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Submitted via Online Public Comment Form

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Re: Comments of Impact Fund, California ChangeLawyers, and ACLU of California to the Task Force on Access Through Innovation of Legal Services: Proposed Regulatory Reform Options

Dear Ms. Marlaud and members of the State Bar Standing Committee on Professional Responsibility and Conduct:

We write on behalf of Impact Fund, California ChangeLawyers, and the ACLU of California. Our organizations are dedicated to advancing justice for low-income and disadvantaged communities in California.

We write to express our comments on Recommendations 1.2, 1.3, 2.2, 2.3, and 2.4 as presented by the Task Force on Access Through Innovation of Legal Services. The State Bar's Board of Trustees appointed this Task Force to identify possible regulatory changes to enhance delivery and access of legal services through technology.¹ The undersigned applaud the State Bar's attention to addressing the access to justice gap through innovative solutions, including technology. We also recognize the State Bar's concurrent mandate to enhance the diversity of the legal profession in California. Before it endorses greater reliance on technology, we urge the Task Force to consider a simpler alternative that will expand access to justice while also increasing diversity: align the California Bar Exam passing score with the national median score.

I. California Faces Challenges in Access to Legal Institutions and in the Diversity of the Legal Profession

Low-income people across the country urgently need legal advocates to represent them, yet the "justice gap" grows wider by the day. While more than seven out of ten low-income households surveyed report experiencing at least one civil legal problem in the past year, low-income Americans received inadequate or no professional legal help for 86% of those problems.² The report commissioned by this Task Force found that nationwide, the spiraling costs of legal representation has forced a growing number of people to represent themselves *pro se* in court.³

As this Task Force recognizes, California faces an access to justice crisis.⁴ Nearly eight million California residents qualify for legal aid,⁵ yet there is just one legal aid attorney for every 7,500 eligible people.⁶ The California Commission on Access to Justice has classified much of California as an “attorney desert,” where residents are unable to obtain legal assistance within their own communities.⁷ Outside of urban centers, most regions and counties contain fewer than one attorney per square mile and those attorneys may not be representing or accepting individual clients.⁸ Lack of access to legal assistance corresponds with high rates of poverty; additional legal resources would increase access to other beneficial resources, such as greater housing stability and public benefits.⁹

Separately, our state faces a dire need for a greater diversity and inclusion among lawyers. As the State Bar has observed, the diversity in California’s legal profession currently “does not match the state’s demographic richness,” when the majority of its residents are people of color.¹⁰ In contrast, the State Bar reports that the majority (68%) of California’s attorneys are white, while only 13% are Asian, 7% are Latino, and 4% are black.¹¹ The high passing score of the bar exam ultimately leads to disparities on the bench as well; the judiciary in California is 67% white.¹²

In 2018, the Legislature formally stated its “commitment to and support of effective policies and activities to enhance access, fairness, and diversity in the legal profession and the elimination of bias in the practice of law.”¹³ The Legislature declared that: (1) “[t]he rich diversity of the people of California requires a justice system that is equally accessible and free of bias and is a core value of the legal profession”; (2) “[d]iversity and inclusion are an integral part of the State Bar’s public protection mission to build, retain, and maintain a diverse legal profession to provide quality and culturally sensitive services to an ever-increasing diverse population”; (3) “[d]iversity increases public trust and confidence and the appearance of fairness in the justice system and therefore increases access to justice”; and (4) “[t]he State Bar should continue to increase diversity and inclusion in the legal profession.”¹⁴

Increased diversity of the state’s attorneys is directly associated with improved access to justice. The State Bar found that attorneys of color are more likely to practice public interest law in the public and non-profit sectors.¹⁵ One 2017 survey conducted by the State Bar found that twice as many black attorneys and almost 50% more Latino attorneys work in government jobs than white attorneys, and that attorneys of color are at least 50% more likely to work in legal non-profits.¹⁶ The State Bar concluded that “the issue of diversity appears to be linked to the issue of access.”¹⁷ We therefore encourage the Task Force to consider options for expanding access to justice in California that require a comprehensive approach and increase the number of qualified attorneys in the state.

