] *See, e.g.*, *Church v. State*, 646 N.E.2d 572, 579–81 (Ill. 1995) (striking down alarm-contracting apprenticeship for identical reasons); *Thorne v. Roush*, 261 S.E.2d 72, 75 (W. Va. 1979) (same for barbering apprenticeship).

This is precisely the sort of oppressive regime condemned in *Blumenthal* and *Brown*.[34]

Courts have also condemned mandatory apprenticeships as overly burdensome where there were reasonable alternative means of ensuring competence. In *Commonwealth v. Beck*, 6 Pa. D. & C.3d 400, 404 (Pa. Com. Pl. 1977), for example, the Pennsylvania Court of Common Pleas considered the constitutionality of a mandatory six-year plumbing apprenticeship under *Gambone*'s second prong, "look[ing] to the interest protected by the ordinance," "the panoply of safeguards available," and whether "other means of protection and enforcement are adequate." *Id.* at 408. Because the licensing scheme also required an exam, inspections, and a code of conduct, the court found that "[t]he challenged requirements add nothing in the way of reasonable regulation" and "unduly restricts defendant's right to engage in his lawful occupation for a protracted and unnecessary period of time." *Id.* at 408–09. While not

[34] *See also Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886) (striking down ordinance allowing board to deny laundry permits based not on objective "rule[s] and conditions" but on "their mere will and pleasure"); Locke, *Second Treatise*, *supra* note 8, at § 57 ("[F]or who could be free, when every other man's humour might domineer over him?").

binding on this Court, *Beck* illustrates perfectly how apprenticeship requirements imposing unnecessary burdens can fail prong two.

RELRA, too, imposes enormous and unnecessary burdens. Ms. Ladd worked for three years as a vacation property manager before this dispute began. (R. 9a ¶ 21, 17a–18a ¶ 60). During that time, her clients were fully satisfied with her services, and there is nothing in the petition to indicate that Ms. Ladd was ever anything other than trustworthy and competent. (R. 14a ¶ 41, 20a ¶¶ 69–70). Yet RELRA would require her to spend three more years—at 62 years of age—working for a broker in a state where she does not live, (R. 4a–5a ¶ 1, 18a ¶ 63), learning about services she does not provide, (*see* R. 12a–13a ¶¶ 29–33 & 35–38 (distinguishing Ms. Ladd's services from those of traditional brokers)). This is "patently beyond the necessities of the case." *Gambone*, 101 A.2d at 637; (*see* R. 5a ¶ 2, 18a–19a ¶¶ 63–66, 22a–23a ¶¶ 81–85 (alleging same)).

Indeed, RELRA itself offers a number of limited licenses—though not for Ms. Ladd's novel services—that allow a person to sell expensive properties, rental information (connecting landlords and

tenants), and even timeshares without having to spend *any* time apprenticing for a broker. 63 P.S. §§ 455.551, 455.561, 455.591. All of these services are still subject to RELRA's code of professional conduct, including discipline and liability under a recovery fund. *Id.* §§ 455.601–609, 455.801–803. Yet because Ms. Ladd's work is swept up under Pennsylvania's century-old definition of the term "broker," it would take her over three years longer to obtain a license than it would in any of these other occupations. (R. 4a–5a ¶ 1, 14a ¶ 44, 17a–18a ¶¶ 60–63). That cannot be right.

RELRA's severity is underscored by the fact that services analogous to Ms. Ladd's are not subject to *any* form of licensure in Pennsylvania. Employees of hotels, apartment complexes, and duplexes—who manage properties and facilitate rentals—are fully exempt from RELRA's requirements. *See* 63 P.S. § 455.304(10) (exempting "[a]ny person employed by an owner of real estate for the purpose of managing or maintaining multifamily residential property"). And travel agents—who help vacationers book precisely the same type of lodging Ms. Ladd manages—are not licensed under any scheme. Yet

as in *Gambone*, where the Court noted that fraud was already banned under the Penal Code, all of these services are still regulated under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, which protects consumers from deceptive business practices. 73 P.S. § 201-3. If this law is sufficient to protect consumers from "fly-by-night" travel agents and deceptive hotel managers, surely it is sufficient to protect Ms. Ladd's clients—who have never once complained about her services. (*See* R. 14a ¶ 41, 20a ¶¶ 69–70 (noting clients' satisfaction)).

2. As applied, RELRA's instructional requirements fail prong two.

RELRA's courses and exams are almost entirely irrelevant to Ms. Ladd's services and would take over three years to complete. *See supra* pp. 9–13. As with the apprenticeship requirement, this fails *Gambone*'s second prong in two ways. First, it would be "unusual and unnecessary" to require Ms. Ladd to spend hundreds of hours learning so much irrelevant material. *Gambone*, 101 A.2d at 637. Second, Ms. Ladd would be forced to bear "oppressive" opportunity costs—including three years of lost income and business goodwill—just to meet these requirements.

