ACLU
AMERICAN CIVIL LIBERTIES UNION
FOUNDATIONS
California

July 16, 2020

Chief Justice Tani Gorre Cantil-Sakauye
The Honorable Ming W. Chin, Associate Justice
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
350 McAllister Street
San Francisco, CA 94102
Sunil.Gupta@jud.ca.gov

Sent via electronic mail

Re: ACLU civil rights concerns with potential use of facial recognition in proctoring the California Bar Examination

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

We write to express our strong opposition to the potential utilization of software integrated with facial recognition technology for proctoring the California Bar Examination.

This letter focuses specifically on our serious concerns with the use of facial recognition 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 the pandemic, particularly given the racial and economic digital divide and disparities it will cause and exacerbate.[i] Nor does our focus on the facial recognition issue in this letter indicate support for requiring law school graduates to take the Bar Exam for admission to practice this year or beyond.

The State Bar has indicated it plans to use ExamID and/or ExamMonitor, products of ExamSoft that collect biometric data for identification purposes, to verify test-takers' identities when they sit for the virtual administration of the Bar Examination currently scheduled for September.[ii] Given the invasive and discriminatory nature of facial recognition technology, the proposed use of software that collects biometric data for the administration of the Bar Examination would be antithetical to the State Bar's mission of protecting the public and increasing access and inclusion in the legal system. In an unprecedented moment that requires innovative, equitable pathways to

attorney licensure due to the myriad challenges posed by COVID-19 and the ongoing movement for racial justice, the deployment of facial recognition threatens to further entrench racial and economic inequities that have long created barriers to the legal profession.

Facial recognition technology disproportionately harms marginalized communities.

The ACLU of California has long advocated against the use of facial recognition technology due to the significant threats it poses to civil rights and civil liberties, particularly for people of color. Facial recognition has been repeatedly demonstrated to be less accurate when used to identify Black people, people of Asian descent, and women.[iii] In a 2019 ACLU study, 1 in 5 California legislators were erroneously matched to a mugshot of persons who have been arrested, with facial recognition disproportionately misidentifying lawmakers of color.[iv] Many face recognition algorithms also misgender transgender and gender nonconforming people, while others purport to identify a person's sexual orientation by relying on and perpetuating harmful stereotypes about physical appearance.[v]

The consequences of misidentification can be life-changing. Late last month, for example, the *New York Times* published the tragic story of Robert Julian-Borchak Williams, a Black man who was falsely identified by facial recognition, leading to his wrongful arrest and detention for a crime he did not commit.[vi] Black and transgender Uber drivers have been denied the ability to work because the company's facial recognition feature failed to recognize them.[vii] Advocates have warned that the increasing use of facial recognition algorithms by prominent employers to vet job applicants during the hiring process replicate job disparities for adults with disabilities in addition to race and gender disparities.[viii]

Even when the technology accurately identifies people, it is still harmful. Over the past several years, face recognition systems have been used to target immigrants for deportation, criminalize poverty, facilitate mass incarceration, and surveil demonstrators exercising their First Amendment rights at protests.[ix] For these reasons and more, 82% of likely 2020 California voters agree that government entities should not be able to monitor and track them using their faces and other biological features.[x] Amidst a national reckoning with racism, prominent face recognition developers are finally acknowledging its potential for abuse- IBM, Amazon, and Microsoft have all recently committed to stop selling facial recognition technology to law enforcement agencies.[xi] Vendors may promise theoretical benefits but given the risks, government agencies should be taking measures to abolish facial recognition technology outright - not encourage its use.

The use of facial recognition technology to proctor the Bar Examination will exacerbate racial and socioeconomic inequities in the legal profession and beyond.

As advocates working closely with people most acutely impacted by the COVID-19 pandemic and state sanctioned violence– people of color, individuals who are incarcerated or in ICE custody, people experiencing homelessness, and workers, among others – we are witnessing firsthand how the disproportionate harms marginalized communities face every day are exacerbated

during moments of crisis. Many aspiring lawyers who are registered for the upcoming California Bar Examination come from and are deeply connected to these communities. Others are committed to filling the justice gap that hinders access to available and affordable legal representation for these groups.

Race, gender, disability, and other biases built into facial recognition algorithms all but guarantee test-takers from marginalized groups will also be disproportionately impacted by erroneous identifications during the exam and the ongoing surveillance risks that stem from having their biometric information enrolled in a facial recognition database. Test-takers of color may be more likely to experience technical difficulties during the examination if facial recognition algorithms are unable to verify their identity. Others may be wrongfully accused of cheating or other suspicious behavior 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 they are already unduly subjected to.

