

September 23, 2019

Via Hand Delivery

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Adverse Effects of the California Bar Exam Cut Score

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

This summer, thousands of applicants across the state sat for the July 2019 administration of the California Bar Exam. In November, these aspiring test-takers will learn whether they may take their place among the next generation of lawyers admitted to the California Bar.

For far too many, the answer will be no—not because they are unprepared to practice law, but because California maintains an arbitrarily high passing score. The Exam’s “cut score” is the second highest in the United States and disproportionately excludes applicants of color from the practice of law. Separate and apart from the cut score, there are significant questions regarding the validity of the Bar Exam and whether it fulfills its purpose of assessing minimal competency to enter the legal profession.

As explained below, California ChangeLawyers, Impact Fund, and ACLU of California respectfully request a meeting to discuss how to mitigate the ongoing disparate impact of the current cut score until the State Bar identifies a less discriminatory alternative that effectively assesses minimal competency.

I. The Bar Exam’s Cut Score Is Inexplicably High

Since its first administration in 1920, the Bar Exam has evolved under this Court’s supervision. Most recently, in 2017, the Court reduced the length of the Bar Exam from three to two days, shortened the Exam to five essays and one performance test, and adopted an equal weighting of the written and multiple-choice components.¹

One element of the Bar Exam, however, has remained constant for over three decades—its cut score. In 1987, California set the cutoff at 144 on a 200-point scale.² There the score has remained.

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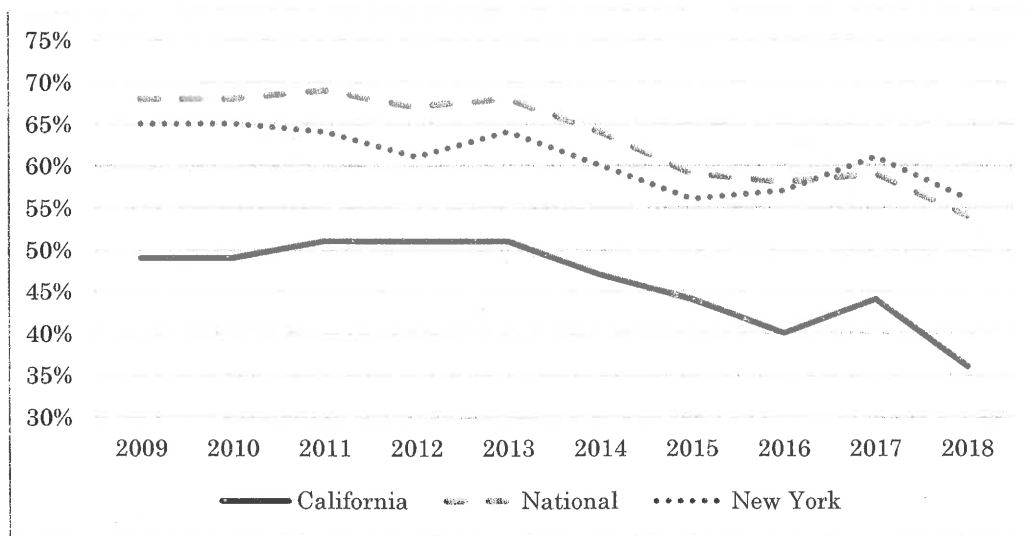
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California's cut score is the second-highest in the country, surpassed only by Delaware's cut score of 145.³ The high cut scores used by California and Delaware are aberrant among their sister states. The median cut score across the country is 135.⁴ The vast majority (nearly 80%) of jurisdictions use a cut score within a few points of this national median (between 131 and 138).⁵ 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.⁶

California inexplicably remains an outlier. Testifying before the California State Assembly Committee on Judiciary in February 2017, the 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."⁷ Her response remains true today. This Court directed the State Bar to begin study of the cut score in 2016, but the Standard Setting Study that evaluated the score is methodologically flawed and incomplete.⁸ Neither of the 2016 studies commissioned demonstrated the content validity of the Exam nor did they provide valid scientific support for the 144 cut score.⁹

California applicants suffer the consequences of this unjustified cut score. Despite outperforming the national average on the MBE,¹⁰ California test-takers pass at significantly lower rates than their counterparts across the country. (See Figure 1.) Across a ten-year period, the average pass rate in California was just 46%, while New York test-takers averaged 61% and national test-takers averaged 63%.¹¹ There is no evidence that the practice of law in California is more complex or sophisticated, warranting a higher cut score and corresponding lower pass rate.

