

**IN THE SUPREME COURT OF PENNSYLVANIA  
WESTERN DISTRICT**

In re: the Petition of LAW STUDENTS  
FOR EQUITABLE RESPONSES TO  
COVID-19 by Ryan Aloysius Smith and  
Pretty Martinez, Trustees ad Litem;  
ROBERT SUITE, MARY BETH KUZNIK,  
BRANDON VANTINE, ROBERT GAVIN,  
CHRISTIAN WOLGEMUTH, JESSICA  
MCDERMOTT, RAVEN MOORE,  
DEREK DEMERI, CATHERINE CUFF,  
MICHELLE TABACH, KARLA  
PISARCIK, CAROLINE ROBELEN, and  
KARLI STUDY,

*Petitioners.*

No. 74 WM 2020

**REPLY BRIEF**

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**I. The Board Mischaracterizes Petitioners’ Request for Relief, Misconstrues Petitioners’ Respect for This Court’s Ultimate Authority To Prescribe Alternative Licensing Requirements, and Ignores the Recommendations Petitioners Submitted.**

The Board grossly mischaracterizes Petitioners’ request for relief as “wholesale diploma privilege” for any individual registered for the October Pennsylvania Bar Exam who is a graduate of an ABA-accredited law school, regardless of whether the individual is a first-time or repeat test-taker. Answer pp. 3–5. In fact, Petitioners indicate in their Petition for Review that they seek “emergency licensure *subject to conditions this Court deems sufficient.*” Petition p. 1 (emphasis added). Petitioners also clearly indicate that their requested form of relief would exclude repeat test-takers. *See id.* at p. 54.

The Board misconstrues Petitioners’ position on “diploma privilege” by claiming that “Petitioners make no meaningful effort to demonstrate that such a diploma itself sufficiently ensures minimal competence.” Answer p. 3. In fact, Petitioners made no such effort because Petitioners never suggest in their Petition for Review that a law degree alone sufficiently ensures minimum competency. Rather, Petitioners submit that this Court should grant “emergency licensure *subject to conditions this Court deems sufficient, but no more than necessary, to protect the public from incompetent legal representation.*” Petition p. 1. (emphasis added).

Petitioners dedicate an entire subsection in their Petition for Review to providing the Court with recommendations as to potential alternative licensing

requirements, such as an enhanced “bridge the gap program”; additional Continuing Legal Education requirements; and/or practice mentors, just to name a few. Petition, Subsection II.B. Nevertheless, the Board improperly suggests that Petitioners failed to give “careful consideration of . . . reasonable alternatives” to secure and protect the public’s interest in competent legal representation. Answer p. 22. Though the Board seemingly wants Petitioners to propose an alternative licensing scheme, doing so would usurp this Court’s ultimate authority to prescribe law licensing requirements. As Petitioners indicate, this Court has full and complete discretion to develop a well-regulated emergency licensure scheme, and “the possibilities are endless.” Petition p. 55.

## **II. The Board Misinterprets *Ladd* and Misapplies the Heightened Rational Basis Test in This Case.**

The Board misinterprets the *Ladd* decision in claiming that the decision “is inapposite” in the present case. Answer pp. 18–17. The Board, in emphasizing that the petitioner in *Ladd* “worked as a ‘short-term vacation property manager,’” conflates a broker who deals with short-term rentals (e.g., a broker who manages weeklong vacation rentals) with a short-term broker’s license (i.e., a temporary license to broker vacation rentals). *Id.* In fact, contrary to the Board’s representation, the petitioner in *Ladd* did not seek any special “certification” or a “temporary” license. *Id.* Rather, like Petitioners here, the *Ladd* petitioner sought “permanent” relief on the basis that, when applied in her case, the requirements violate the

individual right to pursue one’s chosen lawful occupation. *Ladd*, slip op. at 7–8 (explaining Ladd sought to permanently enjoin the Commonwealth from subjecting her to the challenged licensing requirements).

The Board also misapplies the heightened rational basis test applicable to this case. The question is not whether the remote bar exam *itself* is “unreasonable” or “unduly oppressive.” Answer p. 19. Rather, the issue is whether, given the technological, cybersecurity, and psychometric problems attendant to the remote bar exam’s administration and the immeasurable costs imposed on October Candidates, strict adherence to Pa. B.A.R. 203(b)(1) violates the individual right to pursue one’s chosen lawful occupations as lawyers. Petition p. 36.

