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.

REPLY BRIEF FOR APPELLANTS

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

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INTRODUCTION

This appeal is about whether the Court can dismiss a well-pleaded petition for review alleging that Pennsylvania's Real Estate Licensing and Registration Act, 63 P.S. §§ 455.101, *et seq.* (RELRA), violates Appellant Sara Ladd's right to earn an honest living under Article I, Section 1 of the Pennsylvania Constitution.

As stated in the petition, Ms. Ladd was a vacation property manager who helped home owners post and coordinate short-term rentals on websites like Airbnb. (R. 9a–11a ¶¶ 21–28). Clients would inform her of the dates and rate at which they desired to rent their home, and Ms. Ladd would then post that information online and respond to inquiries from prospective renters. (R. 10a–11a ¶¶ 26–29). To make a reservation, a renter signed an agreement directly with the property owner. (R. 10a–11a ¶¶ 27(a) & 28(a)). Ms. Ladd then handled all billing and ensured the property was cleaned between renters. (R. 10a ¶ 27(d) & (e)).

Ms. Ladd's business was focused exclusively on rentals lasting just a few days and costing just a few hundred dollars at a time. (R. 12a

¶¶ 31–32). For Ms. Ladd, at 62 years old and planning for retirement, this was ideal. (R. 14a ¶ 42, 20a–21a ¶¶ 74 & 77). Short-term rentals were simple, which meant she could provide excellent services from home with just a laptop and an internet connection. (R. 13a–14a ¶¶ 40–41, 18a ¶ 63). Moreover, her streamlined business model meant she could avoid the overhead of an office and employees, allowing her to earn a modest yet stable income to supplement Social Security as she aged. (R. 12a–14a ¶¶ 29–33, 39–40, 42).

But Ms. Ladd's plans were crushed when she learned that she would be required to obtain RELRA's onerous broker's license—which meant completing a three-year apprenticeship with an established broker, taking hundreds of hours of courses and two exams on general real-estate practice, and opening a brick-and-mortar office—just to continue assisting her clients with short-term rentals. (R. 18a–19a ¶¶ 62–63 & 67–68). Appellants alleged that these requirements imposed severe burdens on Ms. Ladd's ability to earn a living because they:

- Tied her freedom to work to the unfettered discretion of licensed brokers (R. 16a–17a ¶¶ 52–57, 19a ¶ 66);

- Forced her to spend three years working for somebody who specialized, not in her particular services, but in buying and selling houses (R. 16a–17a ¶¶ 52–57, 18a ¶ 63);
- Forced her to take hundreds of hours of courses and two exams on topics largely unrelated to her work (R. 15a–17a ¶¶ 47, 50–51, 57, 19a ¶ 83); and
- Forced her to open a brick-and-mortar office that she did not need and could not possibly afford (R. 13a ¶ 40, 17a–18a ¶¶ 58 & 63).

Appellants further alleged that, whatever their general purpose, RELRA's licensing requirements lack a "real and substantial relationship" to protecting Ms. Ladd's actual clients from harm, are "excessive" and "sweep[] unnecessarily broadly," and "impose[] an undue burden on her ability to pursue a chosen occupation." (R. 18a–19a ¶¶ 63–65, 22a–23a ¶¶ 83–84).

Appellants have made extensive arguments that these allegations are sufficient to state a claim that RELRA, at least in Ms. Ladd's case, fails the *Gambone* rational-basis test. *See* Appellants' Br. 20–66. Appellees,

largely ignoring these arguments, now ask the Court to dismiss. The question is whether Appellees have carried their burden of justifying a demurrer.

ARGUMENT FOR APPELLANTS

This case is before the Court on a demurrer, which means the only question the Court needs to resolve is whether Appellants have plausibly alleged that RELRA fails the *Gambone* test as applied to Ms. Ladd. Appellees do not seriously attempt to answer that question. Instead, they ask the Court to declare RELRA *per se* constitutional, no matter its irrationality or excessiveness in Ms. Ladd's case, because the law is internally consistent and applying the *Gambone* test in earnest would allegedly stifle the police power. Section I below explains that Appellees misconstrue the *Gambone* test in fundamental respects. Section II then explains that, due to Appellees' misunderstanding of the test, Appellees fail to carry their heavy burden under Pennsylvania's demurrer standard. The Court should reject Appellees' arguments and reverse the Commonwealth Court's decision.