These harms extend far beyond the hours of the Bar Exam and will very likely exacerbate the shortage of attorneys of color in California. California's most underserved communities face record unemployment, mass evictions, and educational inequities related to COVID-19. Increased access to the legal system - and additional public interest lawyers, particularly public interest attorneys of color, to facilitate that access - will be more critical than ever. The State Bar must find a solution to the administration of the Bar Exam that will meaningfully address inequities, not perpetuate them.

Facial recognition risks contributing to the historical exclusion of people of color from the State Bar of California.

The ACLU of California has also advocated for measures to reduce racial disparities in Bar Examination pass rates. As we've previously communicated to this Court, the State Bar first identified racial disparities in bar passage rates more than three decades ago, when a study found that Asian, Latinx, and Black exam takers passed the 1985 and 1986 exam administrations at rates 10 to 33 percentage points below white test-takers.[xii] Thirty five years later, racial disparities in bar passage rates persist. In July 2018, only 19.76% of Black test-takers, 35.85% of Latinx test takers, 35.49% of Asian test takers and 29.75% of other minoritized test takers passed, compared to 49% of white test takers.[xiii]

These disparities are a vestige of historical racism and xenophobia in the legal profession. Until 1878, admission to the California State Bar was restricted to white males, with the first Black attorney being admitted in 1915.[xiv] Hong Yen Chang, the first Chinese-American lawyer in the United States, was denied admission to the State Bar in 1890, consistent with federal and state laws sanctioning anti-Chinese racism.[xv] In 1931, the California State Legislature limited bar membership to U.S. citizens, a restriction that remained in place for more than four decades.[xvi]

We appreciate ongoing efforts by the California State Bar and Supreme Court of California to redress these wrongs and build a more just and inclusive legal profession. The use of facial recognition technology to proctor any State Bar exams will, however, impede rather than promote this progress.

As the nation looks to California's leadership in protecting public health and advancing justice, we hope you will take the individual and collective risks of deploying facial recognition for the California Bar Examination seriously. Because facial recognition technology poses enormous risks to civil rights and equity, we must oppose its use by the State Bar of California.

Sincerely,
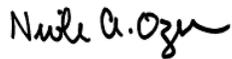
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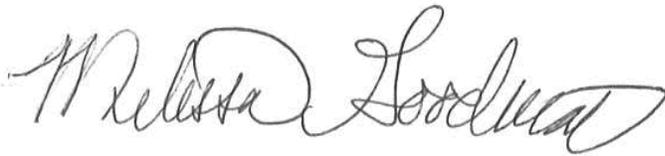
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CC: Mr. Jorge E. Navarrete
Clerk and Executive Officer
The Supreme Court of California

Donna Hershkowitz
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The State Bar of California

Committee of Bar Examiners
The State Bar of California

[i] *See* Joanna Nelius, *The Pandemic Exposed a Massive Digital Divide in Our Schools They Can't Fix on Their Own*, GIZMODO, https://gizmodo.com/the-pandemic-exposed-a-massive-digital-divide-in-our-sc-1844323273 (Jul. 14, 2020); Tawnell D. Hobbs, *'Are They Setting My Children Up for Failure?' Remote Learning Widens Education Gap*, THE WALL STREET JOURNAL, https://www.wsj.com/articles/remote-learning-pushes-americas-most-vulnerable-students-further-behind-11594826905?mod=hp_lead_pos5 (Jul. 15, 2020).

[ii] *See* ExamSoft Worldwide, Inc., *ExamSoft Announces New Education Technology Products to Deliver Unparalleled Secure Assessment Solutions*, PR Newswire https://www.prnewswire.com/news-releases/examsoft-announces-new-education-technology-products-to-deliver-unparallelled-secure-assessment-solutions-300809646 (Mar. 11, 2019).

[iii] Black and Brown people, especially women and young people, are more likely to be misidentified by discriminatory algorithms like facial recognition systems that are built using biased data. *See* Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROCEEDINGS OF MACHINE LEARNING RESEARCH (2018). Last December, the National Institute of Standards and Technology released results for a comprehensive study of facial recognition systems finding that African American and Asian people were up to 100 more times likely to be misidentified than white men, depending on the algorithm and use case. *See* Drew Harwell, *Federal study confirms racial bias of many facial-recognition systems, casts doubt on their expanding use*, WASHINGTON POST, https://www.washingtonpost.com/technology/2019/12/19/federal-study-confirms-racial-bias-manyfacial-recognition-systems-casts-doubt-their-expanding-use/ (Dec. 19, 2019).

