January 19, 2021

Chief Justice Steven C. González
The Honorable Justice Charles W. Johnson
The Honorable Justice Barbara A. Madsen
The Honorable Justice Susan Owens
The Honorable Justice Debra L. Stephens
The Honorable Justice Sheryl Gordon McCloud
The Honorable Justice Mary I. Yu
The Honorable Justice Raquel Montoya-Lewis
The Honorable Justice G. Helen Whitener
WSBA President Kyle Sciuchetti
WSBA Interim Executive Director Terra Nevitt

Re: Request to allow option of diploma privilege for the February 2021 Bar exam instead of the highly problematic ExamSoft remote proctoring system

Dear Chief Justice González, Justices of the Washington Supreme Court, President Sciuchetti, and Director Nevitt:

We are deeply concerned by the Washington State Bar Association's plan to partner with ExamSoft to remotely administer the February Bar Examination using artificial intelligence (AI) monitoring and face recognition technology, despite the barriers to equity posed by those tools, as described in this letter. The Court's December 3, 2020, Order[1] approves remote administration of the Bar exam in February 2021, and information posted by WSBA[2] indicates using ExamSoft will be required. Moreover, the diploma privilege option as an alternative to the Bar exam that the Court approved, with broad legal community support, in June 2020, for the July and September 2020 Bar exams[3] does not appear to have been

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[1] The Supreme Court of Washington, *Order No. 25700-B-651: Authorizing Remote Licensing Examinations and Amending Apr 4 To Reduce Passing Score for Uniform Bar Examination in February 2021,* WASH. (Dec. 3, 2020), https://www.wsba.org/docs/default-source/licensing/supreme-court-order-25700-b-651-authorizing-remote-bar-exam-dec.-3-2020.pdf?sfvrsn=b5940af1_4.

[2] Washington State Bar Association, FAQs for February Remote Uniform Bar Examination in Washington, WASH. STATE BAR ASS'N (Jan 14, 2021), https://www.wsba.org/docs/default-source/licensing/admissions/bar-exam/remote-ube-faq-12-15-2020.pdf?sfvrsn=6ea00af1_10.; Washington State Bar Association, Admission by Lawyer Bar Examination, WASH. STATE BAR ASS'N (Dec. 16, 2020), https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/lawyers/qualifications-to-take-the-bar-exam.

[3] The Supreme Court of Washington, *Order No. 25700-B-630: Granting Diploma Privilege and Temporarily Modifying Admission & Practice Rules,* WASH. (June 12, 2020), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Order%20Granting%20Diploma%20Privilege%2006122020.pdf

renewed, forcing Bar applicants to be subjected to ExamSoft's problems or to delay or withdraw their applications, with only limited accommodations available. The ACLU of Washington, along with 15 organizations and 142 individuals, sent a letter[4] to then Chief Justice Stephens and WSBA, advocating for diploma privilege as an alternative to the February 2021 bar exam. For the reasons stated below, we again request that the Court allow the diploma privilege option for the February 2021 Bar exam.

Deploying AI and face recognition, which is what ExamSoft does, to make decisions that have significant consequences for Washington Bar applicants requires rigorous ethical, privacy, and civil rights standards[5]. The Washington State Bar Association and ExamSoft cannot achieve this by February 2021[6]. Remote proctoring of the February Bar examination using AI monitoring and face recognition technology presents significant privacy, accessibility, and equity risks that warrant alternate pathways to licensure, such as diploma privilege. This letter expands on the concerns raised by Justice Gordon McCloud at the December 3, 2020 WSBA Board of Governors-State Supreme Court meeting.[7] Due to these concerns, we urge the Court and the Bar to allow diploma privilege for the February Bar as an alternative to the use of remote proctoring.

Serious questions have been raised about ExamSoft's ability to ensure equity, accessibility, and privacy.

On Thursday, December 3rd, the same day the WSBA announced its plan to partner with ExamSoft to administer the February Bar Examination, a group of federal lawmakers—composed of Sen. Richard Blumenthal, Sen. Ron Wyden, Sen. Chris Van Hollen, Sen. Tina Smith, Sen. Elizabeth

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[4] Public Interest Law Association et. al, *Permanent Diploma Privilege,* PUB. INT. LAW ASS'N AT UNIV. OF WASH. SCH. OF LAW (Dec. 1, 2020), https://sites.google.com/uw.edu/pila/letter.