I. Appellees Misconstrue the *Gambone* Test.

Appellees claim to recognize that, under Article I, Section 1 of the Pennsylvania Constitution, RELRA must satisfy the *Gambone* test. *See* Appellees' Br. 13. Yet the test they describe bears no resemblance to the test this Court has consistently applied for almost a century. First, Appellees argue that the *Gambone* test is satisfied so long as RELRA is "internally []consistent"—a phrase this Court has never used to describe the test. Appellees' Br. 18. Second, Appellees attempt to discourage the Court from applying the *Gambone* test in earnest due to supposed practical concerns about the applicability of that test to "other professions." Appellees' Br. 19. The Court should reject these arguments and apply its longstanding test.

A. The *Gambone* Test Demands More Than Mere Internal Consistency.

To satisfy the *Gambone* test, a law restricting occupational freedom must meet two basic demands. First, the law must be directed towards a "legitimate public policy." *Shoul v. Commonwealth*, 173 A.3d 669, 678 (Pa. 2017). Second, the law must bear a "real and substantial relation" to

furthering that policy *and* not be "unduly oppressive or patently beyond the necessities of the case." *Id.* at 677.

As explained below, Appellees make no effort to apply these requirements. *See infra* pp. 14–19. Instead, Appellees attempt to cabin this Court's decisions in *Gambone v. Commonwealth*, 101 A.2d 634 (Pa. 1954), and *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003), to situations involving "internally inconsistent" laws. Appellees misread both cases.

In *Gambone*, a gas station challenged a law restricting it from posting fuel prices on signs over a certain size. 101 A.2d at 636. In response, the Commonwealth claimed the law was intended to prevent "fraudulent advertising of prices." *Id.* But this Court, applying Pennsylvania's heightened rational-basis test, disagreed.[1] Though preventing fraud was a legitimate purpose, the Court found it "impossible . . . to see how the size of the sign would have any relevancy to the perpetration of . . . fraud." *Id.* at 637. The Court also noted that if the goal was truly to prevent fraud, the Commonwealth could have

[1] *See* Appellants' Br. 34–35 & n.25 (explaining that this Court has applied a heightened form of rational-basis review since at least as far back as its decision in *George B. Evans, Inc. v. Baldridge*, 144 A. 97 (Pa. 1928)).

simply prohibited "false statements concerning the price," a protection that "already exist[ed] in the Penal Code." *Id.* This failed both prongs of the *Gambone* test.[2]

In *Nixon*, the petitioners challenged a law restricting certain criminal offenders from working in older-adult facilities, but exempting others who had been employed for a year or more. 839 A.2d at 279–81. The Commonwealth responded by invoking its "crucial interest" in protecting older adults from abuse. *Id.* at 288. But this Court, applying the *Gambone* test, was not convinced. According to the Court, the petitioners had submitted declarations showing that they had "essentially rehabilitated themselves," which meant the law, "particularly with regard to its application to [them]," did "not bear a real and substantial relationship" to protecting older adults. *Id.* at 289–90.

Neither *Gambone* nor *Nixon* turned on the challenged law's "internal inconsistency." In fact, neither case even *mentioned* that term. Instead, both cases featured precisely the sort of "means-end review"

[2] The Court also found that the Commonwealth's second purported interest, the potential for price-cutting, was not "in fact or in law, really an evil," and so could not justify exercising the police power. *Gambone*, 101 A.2d at 638.

this Court has always applied to occupational regulations: the Commonwealth first identifies a legitimate purpose, and the Court then asks whether the law bears a "real and substantial relation" to that purpose or imposes burdens that are "unduly oppressive or patently beyond the necessities of the case." *Shoul*, 173 A.3d at 676–77. Appellees' attempts to recast *Gambone* and *Nixon* are unavailing.

