



February 10, 2021

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Dear Mr. SeLeague, Ms. Lin, Ms. Holton, and Mr. Vos,

We, the Lawyers' Committee for Civil Rights Under Law, write to you on behalf of our clients Mr. Ian To, an applicant for admission to the State Bar of California, and the National Association for Equity in the Legal Profession to object to the planned use of facial recognition technology ("FRT") in your administration of the February 2021 bar examination. It is by now well-established by experts in that field that FRT is disproportionately inaccurate in identifying women and people of color.<sup>1</sup> As a result, its use will have an unlawful disparate impact on examinees of color and women examinees. This is a concern of which you are well aware, as U.S. Senators and non-profit groups have written to you to object to the use of FRT on this basis.<sup>2</sup>

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<sup>1</sup> Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 Proceedings of Machine Learning Research 1–15 (2018). ACLU of Northern California, *Facial Recognition Technology Falsely Identifies 26 California Legislators with Mugshots* (Aug. 13, 2019), <https://www.aclunc.org/news/facial-recognition-technology-falsely-identifies-26-california-legislators-mugshots>. Patrick Grother, Mei Ngan & Kayee Hanaoka, *Face Recognition Vendor Test (FRVT), Part 3: Demographic Effects*, National Institute of Standards and Technology (Dec. 2019) <https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf>. Sarah Rahal & Christine Ferretti, *Metro Detroiters battling 'flawed' facial recognition software*, The Detroit News (June 24, 2020) <https://www.detroitnews.com/story/news/local/detroit-city/2020/06/25/wrongfully-accused-detroit-facial-recognition-software-michigan-aclu/3214958001/>; David K. Li, *Black man in New Jersey misidentified by facial recognition tech and falsely jailed, lawsuit claims*, NBC News (Dec. 29, 2020), <https://www.nbcnews.com/news/us-news/black-man-new-jersey-misidentified-facial-recognition-tech-falsely-jailed-n1252489>.

<sup>2</sup> Sara Merken, *ACLU renews bias, privacy warnings over looming California bar exam*, Reuters (Oct. 2, 2020), <https://www.reuters.com/article/californiabar-remoteproctoring/aclu-renews-bias-privacy-warnings-over-looming-california-bar-exam-idUSL1N2GT262>; Jason Kelley et al., *EFF Tells California Supreme Court Not to Require ExamSoft for Bar Exam*, Electronic Frontier Foundation (Sept. 10, 2020), <https://www.eff.org/deeplinks/2020/09/eff-tells-california-supreme-court-not-require-examsoft-bar-exam>; Joyce E. Cutler, *California Law Deans Ask for State to Make Bar Exam 'Open Book'*, Bloomberg Law (Sept. 14, 2020),



We now write to advise that if you do not take immediate steps to discontinue the use of FRT in the administration of the February 2021 examination and any future examinations we will be forced to take legal action.

There are many alternatives to the use of FRT, as evidenced by the fact that more than half of all states have administered their bar exams this past year without reliance on FRT. For example, three states, Indiana, Nevada, and Louisiana, have changed to an “open book” format for the exam.<sup>3</sup> In Indiana’s case, the state made the move less than a week prior to the bar exam’s scheduled start date.<sup>4</sup> Other states have implemented diploma privilege. Wisconsin has had permanent diploma privilege for all graduates of ABA-accredited schools in the state since the 19th century. There are no data to suggest that Wisconsin’s use of diploma privilege has resulted in a higher rate of attorney misconduct.<sup>5</sup> Since March 2020, at least three states, Utah, Washington, and Louisiana, instituted temporary diploma privilege instead of or in addition to their bar exams.<sup>6</sup> The District of Columbia has implemented a similar system which it calls “emergency temporary practice.”<sup>7</sup>

We respectfully request a response by February 16, 2021. If you have questions, you may reach me at [nbaron@lawyerscommittee.org](mailto:nbaron@lawyerscommittee.org).

Sincerely,

Noah Baron  
Counsel and Jerry Shestack Justice Fellow  
Lawyers’ Committee for Civil Rights Under Law

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<https://news.bloomberglaw.com/us-law-week/california-law-deans-ask-for-state-to-make-bar-exam-open-book/>;  
Karen Sloan, *Public Interest Organizations Back Diploma Privilege for Law Grads*, Law.com (Aug. 20, 2020),  
<https://www.law.com/2020/08/20/public-interest-organizations-back-diploma-privilege-for-law-grads/>;  
Zach Whittaker, *Senator: ‘More transparency is needed’ by exam proctoring tech firms*, TechCrunch.com (Jan. 19, 2021),  
<https://techcrunch.com/2021/01/19/senator-more-transparency-is-needed-by-exam-proctoring-tech-firms/>.

<sup>3</sup> Karen Sloan, *First-Ever Open Book, Online Bar Exam Set for July*, Law.com (May 26, 2020),  
<https://www.law.com/2020/05/26/first-ever-open-book-online-bar-exam-set-for-july/>

<sup>4</sup> Stephanie Francis Ward, *Indiana changes online bar exam again after ‘repeated and unforeseen technical complications’*, ABA Journal (July 29, 2020), <https://www.abajournal.com/news/article/state-changes-online-bar-exam-due-to-tech-issues>; *In the Matter of the August 2020 Indiana Bar Examination*, No. 20S-CB-00300 (Ind. July 29, 2020) (ordering change to open-book exam without reference to changing substance of exam), <https://www.in.gov/judiciary/files/order-other-2020-20S-CB-300b.pdf>.

<sup>5</sup> See Emily M. Croucher and Allysa M. G. Scheyer, *Diploma Privilege Is the Only and Humane Path to Licensure During the COVID-19 Crisis*, Jurist.com (Apr. 9, 2020), <https://www.jurist.org/commentary/2020/04/croucher-scheyer-diploma-privilege/>.

<sup>6</sup> See *Louisiana Supreme Court Announcement Regarding 2020 Bar Examination*, Louisiana Supreme Court (July 22, 2020), [https://www.lasc.org/Press\\_Release?p=2020-20.:\\_Order](https://www.lasc.org/Press_Release?p=2020-20.:_Order), Utah S. Ct. (Apr. 21, 2020), [https://www.abajournal.com/files/Signed\\_2020.04.21\\_Bar\\_Waiver\\_Order\\_.pdf](https://www.abajournal.com/files/Signed_2020.04.21_Bar_Waiver_Order_.pdf).

<sup>7</sup> *Order No. M269-20*, D.C. Ct. App. (Sept. 24, 2020), [https://www.dccourts.gov/sites/default/files/2020-09/ORD\\_269-20.pdf](https://www.dccourts.gov/sites/default/files/2020-09/ORD_269-20.pdf).