[5] The Organisation for Economic Co-operation and Development ("OECD") Principles on Artificial Intelligence, which the United States has endorsed, make clear that an entity deploying an AI system must respect "freedom, dignity and autonomy, privacy and data protection, non-discrimination and equality, diversity, [and] fairness"; that the entity must be "accountable for the proper functioning of [the] AI system[]"; and that the entity must exercise "transparency and responsible disclosure," including "easy-to-understand information on the factors, and the logic that served as the basis for [any] prediction, recommendation or decision" by the AI system. *See* OECD Legal Instruments, *Recommendation of the Council on Artificial Intelligence*, OECD (May 21, 2019), legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449.; Fiona Alexander, *U.S. Joins with OECD in Adopting Global AI Principles*, NTIA BLOG (May 22, 2019), https://www.ntia.gov/blog/2019/us-joins-oecd-adopting-global-ai-principles.

[6] At the time of this writing, the only public standard promulgated by the WSBA is an eight-page FAQ, *see* Washington State Bar Association, *supra* note 2.

[7] Washington State Bar Association Board of Governors and Washington State Supreme Court, *Virtual Public Meeting,* TVW (Dec. 3, 2020), https://www.tvw.org/watch/?eventID=2020121043.

Warren, and Sen. Cory Booker—launched an inquiry into ExamSoft regarding alarming issues of privacy, accessibility, and equity experienced by students and professionals using the platform.[8] Lawmakers highlighted that "[s]tudents of color, and students wearing religious dress, like headscarves, have reported issues with the software's inability to recognize their facial features, temporarily barring them from accessing the software,"[9] and that "students have reported egregious situations in which monitoring features have flagged individuals with disabilities or physical conditions, such as tic disorders or muscle reflexes, as suspicious."[10] Lawmakers have requested that ExamSoft provide information on the steps it has taken to protect the civil rights of students and ensure that ExamSoft is not creating barriers for students' futures.

For the reasons explained below, we share the lawmakers' concerns about the privacy, accessibility, and equity issues posed by ExamSoft. Race, gender, disability, and other biases built into face recognition and AI-monitoring algorithms like those used by ExamSoft make it highly likely that marginalized groups will be disproportionately impacted by erroneous identifications and characterizations during the exam, in addition to the ongoing surveillance risks that stem from having their biometric information enrolled in a face recognition database.

Face recognition technology disproportionately harms marginalized communities.

We have serious equity concerns about both the use of AI-driven monitoring and face recognition technology to administer the February bar, as would occur with ExamSoft. The ACLU of Washington has long advocated for algorithmic accountability and has opposed the use of face surveillance systems because they reproduce systemic racism and injustice. We emphasize that the use of surveillance tools will invariably have disparate impacts on marginalized groups, whether or not the technology operates accurately.

Face recognition technology is inherently biased, and in many cases, has had life-or-death consequences. Use of racially biased face recognition has implicated people in crimes they have not committed, as in the case of Robert Julian-Borchak Williams, a Black man who was wrongly arrested and jailed due to a false face recognition match[11]. Much research

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[8] For review, *see* Richard Blumenthal et. al, *Letter from Sen. Richard Blumenthal et al. to Sabastian, Chief Exec. Officer*, *ExamSoft*, at 2, U.S. SENATE (Dec. 3,2020), https://www.blumenthal.senate.gov/imo/media/doc/2020.12.3%20Letter%20to%20Ed%20Testing%20Software%20Companies%20ExamSoft.pdf.

[9] *Id*. at 1

[10] *Id*. at 2

[11] Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. TIMES (Jun. 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.

demonstrates that face recognition technology is less accurate for people with darker skin[12], women[13], transgender and non-binary individuals[14], the elderly[15], and children[16].

The limitations of face recognition technology have already had real world implications for bar applicants. In the lead up to ExamSoft's administration of the California Bar Examination, one examinee, who is Arab-American, had to complete ExamSoft's facial recognition process over 75 times to no avail when completing practice versions of the exam.[17] Another examinee, a Black woman, reported having to constantly shine a bright light on her face for the entire two day exam period in order to prevent her darker skin tone from generating problematic flags from the AI monitoring tool.[18] ExamSoft has not publicly responded to these concerns, and has made no public attempt to fix the software issues that disparately impact people of color. This warrants allowing the diploma privilege option for the February Bar exam.

Automated remote proctoring is highly problematic for students with disabilities.[19]