Id. Again, the decisions of other state high courts provide persuasive guidance on both fronts.

Regarding "unusual and unnecessary requirements," the Connecticut Supreme Court's decision in *United Interchange, Inc. v. Spellacy*, 136 A.2d 801, 802 (Conn. 1957), is instructive. There, the court considered a Connecticut law requiring employees of an out-of-state company, who merely solicited contracts from owners interested in listing their properties for sale or lease in a monthly digest, to obtain a real-estate broker's license. *Id.* at 802–03. The company brought an as-applied challenge under Connecticut's due-process and equal-protection provisions, among others. *Id.* at 805. The court concluded that because the employees' services consisted mostly of advertising and did not involve negotiation, it would be "unnecessarily burdensome and discriminatory" to subject them to a written exam (and additional regulations) covering the full scope of real-estate practice. *Id.* at 805–06.[35]

[35] The California and Maine Supreme Courts reached the same conclusion in virtually identical challenges. *See, e.g. United Interchange, Inc. v. Savage*, 342 P.2d 249, 252 (Cal. 1959); *United Interchange, Inc. of Mass. v. Harding*, 145 A.2d 94, 100 (Me. 1958).

As in *Spellacy*, RELRA's courses and exams appear to cover topics far beyond what Ms. Ladd reasonably needs to know to provide competent vacation property management services. *See supra* pp. 11–13. Unlike most brokers, Ms. Ladd does not help clients buy or sell property, facilitate leases or the creation of landlord-tenant relationships, or handle large sums of money. (R. 12a–13a ¶¶ 29–32 & 35–38). And her clients, including Appellant Harris, are perfectly happy with the services she does provide. (R. 14a ¶ 41, 20a ¶¶ 69–70). Forcing a person to take courses and exams on work they will never perform is the epitome of "unusual and unnecessary." *Gambone*, 101 A.2d at 637.

The Texas Supreme Court's recent decision in *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), regarding an extensive set of educational requirements for eyebrow threaders, is similarly instructive regarding "oppressiveness." There, the threaders brought an as-applied challenge to the state's cosmetology license, which required them to complete 750 hours of study, only 52% of which were "arguably relevant" to threading. *Id.* at 87. Applying the *second* prong of the Texas rational-basis test—which is materially identical to *Gambone*'s

second prong—the court found that "the large number of hours not arguably related to the actual practice of threading, the associated costs of those hours in out-of-pocket expenses, and the delayed employment opportunities while taking the hours" was "not just unreasonable or harsh, but [] so oppressive that it violates Article I, § 19 of the Texas Constitution." *Id.* at 90.

So too, here. Ms. Ladd is 62 years old and attempting to plan for retirement. (R. 7a ¶ 11, 14a ¶ 42, 20a–21a ¶¶ 74 & 77). She cannot afford to spend over three years taking courses and passing exams on services she will never provide. (R. 19a ¶ 64). That she cannot afford to do so is part of why she was forced to shut down her business and pursue other work. (R. 19a–20a ¶¶ 67 & 73). This is precisely the sort of "unduly burdensome" result that controlled in *Patel*, and that *Gambone*'s analogous second prong was designed to prohibit.

3. As applied, RELRA's brick-and-mortar office requirement fails prong two.

Finally, RELRA's brick-and-mortar office requirement imposes prohibitive costs on Ms. Ladd, despite the existence of "less drastic and intrusive alternative[s]." *Mahony*, 651 A.2d at 528. This requirement also

violates prong two. In *Olan Mills, Inc. v. City of Sharon*, 92 A.2d 222, 224 (Pa. 1952), this Court made clear that under Article I, Section 1, licensing requirements cannot impose excessive burdens even in pursuit of legitimate ends. There, a company challenged an ordinance requiring out-of-state photographers to pay a $200 transient-business "license fee." *Id.* at 222. The company argued the fee was far greater than necessary to protect city residents from "unreliable fly-by-night operators." *Id.* This Court agreed, noting that "the record show[ed] that the enforcement of the ordinance impose[d] no unusual extra expense on the City" that would justify so heavy a fee, and struck the ordinance down. *Id.* at 223–24.

RELRA's office requirement, as applied to Ms. Ladd, is even more excessive than the fee in *Olan Mills*. Here, the petition provides no grounds for a concern about fly-by-night businesses. (*See* R. 5a ¶ 2 (alleging that forcing Ms. Ladd to obtain a broker's license merely to provide vacation property management services "does not protect the public from any real danger"), 14a ¶ 41, 20a–21a ¶¶ 69–70 & 78–79 (alleging Ms. Ladd provided reliable services that her clients trusted and

valued)). And even if it did, the Commonwealth has ample tools at its disposal—between the Unfair Trade Practices Act and Consumer Protection Law, and RELRA's existing code of conduct (which does not depend on the office requirement)—for holding Ms. Ladd accountable at her current physical address. *See supra* pp. 51. Despite these alternatives, the Commonwealth chose its *most* burdensome option—requiring Ms. Ladd to open an office she does not need and could not possibly afford—and ran Ms. Ladd's business into the ground. (R. 4a–5a ¶ 1, 9a ¶ 24, 13a ¶ 40, 18a ¶ 63). That is unconstitutional.