### **III. The Board Fails To Address the Impossibility of Equating and Scaling a Remote, Reduced-Question Multistate Bar Exam Without Extensive Psychometric Research.**

The Board completely ignores, given the lack of psychometric research, that it will be *impossible* to equate and scale scores on a remote, reduced-question MBE.<sup>1</sup> See Petition pp. 39–42. The equating process used for the October Exam will inevitably “produce misleading results” due to sudden changes in the form of the MBE.<sup>2</sup> This is because equating is only possible by comparing “the new form of the

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<sup>1</sup> Joe Patrice, *Bar Examiners Attempt Mind Trick on Diploma Privilege Petition, Fail*, Above the Law (Aug. 26, 2020), <https://abovethelaw.com/2020/08/bar-examiners-attempt-mind-trick-on-diploma-privilege-petition-fail-pennsylvania/>.

<sup>2</sup> See Deborah J. Merritt, *Equating, Scaling, and Civil Procedure*, Law School Cafe (April 16, 2015), <https://www.lawschoolcafe.org/2015/04/16/equating-scaling-and-civil-procedure/>

MBE to prior forms of the MBE.”<sup>3</sup> Unlike prior forms of the MBE, the remote October Exam’s wholly novel MBE consists of only 100 questions (*half* the usual number of questions). Answer p. 19. Equating the scores on the October Exam will be impossible, **according to the National Conference of Bar Examiners**, because the remote exam “cannot be considered comparable to the standard, paper-based, full-length MBE.”<sup>4</sup> Moreover, the Board conveniently chooses to ignore the indisputable fact that it is not possible to complete the necessary psychometric research in time for the scheduled October Exam.<sup>5</sup>

Since the scaling process used for the October Exam will inevitably rely on misleading equated scores, it simply does not matter that the “bar exam will be weighted as it usually is.” Answer p. 19. Nor does it matter that “the Board is administering all of its essay questions and the performance test.” *Id.* This is because written scores on the bar exam must be scaled to scores on the MBE.<sup>6</sup> The scaling-and-equating process, as a whole, simply cannot produce reliable results because of

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<sup>3</sup> Michael T. Kane & Andrew Mroch, *Equating the MBE*, 74 B. Examiner, Aug. 2005, at 22.

<sup>4</sup> *NCBE COVID-19 Updates*, NCBE, <https://www.ncbex.org/ncbe-covid-19-updates> (last updated June 1, 2020).

<sup>5</sup> *Cf. Rawdin v. Am. Bd. of Pediatrics*, 985 F. Supp. 2d 636, 647 (E.D. Pa. 2013) “(Given the lengthy and ongoing process required to develop questions and the need for reliability and objectivity, . . . [it] is not possible for [the American Board of Pediatrics] to develop an exam with a different format in a short period of time and still meet the relevant standards of reliability.”).

<sup>6</sup> Susan M. Case, *The Testing Column: Demystifying Scaling to the MBE: How’d You Do That?*, 74 B. Examiner, May 2005, at 45, 46.

the remote, reduced-question MBE that the Board intends to use in October. *See* Petition pp. 39–42.

Given that it is not possible to complete the necessary psychometric research by October, it will therefore be impossible to properly equate and scale scores on the remote, reduced-question bar exam in 2020. As a result, the scores on the October Exam will fail to reliably measure minimum competency and thus fail to protect the public’s interest.

**IV. The Board Fails To Mention the Technological Failures of the June Administration of the Saudi Arabian SAAT Exam and Misrepresents the Extent of the Software Changes.**

The Board’s reliance on the June 2020 remote administration of the Standard Achievement Administration Test (SAAT) in Saudi Arabia is misplaced because technological problems prevented 8% of remote test-takers from submitting their exams.<sup>7</sup> The Board cannot possibly claim, with any credibility, that ExamSoft successfully administered the SAAT when over 16,000 examinees could not submit their exams due to technological errors.<sup>8</sup>

In addition, **none** of the four news articles cited by the Board<sup>9</sup> support its contention that the Kingdom of Saudi Arabia successfully administered the SAAT

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<sup>7</sup> *ETEC: AI and TM Monitored All Irregularities and We Will Reveal Them with the Results Announcement*, Educ. & Training Evaluation Comm. (June 12, 2020), <https://www.etc.gov.sa/en/Media/News/Pages/Remote-testing2.aspx>.