Figure 1. Bar Passage Rates, 2009-2018.

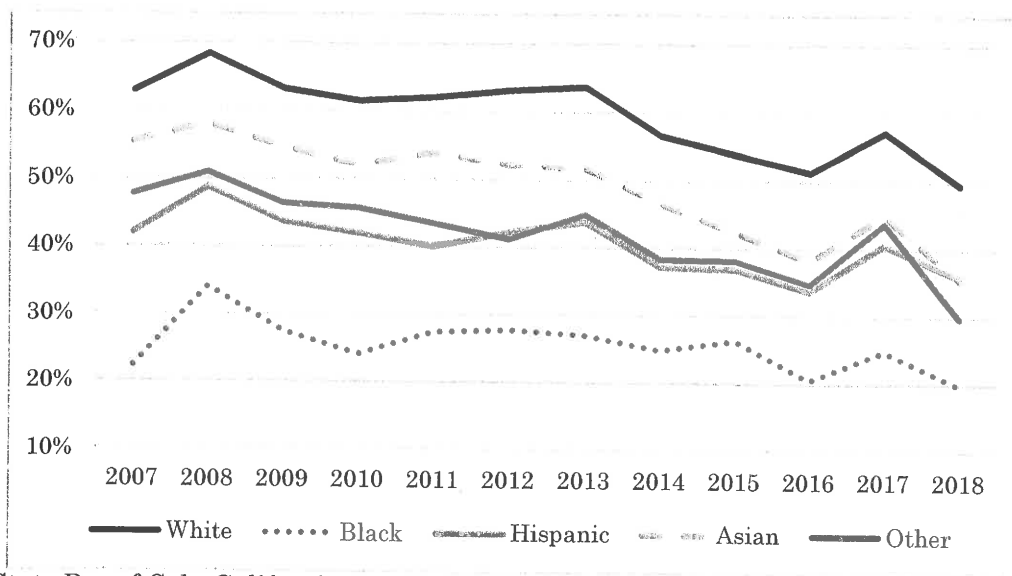


Source: Nat. Conf. of Bar Examiners, Ten-Year Summary of Bar Passage Rates, Overall and First-Time, 2009-2018 <<https://thebarexaminer.org/statistics/2018-statistics/ten-year-summary-of-bar-passage-rates-overall-and-first-time-2009-2018/>> (as of July 19, 2019) (derived from available data).

II. The Bar Exam's Cut Score Has a Disparate Racial Impact

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.¹² (See Figure 2.)

Figure 2. 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.¹³ This disparity has persisted over time and continues today.¹⁴ (See Figure 2.) 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.¹⁵

Failure to pass the bar exam exacts an economic toll on test-takers. Samuel Chang, a former governor of the ABA Law Student Division and U.C. Hastings law student, testified before the Assembly Judiciary Committee, “Simply put: no bar, no job.”¹⁶ He explained that many law firms or organizations rescind job offers for students who fail, increasing the risk of unemployment.¹⁷ Also, “[m]ultiple retakes of the California bar exam mean more law students have to add to their already burdensome debt” because students must incur the \$830 fee to re-take the exam, about \$2,000 in bar preparation fees, and thousands of dollars of ongoing living expenses.¹⁸ These costs add to a spiraling crisis of debt that includes student loan

payments that students cannot meet without a steady income. Given that black and Latino law school graduates generally have higher debt burdens already,¹⁹ the financial costs of failing the bar present significant hurdles as they attempt to launch their careers.

III. This Court Should Continue Its Efforts to Reduce Racial Exclusion in the Legal Profession by Addressing the Effects of the Bar Exam's Cut Score

People of color have long faced barriers to entering the legal profession. Historically, legal education was unattainable for many students of color because they lacked an undergraduate degree and sufficient funds.²⁰ Well into the twentieth century, many law schools across the country maintained quotas limiting enrollment of minority students or excluding them altogether.²¹ The American Bar Association imposed stringent standards on law schools that made it more difficult for black students to seek a legal education, and the association did not admit its first black lawyer until 1950.²²

