



October 1, 2020

Chief Justice Tani Gorre Cantil-Sakauye  
The Honorable Carol A. Corrigan, Associate Justice  
The Honorable Mariano-Florentino Cuéllar, Associate Justice  
The Honorable Joshua P. Groban, Associate Justice  
The Honorable Leondra R. Kruger, Associate Justice  
The Honorable Goodwin H. Liu, Associate Justice

Attn: Mr. Sunil Gupta  
The Supreme Court of California  
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*Sent via electronic mail*

**Re: ACLU opposition to the use of remote proctoring for the California Bar Examination**

Dear Chief Justice Cantil-Sakauye and Justices of the Supreme Court of California:

Thank you for directing the State Bar to respond to our letter expressing civil rights concerns with the use of facial recognition technology in proctoring the upcoming California Bar Examination. As the Exam date approaches, we remain wary of the State Bar's plans to utilize remote proctoring technology due to the discriminatory impact this decision has had, and will continue to have, on test takers from marginalized groups. We are also concerned that the software the State Bar has required test takers to download for purposes of completing the remote administration of the Exam contravenes the California Consumer Privacy Act. We urge the Supreme Court of California and the State Bar to develop a pathway to licensure that is both equitable and consistent with the robust privacy laws of this State.

Again, this letter focuses specifically on our serious concerns with the use of remote proctoring technology in any online Bar Exam administration. However, we must note that this does not mean we endorse the goal of administering an online Bar Exam during this volatile historical moment. In our previous letter, we voiced concerns that an administration of the Exam during the COVID-19 pandemic would exacerbate racial and economic disparities due to the digital divide. Two months later, the circumstances under which Bar applicants are expected to take the most important exam of their lives have significantly worsened. Last week, the United States reached 200,000 coronavirus fatalities, a death toll that has fallen disproportionately on minoritized racial groups. Economic instability has increased as states continue to face record unemployment and millions of families grapple with the uncertainty created by delayed federal relief measures. Protests

against racialized state violence continue proliferating as more and more Black people are killed by police with impunity. California is currently witnessing some of the largest and most devastating wildfires in its history, with many Bar applicants and their families being displaced and physically and psychologically impacted by the smoke. These unprecedented events call into question the fundamental fairness of going about business as usual, especially when we know said events impact some Bar applicants more acutely than others.

### **The use of remote proctoring invites discrimination and creates additional stressors for marginalized test takers.**

It is against this backdrop that we remain opposed to the use of ExamSoft for proctoring the Exam. Although the State Bar has indicated that it will not rely on the software's facial recognition technology to make any final determinations regarding the Exam, this does not adequately remedy the discriminatory effect of technology that is inherently biased.<sup>i</sup> Nor does the proposed process of human review.<sup>ii</sup> Even if ExamSoft's identity verification process is only one part of a larger framework that involves human review, the use of facial recognition will nonetheless be disruptive and have a disparate impact on marginalized test takers. Reports from examinees of color who have completed practice versions of the California Bar Exam illustrate these concerns. One Bar examinee, who is Arab-American, reports that he has attempted to verify his identity using ExamSoft's facial recognition system at least 75 times in several different rooms and with various lighting arrays, but has been unsuccessful.<sup>iii</sup> Another Bar examinee, who is a Black woman, reports that she plans to keep a light shining directly on her face for the duration of the two-day exam to prevent her skin tone from raising red flags.<sup>iv</sup> Although the State Bar asserts that these barriers to identity verification will not preclude an Exam taker of color from continuing with an exam session, it is likely they will trigger additional human review based on race. Accordingly, the racial biases embedded in facial recognition technology create a substantial likelihood that human reviewers will be watching exam takers of color with a closer eye. In many ways, this scenario illustrates a classic example of why the ACLU of California has long advocated against the use of surveillance technologies, particularly facial recognition, on civil rights and civil liberties grounds. Racialized surveillance by government actors is a shameful part of our nation's history, dating back to the earliest days of the Republic.<sup>v</sup> The notion that representatives of the State Bar may unwittingly engage in racialized surveillance runs counter to the agency's stated commitment of building a more just and inclusive legal profession and raises a fundamental issue of equal protection of laws.