4. As applied, RELRA's total burdens fail prong two.

RELRA also violates prong two in a final, broader respect. Even if this Court finds that each of RELRA's requirements, in isolation, satisfies prong two, Appellants have still plausibly alleged that these requirements, *in total*, are "unduly oppressive." *Gambone*, 101 A.2d at 637; (*see* R. 4a–5a ¶ 1, 19a ¶¶ 64–65, 23a ¶ 84 (alleging same)). RELRA requires Ms. Ladd to spend over three years of her life taking courses and exams on work she will never perform; apprenticing for people who do not specialize in her services; and opening an office she does not

need and could not possibly afford, in a state where she does not live—all to continue working part-time, from home, helping a handful of neighbors rent their vacation homes on websites like Airbnb. *See supra* pp. 5–13. For comparison, it would take Ms. Ladd over ***31 times*** longer to meet these requirements than to become certified for the life-or-death work of an emergency medical technician in Pennsylvania.[36] Whatever the Commonwealth's interest in regulating Ms. Ladd's services happens to be, this is "obviously unnecessary in [its] severity and comprehensiveness." *Zasloff*, 13 A.2d at 70.

CONCLUSION

This Court should reverse the Commonwealth Court's decision.

[36] *See* Dick Carpenter et al., *License to Work: A National Study of Burdens from Occupational Licensing* 120 (2d ed. 2017) (estimating that it takes just 35 takes days to become a certified emergency medical technician in Pennsylvania).

Dated: October 9, 2018.

Respectfully submitted,

DILWORTH PAXSON LLP
By: _____
Joshua D. Wolson (Bar No. 84998)
1500 Market Street, Suite 3500E
Philadelphia, PA 19102
Tel: (215) 575-7295
Fax: (215) 575-7200
Email: jwolson@dilworthlaw.com

INSTITUTE FOR JUSTICE
By: _____
Joshua A. Windham*
North Carolina Bar No. 51071
Paul M. Sherman*
Virginia Bar No. 73410
901 North Glebe Road
Suite 900
Arlington, VA 22203
Telephone: +1 (703) 682-9320
Facsimile: +1 (703) 682-9321
Email: jwindham@ij.org, psherman@ij.org
**Admitted Pro Hac Vice*

CERTIFICATE OF COMPLIANCE

This brief complies with the word-count limitation of Pa. R.A.P. 2135, because it contains 13,997 words, including footnotes, based on the word count of the word processing system used to prepare it.

Dated: October 9, 2018

/s/ Joshua D. Wolson
Joshua D. Wolson
Counsel for Appellants

CERTIFICATE OF SERVICE

I, Joshua D. Wolson, hereby certify that I am this day serving a copy of the foregoing document upon the persons listed below via the electronic filing system and by first class mail:

Howard G. Hopkirk
Office of the Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1478
hhopkirk@attorneygeneral.gov
Counsel for Appellees

Nicole Jeanne Boland
Office of the Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-3146
nboland@attorneygeneral.gov
Counsel for Appellees

/s/ Joshua D. Wolson
Joshua D. Wolson
Counsel for Appellants

Dated: October 9, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellee and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: October 9, 2018.

Respectfully submitted,

/s/ Joshua D. Wolson
Joshua D. Wolson
Counsel for Appellants

APPENDIX A

LM

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sara Ladd, Samantha Harris, and Pocono Mountain Vacation Properties, LLC, Petitioners	:	
v.	:	No. 321 M.D. 2017
	:	Argued: April 12, 2018
Real Estate Commission of the Commonwealth of Pennsylvania and Department of State (Bureau of Professional and Occupational Affairs) of the Commonwealth of Pennsylvania, Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge

OPINION BY JUDGE BROBSON **FILED: June 4, 2018**

Before this Court in our original jurisdiction are the preliminary objections filed by the Pennsylvania Real Estate Commission (Commission) and the Pennsylvania Department of State, Bureau of Professional and Occupational Affairs (Bureau) (collectively, Commonwealth Respondents) to a petition for review filed by Sara Ladd (Ladd), Samantha Harris (Harris), and Pocono Mountain Vacation Properties, LLC, (collectively, Petitioners). For the reasons set forth below, we sustain, in part, and overrule, in part, Commonwealth Respondents' preliminary objections.