[iv] ACLU of Northern California, *Facial Recognition Technology Falsely Identifies 26 California Legislators with Mugshots*, ACLU NORCAL, https://www.aclunc.org/news/facial-recognition-technology-falsely-identifies-26-california-legislators-mugshots (Aug, 13, 2019).

[v] Vanessa Taylor, *Facial recognition misclassifies transgender and non-binary people, study finds*, MIC, https://www.mic.com/p/facial-recognition-misclassifies-transgender-non-binary-people-study-finds-19281490 (Oct. 30, 2019).

[vi] 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).

[vii] Olivia Rudgard, *Uber faces racism claim over facial recognition software*, THE TELEGRAPH, https://www.telegraph.co.uk/technology/2019/04/23/uber-faces-racism-claim-facial-recognition-software/ (Apr 23, 2019); Steven Melendez, *Uber driver troubles raise concerns about transgender face recognition*, FAST COMPANY, https://www.fastcompany.com/90216258/uber-face-recognition-tool-has-locked-out-some-transgender-drivers (Aug. 9, 2018).

[viii] Facial recognition software is often designed to make assumptions about candidates based on their facial movements, tone of voice, and mannerisms, replicating disparities for adults with disabilities and race and gender disparities. *See* Ifeoma Ajunwa, *Beware of Automated Hiring*, NEW YORK TIMES, https://www.nytimes.com/2019/10/08/opinion/ai-hiring-discrimination.html (Oct. 8, 2019). *See also* Drew Harwell, *A face-scanning algorithm increasingly decides whether you deserve the job*, WASHINGTON POST, https://www.washingtonpost.com/technology/2019/10/22/ai-hiring-face-scanning-algorithm-increasingly-decides-whether-you-deserve-job/ (Nov. 6, 2019).

[ix] Catie Edmundson, *ICE Used Facial Recognition to Mine State Driver's License Databases*, NEW YORK TIMES, https://www.nytimes.com/2019/07/07/us/politics/ice-drivers-licenses-facial-recognition.html (Jul. 7, 2019); Russell Brandom, *Facebook, Twitter, and Instagram surveillance tool was used to arrest Baltimore protestors*, VERGE, https://www.theverge.com/2016/10/11/13243890/facebook-twitter-instagram-police-surveillance-geofeedia-api (Oct. 11, 2016); Paul Mozur, *One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority*, New York Times, https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html (Apr. 11, 2019).

[x] *California Statewide Survey: Poll Results of Likely 2020 Presidential Voters*, DAVID BINDER RESEARCH, https://www.aclunc.org/docs/DBR_Polling_Data_On_Surveillance.pdf.

[xi] Isobel Asher Hamilton, *Outrage over police brutality has finally convinced Amazon, Microsoft, and IBM to rule out selling facial recognition tech to law enforcement. Here's what's going on*, BUSINESS INSIDER, https://www.businessinsider.com/amazon-microsoft-ibm-halt-selling-facial-recognition-to-police-2020-6#:~:text=IBM%2C%20Amazon%2C%20and%20Microsoft%20have%20all%20committed%20to,Matter%20movement%20appears%20to%20have%20tipped%20the%20scale (Jun.13, 2020).

[xii] *See* ACLU of California, California ChangeLawyers, & Impact Fund, *Re: Adverse Effects of the California Bar Exam Cut Score* (citing Klein & Bolus, *Comparisons of Eventual Passing Rates in the 1985 and 1986 Cohorts*, (Oct. 30, 1988) p. 3 http://www.seaphe.org/pdf/past-bar-research/Comparisons_of_Eventual_Passing_Rates_in_the_1985_and_1986_Cohorts.pdf.)

[xiii] *Id.* (citing State Bar of Cal., General Statistics Report: July 2018 California Bar Examination (Jan. 2, 2019) p.2 http://www.calbar.ca.gov/Portals/0/documents/admissions/JULY2018_CBX_Statistics.pdf.)

[xiv] *Id.* (citing Code Civ. Proc., 275, as amended by Stats. 1818, ch. 600, 2, p. 99 (approved Apr. 1, 1878); J. Clay Smith, Jr., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944 (1993) p. 485).

[xv] *Id.* (citing *In re Chang* (2015) 60 Cal. 4th 1169, 1171.

[xvi] *Id.* (citing *Raffaelli v. Committee of Bar Examiners* (1972) 7 Cal.3d 288, 295).