In any case, Appellants note (as they did in their initial brief) that RELRA *is* actually internally inconsistent. *See* Appellants' Br. 58–60. Under RELRA, certain people are free to buy and sell entire homes, multifamily dwellings, timeshares, and rental information without completing a three-year apprenticeship, most of the required real-estate courses, or the broker exam. *See* 63 P.S. §§ 455.551, 455.561, 455.591. Others are free to facilitate rentals of hotels, apartments, and duplexes, *see id.* § 455.304(10) (exempting services), and to help vacationers book lodging for travel, without completing any of RELRA's requirements. Yet Ms. Ladd, whose services are either analogous to or involve much lower stakes than these other services, is subject to RELRA's *most onerous* requirements. Even under Appellees' narrow reading of the *Gambone*

test, these inconsistencies (which Appellees provide no explanation for) would be fatal.

B. Appellees' Practical Concerns About the *Gambone* Test Are Unfounded.

The *Gambone* test is this Court's longstanding, established test for determining whether occupational regulations satisfy Article I, Section 1 of the Pennsylvania Constitution. *Shoul*, 173 A.3d at 676–78; *see also* Appellants' Br. 21–35 (setting forth constitutional basis for test and cases applying it). Yet Appellees argue that subjecting RELRA to that test would "forever diminish[]" the legislature's power to enact reasonable regulations. Appellees' Br. 19. Appellees' fears are unfounded.

For almost a century, this Court has seamlessly applied the *Gambone* test to licensing, consumer-protection, and several other occupational restrictions. *See* Appellants' Br. 34 n.25 (collecting cases). The sky has not fallen. Nor did it fall in California, Connecticut, Florida, Maine, or North Carolina after those states' high courts struck down various applications of real-estate licenses, *see* Appellants' Br. 36 n.27 (collecting cases), or more recently in Texas after the Texas Supreme Court struck down an "oppressive" application of a cosmetology

license. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 90 (Tex. 2015).[3] This case is no different.

Appellees' fears appear rooted in two false premises. First, Appellees seem to think the Court can either protect the right to earn a living or preserve the police power—but it cannot do both. *See* Appellees' Br. 13 ("This case pits the right of an individual to pursue a chosen occupation *against* the right of the General Assembly . . . to further the welfare of the citizens of Pennsylvania." (emphasis added)). Second, Appellees suggest, as the Commonwealth Court did below,[4] that allowing this case to proceed past the pleading stage would compromise licensing laws across the Commonwealth. *See* Appellees' Br. 19 ("What legal principle would prevent the application of this decision to other professions?"). Appellees' Br. 19. Neither is correct.

Simply put, the right to earn a living and the police power are not in conflict. Under Article I, Section 1 of the Pennsylvania Constitution,

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[3] *See also* Br. *Amicus Curiae* Ashish Patel 16–33 (discussing *Patel* and its relevance to this case).

[4] *See* Appellants' Br., Appendix A at 11 ("Were this Court to accept Petitioners' argument, we would effectively upend the legitimacy of any requirement by the Commonwealth for a professional license.").

that right is "inalienable" within its proper sphere. *Sec'y of Revenue v. John's Vending Corp.*, 309 A.2d 358, 361 (Pa. 1973). But that sphere does not include the freedom to injure or defraud others—those are the province of the police power. *Nixon*, 839 A.2d at 286. The *Gambone* test is how this Court polices that line. *See Gambone*, 101 A.2d at 637 ("Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private businesses or impose unusual or unnecessary restrictions upon lawful occupations.").

As for Appellees' fears about "other professions," there is no reason to think that allowing Appellants a chance to prove that RELRA fails the *Gambone* test *in this case* would cause licensing laws across the Commonwealth to come crashing down.[5] To the contrary, this Court has decided similar as-applied challenges under the *Gambone* test for almost a

[5] Indeed, it would not even bring RELRA down. For Appellants do not contend, as Appellees suggest, that the legislature could never regulate Ms. Ladd's services. *Contra* Appellees' Br. 19. Rather, Appellants argue only that subjecting her to RELRA's *most onerous* requirements, when those requirements impose largely irrelevant and excessive burdens on her actual services, fails the *Gambone* test. There is nothing radical about such a claim. *See 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.").

century, yet physicians and attorneys (along with dozens of other occupations) remain heavily regulated.