In ruling on preliminary objections, we accept as true all well-pleaded material allegations in the petition for review and any reasonable inferences that we

may draw from the averments. *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Cmwlth. 1994). The Court, however, is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in the petition for review. *Id.* We may sustain preliminary objections only when the law makes clear that the petitioner cannot succeed on the claim, and we must resolve any doubt in favor of the petitioner. *Id.* "We review preliminary objections in the nature of a demurrer under the above guidelines and may sustain a demurrer only when a petitioner has failed to state a claim for which relief may be granted." *Armstrong Cty. Mem'l Hosp. v. Dep't of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Cmwlth. 2013).

With the above standard in mind, we accept as true the following allegations from the Petition for Review (Petition). Petitioner Ladd, a New Jersey resident, worked as a "short-term vacation property manager," providing services in the Pocono Mountains area of Pennsylvania. (Pet. at ¶ 1.) In 2009, Ladd began renting two "cottages" that she owns in Arrowhead Lake, Monroe County, Pennsylvania. (Pet. at ¶¶ 15-19.) Using prior experience with digital marketing and website maintenance, Ladd "developed an online system that kept the cottages consistently booked whenever she was away." (Pet. at ¶ 20.) After a few years successfully managing and renting her own properties, Ladd accepted the requests of other Arrowhead Lake property owners to assist with renting their properties. (Pet. at ¶ 21.) Petitioner Harris is one of the property owners who utilized Ladd's services to rent and manage her property. (Pet. at ¶ 7.)

In 2013, Ladd formed Pocono Mountain Vacation Properties, LLC (PMVP), a New Jersey limited liability company, to provide her services for properties in the Poconos. (Pet. at ¶ 22.) In 2016, Ladd launched the website for

PMVP. (Pet. at ¶ 23.) Ladd sought to "take the hassle out of short-term vacation rentals by handling all of the marketing and logistics that property owners would otherwise have to coordinate themselves." (Pet. at ¶ 25.) That included marketing the properties on the Internet, responding to inquiries, arranging cleaning services, managing the billing, and informing property owners of their tax burdens (*i.e.*, Pennsylvania's "hotel tax"). (Pet. at ¶¶ 27, 34.) Ladd mainly operated PMVP by laptop from her house in Hampton, New Jersey. (Pet. at ¶¶ 24, 40.)

Ladd credits her success to the distinction between her business model and that of a typical real estate broker. Whereas most real estate brokers need to coordinate numerous complex transactions simultaneously, Ladd is able to keep her clients' properties consistently booked and competently managed due to the small number of PMVP clients and PMVP's low operating costs. (Pet. at ¶¶ 36-40.) Ladd would be unable to provide such niche services if she were required to pay for a physical office space and salaried employees. (Pet. at ¶ 40.)

In January 2017, the Bureau contacted Ladd and informed her that she had been reported for the unlicensed practice of real estate in violation of the Real Estate Licensing and Registration Act (RELRA).[1] (Pet. at ¶ 60.) Upon review of RELRA, Ladd discovered that her property management services did, in fact, constitute the practice of real estate and that she needed a real estate broker's license to continue operating PMVP as she did before the Bureau contacted her. (Pet. at ¶¶ 61-62.) RELRA required Ladd to spend three years working for an established real estate broker, pass two exams, and set up a physical office in Pennsylvania in order to obtain a real estate broker's license. (Pet. at ¶ 62.) In order

[1] Act of February 19, 1980, P.L. 15, *as amended*, 63 P.S. §§ 455.101-.902.

to avoid the civil and criminal repercussions for violating RELRA, Ladd shut down her business. (Pet. at ¶¶ 67-68.)

Ladd alleges that RELRA's overly burdensome requirements have effectively precluded her from providing short-term rental management services in Pennsylvania. (Pet. at ¶ 72.) Because she had to shut down PMVP, Ladd "has been deprived of the stable, supplemental, home-based income that working as a property manager through PMVP provided and would have continued to provide into her retirement years." (Pet. at ¶ 74.) Petitioner Harris, upon hearing that Ladd could no longer manage her property, was forced to hire a licensed real estate broker. (Pet. at ¶ 71.) On her part, Harris alleges that she is aggrieved because her property has been rented out less consistently since Ladd shut down PMVP and that she prefers Ladd's services. (Pet. at ¶¶ 70, 71.) But for the RELRA licensing requirements, Harris would continue to benefit from Ladd's services and the "peace of mind that comes with continuing to work with somebody she knows and trusts." (Pet. at ¶ 79.)

Petitioners seek a declaration from this Court under the Declaratory Judgments Act[2] that RELRA, its implementing rules and regulations, and the practices and policies of the Bureau impose unconstitutional burdens on Ladd's ability to work as a short-term property manager. Petitioners allege that these burdens violate Ladd's right to pursue her chosen occupation under Article I, Section 1 of the Pennsylvania Constitution.[3] Petitioners also allege that precluding

---

[2] 42 Pa. C.S. §§ 7531-7541.