The legal profession in California shares a similar history of discrimination, a wrong that this Court has sought to rectify. Until 1878, state law limited bar admission to white males.²³ Even after the California Legislature repealed that law, the bar did not admit its first black lawyer for nearly another decade, and it was not until 1915 that the first black student matriculated at a California law school.²⁴ The federal Chinese Exclusion Act and state laws sanctioning discrimination against Chinese people also gave rise to a “sordid chapter of our state and national history.”²⁵ During this period, in 1890, California denied Hong Yen Chang, the first Chinese-American lawyer in the United States, admission to the state bar.²⁶ In 2015, the Court posthumously admitted Mr. Chang and acknowledged that “the discriminatory exclusion of Chang from the State Bar of California was a grievous wrong” and “a loss to our communities and to society as a whole, which denied itself the full talents of its people and the important benefits of a diverse legal profession.”²⁷

In addition, in 1931, the Legislature restricted bar membership to United States citizens.²⁸ It took 41 years for the Court to invalidate that exclusion as unconstitutional.²⁹ In doing so, the Court called the law “the lingering vestige of a xenophobic attitude which . . . also once restricted membership in our bar to persons who were both ‘male’ and ‘white.’”³⁰ By that time, the exclusion law had already precluded the admission of Sei Fujii, a Japanese immigrant lawyer who championed civil rights.³¹ He was the named plaintiff in *Sei Fujii v. State of California* (1952) 38 Cal.2d 718, in which this Court struck down California’s discriminatory Alien Land Law.³² The Court posthumously granted Mr. Fujii admission two years ago, recognizing that “Fujii’s work in the face of prejudice and oppression embodies the highest traditions of those who work to make our society more just.”³³ See also *In re*

Garcia (2014) 58 Cal.4th 440, 467 (granting admission of Sergio Garcia, an undocumented immigrant, to the California Bar).

While laws condoning racial discrimination are gone, the abnormally and arbitrarily high cut score effectively continues to exclude people of color from the ranks of California's lawyers.

IV. The Bar Exam's Cut Score Decreases Diversity in the State's Legal Community

The disproportionately low bar passage rates for applicants of color contribute to a legal profession that the State Bar recognizes "does not match the state's demographic richness," when the majority of its residents are people of color.³⁴ In contrast, the State Bar reports that the majority (68%) of its attorneys are white, while only 13% are Asian, 7% are Latino, and 4% are black.³⁵ The cut score ultimately leads to disparities on the bench as well; the judiciary in California is 67% white.³⁶

The racial disparity caused by California's abnormally high cut score produces real-world consequences that are detrimental to our state's legal system and access to justice. A diverse legal profession helps promote public confidence and positive perceptions of the legal system, higher quality legal services, and fairer representation.³⁷ People of color have historically felt unfairly treated by the legal system.³⁸ They should instead have an equal opportunity to retain counsel from diverse backgrounds who are sensitive to their experiences and make them feel comfortable.³⁹ A more diverse bar could also facilitate access to justice as attorneys of color are more likely to practice public interest law in the public and nonprofit sectors.⁴⁰ In a state where nearly eight million people qualify for legal aid,⁴¹ California faces an urgent need for lawyers who will serve the public interest.⁴²

The lack of diversity in the legal profession is directly associated with California's unjustifiably high cut score.⁴³ 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.⁴⁴

V. The Bar Cut Score's Racially Disparate Impact Interferes with the State's Promises of Equal Opportunity and Diversity in the Legal Profession

The public policy of California prohibits discrimination on the basis of race in the licensing and employment of individuals seeking to enter a profession. The

State Constitution and statutes contain multiple promises of equal employment opportunity, generally and specifically with regard to the legal profession.

Article I, Section 8 of the California Constitution forbids disqualifying someone from pursuing a profession because of race, color, or national or ethnic origin. California statutes further forbid discrimination in any program or activity conducted, operated, or administered by the state or that receives financial assistance from the state.⁴⁵ State law also prohibits discrimination in employment or any licensing qualification, including exams, because of race, national origin, or ancestry.⁴⁶ California law recognizes that racial discrimination in employment harms employees, employers, and the public at large.⁴⁷

The Business and Professions Code calls protection of the public, including by supporting greater access and inclusion in the legal system, the “highest priority” and “paramount.”⁴⁸ In 2018, in part as a response to racial disparities in Bar Exam pass rates and the underrepresentation of people of color in the bar and on the bench,⁴⁹ 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.”⁵⁰ 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.”⁵¹

The State Bar cannot achieve these goals so long as the cut score operates as a discriminatory barrier to entry into the legal profession. Continued failure to take steps to address the racially disparate passage rates that result from the current cut score of 144 would contravene state laws and policies that promise equal employment opportunity and promote a diverse legal profession in California.