The *Gambone* test simply ensures that, on the rare occasion when the legislature steps too far, an individual has some mechanism for "prov[ing]" it. *Nixon*, 839 A.2d at 286. Success is not guaranteed. To the contrary, most applications of existing licensing laws would likely satisfy the *Gambone* test on the merits, since the legislature does not make a habit of enacting laws with no real-world connection to the public health or safety, or that impose excessive burdens on individuals.[6] But the fact that many challenges would fail on the merits does not mean that *this* one will.

Indeed, Appellees' hypothetical of the person who would like to practice medicine involving no surgeries without attending medical school provides a ready contrast with this case. *See* Appellees' Br. 19. There, medical school bears an obvious connection to the myriad other forms of treating the human body (e.g., performing tests, diagnosing

[6] Other challenges might simply be foreclosed by precedent, and therefore subject to potential sanctions under Pennsylvania Rule of Professional Conduct 3.1 (regarding "frivolous" claims).

diseases, and prescribing medications) that physicians engage in short of performing surgery. But surely a more limited professional, like a massage therapist (who also happens to treat the human body), would have a plausible claim under the *Gambone* test if the legislature decided to subject her to the full panoply of physician-licensing requirements—a claim that would impugn neither physician nor massage-therapist licensing in general, but the *application* of a hot of largely irrelevant and excessive requirements to her in particular.[7]

The same logic applies here. In this case, Appellees contend that RELRA was designed "to protect the public from incompetent and unscrupulous persons engaged in the business of *buying and selling* real estate," Appellees' Br. 12 (emphasis added), which is a service Ms. Ladd has never offered. (R. 12a ¶¶ 29–30). Yet RELRA subjects Ms. Ladd to Pennsylvania's *most onerous* real-estate licensing requirements—requirements that, as with the hypothetical massage therapist described above, appear to impose largely irrelevant and excessive burdens on her

[7] Unsurprisingly, the legislature has chosen not to regulate massage therapists like physicians. *See* 63 P.S. § 627.14, *et seq.* (setting forth more limited licensing requirements for massage therapists).

ability to earn a living. (R. 18a–19a ¶¶ 63–65, 22a–23a ¶¶ 83–84). Whatever RELRA's general purpose and validity, Appellants deserve an opportunity to make that showing.

II. Appellees Fail to Apply Both the *Gambone* Test and the Demurrer Standard.

Due to Appellees' misconception of the *Gambone* test, Appellees do not attempt to carry their burden of showing "with certainty" that Appellants have failed to state a claim. *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 56 (Pa. 2014). First, Appellees fail to explain how RELRA satisfies either prong of the *Gambone* test. Second, Appellees fail to point to anything in Appellants' petition that would justify a demurrer. The Court should reject Appellees' arguments and reverse the Commonwealth Court's decision.

A. Appellees Fail to Apply the *Gambone* Test.

To justify a demurrer, Appellees must show "with certainty" that RELRA satisfies the *Gambone* test as applied to Ms. Ladd. *Bruno*, 106 A.3d at 56. To make that showing, Appellees must meet two basic demands. First, they must identify the "legitimate public policy" that RELRA serves in Ms. Ladd's case. *Shoul*, 173 A.3d at 678. Second, they

must show that RELRA bears a "real and substantial relation" to furthering that purpose *and* does so in a way that is not "unduly oppressive or patently beyond the necessities of the case." *Id.* at 677. Appellees do not seriously attempt to make these showings.

First, Appellees identify RELRA's purpose as "protect[ing] the public from incompetent and unscrupulous persons engaged in the business of buying and selling real estate." Appellees' Br. 12. This may make sense as a *general* justification for RELRA, given that property is "the most expensive item many persons ever buy or sell." Appellees' Br. 16 (quoting Appendix A at 11). But again, it makes no sense here, where the question is whether RELRA is constitutional *as applied* to Ms. Ladd, whose services do not include buying or selling property. (R. 12a ¶¶ 29–30). If RELRA has another purpose that relates to Ms. Ladd's actual services, Appellees have yet to identify it.[8]

Second, Appellees fail to explain how RELRA's extensive requirements—which include a three-year apprenticeship with an established broker, hundreds of hours of courses and two exams on

[8] Which also means Appellants have not yet had an opportunity to "rebut[]" it. *Shoul*, 173 A.3d at 678.

real-estate practice, and a brick-and-mortar office—bear a "real and substantial relation" to Ms. Ladd's services. Appellants have made extensive arguments that, based on the facts pleaded, they do not. *See* Appellants' Br. 39–52. Yet Appellees, who bear the burden in this appeal, do not discuss how even a single one of these requirements would make Ms. Ladd a better vacation property manager.