II. Aligning the Bar Exam Cut Score with the National Median Would Help Address the Access to Justice Gap and Increase Diversity Among California’s Lawyers

The Task Force’s proposed recommendations to expand access to justice range from those that encourage lawyers to “strive to expand access to justice through innovation with the use of technology[,]”develop empirical metrics that “access the impact of the ATILS reforms on

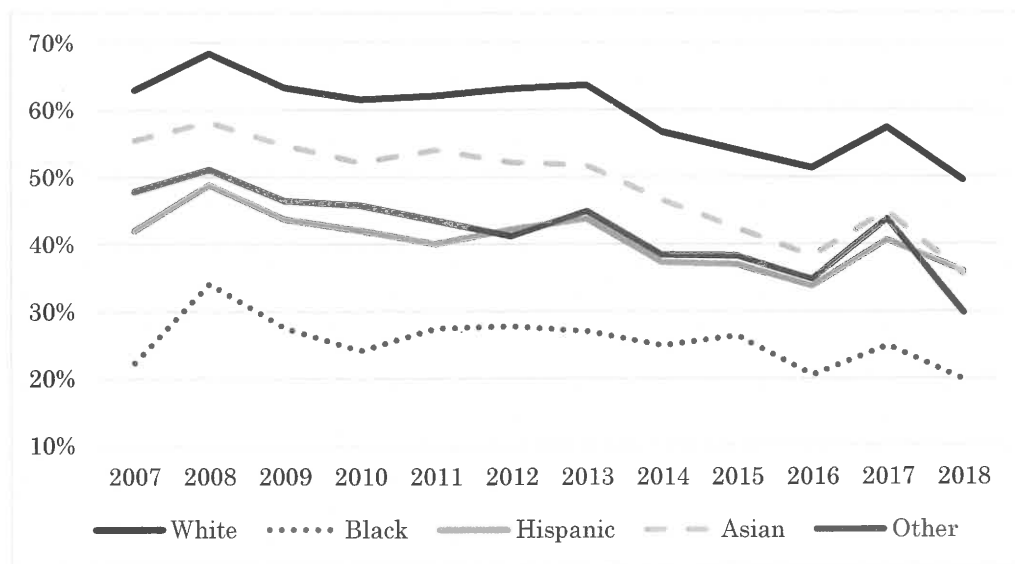
the delivery of legal services, including access to justice” to those that specifically recommend limited use of artificial intelligence to provide legal advice.¹⁸ Yet a simpler alternative exists to address the justice gap: align the California Bar Exam’s passing or “cut” score with the national median. Doing so would quickly address the State Bar’s twin aims of improving access to justice and expanding diversity in the legal profession.

At 144, California’s Bar Exam cut score is the second highest in the country, surpassed only by Delaware’s cut score of 145.¹⁹ California’s and Delaware’s high cut scores are aberrant among their sister states. The median cut score across the country is 135.²⁰ The vast majority (nearly 80%) of jurisdictions use a cut score within a few points of this national median (between 131 and 138).²¹ New York has the legal market most closely comparable to that of California and sets its cut score at 133, two points *below* the national median.²²

California inexplicably remains an outlier. Testifying before the California State Assembly Committee on Judiciary in February 2017, former State Bar Executive Director Elizabeth Parker said: “When you ask why is it set at 144, I’m embarrassed to tell you, there’s no good answer.”²³ Her response remains true today.

The high cut score for the Bar Exam has a disparate impact on aspiring lawyers of color. Test-takers of color have consistently experienced lower pass rates than their white counterparts over the past 11 years.²⁴ (See Figure 1.)

Figure 1. Pass Rates by Race for July Administrations, 2007-2018.



Source: State Bar of Cal., *California Bar Exam Statistics* (2019) <<http://www.calbar.ca.gov/Admissions/Law-School-Regulation/Exam-Statistics>> (as of July 11, 2019) (derived from available data).