[3] Article I, Section 1 of the Pennsylvania Constitution provides:

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and

Harris from availing herself of Ladd's services also violates Article I, Section 1. Petitioners further request that this Court permanently enjoin Commonwealth Respondents from enforcing RELRA against Ladd and other similarly situated individuals.

On August 17, 2017, Commonwealth Respondents filed preliminary objections. Commonwealth Respondents first object on the ground that Petitioners failed to plead an actual controversy. Commonwealth Respondents argue that Petitioners are not entitled to a declaratory judgment because the Commonwealth has taken no action against Ladd; thus, her concerns about future enforcement under RELRA are mere speculation. Second, Commonwealth Respondents object to Petitioners seeking declaratory judgment before exhausting their statutory remedies. Commonwealth Respondents argue that Petitioners cannot pursue their Petition without first procuring a final determination by the Commission. Commonwealth Respondents argue that Petitioners are required to exhaust administrative remedies even though they raise a constitutional challenge, because Petitioners are not challenging the constitutionality of RELRA as a whole. Commonwealth Respondents' third objection is in the nature of a demurrer, alleging that the Petition is legally insufficient. Commonwealth Respondents argue that RELRA does not violate Article I, Section 1 of the Pennsylvania Constitution, because it constitutes a valid exercise of the Commonwealth's police power and satisfies rational basis review. Finally, Commonwealth Respondents object to Petitioner Harris's involvement in the case. Commonwealth Respondents argue that Harris does not

---

> liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Pa. Const. art. I, § 1.

have standing to challenge the RELRA requirements as they pertain to Ladd merely because she is unable to use Ladd as a real estate broker.

In response, Petitioners argue that there is a controversy ripe for judicial review, because the Petition challenges the constitutionality of applying RELRA to Ladd and because denying review would impose substantial hardships on Petitioners. Relatedly, in response to the argument that they must exhaust their administrative remedies, Petitioners cite to cases such as *Bayada Nurses, Inc. v. Department of Labor & Industry*, 8 A.3d 866 (Pa. 2010) and *Pennsylvania Independent Oil & Gas Association v. Department of Environmental Protection*, 135 A.3d 1118 (Pa. Cmwlth. 2015), *aff'd*, 161 A.3d 949 (Pa. 2017) (*PIOGA I*), where the courts have applied an exception to the exhaustion requirement. Regarding the Commonwealth Respondents' demurrer, which posits that the application of RELRA is constitutional, Petitioners first argue that they are not required to prove the merits of their constitutional claims at this stage in the litigation. Petitioners further argue that the application of RELRA to Ladd does not satisfy rational basis review. Specifically, Petitioners argue that RELRA is unconstitutional under the rational basis review that the Pennsylvania Supreme Court employed in *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003). Finally, Petitioners argue that Petitioner Harris has standing, because she had a pre-existing relationship with Ladd, thus differentiating her from anyone else who cannot utilize Ladd's services.

Commonwealth Respondents' first two objections—ripeness and failure to exhaust administrative remedies—are frequently invoked simultaneously in cases such as this one, where a party facing the prospect of enforcement by a Commonwealth agency seeks pre-enforcement review in this Court's original

jurisdiction. Though these two doctrines overlap, they are also distinct. "While ripeness arises from a concern not to become involved in abstract disputes, exhaustion is concerned with agency autonomy, and the desire that parties resort to the administrative process so as to ensure that agency decision making is not unduly disrupted." *Bayada*, 8 A.3d at 875. Despite their distinction, both doctrines involve the overarching issue of the propriety of this Court's pre-enforcement review of Petitioners' challenge to the application of RELRA to Ladd. Thus, Commonwealth Respondents' first two objections require us to determine the applicability of the so-called *Arsenal Coal* exception.

In *Arsenal Coal Company v. Department of Environmental Resources*, 477 A.2d 1333 (Pa. 1984), several coal mine operators sought an injunction from this Court in our original jurisdiction to prevent the Department of Environmental Resources from enforcing allegedly unlawful regulations adopted by the Environmental Quality Board. This Court determined that the coal mine operators failed to exhaust their administrative remedies and, as a result, this Court lacked jurisdiction to review the matter. On appeal, however, the Pennsylvania Supreme Court reversed. The Supreme Court determined that the impact of the regulations was "sufficiently direct and immediate" to warrant pre-enforcement judicial review. *Arsenal Coal*, 477 A.2d at 1340. The Supreme Court explained that, accepting as true the allegations in the petition for review, the coal mine operators faced substantial sanctions for noncompliance with the regulations, or a costly and inefficient procedure if they chose to comply with the regulations. The Supreme Court also explained that the alternative proposed by the Department of Environmental Resources—challenging the regulations after enforcement through a lengthy administrative challenge—would leave the mine operators with "ongoing

uncertainty in the day[-]to[-]day business operations of an industry which the General Assembly clearly intended to protect from unnecessary upheaval." *Id.* The Supreme Court thus determined that this Court erred in declining jurisdiction for the coal mine operators' challenge to the regulatory scheme. Following *Arsenal Coal*, "[w]here the effect of the challenged regulations upon the industry regulated is direct and immediate, the hardship thus presented suffices to establish the justiciability of the challenge in advance of enforcement." *Id.* at 1339.