Instead, Appellees baldly assert that "[RELRA's] requirements would help insure that *all* licensees are competent." Appellees' Br. 15–16 (emphasis added). But Appellees point to nothing in the petition which would support that assertion in Ms. Ladd's case. *See Connor v. Archdiocese of Phila.*, 975 A.2d 1084, 1085–86 (Pa. 2009) (noting that on a demurrer, the Court must draw the "salient facts . . . solely from the [petition]"). Such assertions, without more, are not sufficient to show a "real and substantial relation." *See Shoul*, 173 A.3d at 680 (rejecting "abstract and attenuated" justification for law disqualifying certain criminal offenders from obtaining commercial driver's license).

Appellees' rhetorical question about "[h]ow . . . it protect[s] consumers to allow untrained individuals to rent out vacation property,"

fares no better. This question (which Appellees ask in support of their failed "internal inconsistency" argument, *see supra* pp. 5–9) assumes that Ms. Ladd's services warrant regulation in the first place. Appellees' Br. 18. But if they do, Appellees have not shown it. Appellees have not explained what about Ms. Ladd's services requires training; what sort of training would bear a "real and substantial relation" to addressing those concerns; or how RELRA requires that training.[9] This, too, is insufficient to show a "real and substantial relation." *Shoul*, 173 A.3d at 680.

Appellees also fail to explain how RELRA's requirements are not "unduly oppressive or patently beyond the necessities of the case." Here again, Appellants have argued at length, based on facts alleged in the petition, that RELRA fails this requirement. *See* Appellants' Br. 52–66. Appellees make no attempt to address these arguments. Instead, Appellees argue that Ms. Ladd's "cost-benefit calculation" regarding the

[9] Nor have Appellees explained why Pennsylvania's Unfair Trade Practices and Consumer Protection Law, which already forbids Ms. Ladd from engaging in fraudulent or abusive business practices, would not be sufficient to address any legitimate concerns they might have. *See* Appellants' Br. 51 & 60, *citing* 73 P.S. § 201-3; *Danganan v. Guardian Prot. Servs.*, 179 A.3d 9, 16 (Pa. 2018) (applying law to out-of-state-actors).

feasibility of obtaining a broker's license is simply "not relevant" to RELRA's constitutionality. Appellees' Br. 12. That is incorrect.

Simply put, whether RELRA's requirements impose excessive burdens on Ms. Ladd's ability to earn a living is central to the *Gambone* test. *See Shoul*, 173 A.3d at 680 (rejecting highway-safety justification for law disqualifying certain criminal offenders from obtaining commercial driver's license where law's "severity" was out of proportion with "other sanctions for conduct plainly more dangerous to highway safety"); *see also* Appellants' Br. 53 (collecting cases). Appellees cannot side-step prong two by reading it out of the test completely.

The only other basis Appellees offer for RELRA's constitutionality is the assertion that RELRA is broadly "rational[]." Appellees' Br. 19. In other words, Appellees contend that because RELRA is constitutional in *most* cases, it must be constitutional in this one. But that merely begs the question, since Appellants' core claim is that RELRA is unconstitutional *as applied* to Ms. Ladd. Appellees offer nothing that would help the Court answer that question: no explanation for what RELRA's chief concern has to do with Ms. Ladd's services; no

explanation for how RELRA's onerous requirements relate to her work; no explanation for why their severity is justified her case.

These are not arguments. They are conclusory assertions that Appellees ask this Court to blindly accept to avoid engaging in meaningful constitutional scrutiny. But the Court has a "duty" to subject RELRA "to judicial review and a constitutional analysis." *Hertz Drivurself Stations v. Siggins*, 58 A.2d 464, 469 (Pa. 1948); *Nixon*, 839 A.2d at 286. For whether RELRA complies with Article I, Section 1 of the Pennsylvania Constitution on the facts of this case is a question whose "final determination is for [this Court]." *Shoul*, 173 A.3d at 677. The Court should reject Appellees' invitation to abdicate its duty.