Artificial intelligence-driven monitoring in the context of test proctoring,

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[12] *See* Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROCEEDINGS ON MACH. LEARNING RES.: CONF. OF FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 1, 2-8 (2018).; Inioluwa Raji & Joy Buolamwini, *Actionable Auditing: Investigating the Impact of Publicly Naming Biased Performance Results of Commercial AI Products,* CONF. ON ARTIFICIAL INTELLIGENCE, ETHICS, AND SOC'Y 1- 5 (2019).; Joy Buolamwini, *When the Robot Doesn't See Dark Skin,* N.Y. TIMES (June 21, 2018), https://www.nytimes.com/2018/06/21/opinion/facial-analysis-technology-bias.html.
[13] *See* Buolamwini & Gebru, at 6, 8, 10; Raji & Buolamwini, at 4; Buolamwini.
[14] Os Keyes, *The Misgendering Machines: Trans/HCI Implications of Automatic Gender Recognition*, 2 PROCEEDINGS OF THE ACM ON HUM.-COMPUT. INTERACTION 1, 4 (2019).
[15] *See* Patrick Grother et al., *Face Recognition Vendor Test (Frvt)*, 8280 NAT'L INST. OF STANDARDS AND TECH. 2, 8, 17 (2019).
[16] *Id*. at 2.
[17] *See* Todd Feathers & Janus Rose, *Students Are Rebelling Against Eye-tracking Exam Surveillance Tools*, VICE (Sep. 24, 2020), https://www.vice.com/en_us/article/n7wxvd/students-are-rebelling-against-eye-tracking-exam-surveillance-tools.
[18] *See* Khari Johnson, *ExamSoft's Remote Bar Exam Sparks Privacy and Facial Recognition Concerns*, VENTURE BEAT (Sept. 29, 2020), https://venturebeat.com/2020/09/29/examsofts-remote-bar-exam-sparks-privacy-and-facial-recognition-concerns/.
[19] For review, *see* Lydia X.Z. Brown, *How Automated Test Proctoring Software Discriminates Against Disabled Students*, CTR. FOR DEMOCRACY & TECH. (Nov. 16, 2020), https://cdt.org/insights/how-automated-test-proctoring-software-discriminates-against-disabled-students/#:~:text=How%20Automated%20Test%20Proctoring%20Software%20Discriminates%20Against%20Disabled%20Students,-November%2016%2C%202020&text=Virtual%20proctoring%20can%20involve%20using,recognition%20to%20identify%20test%2Dtakers.

like that used by ExamSoft, often flags disabled students as anomalous or suspicious based on "disability-specific movement, speech, and cognitive processing." Lydia X.Z. Brown of the Center for Democracy & Technology (CDT) highlights that AI-driven monitoring will invariably flag, for example: students with attention deficit disorder (ADD) who get up and pace around the room; students with Tourette's who have motor tics; students with cerebral palsy who have involuntary spasms; autistic students who flap or rock; students with dyslexia who read questions out loud; blind students using screen-reader software that speaks aloud; students with Crohn's disease or irritable bowel syndrome who need to leave to use the bathroom frequently; and blind or autistic students who have atypical eye movements.

Critically, Brown underscores that "[b]ecause all of these movements and responses are naturally occurring characteristics of many types of disabilities, there is no way for algorithmic virtual proctoring software to accommodate disabled students. The point is to identify and flag atypical movement, behavior, or communication; disabled people are by definition going to move, behave, and communicate in atypical ways."

The WSBA's proposed use of human review to respond to identification problems is insufficient to protect the civil rights and civil liberties of Washington State bar applicants.

Research on human review of algorithmic decision-making reveals that people regularly defer to and rely on whatever an algorithm generates rather than questioning the algorithm or using their own judgment.[20] Indeed, in the infamous case of Robert Williams, a Black man falsely arrested for larceny based on an erroneous facial recognition match, human review was employed to no avail.[21] This raises serious concerns about WSBA's stated plan during the December 3, 2020 meeting[22] to leverage "human review"[23] as a central and singular safeguard against algorithmic injustice for Washington Bar examinees.

Moreover, that additional human review of Washington bar examinees may be based on protected characteristics in and of itself warrants reconsideration of remote proctoring for the Washington Bar Examination

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[20] 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/.

[21] Hill, *supra* note 11.

[22] Washington State Bar Association Board of Governors and Washington State Supreme Court, *supra* note 7.

[23] The review process was described at the December 3 meeting as "If an applicant experiences an issue with exam identification, … What happens is then a file is flagged for a human to review and authenticate the identity of the applicant."

and allowing a diploma privilege option. Because people in marginalized groups are more likely to experience problems with ExamSoft, they are more likely to need human review, resulting in heightened scrutiny and subjection to potential human unconscious bias. This underscores the need for alternative and more equitable pathways to licensures, such as diploma privilege.

The use of AI-driven monitoring and face recognition technology, like ExamSoft, to proctor the Bar Examination will exacerbate racial and socioeconomic inequities in the legal profession.