In support of their pre-enforcement challenge, Petitioners cite to *Bayada Nurses* and *PIOGA I*, where the Supreme Court and this Court, respectively, applied the *Arsenal Coal* exception. In *Bayada Nurses*, the Pennsylvania Supreme Court held that an at-home health services company could challenge the Department of Labor and Industry's interpretation of an exemption under The Minimum Wage Act of 1986[4] prior to enforcement by the Commonwealth under that statute. *Bayada Nurses*, 8 A.3d at 876.[5] Likewise, in *PIOGA I*, this Court held that the members of a trade association were not required to exhaust their administrative remedies and that the association could seek pre-enforcement declaratory judgment and injunctive relief under the Declaratory Judgments Act in its challenge to a permit application process. *PIOGA I*, 135 A.3d at 1129-30.

We agree with Petitioners that there is a justiciable controversy in the instant matter under the *Arsenal Coal* exception. Like in *Arsenal Coal* and its

---

[4] Act of January 17, 1968, P.L. 11, *as amended*, 43 P.S. §§ 333.101-.115.

[5] The Supreme Court also emphasized the broad right to relief under the Declaratory Judgments Act. *Bayada Nurses*, 8 A.3d at 876. The purpose of the Declaratory Judgments Act is to "settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and [the Declaratory Judgments Act] is to be liberally construed and administered." 42 Pa. C.S. § 7541(a). In *Bayada Nurses*, the Supreme Court explained that the Declaratory Judgments Act "certainly embraces the type of dispute[s]" that fall within the ambit of *Arsenal Coal*. *Bayada Nurses*, 8 A.3d at 876.

progeny, Ladd faces sanctions for noncompliance with RELRA or the substantial cost and lengthy administrative process if she acquiesces to RELRA's requirements. The effect of the licensing requirements on Ladd under RELRA, therefore, is sufficiently "direct and immediate" to warrant justiciability in advance of enforcement. *See Arsenal Coal*, 477 A.2d at 1339. Pre-enforcement review of the application of RELRA's licensing requirements to Ladd in this Court's original jurisdiction is proper.

Moreover, Commonwealth Respondents make no attempt to distinguish the instant dispute from *Arsenal Coal* or its progeny. Instead, Commonwealth Respondents liken this case to *Morrison v. State Board of Medicine*, 618 A.2d 1098 (Pa. Cmwlth. 1992), and *Linesville PA VFW Post 7842 v. Commonwealth* (Pa. Cmwlth., No. 337 M.D. 2015, filed February 5, 2016) (Colins, J.).[6] In *Morrison*, a physician sought a declaration that she is approved to use a prayer and spiritual treatment program in the course of her medical practice. *Morrison*, 618 A.2d at 1098. We held that there was no justiciable case or controversy because there was no threat to the physician's ability to practice medicine or indication that her license was in jeopardy. *Id.* at 1101. In *Linesville*, aspiring gaming organizations sought a declaration from this Court that their plans to use certain gaming equipment to conduct raffles complied with state law. *Linesville*, slip op. at 5-6. Like in *Morrison*, Senior Judge Colins determined that the potential injury was not sufficiently direct or immediate because the aspiring gaming organizations had taken no concrete steps to conduct raffles and instead only alleged a desire to purchase such equipment. *Id.*, slip op. at 9. Moreover, Senior

[6] Section 414(b) of the Commonwealth Court Internal Operating Procedures provides: "A single-judge opinion of this court, even if reported, shall be cited only for its persuasive value, not as a binding precedent." 210 Pa. Code § 69.414(b).

Judge Colins differentiated the dispute in *Linesville* from *Arsenal Coal* in that there was no indication that any Commonwealth party took a position regarding the equipment for electronic raffles that could adversely affect the aspiring gaming organizations, even if they did purchase such equipment. *Id.*, slip op. at 12. Here, Ladd faces the direct and immediate price of compliance with RELRA or sanctions for noncompliance. The harm is more direct and immediate than that in *Morrison* or *Linesville*.