B. Appellees Fail to Apply the Demurrer Standard.

The central question in this appeal is whether, "based on the facts pleaded, it is clear and free from doubt that [Appellants] will be unable to prove facts legally sufficient to" show that RELRA fails the *Gambone* test as applied to Ms. Ladd. *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 101 (Pa. 2008). Appellees fail to answer that question. Not only do they fail to discuss "the facts pleaded" or what Appellants "will be []able to

prove," they also ask the Court to ignore the demurrer standard and resolve this case on the merits. These errors are fatal.

1. Appellees do not discuss the petition for review.

To satisfy Pennsylvania's pleading requirements, Appellants need only set forth the "material facts on which [their claim] is based . . . in a concise and summary form." Pa. R.C.P. 1019(a). The facts may be stated "in the most general terms." *Wicks v. Milzoco Builders, Inc.*, 470 A.2d 86, 90 (Pa. 1983). This is not a tall order, which is why the Court considers dismissal a "drastic measure," *McCreesh v. City of Phila.*, 888 A.2d 664, 673 (Pa. 2005), and the standard for sustaining a demurrer "quite strict." *Gekas v. Shapp*, 364 A.2d 691, 693 (Pa. 1976).

Appellees have not met that standard. The Court has made clear that, "to sustain [a] demurrer, it is essential that the [petition] *indicate on its face* that [the] claim cannot be sustained, and the law will not permit recovery." *Id.* (emphasis added). But Appellees do not cite to the petition—even once—in the entire "Argument" section of their brief. *See* Appellees' Br. 13–20. Nor do they argue that any of Appellants' factual allegations would make it impossible to show that RELRA fails

the *Gambone* test in Ms. Ladd's case. In short, Appellees do not discuss the "legal sufficiency of the challenged pleading"—which is the point of a demurrer. *Mazur*, 961 A.2d at 101.

2. Appellees attempt to shift the burden by prematurely asking the Court to resolve this case on the merits.

Appellees' failure to engage with the petition is doubtless due to their confusion over who bears the burden in this appeal. For at the outset, Appellees ask the Court to decide, not whether Appellants have plausibly alleged that RELRA fails the *Gambone* test, but "[w]hether the licensing requirements under [RELRA] *are* unconstitutional as applied to [Ms.] Ladd." Appellees' Br. 3 (emphasis added). That is, Appellees prematurely ask the Court to resolve this case on the merits.

But Appellees' request would turn the demurrer standard on its head. On a demurrer, Appellees bear the burden of showing "with certainty" that RELRA meets the *Gambone* test. *Bruno*, 106 A.3d at 56. Yet if the Court were resolving this case on the merits, Appellants would be required to "prove" RELRA's unconstitutionality simply to state a claim. *Nixon*, 839 A.2d at 286. That would be completely inappropriate.

See Int'l Union of Operating Eng'rs v. Linesville Const. Co., 322 A.2d 353, 356 (Pa. 1974) (noting that a petitioner has "no burden . . . to prove [her] cause of action" at the pleading stage); *Com. by Shapiro v. Golden Gate Nat'l Senior Care LLC*, 194 A.3d 1010, 1030 (Pa. 2018) (noting that Pennsylvania's pleading rules merely require a petitioner to "adequately detail[] the nature of the claims so as to permit the [respondent] to prepare a defense and satisf[y] this Court that the claims are not baseless subterfuge").

Indeed, requiring Appellants to "prove their case" at the pleading stage would make it practically impossible to state a claim under the *Gambone* test, where cases so often turn on how the Commonwealth chooses to justify a law and whether the petitioner has built a factual record capable of rebutting that justification. *See* Appellants' Br. 29–30 & n.23 (collecting cases striking down economic regulations under the *Gambone* test based on record evidence). On such a standard, the Commonwealth could effectively immunize occupational regulations from scrutiny by invoking broad, legitimate-sounding bases for a law and then moving to dismiss before the petitioner has had an opportunity to

refute them. In fact, that is exactly what Appellees ask the Court to do here. *See* Appellees' Br. 12, 16, 19 (asking the Court to declare RELRA rational as applied to Ms. Ladd based on asserted general purpose).