<sup>8</sup> *See id.*

<sup>9</sup> *See* Answer pp. 14–15 & 14 n.18.

remotely to 167,000 students simultaneously.<sup>10</sup> In fact, the sources that the Board cites reference test-takers’ “issues with installing the platform,” issues “taking the practice test,” and the need to reschedule the exam “for those who faced technical issues” that were so severe that they were unable to submit their exams.<sup>11</sup>

Further, the Board misrepresents that the October Exam will be administered using the “same software that has been used during in-person Pennsylvania exams for years.” Answer p. 8. The Board acknowledges that “[t]he remote exam will be administered using ExamSoft’s latest Examplify software.”<sup>12</sup> However, this “latest software” includes ExamMonitor, which on June 18, 2020, ExamSoft’s Chief Technology Officer indicated “just finished beta [testing] in March with eight customers on it.”<sup>13</sup> There is simply not enough time to perform the testing necessary

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<sup>10</sup> In fact, two of the four articles the Board cites were written *before* the administration of the June 8–9, 2020 remote exam. They merely discuss the Kingdom’s *plans* to administer the test remotely. See *AI technology To Enable 350,000 Students To Take Remote SAAT in Saudi Arabia*, Saudi Gazette, <https://saudigazette.com.sa/article/593951/SAUDI-ARABIA/AI-technology-to-enable350000-students-to-take-remote-SAAT-in-Saudi-Arabia> (June 7, 2020); *ETEC: Standard Achievement Admission Test to Be Conducted Online and at Computerized Testing Centers Tomorrow*, Saudi Press Agency (June 7, 2020), <https://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2095734>.

<sup>11</sup> *More Than 203 Thousand Students Successfully Complete Remote SAAT*, Educ. & Training Evaluation Comm. (June 9, 2020), <https://etec.gov.sa/en/Media/News/Pages/Achievement-test2.aspx>.

<sup>12</sup> *October 2020 Pennsylvania Bar Exam Frequently Asked Questions*, Pa. Bd. of Law Exam’rs [https://www.pabarexam.org/bar\\_exam\\_information/cbtremoteexamfaq.htm](https://www.pabarexam.org/bar_exam_information/cbtremoteexamfaq.htm) (Aug. 25, 2020).

<sup>13</sup> Riley Farrell, *ExamSoft, a Provider of Anti-Cheating Tech, Experiences Growth In an Age Of Online Education*, Dallas Innovates (June 18, 2020), <https://dallasinnovates.com/examsoft-a-provider-of-anti-cheating-tech-experiences-major-growth-in-an-age-of-online-education/>.

to ensure a reliable administration of an unprecedented remote bar exam using this software.<sup>14</sup>

**V. The Board’s Accommodations Are Insufficient To Address the Issues Surrounding the October Exam’s Psychometric Reliability, Cybersecurity, and Technological Feasibility.**

The Board obscures the inherent problems with the remote administration of the October Exam by suggesting that its accommodations will adequately address Petitioners’ concerns. For instance, the Board emphasizes that it has a partnership project with the Pennsylvania Bar Association (PBA) to address the need for suitable testing spaces. Answer p. 11. Even if the Board and PBA can somehow find enough testing spaces for the hundreds of October Candidates who will need them,<sup>15</sup> these testing accommodations cannot eliminate the substantial risks of technological errors and cyberattacks during the October Exam. Nor can any testing accommodations cure the remote exam’s fatal infirmity—that is, the October Exam

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<sup>14</sup> Stephanie Francis Ward, *Software Provider Pulls Out of Remotely Proctored Bar Exams Because of Technology Concerns*, ABA J. (Aug. 18, 2020), <https://www.abajournal.com/web/article/due-to-technology-concerns-software-provider-pulls-out-of-remotely-proctored-bar-exams>

<sup>15</sup> Considering that 61.6% of October Candidates lack suitable testing spaces and that only twenty-seven firms and member organizations have so far offered testing spaces (around sixty-five individual testing spaces in total), it is highly unlikely that the Board and PBA will find suitable accommodations for every October Candidate. *See* Petition, p. 49; *Remote Bar Exam: Connecting Bar Applicants with Testing Spaces*, Pa. Bar Ass’n, <https://www.pabar.org/site/Get-Involved/Volunteer/Bar-Exam-Testing-Space> (last visited Aug. 26, 2020 2:57 PM). The Board has not announced a contingency plan to secure additional testing spaces in the event that law firms and PBA member organizations are unable to offer enough spaces.

will yield unreliable measures of minimum competency because it will be impossible to equate and scale the remote, reduced-question MBE.

### CONCLUSION

Petitioners respectfully request that this Honorable Court grant the relief requested in their Petition for Review Under This Court's Exclusive Jurisdiction and for Extraordinary Relief Under King's Bench Jurisdiction.

Respectfully submitted:

*/s/ Louis M. Natali*

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**CERTIFICATION OF SERVICE**

I, Michael J. Engle , hereby certify that I caused a copy of the foregoing to be filed and served upon the following individuals by overnight mail:

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**CERTIFICATION OF COMPLIANCE WITH PA.R.A.P. 127**

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

/s/ Michael J. Engle  
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