Commonwealth Respondents next object on the ground that even accepting the allegations in the Petition as true, Petitioners cannot prevail on their constitutional challenge because RELRA and its application to Ladd are constitutional. Regarding this preliminary objection in the nature of a demurrer, Commonwealth Respondents argue that the application of RELRA to Ladd is subject to rational basis review. Commonwealth Respondents contend that RELRA is merely a professional licensing scheme, one within the Commonwealth's general police powers. The Pennsylvania Supreme Court has explained that Article I, Section 1 protects both fundamental rights—like the right to marry and procreate—which warrant the protection of strict scrutiny review, as well as other rights, which are "undeniably important" but not fundamental. *Nixon*, 839 A.2d at 287. The right to pursue a lawful occupation is one of the non-fundamental rights guaranteed under Article 1, Section 1. *Id.* at 288. A law that restricts the right to pursue a lawful occupation is subject to rational basis review. *Id.*

While Commonwealth Respondents contend that RELRA's licensing requirements satisfy rational basis, Petitioners argue in response that RELRA is unconstitutional under the version of rational basis that the Pennsylvania Supreme

Court utilized in *Nixon*. Initially, we agree that *Nixon* requires a somewhat heightened rational basis review, which the Supreme Court has termed the "*Gambone* rational basis test." *Id.* at 289. Under the *Gambone* rational basis test, a law that restricts the right to pursue a lawful occupation "must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained." *Id.* at 287 (quoting *Gambone v. Cmwlth.*, 101 A.2d 634, 637 (Pa. 1954)).

Despite the heightened nature of the *Gambone* rational basis test, we agree with Commonwealth Respondents that the licensing scheme under RELRA is constitutional. The primary purpose of RELRA's licensing requirements is "to protect buyers and sellers of real estate, the most expensive item many persons ever buy or sell, from abuse by persons engaged in the business." *Kalins v. State Real Estate Comm'n*, 500 A.2d 200, 203 (Pa. Cmwlth. 1985).[7] Prerequisites to practicing a certain profession, such as a professional license, can be seen across many career fields. We would no sooner obviate the requirement for a professional engaging in the practice of real estate to hold a license than we would obviate the licensure requirement for an attorney, physical therapist, or any other professional, merely because they have limited clients or only practice part of the year. Were this Court to accept Petitioners' argument, we would effectively upend the legitimacy of any requirement by the Commonwealth for a professional license. State-mandated licensing requirements serve to ensure competence of professionals in given fields.

[7] While the General Assembly has modified RELRA since our decision in *Kalins*, we agree with the Superior Court's assessment that "none of these modifications in any way altered the underlying purpose of [RELRA] which is to protect the public from abuse by those who are engaged in the business of trading real estate." *Meyer v. Gwynedd Dev. Grp., Inc.*, 756 A.2d 67, 69 n.2 (Pa. Super. 2000).

Petitioners do not cite to any case, nor is this Court aware of any, in which a Pennsylvania court has determined that a license requirement becomes unreasonable or oppressive for individuals who provide professional services, *like the services Petitioners admit Ladd provided*, but in a limited fashion. Moreover, RELRA bears a real and substantial relationship to the interest in protecting from abuse buyers and sellers of real estate and is similar to licensing requirements in other fields. The application of RELRA's licensing requirements to Ladd, therefore, satisfies the *Gambone* rational basis test.

We understand that Ladd believes RELRA's licensing requirements to be unduly burdensome given the small volume of real estate practice she conducted. We agree that, were Ladd to elect to comply with RELRA's requirements, she would face greater burdens in proportion to her real estate practice than those faced by a typical real estate broker who, for example, exclusively sells houses and does so year-round. The Pennsylvania Constitution, however, does not require the General Assembly to establish a tiered system for every profession that it regulates in order to account for different volumes of work performed. Ladd likely shares her frustration with any other person who aspires to work minimally in a given field but feels the prerequisites for that field are too onerous. Despite the reasonableness of her frustration, we are still compelled to uphold the will of the General Assembly in policing professionals, so long as the regulatory scheme satisfies the *Gambone* rational basis test. Here, it does.

The Pennsylvania Supreme Court's decision in *Nixon* and its progeny do not require a different result. In *Nixon*, the Supreme Court reviewed the constitutional challenge to amendments to the Older Adults Protective Services Act,[8]

[8] Act of November 6, 1987, P.L. 381, *as amended*, 35 P.S. §§ 10225.101-.5102.

which became effective in June 1998. The result of the amendments was to "prohibit the employment of convicted criminals who were not then working in a covered facility or who had obtained a new job in a covered facility less than a year before the effective date" of the amendments (*i.e.*, June 1997). *Nixon*, 839 A.2d at 288. The amendments did not apply, however, to formerly convicted individuals who held their position for more than a year before the effective date of the amendments. The Supreme Court explained that, if the state interest was to protect the elderly, disabled, and infirm, the distinction between formerly convicted caretakers that held their job before June 1997 and those that did not lacked a "real and substantial relationship" with that interest. *Id.* at 289. The Supreme Court thus held that the amendments failed the *Gambone* rational basis test.

