



INSTITUTE FOR JUSTICE

July 28, 2022

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Re: No. ADM2022-00522

Honorable Justices of the Supreme Court of Tennessee:

The Institute for Justice (“IJ”) submits these comments in support of the April 25, 2022 Petition of the Network of Enlightened Women (“Petitioner”), *In re: Amendment of Rule 7, Section 5.01(c), Rules of the Tennessee Supreme Court*. IJ is a national, nonprofit, public interest law firm that litigates, provides research, and advocates in the areas of law that provide the foundation for a free society, including economic liberty and private property.¹ Economic liberty is the right to earn a living free from unreasonable or arbitrary government interference. IJ’s efforts to protect economic liberty have included petitioning other state supreme courts to amend their rules to afford attorneys greater flexibility.²

Tennessee Supreme Court Rule 7, section 5.01(c) governs the admission of attorneys licensed in other jurisdictions to the Tennessee bar without examination, otherwise known as admission by comity. The current rules require such applicants to have practiced full-time for five of the previous seven years in order to qualify. The Petition proposes ending the full-time requirement for comity and instead adopting language that requires applicants to have engaged in “the representation of one or more clients in the private or public practice as a licensed attorney.”³ IJ submits these comments because granting the Petition is in line with the constitutionally recognized right to earn a living. Granting the Petition would also benefit Tennesseans by bringing the state’s rules on admission by comity into greater uniformity with the majority of other jurisdictions.

¹ *About Us*, INST. FOR JUST., <https://ij.org/about-us/> (last visited July 18, 2022); *Four Pillars Plaque*, INST. FOR JUST. (Oct. 1, 2008), <https://ij.org/ll/four-pillars-plaque/>.

² *See, e.g.*, Petition for Rulemaking from Five Licensed Attorneys, *In re: Changes to the Rule Regulating Quantity of On-demand Continuing Legal Education Course Approval*, No. ADM09-8008 (Minn. Aug. 1, 2019).

³ Pet. at Ex. A.

I. Tennessee Law Includes a Constitutional and Statutory Right to Earn a Living, Which Supports Granting the Petition.

The right to earn a living has long been protected by the Tennessee Constitution (and caselaw interpreting it), and it is also protected by a more recently codified statute. Adopting Petitioner’s proposed amendment is both supported by—and would align this Court’s rules with—this liberty interest. This, in turn, would increase the economic liberty afforded to Tennesseans and allow them greater freedom to make career decisions that are best for themselves and their families.

The Tennessee Constitution guarantees a right to earn a living. Article I, section 8 states “[t]hat no man shall be . . . disseized of his . . . liberties or privileges . . . or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.”⁴ This provision has long been interpreted by this Court to encompass “the right to use one’s faculties in all lawful ways, . . . to pursue any lawful calling, vocation, trade, or profession, . . . and to enjoy the legitimate fruits thereof.”⁵ This is not only a matter of personal liberty, but an outgrowth of property rights as well: “Labor is property, and, as such, merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property, and of all solid individual and national prosperity.”⁶

Granted, these are not “unlimited rights” but rather “are subject to the law’s control, and may at any time be abridged or enlarged, or even destroyed, within constitutional bounds”; that is, “by ‘due process of law’ or ‘the law of the land’ . . . two phrases [that] have exactly the same import.”⁷ To that end, this Court has held that “interference with an individual’s inherent property right to pursue [an] occupation is not constitutionally permissible except in so far as such interference may be justified by the police power of the State. Beyond that limitation it is the taking, in effect, of property belonging to another.”⁸ This Court has found the police power “embraces all matters reasonably expedient for the safety, health, morals, comfort and general well-being of its people” but that “[i]f a given legislative enactment is to be justified by reason of the inherent police power of the sovereign, it, the legislation in question, must at least exhibit a real tendency to effect that end.”⁹

On the other hand, this Court has found that “[r]egulation of technical occupations is not ipso facto valid because of its purpose to protect the citizen.”¹⁰ Rather, if “this Court is entirely unable to imagine how such requirements at all promote the general welfare or protect the public morals, health or safety, or have any real tendency to those ends,” then “its plain duty is to adjudge this statute unconstitutional because it may deny some citizens their inherent right to earn their

⁴ TENN. CONST. art. I, § 8.

⁵ *Harbison v. Knoxville Iron Co.*, 53 S.W. 955, 957 (Tenn. 1899).