This Court has called upon the members of Washington's legal community to "ask ourselves how we may work together to eradicate racism."[24] Given all of the serious concerns outlined above, providing no alternative to AI-driven monitoring and face recognition technology conflicts with the Court's statement and risks increasing barriers to entry for our state's legal profession. AI-driven monitoring and face recognition technology reify racism[25], ableism[26], and transphobia[27]. These technologies are under severe scrutiny from federal lawmakers[28], privacy and civil liberties advocates[29], and students across the country.[30] Washington State Bar applicants from vulnerable communities are keenly

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[24] Debra L. Stephens et al., *Letter to Members of the Judiciary and the Legal Community*, WASH. (June 4, 2020) https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf

[25] *See e.g.,* Karen Hao, *A US government study confirms most face recognition systems are racist*, MIT TECH. REVIEW (Dec. 20, 2019), https://www.technologyreview.com/2019/12/20/79/ai-face-recognition-racist-us-government-nist-study/.; Kade Crockford, *How is Face Recognition Surveillance Technology Racist?,* ACLU (June 16, 2020), https://www.aclu.org/news/privacy-technology/how-is-face-recognition-surveillance-technology-racist/.

[26] For review, *see* Brown, *supra* note 19.

[27] Popular facial analysis services regularly misclassify individuals who do not identify with the traditional gender binary. *See e.g.*, Morgan Klaus Scheuerman, Jacob M. Paul, and Jed R. Brubaker, *How computers see gender: An evaluation of gender classification in commercial facial analysis services*, 144 PROCEEDINGS OF THE ACM ON HUM.-COMPUT. INTERACTION 1-33 (2019).

[28] Blumenthal et al., *supra* note 8.

[29] *See, e.g.*, Complaint of EPIC, *In re Online Test Proctoring Companies,* EPIC (Dec. 9, 2020), https://epic.org/privacy/dccppa/online-test-proctoring/EPIC-complaint-in-re-online-test-proctoring-companies-12-09-20.pdf.; Jason Kelley, Sophia Cope, and Lindsay Oliver*, EFF Tells California Supreme Court Not to Require Examsoft for Bar Exam*, ELEC. FRONTIER FOUND. (Sept. 10, 2020), https://www.eff.org/deeplinks/2020/09/eff-tells-california-supreme-court-not-require-examsoft-bar-exam.

[30] Todd Feathers & Janus Rose, *Students Are Rebelling Against Eye-Tracking Exam Surveillance Tools*, VICE (Sep. 24, 2020), https://www.vice.com/en/article/n7wxvd/students-are-rebelling-against-eyetracking-exam-surveillance-tools.

aware of this. The technology is fraught and threatens to undermine an equitable administration of the state's bar examination, but even if the technology "works perfectly," the stress and burden it places on already marginalized bar applicants will undoubtedly harm our state's system of licensure.

Use of AI-driven monitoring and face recognition tools to proctor the Bar Examination will disproportionately impact individuals who already face challenges entering the legal profession. Test takers of color may be more likely to experience technical difficulties during the examination if face recognition algorithms are unable to verify their identity. Test takers with disabilities may be flagged and wrongfully accused of cheating based on an algorithm's misreading of facial movements or mannerisms. For undocumented bar applicants and applicants of color, the risks of having their biometric data stored in a vendor's database increases the possibility of surveillance and criminalization that they are already unduly subjected to.

Finally, we know that ExamSoft does not work accurately or properly, and its inaccuracies will impact applicants inequitably. ExamSoft's software crashed during Michigan's remote exam[31], flagged one-third of California's 8,920 exam takers as potential cheaters[32], and over forty-one percent of test takers surveyed after New York's remote bar exam administered by ExamSoft reported experiencing technical difficulties during the exam.[33]

Conclusion

The inequities inherent in remote administration of the Bar Exam using ExamSoft are significant and concerning, justifying allowing the diploma privilege option for the February Bar. For the foregoing reasons, we urge the Court to allow alternate paths to licensure, such as diploma privilege.

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[31] Caroline Spiezio, *Michigan software crash roils first online U.S. bar exam*, REUTERS (July 28, 2020), https://www.reuters.com/article/lawyer-coronavirus-michigan/michigan-software-crash-roils-first-online-u-s-bar-exam-idUSL2N2EZ26A.

[32] *See* e.g., Jason Kelley, *ExamSoft Flags One-Third of California Bar Exam Test Takes for Cheating*, ELEC. FRONTIER FOUND. (Dec. 22, 2020), https://www.eff.org/deeplinks/2020/12/examsoft-flags-one-third-california-bar-exam-test-takers-cheating.; Stephanie Francis Ward and Lyle Moran, *Thousands of California bar exam takers have video files flagged for review,* AM. BAR ASS'N JOURNAL (Dec. 18, 2020), https://www.abajournal.com/web/article/thousands-of-california-bar-exam-takers-have-video-files-flagged-for-review.

[33] Brad Hoylman, *Senator Brad Hoylman and Assemblymember Jo Anne Simon Snapshot Survey of New York Online Bar Exam Finds Nearly Half of Respondents Experienced Technical Difficulties*, N.Y. STATE SENATE (Oct. 16, 2020), https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/senator-brad-hoylman-and-assemblymember-jo-anne-simon-snapshot.

Sincerely,

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