This gap is not new. The State Bar first identified the racial disparity in bar passage rates over thirty years ago, when a study found that Asian, Latino, and black test-takers passed the 1985 and 1986 exam administrations at rates 10 to 33 percentage points below white test-takers.²⁵ This disparity has persisted over time and continues today.²⁶ (See Figure 1.) Slightly

over 49% of white test-takers passed the July 2018 administration, while only 19.76% of black test-takers, 35.85% of Hispanic test-takers, 35.49% of Asian test-takers, and 29.75% of other minority test-takers passed.²⁷

As noted above, California law obligates the State Bar to develop a plan to enhance access, fairness, and diversity in the legal profession.²⁸ The Bar's initial report suggested certain changes to the Bar Exam to promote a more diverse pipeline of future attorneys, but notably, none of those changes included a review of the cut score.²⁹ This is unfortunate, as the lack of diversity in the legal profession is directly associated with California's unjustifiably high cut score.³⁰ As former State Bar President Jeffrey L. Bleich wrote in a recent op-ed, the "disparity in passage rates leads to a disproportionately white legal community that doesn't reflect the demographic composition of the state."³¹ The State Bar's own studies confirmed that lowering the cut score would help address the racial disparity. Lowering the cut score to the national median of 135 for the July 2016 administration would have increased passage rates among blacks by 113.5%, Hispanics by 74.9%, Asians by 57.7%, and whites by 42.3% that year.³² As the California Commission on Access to Justice concluded, aligning the California cut score with national standards would likely have a positive effect on the availability of attorneys in underserved communities because it would "bolster the number of rural practitioners, while also presumably resulting in a more diverse profession."³³

III. A Diverse Legal Profession Is Better Suited to Meet the Needs of Underserved Communities Than Technology

Diversity among California's lawyer community would help ensure that underserved people, especially people of color, can fully access the legal system. A diverse legal profession helps promote public confidence and positive perceptions of the legal system, higher quality legal services, and fairer representation.³⁴ It also has a positive "trickle-up" effect to the bench; as the Honorable Edward M. Chen of the Northern District of California once observed, "[a] diverse judiciary signals the public acknowledgment of historically excluded communities[,] sends an invaluable message of inclusion," and "enhances the quality of judicial decision making."³⁵

Attorneys of color also bring perspectives and experiences that help mitigate the pervasive influences of implicit biases and better support underserved communities.³⁶ People of color have historically felt unfairly treated by the legal system.³⁷ They should have an equal opportunity to retain counsel from diverse backgrounds who are sensitive to their experiences and make them feel comfortable.³⁸ In other words, "[t]hey want attorneys of color to be different from other lawyers whose racial bias often left them disappointed and distrustful of 'outsiders.'"³⁹

By contrast, greater reliance on technology and artificial intelligence could cause greater harm to these same underserved communities, and in fact undermine efforts to reduce bias. Artificial intelligence learns from its human creators, and it can replicate social stereotypes, historical context, and social biases that infused the human decisions it learned without understanding their source.⁴⁰ Also, the lack of diverse workforces at artificial intelligence companies could result in technological systems that reinforce biases and discriminatory

stereotypes (consciously or unconsciously).⁴¹ Biases that are instilled in artificial intelligence are not easily rooted out. As California Supreme Court Justice Mariano-Florentino Cuéllar cautioned, “The intricate pattern recognition made possible by these [artificial intelligence] techniques comes at an analytical price, though, as in some cases it is far from clear, even to the designers of the systems, precisely how they have arrived at their conclusions.”⁴²

The results of stereotype-infused technology could be devastating for low-income communities and communities of color, who are more likely to have problems accessing legal institutions. For example, one study found that a computer program used to assess criminal recidivism rates incorrectly calculated that black defendants were at a higher risk of re-offending than white defendants.⁴³ The algorithm made predictive inferences from answers to specific questions, but those questions and inferences possibly were contaminated with the computer programmers’ implicit biases.⁴⁴ Other computer programs used in predictive policing systems have also been shown to use data from racially biased law enforcement practices to make its predictions, “thus embedding bias into the logics of such systems.”⁴⁵

IV. Concluding Recommendations to the State Bar

In recognition of the potential challenges posed by technology and in furtherance of your responsibility to identify possible regulatory solutions to facilitate access to justice, we urge the Task Force to consider more carefully the effects of increased technology, including artificial intelligence. In the alternative, we suggest that you recommend increasing the number of qualified attorneys in the state by aligning the Bar Exam cut score with the national median. Aligning the cut score would contribute to the State Bar’s twin goals of expanding access to justice and increasing the diversity of the legal profession in our state.