⁶ *Id.* (internal quotation marks omitted).

⁷ *Id.*

⁸ *Livesay v. Tenn. Bd. of Exam’rs*, 322 S.W.2d 209, 211 (Tenn. 1959).

⁹ *Id.*

¹⁰ *Id.* at 213 (quoting R.D. Hursh, Annotation, *Regulation or Licensing of Watchmaking, Watch Repairing, and the Like*, 34 A.L.R.2d 1326 § 1 (1954)).

livelihood in a private field of work, thus depriving them of a valuable property right without due process of law.”¹¹

This Court has set the bar for the exercise of the police power very high. The Court has gone so far as to declare that:

[I]f the opportunity for a dishonest person in pursuit of a private occupation to defraud his customer is to become a justification for the regulation under the police power rule of an otherwise private occupation, then the Legislature may well regulate every conceivable business, and the claim of the police power rule would become a delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint.¹²

This high bar comports with this Court’s determination that “[t]he right to engage in work of one’s own choosing is a fundamental one.”¹³ Indeed, this economic liberty right is so fundamental that it dates back to Magna Carta.¹⁴ These deeply rooted origins in English common law influenced such Founding Fathers as Thomas Jefferson¹⁵ and James Madison¹⁶ as they laid the foundations of the United States. The Virginia Declaration of Rights, written by George Mason, contained in its very first section the recognition “[t]hat all men . . . have certain inherent rights, of which . . . they cannot, by any compact, deprive or divert their posterity; namely, . . . the means of acquiring and possessing property.”¹⁷ Jefferson would draw upon the Virginia Declaration in writing the Declaration of Independence,¹⁸ in which he would reference the right to earn a living as the right to the “pursuit of Happiness.”¹⁹

The majority of states (as well as the District of Columbia) do not impose full-time requirements for attorneys to qualify for admission by comity, and such practice is the national

¹¹ *Id.* (internal quotation marks omitted).

¹² *Id.* (cleaned up).

¹³ *Id.* (quoting Hursh, *supra* note 10).

¹⁴ Bruce F. Broll, *The Economic Liberty Rationale in the Dormant Commerce Clause*, 49 S.D. L. REV. 824, 826 (2004).

¹⁵ Timothy Sandefur, *State Powers and the Right to Pursue Happiness*, 21 TEX. REV. L. & POL. 323, 324–25 (2017).

¹⁶ Bernard H. Siegan, *Protecting Economic Liberties*, 6 CHAP. L. REV. 43, 81–84 (2003) (quoting Madison as saying, “I own myself the friend to a very free system of commerce, and hold it as a truth, that commercial shackles are generally unjust, oppressive, and impolitic.”).

¹⁷ VA. DECL. OF RIGHTS § 1 (1776); *see also* Sandefur, *supra* note 15, at 323 n.2 (“The Virginia Declaration of Rights made the point most succinctly in connecting the natural equality of mankind with individual freedom, including the freedom to obtain, use, and enjoy property so as to flourish as individuals.”).

¹⁸ *The Virginia Declaration of Rights*, NAT’L ARCHIVES (Sept. 29, 2016), <https://www.archives.gov/founding-docs/virginia-declaration-of-rights>.

¹⁹ Sandefur, *supra* note 15, at 324.

standard advocated for by the American Bar Association (“ABA”) in its model rules.²⁰ In fact, some state supreme courts have questioned their ability regulate certain types of attorney conduct against the right to earn a living.²¹ Given these facts, it stands to reason that Tennessee’s current full-time requirement does not protect health and safety or the general welfare.

The right to earn a living also receives statutory protection under Tennessee law. In 2016, the General Assembly passed the Right to Earn a Living Act—a sunset act—which codified into statute the Tennessee Constitution’s right to earn a living. The text of the Act makes its overall aim clear. First, the Act affirms that “the right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference, is a *fundamental* civil right.”²² Second, it cites the glut of rules regulating entry into specific lines of work—known as entry regulations—that “have exceeded legitimate public purposes and have had the effect of arbitrarily limiting entry and reducing competition,” noting that “the burden of excessive regulation is borne most heavily by individuals outside the economic mainstream, for whom opportunities for economic advancement are curtailed.”²³ Therefore, the Act concludes that:

[I]t is in the public interest to ensure the right of all individuals to pursue legitimate entrepreneurial and professional opportunities to the limits of their talent and ambition . . . and to ensure that regulations of entry into businesses, professions, and occupations are *demonstrably necessary and narrowly tailored to legitimate health, safety, and welfare objectives*.²⁴

The Act thus clearly draws on the language of this Court’s caselaw which has found the right to earn a living to be a “fundamental one”²⁵ that may only be “reasonably” regulated in terms of “safety, health, . . . and general well-being.”²⁶ Although the statute only applies to executive branch authorities,²⁷ this Court should nevertheless find its principles instructive in considering the Petition with an eye towards promoting greater economic liberty and property rights.