But such assertions are "only the beginning of the . . . constitutional inquiry." *See Robinson Twp., Washington Cty. v. Commonwealth*, 83 A.3d 901, 988 (Pa. 2013).[10] Hence the Court's refusal to dismiss Earl Nixon's as-applied challenge to the Older Adults Protective Services Act, which prevented him from working in older-adult facilities based on a past conviction, even after the Commonwealth invoked its "crucial interest" in protecting older adults. *Nixon*, 839 A.2d at 288–90. Rather than blindly accept the Commonwealth's rationale, the Court considered evidence that Nixon and his fellow petitioners had "essentially rehabilitated themselves" and concluded that the law, "particularly with

[10] This is true even under Pennsylvania's *more lenient* equal-protection standard. *See Robinson Twp., Washington Cty.*, 83 A.3d at 988 (overruling demurrer in equal-protection challenge where Commonwealth Court analyzed oil-and-gas law "as a vague whole, based on an overly broad distinction and absent any analysis of whether the distinction had any fair and substantial relationship to the [law's] object"); *see also Nixon*, 839 A.2d at 287 n.15 (noting that the *Gambone* test requires a "more restrictive" rational-basis test in substantive-due-process challenges than in equal-protection challenges).

regard to its application to [them]," did "not bear a real and substantial relationship" to protecting older adults. *Id.* at 289–90.

So too for the Sun Ray Drug Company's as-applied challenge to Pennsylvania's Ice Cream Law, which restricted the company from selling dairy products with less than a certain butterfat content. *Com. ex rel. Woodside v. Sun Ray Drug Co.*, 116 A.2d 833, 834–35 (Pa. 1955). Rather than dismiss that case after the Commonwealth invoked the "*possibility* of confusing, defrauding, or deceiving the public," the Court allowed the company to demonstrate the safety of its product and to build a record showing "no evidence" that fraud was a real-world concern—facts the Court ultimately relied on to strike the law down. *Id.* at 837–40.

Even the Commonwealth Court, applying the *Gambone* test in 2009, refused to dismiss an as-applied challenge to the Debt Management Services Act, which licensed both debt-settlement and debt-management services to "[p]revent[] fraud and abusive business practices." *Ass'n of Settlement Cos. v. Dep't of Banking*, 977 A.2d 1257, 1276 (Pa. Cmwlth. 2009). There, a group of debt-settlement servicers alleged that the Act's fee scheme failed to take into account the differences

between debt-settlement and debt-management, and "would have a severe impact on [their] business models." *Id.* at 1275. The court found a demurrer inappropriate because the litigation was at a "preliminary stage" and there "ha[d] been no evidence to support" the law's purported rationale. *Id.* at 1279.

These cases were not dismissed because the Court cannot determine whether a law satisfies the *Gambone* test, *as applied*, in the abstract.[11] Nowhere is that clearer than in this case, where there is nothing in the petition to explain what RELRA's core concern has to do with Ms. Ladd's services; nothing to explain how RELRA's onerous requirements relate to her work; and nothing to explain why their severity is justified her case. If the *Gambone* test is to mean anything, and the presumption of constitutionality truly is "rebuttable," then Appellants must be given an opportunity to prove that such a law fails the *Gambone* test. *Shoul*, 173 A.3d at 678. The Court should reject Appellees' attempt to deny Appellants that opportunity.

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[11] *See* Br. *Amicus Curiae* Goldwater Institute 5–12 (setting forth concerns with dismissing well-pleaded petitions under rational-basis test without affording petitioners an opportunity build a factual record).

CONCLUSION

The Court should reject Appellees' arguments and reverse the Commonwealth Court's decision.

Dated: January 11, 2019.

Respectfully submitted,

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**Admitted Pro Hac Vice*

CERTIFICATE OF COMPLIANCE

This brief complies with the word-count limitation of Pa. R.A.P. 2135, because it contains 4,958 words, including footnotes, based on the word count of the word processing system used to prepare it.

Dated: January 11, 2019

/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:

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Dated: January 11, 2019

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: January 11, 2019.

Respectfully submitted,

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

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 11th day of January, 2019, 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:

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IN THE SUPREME COURT OF PENNSYLVANIA

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IN THE SUPREME COURT OF PENNSYLVANIA

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