In the aftermath of *Nixon*, this Court has held that blanket bans on formerly convicted individuals—particularly where some, but not all former criminals face such a consequence—do not satisfy the *Gambone* rational basis test. *See Peake v. Cmwlth.*, 132 A.3d 506 (Pa. Cmwlth. 2015) (holding lifetime ban for individuals convicted of certain offenses from working in elder care violated due process); *see also Warren Cty. Human Servs. v. State Civil Serv. Comm'n (Roberts)*, 844 A.2d 70 (Pa. Cmwlth.), *appeal denied*, 863 A.2d 1152 (Pa. 2004) (holding lifetime ban for individuals convicted of certain offenses from working in child care violated due process).

Petitioners' attempts to analogize the matter now before this Court to *Nixon* and its progeny are unpersuasive. Rather than a blanket ban on certain individuals from working as real estate brokers, RELRA merely requires a real estate broker's license prior to engaging in the practice of real estate. *See Reisinger v. State Bd. of Med. Educ. & Licensure*, 399 A.2d 1160, 1165 (Pa. Cmwlth. 1979) (noting

that, in denying petitioner license, the State Board of Medical Education and Licensure "[was] not prohibiting the practice of Naturopathy but merely assuring that those who practice it [were] medically competent to do so"). *Nixon*, therefore, is inapposite. Because RELRA merely establishes the prerequisites to engaging in the practice of real estate, *Nixon* does not compel a determination that RELRA violates due process.

Accordingly, we sustain, in part, and overrule, in part, Commonwealth Respondents' preliminary objections and dismiss with prejudice Petitioners' Petition.[9]

P. KEVIN BROBSON, Judge

[9] Because Petitioners are unable to succeed on the constitutional challenge of the application of RELRA's licensing requirements to Ladd, we need not reach a determination on Commonwealth Respondents' final preliminary objection, pertaining to Harris's standing in this matter.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sara Ladd, Samantha Harris, and Pocono Mountain Vacation Properties, LLC, Petitioners	:	
v.	:	No. 321 M.D. 2017
Real Estate Commission of the Commonwealth of Pennsylvania and Department of State (Bureau of Professional and Occupational Affairs) of the Commonwealth of Pennsylvania, Respondents	:	

ORDER

AND NOW, this 4th day of June, 2018, the preliminary objections by the Pennsylvania Real Estate Commission and the Pennsylvania Department of State, Bureau of Professional and Occupational Affairs to the petition for review filed by Sara Ladd, Samantha Harris, and Pocono Mountain Vacation Properties, LLC, are OVERRULED, in part, and SUSTAINED, in part. The preliminary objections based on failure to plead an actual controversy and failure to exhaust administrative remedies are OVERRULED. The preliminary objection based on demurrer is SUSTAINED, and the petition for review is DISMISSED with prejudice.

P. KEVIN BROBSON, Judge

IN THE SUPREME COURT OF PENNSYLVANIA

Sara Ladd, Samantha Harris, and Pocono Mountain Vacation Properties, LLC, Appellants	:	33 MAP 2018
v.	:	
Real Estate Commission of the Commonwealth of Pennsylvania and Department of State (Bureau of Professional and Occupational Affairs) of the Commonwealth of Pennsylvania, Appellees	:	

PROOF OF SERVICE

I hereby certify that this 9th day of October, 2018, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served:	Howard Greeley Hopkirk
Service Method:	eService
Email:	hhopkirk@attorneygeneral.gov
Service Date:	10/9/2018
Address:	Office of Attorney General, Appellate Section 15th Floor Strawberry Square Harrisburg, PA 17120
Phone:	717--78-3-1478
Representing:	Appellee Real Estate Commission and Dept. of State (Bureau of Professional and Occupation Affairs)

Served:	Nicole Jeanne Boland
Service Method:	eService
Email:	nboland@attorneygeneral.gov
Service Date:	10/9/2018
Address:	Office of Attorney General 15th Fl., Strawberry Sq. Harrisburg, PA 17120
Phone:	717--78-3-3146
Representing:	Appellee Real Estate Commission and Dept. of State (Bureau of Professional and Occupation Affairs)

IN THE SUPREME COURT OF PENNSYLVANIA

/s/ Joshua D. Wolson

(Signature of Person Serving)

Person Serving:	Wolson, Joshua D.
Attorney Registration No:	084998
Law Firm:	
Address:	Dilworth Paxson LLP 1500 Market St Ste E 3500 Philadelphia, PA 191022101
Representing:	Appellant Sara Ladd, Samantha Harris, and Pocono Mountain Vacation Properties, LLC