Thank you for considering our comments. We would be pleased to work with the Task Force and the State Bar on these proposals to improve the diversity of the legal profession and access to the legal system in California.

Sincerely,



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¹ Edmon & Difuntorum, State Bar Task Force on Access Through Innovation of Legal Services Report: Request to Circulate Tentative Recommendations for Public Comment (July 11, 2019) p. 2 (hereafter 2019 Task Force Report) (referring to Task Force Charter). The recommendations also propose changes regarding nonlawyers and the unauthorized practice of law. Our comments are specific to the recommendations regarding the use of technology but are relevant to increased access to legal services more broadly.

² Legal Services Corp., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* (2017) p. 21, 22 <<https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>>.

³ Henderson, *Legal Market Landscape Report* (July 2018) pp. 19-20, available at Difuntorum, State Bar Study of Online Delivery of Legal Services—Discussion of Preliminary Landscape Analysis (Jul. 19, 2018) attachment A <<http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf>>.

⁴ The State Bar’s own mission statement includes “support of efforts for greater access to, and inclusion in, the legal system.” State Bar of Cal., *Our Mission: What We Do* <<http://www.calbar.ca.gov/About-Us/Our-Mission>> (as of Sept. 22, 2019); see also State Bar of Cal., *California Justice Gap Study* (2019) <<http://www.calbar.ca.gov/Access-to-Justice/About-the-Office-of-Access-Inclusion/Our-Projects/California-Justice-Gap-Study>> (as of Aug. 2, 2019)> (a study to “improve our understanding of current legal services needs and opportunities for helping to close the justice gap”).

⁵ Legal Services Corp., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*, *supra*, p. 16.

⁶ Cal. Comm’n on Access to Justice, *California’s Attorney Deserts: Access to Justice Implications of the Rural Lawyer Shortage* (July 2019) p. 7 <<http://www.calbar.ca.gov/Portals/0/documents/accessJustice/Attorney-Desert-Policy-Brief.pdf>> (hereafter *California’s Attorney Deserts*).

⁷ *Id.* at p. 1 (“Massive parts of rural California are attorney deserts, where residents must drive many miles to reach an attorney who can represent them.”)

⁸ *Id.* at pp. 2, 9.

⁹ *Id.* at pp. 7-8.

¹⁰ State Bar of Cal., *Advancing Diversity and Inclusion in the Legal Profession* (May 14, 2019) p. 1 <<http://www.calbar.ca.gov/Portals/0/documents/Advancing-Diversity-and-Inclusion-in-the-Legal-Profession.pdf>>. The Bar observed, “Graduates of color also show lower first-time pass rates on the California Bar Exam. Disparities continue and escalate as diverse populations progress through their careers” *Id.* at p. 2.

¹¹ *Id.* at p. 1.

¹² Assem. Com. on Judiciary, *Hearing: How Can California Increase the Diversity of the Legal Profession and the Judiciary?* (May 14, 2019) testimony of Chris Punongbayan, Executive Director, California Changelawyers, p. 1 <<https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/Christopher%20Punongbayan%20testimony.pdf>>.

¹³ Bus. & Prof. Code, § 6001.3, subd. (a).

¹⁴ *Id.*, § 6001.3, subd. (b).

¹⁵ State Bar of Cal., *Report to the Supreme Court of the State of California: Final Report on the 2017 California Bar Exam Standard Setting Study* (July 28, 2017) pp. 39-40 <<https://www.calbar.ca.gov/Portals/0/documents/communications/CA-State-Bar-Bar-Exam09122017.pdf>> (hereafter *State Bar Report*).