²⁰ See *infra* pp. 5–6 and notes 29–31.

²¹ See, e.g., *In re Palazzola*, 853 S.E.2d 99, 111 (Ga. 2020) (Peterson, J., concurring specially) (questioning the extent of “the inherent authority to regulate the practice of law that the Georgia Constitution vests in this Court” since “the Georgia Constitution’s Due Process Clause guarantees the people of Georgia the ‘right to work in one’s chosen profession free from unreasonable government interference’” and noting that the further from the aim of protecting the public a regulation strays, “the greater the risk that our reach exceeds our power.” (quoting *Jackson v. Raffensperger*, 843 S.E.2d 576, 578 (Ga. 2020)).

²² Right to Earn a Living Act, 2016 Pub. Acts ch. 1053 (emphasis added) (codified as amended at TENN. CODE ANN. §§ 4-5-501 to -502).

²³ *Id.*

²⁴ *Id.* (emphasis added).

²⁵ *Livesay v. Tenn. Bd. of Exam’rs*, 322 S.W.2d 209, 213 (Tenn. 1959) (quoting Hursh, *supra* note 10).

²⁶ *Id.* at 211.

²⁷ TENN. CODE ANN. § 4-5-501(2).

II. Granting the Petition Would Bring Tennessee’s Rules on Admission by Comity into Greater Conformity with Other Jurisdictions, Benefitting the State’s Growing Population.

Adopting Petitioner’s proposed amendment would also bring Tennessee’s rules on admission by comity into greater uniformity with the national standard adopted by most other jurisdictions. As the Petition notes, the current language of this Court’s rules requires attorneys applying for admission by comity to have been engaged in “full-time private or public practice as a licensed attorney”—i.e., forty or more hours per week—in another jurisdiction for at least five of the last seven years.²⁸ By contrast, the ABA’s Model Rule on Admission by Motion (“ABA Model Rule”) does not include any such requirement in its definition of the “active practice of law.”²⁹ The ABA Model Rule also “urges jurisdictions that have not adopted [it] to do so, and urges jurisdictions that have adopted admission by motion procedures to eliminate any restrictions that do not appear in the [ABA Model Rule].”³⁰

Accordingly, most jurisdictions admit attorneys by comity without any requirements beyond those listed in the ABA Model Rule, and very few carry a full-time requirement. Indeed, Tennessee is an outlier. Only seven states—Maine, Maryland, Mississippi, Missouri, Ohio, Tennessee, and Virginia—have a full-time requirement.³¹ Thirty-five states and the District of

²⁸ TENN. S. CT. R. 7, art. V, § 5.01(c)(1)(A), (a)(1)(3), <https://www.tncourts.gov/rules/supreme-court/7>; Pet. at 1–2.

²⁹ Pet. at 1; MODEL RULE ON ADMISSION BY MOTION, at 1 (AM. BAR ASS’N Aug. 6, 2012), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model_rule_admission_motion.pdf.

³⁰ MODEL RULE ON ADMISSION BY MOTION, at 2.