VI. Concerns Regarding Racial Disparities in Bar Exam Pass Rates Have Repeatedly Been Raised

The undersigned are not alone in raising concerns over the current cut score. In a February 2017 letter, the deans of 20 ABA-accredited law schools in California asked this Court to adjust the cut score to “bring our exam in line with the approach taken by other economically significant states” as a response to the historically low pass rates for the July 2016 administration.⁵² They predicted the high cut score will “ultimately have a dire impact” on minority representation in the legal profession.⁵³

In a 2017 letter to this Court, Professor Deborah Merritt wrote, “The combination of a non-validated exam, an unusually high cut score, and a racially disproportionate impact is very troubling from both a social science and policy perspective.”⁵⁴

In May 2019, the Assembly Judiciary Committee convened a hearing on the lack of diversity in California’s judiciary and legal profession. The Committee’s briefing report found that “[t]he California Bar Exam is a Significant Hurdle for all Law Graduates, But Especially for Underrepresented Minorities,” and that “[i]f California’s passing score were reduced to the national average score, the racial disparities would not disappear, but they would be significantly reduced.”⁵⁵ At the hearing, U.C. Irvine School of Law Dean L. Song Richardson testified that “[i]f we care about diversity and inclusion in the legal profession, . . . then the current bar exam cut score is simply unconscionable[.]” and that “[b]ecause of our outlier cut score, many of our promising and talented law graduates are losing their jobs and increasing their debt. So it is abundantly clear that our abnormally high cut score adversely impacts the diversity of the legal profession.”⁵⁶

Former State Bar President Jeffrey L. Bleich also described the impact of the high cut score in a recent op-ed. He wrote that the “disparity in passage rates leads to a disproportionately white legal community that doesn’t reflect the demographic composition of the state.”⁵⁷

These concerns echo those of other scholars who have identified the disparate impact of bar exams on people of color in California and other states.⁵⁸

VII. The State Bar’s Review of the Bar Exam Should Ensure That It Effectively Assesses Minimum Competence

California law permits the Bar Exam to test solely for “minimally needed competence for entry-level attorneys,” and the cut score must be set to reflect that purpose.⁵⁹ The State Bar recently embarked on a new study of both the Bar Exam cut score and its content to ensure that it maintains “a timely, fair, and appropriately resourced admissions system for California lawyers.”⁶⁰ The study has begun with an Attorney Practice Analysis, including a state-wide survey and focus groups, with a final report expected by the end of 2019. The report and the subsequent review of the Bar Exam must be methodologically rigorous in order to support scientifically sound recommendations to the Supreme Court.

Scholars, practitioners, and bar associations have long criticized bar exams in their current form for focusing on routine memorization and failing to test the skills lawyers rely on in their work.⁶¹ As former State Bar President Bleich recently wrote, “Our bar exam is not a precise instrument that perfectly calibrates the quality of a lawyer. The bar exam focuses on the ability to memorize mountains of

information and on critical reasoning. . . . But at some point, the test measures meaningless differences in those skills, while overlooking other essential real-world lawyering capabilities and traits that the exam does not measure at all.”⁶² In addition to addressing the harmful effects of the current cut score, the State Bar should consider modifying the Bar Exam to incorporate elements of legal practice. Such an exam could be developed based on California’s own performance test or Canada’s psychometrically validated exams.⁶³

The State Bar could also consider supplemental requirements of experiential learning, such as Delaware’s clerkship program, which currently requires that applicants complete an aggregate five months of full-time service and twenty-six discrete tasks,⁶⁴ or New York’s requirement that applicants complete at least fifty supervised pro bono hours.⁶⁵ Other professions such as medicine, architecture, and counseling require completing experiential learning programs for licensing.⁶⁶ Alternatively, the State Bar could evaluate adopting graded skills-assessment courses that precede bar admission.⁶⁷

VIII. Request for Immediate Action

Given concerns about the Bar Exam cut score’s legality and impact shared by practicing attorneys, law school deans, and bar associations across the State, there are steps that the Supreme Court and Committee of Bar Examiners can and should take right away.