¹⁶ *Id.* at p. 39.

¹⁷ *Id.* at p. 40; see also State Bar of Cal., *Diversity & Inclusion Plan: 2019-2020* (Mar. 15, 2019) p. 7 (“The private sector is the least diverse in terms of the racial/ethnic and gender composition of the attorney population, while the non-profit sector is the most diverse on both of these dimensions.”).

¹⁸ Edmon & Difuntorum, State Bar Task Force on Access Through Innovation of Legal Services Report: Request to Circulate Tentative Recommendations for Public Comment, *supra*, p. 5 (referring to Recommendations 1.2, 1.3, 2.2, and 2.4).

¹⁹ Gundersen & Guback, Comprehensive Guide to Bar Admission Requirements 2019 (2019) p. 33 <<http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf>>.

²⁰ See *id.* at pp. 33-34.

²¹ See *ibid.*

²² See *id.* at p. 34.

²³ Assem. Com. on Judiciary, Hearing: Declining Passage Rates on the California Bar Exam: Possible Explanations and Impacts (Feb. 14, 2017) testimony of Elizabeth Parker, Executive Director, State Bar of Cal. <<https://ca.digitaldemocracy.org/hearing/51787?startTime=61&vid=e8c25dff0b0f967b12cc477edcf0587>>.

²⁴ The pass rates presented here were calculated from publicly available information. See State Bar of Cal., *California Bar Exam Statistics* (2019) <<http://www.calbar.ca.gov/Admissions/Law-School-Regulation/Exam-Statistics>> (as of July 11, 2019).

²⁵ 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>. The study also found that “[l]owering the score required for passing would increase the *passing rate* in all groups, but this increase would be greater for minority groups than for Whites.” *Id.* at p. 8 (emphasis in original).

²⁶ See State Bar of Cal., *California Bar Exam Statistics*, *supra*. Another evaluation commissioned by the State Bar shows that passage rates for people of color have remained consistently below passage rates for white people. Bolus, Recent Performance Changes on the California Bar Examination (CBE), appen. G, State Bar Report, *supra*, at pp. G19-G20.

²⁷ The pass rates presented here were calculated from publicly available information. See 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>.

²⁸ Bus. & Profs. Code § 6001.3, subd. (a); subd. (c).

²⁹ See State Bar of Cal., Diversity & Inclusion Plan: 2019-2020, *supra*, pp. 9, 15

³⁰ See Assem. Com. on Judiciary, Hearing: Declining Passage Rates on the California Bar Exam: Possible Explanations and Impacts, *supra*, background paper prepared by committee staff, p. 28 (“For communities of color and advocates for and from underrepresented minorities, an unnecessarily high barrier to entering the legal profession also has significant consequences in terms of its effect on the diversity of the legal profession.”).

³¹ Bleich, *We must set a reasonable standard for passing the bar*, Daily J. (Aug. 7, 2019) <<https://www.dailyjournal.com/articles/353764-we-must-set-a-reasonable-standard-for-passing-the-bar>> (as of Aug. 8, 2019).

³² State Bar Report, *supra*, append. I, at p. I1.

³³ California Attorney’s Deserts, *supra*, p. 12 (“A higher pass rate would likely bolster the number of rural practitioners, while also presumably resulting in a more diverse profession. This prospect is supported by the fact that many graduates of Cal-accredited schools, especially those located in rural areas, tend to stay and practice in those locales.”); see also State Bar Report, *supra*, at pp. 39-40 (citing studies that attorneys of color are more likely to practice in public interest and public service law and concluding that “the issue of diversity appears to be linked to the issue of access”); Erwin Chemerinsky, Dean of the University of California, Irvine, School of Law et al., letter to Supreme Court of California, *The California Bar Exam*, Feb. 1, 2017, p. 2 (suggesting that the high cut score is related to a shortage of attorneys in underserved geographic areas who serve lower- and middle-class Californians).