³¹ MAINE BAR ADMISSION R. 11A(a)(2), <https://mainebarexaminers.org/wp/wp-content/uploads/2017/09/Fully-amended-MBAR-0517-TOC-amended-0917.pdf> (defining the “active practice of law” as requiring “a full time basis”); MD. R. ATTORNEYS 19-215(b), [https://govt.westlaw.com/mdc/Document/NE4E3EE60A41A11EB87D1C73F16553F81?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/mdc/Document/NE4E3EE60A41A11EB87D1C73F16553F81?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)) (defining “[t]he professional experience required for admission under this Rule” to “be on a full time basis”); MISS. BD. OF BAR ADMISSIONS R. VI cmt., https://courts.ms.gov/research/rules/msrulesofcourt/rules_admission_msbar.pdf (“An attorney’s five (5) years of prior practice must have constituted a full-time or regular undertaking . . .”); MO. BD. OF LAW EXAM’RS R. 8.10(a)(4), <https://www.mble.org/rule-8> (requiring applicants to have worked full-time in private practice, as a lawyer for the U.S. government, as in-house counsel, or as an instructor at an ABA-approved law school for five of the last ten years); OHIO S. CT. R. I, § 10(A)(2)(c), <https://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf#Rule1> (requiring practice “on a fulltime basis” to be eligible for admission without examination); TENN. S. CT. R. 7, art. V, § 5.01(c)(1)(A), <https://www.tncourts.gov/rules/supreme-court/7> (defining the “active practice of law” as, *inter alia*, “full-time private or public practice as a licensed attorney”); VA. S. CT. R. 1A:1 cmt., <https://barexam.virginia.gov/pdf/Rule1A-1.pdf> (“For purposes of admission without examination, ‘full-time’ means practicing law for a minimum of 32 hours per week.”).

Columbia, or over 68% of jurisdictions, do not impose a full-time requirement on attorneys seeking admission by comity. The remaining eight states do not allow admission by comity.³² Thus, a large majority of jurisdictions do not carry a full-time requirement. This should bolster the Court's confidence that adopting Petitioner's proposed amendment will not harm the quality of legal services available to the public in Tennessee.

Finally, greater conformity with the majority, ABA-approved national standard is increasingly important as Americans continue to relocate in response to the COVID-19 pandemic. According to a study released by United Van Lines, which surveys its customers annually to determine where they are moving, Tennessee was the sixth most moved-to state in 2021.³³ UCLA economics and public policy professor Michael Stoll notes that this trend is generally reflective of the broader realignment of American life away from high density regions, which is "indicative of COVID-19's impact on domestic migration patterns" and of adaptation to more flexible work environments.³⁴ In the face of this continuing demographic shift, which inevitably impacts both the supply and demand for legal services, it would benefit both the people of Tennessee and those attorneys moving to the state for the rules to conform to the more permissive national standard on admission by comity.

CONCLUSION

In summary, IJ respectfully requests that this Court grant the Petition to amend Rule 7, section 5.01(c). Doing so is supported by, and would respect, the Tennessee Constitution's deeply rooted principles, as well as the will of the General Assembly to increase economic liberty in the state. Amending section 5.01(c) would also bring this Court's rules into greater conformity with the national standard adopted by the majority of other jurisdictions. This shows that such a change would have little to no downside, illustrating that the current full-time requirement is not necessary for health, safety, or welfare objectives. Finally, greater conformity with the national standard

³² *Attorney Applicants*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Requirements/Attorney-Applicants>; *Frequently Asked Questions*, DE. CTS.: BD. OF BAR EXAM'RS, <https://courts.delaware.gov/bbe/faqs.aspx> (click "I am admitted in another state. Do I have to take the Delaware Bar Exam to be admitted in Delaware?"); *Frequently Asked Questions*, FL. BD. OF BAR EXAM'RS, <https://www.floridabarexam.org/web/website.nsf/faq.xsp#10D6>; *Frequently Asked Questions*, HAW. STATE BAR ASS'N, https://hsba.org/Supreme_Court_HSBA_2020/Public/FAQ.aspx#Reciprocity; LA. S. CT. R. XVII, § 11, https://www.lasc.org/Supreme_Court_rules/?p=RuleXVII; *Admission Requirements*, STATE BAR OF NEV., <https://nvbar.org/licensing-compliance/admissions/admission-requirements/#reciprocity>; *Admission to the Rhode Island Bar: Attorney Admission on Examination*, R.I. JUDICIARY, <https://www.courts.ri.gov/AttorneyResources/baradmission/Pages/Attorney%20on%20Admission.aspx>; *Admission to Practice Law in South Carolina*, S. CT. OF S.C.: OFF. OF BAR ADMISSIONS, <https://barapplication.sccourts.org/admissionToPractice.cfm>.

³³ Elliott Davis Jr., *Americans Moved South in 2021, Often Influenced by the Pandemic*, U.S. NEWS & WORLD REP. (Jan. 3, 2022, 3:39 PM), <https://www.usnews.com/news/best-states/articles/2022-01-03/americans-moved-south-in-2021-a-study-finds>.

³⁴ *Id.*

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would allow attorneys more flexibility as they adapt to changing demands for legal services in Tennessee created by the state's growing population. For these reasons, the Petition should be granted.

Respectfully submitted,

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