First, the Supreme Court should adjust the Bar Exam cut score to 135, the national median score, pending the completion of a job analysis and content validation study of the Bar Exam.

Second, the State Bar should continue progress toward a scientifically sound study of the Bar Exam to determine whether it tests for the minimum level of competency required of an entry-level attorney. The State Bar’s review of the Bar Exam should consider: (1) whether maintaining the Exam in its current form and permanently adjusting the cut score to the national median cut score would provide a reliable measure of competency; and (2) whether there is an alternative assessment that more accurately evaluates minimal competency with less discriminatory outcomes.

Thank you for your consideration of our concerns. We would welcome the opportunity to speak with you in person regarding these proposals to reduce the deeply troubling disparities in the bar passage rate. We would be pleased to work together to improve the diversity of the legal profession and judiciary and access to the legal system in California.

Sincerely,



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cc: Committee of Bar Examiners (by mail)

¹ State Bar of Cal., *Changes to the California Bar Exam* <<http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Changes-to-Bar-Exam>> (as of Aug. 1, 2019); State Bar of Cal., Information Regarding Modifications to California Bar Examination Effective July 2017 (2017) <http://www.calbar.ca.gov/Portals/0/documents/admissions/CBE/2015_InformationRegardingModification0815_R2.pdf>.

² 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) p. 6 <<https://www.calbar.ca.gov/Portals/0/documents/communications/CA-State-Bar-Bar-Exam09122017.pdf>> (hereafter State Bar Report). California uses a 2000-point scale, making its cut score a total scaled score of 1440. *Id.* at p. 6, fn. 5. For the sake of comparison with other states, we use the 200-point scale here.

³ Gundersen & Guback, Comprehensive Guide to Bar Admission Requirements 2019 (2019) p. 33 <<http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf>>.

⁴ See *id.* at pp. 33-34.

⁵ See *ibid.*

⁶ See *id.* at p. 34.

⁷ 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=e8c25dffd0b0f967b12cc477edcf0587>>.

⁸ See Buckendahl, Conducting a Standard Setting Study for the California Bar Exam: Final Report (July 28, 2017) appen. B, State Bar Report, *supra*, p. B20 (recommending keeping the cut score at 144). Professor Deborah Merritt, a recognized scholar on state bar exams and cut scores, explained that the standard setting study was inadequate. Professor Deborah Jones Merritt, letter to Hon. Tani G. Cantil-Sakauye and Associate Justices, Docket Number S244281: In re California Bar Exam, Oct. 1, 2017. Professor Merritt first noted that the Bar Exam has never been validated, which “means that no job analysis or other scientific study links the exam’s content to the skills and knowledge needed by new attorneys.” She next observed that, “the participants in the study identified essays with widely divergent scores as minimally competent” and assigned “internally inconsistent” scores (for example a panelist marked a high-scoring essay as incompetent and a lower-scoring essay as competent). *Id.* at pp. 2-3. She finally explained that the study did not evaluate the applicants’ scores on the multiple-choice portion of the Exam and instead assumed a “misleading” correlation between an applicant’s written and multiple-choice scores. *Id.* at pp. 3-4. According to Professor Merritt, “[t]hese flaws undermine any scientific basis for the cut scores recommended by the State Bar.” *Ibid.*

⁹ See generally Buckendahl, *supra*; Buckendahl, Conducting a Content Validation Study for the California Bar Exam: Final Report (Oct. 4, 2017)

<http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/CBEStudy_Attachment_A.pdf> (evaluating the content of the Exam in light of a national job analysis).

¹⁰ See Bolus, Recent Performance Changes on the California Bar Examination (CBE): Insights from CBE Electronic Databases (Feb. 19, 2017) appen. G, State Bar Report, *supra*, Figure 1: Comparison of California and National Average MBE Performance 2008 through 2016 July Administrations, p. G5 (showing that MBE performance in California surpassed that of the national average for all exam administrations reported).

¹¹ Nat. Conf. of Bar Examiners, Ten-Year Summary of Bar Passage Rates, Overall and First-Time, 2009-2018 <<https://thebarexaminer.org/statistics/2018-statistics/ten-year-summary-of-bar-passage-rates-overall-and-first-time-2009-2018/>> (as of July 19, 2019).

¹² 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).

¹³ 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).