Furthermore, human review has already proven to be an inadequate solution to the risks of facial recognition bias. *The New York Times'* coverage of the story of Robert Williams, a Black man who was falsely arrested for larceny based on a faulty facial recognition match, is a representative case.<sup>vi</sup> Williams was arrested after police ran a still image from a store surveillance video through a state facial recognition database as part of a shoplifting investigation.<sup>vii</sup> The system generated a match with Mr. Williams' driver license photo, prompting investigators to present his image in a line up for a loss prevention specialist to review.<sup>viii</sup> She incorrectly concluded that his driver license photo matched the image caught by surveillance cameras which in turn lead to the arrest of Williams.<sup>ix</sup> This case illustrates the limitations of human review as a sufficient check on the biases embedded in facial

recognition technology, and it is not an anomaly. A recent study on human review of automated systems found that people frequently rely on the output generated by algorithms and stop using their own judgement or questioning whether the algorithm may be wrong, calling into question the notion of human review as a safeguard against algorithmic bias.<sup>x</sup>

In our view, the mere possibility that the need for additional human review of a test taker's Exam may be based on protected characteristics in and of itself warrants reconsideration of deploying remote proctoring technology for this Exam. But the Court and the State Bar should also consider the impact that this form of heightened scrutiny has on marginalized test takers. Many students of color will enter this Exam with the unjustifiable burden of knowing they may be disproportionately scrutinized by human reviewers. For some, this added stress could be the difference between passing and not passing. For others, it may compel them to sit for an in-person administration of the Exam instead, risking their personal health to avoid any potential issues. Indeed, we are aware of at least one California Bar applicant who opted to take an in-person exam rather than expose themselves to scrutiny for wearing their religious head covering. The applicant learned that they would be automatically flagged by the remote proctoring technology for exercising their fundamental religious right. Exam takers that require disability accommodations have also been uniquely disadvantaged by the proposed use of remote proctoring. Rather than implement solutions to allow disabled test takers to participate in the remote administration of the exam, the State Bar has prohibited individuals who cannot stay in front of the camera for the entirety of the Exam or who need to use scratch paper from testing remotely, effectively forcing them to risk exposure to COVID-19 due to the limitations posed by remote proctoring technology.<sup>xi</sup>

Exam takers of lower socioeconomic status also face a predicament due to the limitations of remote proctoring. As the deans of several California law schools recently pointed out, the prohibition on food or books being visible during the Exam creates unnecessary hardships for test takers who live in small apartments.<sup>xii</sup>

The inequities inherent in an administration of the Bar Exam that relies on remote proctoring are anything but trivial. If facial recognition is necessary to ensure the integrity and security of a Bar Exam without human proctors, we ask that the Court and State Bar consider alternative pathways to licensure that do not involve its use and the resulting discrimination against Bar applicants.

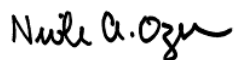
### **The use of remote proctoring for the Bar Exam raises significant privacy and security concerns and implicates the California Consumer Privacy Act.**

We are further concerned that the required use of ExamSoft for the remote administration would significantly invade the privacy and security of Bar applicants and implicates the California Consumer Privacy Act ("CCPA"). Under the CCPA businesses must maintain reasonable security protections for consumers' personal information to ensure that it is protected from breach or other unauthorized disclosure.<sup>xiii</sup> Recent events have revealed that State Bar administrators, as well as remote-proctoring software companies, may not be up to the task of securing exam-takers data. In August, it came to light that remote proctoring software ProctorU was hacked, exposing the

personal information of approximately 400,000 people.<sup>xiv</sup> The District of Columbia Bar, similarly, reportedly revealed documents containing intimate details of bar applications, including full employment history, previous home addresses, and disciplinary records of applicants.<sup>xv</sup> A breach during or after the bar exam could subject exam takers to identity theft, harassment, and further trauma, even if they are able to complete the test. And ExamSoft could see significant liability under the CCPA, which directs that damages between \$100 and \$750 per consumer per incident be awarded in an action brought by consumers.<sup>xvi</sup>