³⁴ ABA, *Diversity in Law: Who Cares?* (Apr. 30, 2016), <<https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2016/spring2016-0416-diversity-in-law-who-cares/>> (as of Aug. 2, 2019); see also Brief of the American Bar Association as Amicus Curiae

in Support of Respondent, *Fisher v. Univ. of Texas* (2013) 570 U.S. 297, at p. 13 (declaring that “diversity in the legal profession is needed to generate and sustain trust in our government,” and that “[r]acial and ethnic diversity in the legal profession is necessary to demonstrate that our laws are being made and administered for the benefit of all persons”);

³⁵ Hon. Edward M. Chen, *The Judiciary, Diversity, and Justice for All* (2003) 91 Calif. L.Rev. 1109, 1117 (2003).

³⁶ See, e.g., Kang et al., *Implicit Bias in the Courtroom* (2012) 59 UCLA L.Rev. 1124, 1168 (surveying various studies of criminal and civil cases and concluding that “implicit bias in the trial process is a problem worth worrying about”); Smith & Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion* (2012) 35 Seattle U. L.Rev. 795, 822 (finding “compelling reasons to believe that prosecutors unwittingly display implicit racial bias at a variety of decision points”).

³⁷ Negowetti, *Implicit Bias and the Legal Profession’s “Diversity Crisis”: A Call for Self-Reflection* (2012) 15 Nev. L.J. 930, 950-51.

³⁸ *Id.* at p. 951; see also Chopp, *Addressing Cultural Bias in the Legal Profession* (2017) 41 N.Y.U. Rev. L. & Soc. Change 364, 377 (“[A] lawyer may fail to establish a healthy rapport with her client because the lawyer is unknowingly exhibiting alienating or aloof behaviors that are rooted in bias; she may make assumptions about her client’s values based on an inadequate understanding of her client’s culture; and she may communicate with clients differently depending on their race, sex, national origin, or sexual orientation.”)

³⁹ Lawton, *Am I My Client – Revisited: The Role of Race in Intra-Race Legal Representation* (2016) 22 Mich. J. Race & L. 13, 23-24; see also Chen, *supra*, p. 1117 (saying that a diverse judiciary “enhances courts’ credibility among affected communities who would otherwise feel they have no voice within the institution”).

⁴⁰ See Chambers Goodman, *AI/Esq.: Impacts of Artificial Intelligence in Lawyer-Client Relationships* (2019) 72 Okla. L.Rev. 149, 173-76.

⁴¹ See, e.g., Cruz, *Coding for Cultural Competency: Expanding Access to Justice with Technology* (2019) 86 Tenn. L.Rev. 347, 369-72 (“In fact, data shows that, in particular, AI can adopt its creators’ understanding of people of color—or lack thereof”); West et al., AI Now Institute, *Discriminating Systems: Gender, Race, and Power in AI* (2019) pp. 15-16 <<https://ainowinstitute.org/discriminatingystems.pdf>>; Crawford, *Artificial Intelligence’s White Guy Problem*, N.Y. Times (June 25, 2016), <<https://www.nytimes.com/2016/06/26/opinion/sunday/artificial-intelligences-white-guy-problem.html>> (as of Sept. 17, 2019) (“Sexism, racism, and other forms of discrimination are being built into the machine-learning algorithms that underlie the technology because many ‘intelligent’ systems that shape how we are categorized and advertised to.”).

⁴² Cuellar, *A Simpler World? On Pruning Risks and Harvesting Fruits in an Orchard of Whispering Algorithms* (2017) 51 U.C. Davis L.Rev. 27, 33-34.

⁴³ Cruz, *Coding for Cultural Competency: Expanding Access to Justice with Technology*, *supra*, at p. 370.

⁴⁴ *Id.* at p. 371; see also Larson et al., *How We Analyzed the COMPAS Recidivism Algorithm* (May 23, 2016) ProPublica <<https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>> (as of Sept. 17, 2019).

⁴⁵ West et al., AI Now Institute, *Discriminating Systems: Gender, Race, and Power in AI*, *supra*, at p. 17.