¹⁴ 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.

¹⁵ 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>.

¹⁶ Assem. Com. on Judiciary, Hearing: Declining Passage Rates on the California Bar Exam: Possible Explanations and Impacts, *supra*, testimony of Samuel Chang <<https://abaforlawstudents.com/2017/03/07/how-decline-in-bar-exam-passage-rates-impacts-law-students/>> (as of Aug. 2, 2019).

¹⁷ *Id.*, § 3. Low Bar Passage means Less Chance of Employment. (“Low bar passage rate means a greater chance of unemployment for another year. Not many law firms or organizations are willing to retain students who have failed the bar. No job means an inability to pay the loans.”).

¹⁸ *Id.*, § 4. Low Bar Passage Means More Debt.

¹⁹ Sandefur et al., American Bar Foundation & NALP Foundation for Law Career Research and Education, *Financing Legal Education—The View Twelve Years Out of Law School in After the JD III: Third Results from a National Study of Legal Careers* (Plickert edit., 2014) p. 81; see also Thompson, *Law Schools Are Failing Students of Color* (Jun. 5, 2018) The

Nation <<https://www.thenation.com/article/law-schools-failing-students-color/>> (as of Aug. 2, 2019) (“On average, minority students end up in lower-ranked law schools, which they pay more to attend than white students, resulting in higher debt burdens.”)

²⁰ Paul Finkelman, *Review: Not Only the Judges’ Robes Were Black: African-American Lawyers as Social Engineers* (1994) 47 *Stan. L. Rev.* 161, 196 (1994).

²¹ *Id.* at p. 167.

²² *Id.* at p. 200; Kaplan & Middleton, ABA, *ABA Timeline* (2019) 1943: Membership Not Dependent on “Race, Creed Or Color” <https://www.americanbar.org/about_the_aba/timeline> (as of Aug. 2, 2019).

²³ Code Civ. Proc., § 275, as amended by Stats. 1878, ch. 600, § 2, p. 99 (approved Apr. 1, 1878); see also J. Clay Smith, Jr., *Emancipation: The Making of the Black Lawyer, 1844-1944* (1993) p. 485 (noting that in 1878, “the California State Assembly passed legislation . . . striking from the Code of Civil Procedure the words ‘white male’ from all sections, thus permitting persons of color to qualify for the bar examination.”).

²⁴ Smith, *supra*, at p. 485.

²⁵ See *In re Chang* (2015) 60 Cal. 4th 1169, 1171.

²⁶ *Id.* at p. 1174.

²⁷ *Id.* at p. 1175.

²⁸ *Raffaelli v. Committee of Bar Examiners* (1972) 7 Cal.3d 288, 295

²⁹ *Id.* at p. 304.

³⁰ *Id.* at p. 291.

³¹ *Administrative Order 2017-05-17* (2017) 217 Cal.Rptr.3d 730, 730.

³² *Id.* at p. 731.

³³ *Id.* at p. 732.

³⁴ 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.

³⁵ *Id.* at p. 1.

³⁶ 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>>.

³⁷ 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”); Hon. Edward M. Chen, *The Judiciary, Diversity, and Justice for All* (2003) 91 Calif. L.Rev. 1109, 1117 (2003) (observing that “[a] diverse judiciary signals the public acknowledgement of historically excluded communities and sends an invaluable message of inclusion” and “enhances the quality of judicial decision making.”).

³⁸ Negowetti, *Implicit Bias and the Legal Profession’s “Diversity Crisis”: A Call for Self-Reflection* (2012) 15 Nev. L. J. 930, 950-51.

³⁹ *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.”)

⁴⁰ State Bar Report, *supra*, pp. 39-40.

⁴¹ Legal Services Corp., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* (2017) p. 16
<<https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>>.

⁴² 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 Aug. 2, 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”).

⁴³ 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.”).

⁴⁴ State Bar Report, *supra*, append. I, at p. I1.

⁴⁵ Gov. Code, §§ 11135, subd. (a), 12940, subd. (a); Cal. Code Regs., tit. 2, § 11154, subd. (i)(1).

⁴⁶ Gov. Code, §§ 12940, subd. (a), 12944, subd. (a).

⁴⁷ *Id.*, § 12920.

⁴⁸ Bus. & Prof. Code, § 6001.1.