We appreciate the State Bar's response to our previously expressed concerns regarding the use of facial recognition for proctoring the California Bar Exam. However, we respectfully disagree that the backstops and process of human review the State Bar has identified as a solution meaningfully address the discrimination and privacy and security concerns raised by a remotely administered exam. For the foregoing reasons, we continue to oppose the use of ExamSoft remote proctoring by the State Bar of California.

Sincerely,



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The Supreme Court of California

Donna Hershkowitz  
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Committee of Bar Examiners  
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<sup>i</sup> State Bar of California, *Response letter to ACLU re facial rec* (Sep. 21, 2020).

<sup>ii</sup> *Id.*

<sup>iii</sup> See Todd Feathers & Janus Rose, *Students Are Rebellng Against Eye-tracking Exam Surveillance Tools*, VICE, [https://www.vice.com/en\\_us/article/n7wxvd/students-are-rebellng-against-eye-tracking-exam-surveillance-tools](https://www.vice.com/en_us/article/n7wxvd/students-are-rebellng-against-eye-tracking-exam-surveillance-tools) (Sep. 24, 2020).

<sup>iv</sup> See Khari Johnson, *ExamSoft's Remote Bar Exam Sparks Privacy and Facial Recognition Concerns*, VENTURE BEAT, <https://venturebeat.com/2020/09/29/examssofts-remote-bar-exam-sparks-privacy-and-facial-recognition-concerns/> (Sep. 29, 2020).

<sup>v</sup> See Simone Brown, *Race and Surveillance*, in HANDBOOK OF SURVEILLANCE STUDIES edited by Kirstie Ball, Kevin D. Haggerty, and David Lyon, Routledge (2012).

<sup>vi</sup> Kashmir Hill, *Wrongfully Accused by an Algorithm*, NEW YORK TIMES, <https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html> (Jun. 24, 2020).

<sup>vii</sup> *Id.*

<sup>viii</sup> *Id.*

<sup>ix</sup> *Id.*

<sup>x</sup> Lauren Chambers & Emiliano Falcon-Morano, *Bias All the Way Down: Research Shows Domino Effect When Human Use Facial Recognition Algorithms*, PRIVACY SOS, <https://privacysos.org/blog/bias-all-the-way-down-research-shows-domino-effect-when-humans-use-face-recognition-algorithms/>.

<sup>xi</sup> Complaint at 1-2, *Gordon v. State Bar of California*, Case No. 3:20-cv-06442 (N.D. Cal. 2020), available at <https://legalaidatwork.org/wp-content/uploads/2020/09/Gordon-v-State-Bar.pdf>.

<sup>xii</sup> See Joyce E. Cutler, *California Law Deans Ask for State to Make Bar Exam 'Open Book'*, BLOOMBERG LAW, <https://news.bloomberglaw.com/us-law-week/california-law-deans-ask-for-state-to-make-bar-exam-open-book> (Sept. 14, 2020).

<sup>xiii</sup> Cal. Civ. Code § 1798.150(a)(1).

<sup>xiv</sup> See Johnson *supra* note iv.

<sup>xv</sup> Zack Whittaker, *Applicants Say DC Bar Exposed Their Personal Data and Background Checks*, TECH CRUNCH, <https://techcrunch.com/2020/09/30/district-columbia-bar-exposed-personal-data/> (Sep. 30, 2020).

<sup>xvi</sup> Cal. Civ. Code § 1798.150(a)(1)(A).