⁴⁹ Assem. Com. on Judiciary, State Bar: Annual Licensing Fee and Oversight, Rep. on Assem. Bill No. 3249 (2017-2018 Reg. Sess.) May 8, 2018, pp. 13-14.

⁵⁰ Bus. & Prof. Code, § 6001.3, subd. (a).

⁵¹ *Id.*, § 6001.3, subd. (b).

⁵² 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.

⁵³ *Id.* at p. 3.

⁵⁴ Professor Deborah Jones Merritt, letter to Hon. Tani G. Cantil-Sakauye and Associate Justices, *supra*, p. 1; *see also* fn. 9, *supra* (discussing Prof. Merritt's critiques of the standard setting study).

⁵⁵ Assem. Com. on Judiciary, Hearing: How Can California Increase the Diversity of the Legal Profession and the Judiciary?, *supra*, p. 15
<<https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/2.%20Background%20Paper.pdf>>; *see also id.* at pp. 25-26 (recommending reducing the passing score on the Bar Exam to improve the diversity of legal professionals in California).

⁵⁶ Miller, *Critics Link California's Bar Exam to Lack of Bench, Bar Diversity*, The Recorder (May 15, 2019) <<https://www.law.com/therecorder/2019/05/15/critics-link-californias-bar-exam-to-lack-of-bench-bar-diversity/>> (as of Aug. 5, 2019).

⁵⁷ 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).

⁵⁸ *See, e.g.,* Chong, *Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination* (2018) 18 Univ. Md. L.J. of Race, Religion, Gender & Class 31, 36-39 (discussing different statistical analyses of bar passage rates and underperformance by minority test-takers, including in California); Cross, *The Bar Examination in Black and White: The Black-White Bar Passage Gap and the Implications for Minority Admissions to the Legal Profession* (2004) 18 Nat'l Black L.J. 63 (suggesting that raising bar exam cut scores in different jurisdictions could exacerbate the passage rate gap between white and black test-takers); Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification* (2004) 29 L. & Soc. Inquiry 547, 565-72 (questioning the methodology and conclusions used by the National Conference of Bar Examiners and state exam administrators to determine that bar exams do not have a disparate impact on people of color).

⁵⁹ Bus. & Prof. Code, § 6046.8.

⁶⁰ State Bar of Cal., Attorney Practice Analysis for the California Bar Exam (Apr. 16, 2019) <http://www.calbar.ca.gov/Portals/0/documents/Practice_Analysis_Fact_Sheet.pdf>.

⁶¹ *See, e.g.,* Curcio et al., *How to Build a Better Bar Exam* (2018) N.Y. St. B. Ass'n J. 37, 38; Curcio, (2002) *A Better Bar: How and Why the Existing Bar Exam Should Change*, 81 Neb. L.Rev. 363, 373-86; ABA, Sec. of Legal Educ. & Admissions to the Bar, Report of the Task

Force on Law Schools and the Profession: Narrowing the Gap (1992) pp. 277-80 (also known as the *McCrate Report*).

⁶² Bleich, *We must set a reasonable standard for passing the bar, supra*.

⁶³ Curcio et al., *supra*, at pp. 38-40.

⁶⁴ Del. Supreme Court Rules, rule 52(a)(9); Bd. of Bar Examiners of the Del. Supreme Court, *2019 Law Clerk Schedule of Legal Assignments* (2019) <<https://courts.delaware.gov/forms/download.aspx?id=28478>>; see also Holland, *The Delaware Clerkship Requirement: A Long-Standing Tradition* (Nov. 2009) The Bar Examiner, at pp. 28-38 (discussing Delaware's clerkship program).

⁶⁵ N.Y. Rules of Ct.App., § 520.16, subds. (a), (c).

⁶⁶ Assn. of American Medical Colleges, *The Road to Becoming a Doctor* <<https://www.aamc.org/download/68806/data/road-doctor.pdf>> (detailing that medical residencies are supervised, hands-on training programs that typically take three to seven years, with additional time for fellowships); Nat. Council of Architectural Registration Bds., *Architectural Experience Program Guidelines* (2019), p.14 <<https://www.ncarb.org/sites/default/files/AXP-Guidelines.pdf>> (explaining most jurisdictions require architects to complete a minimum of 3,740 hours across six experience areas for licensure); Bd. of Behavioral Services, *Licensed Marriage and Family Therapist: Information for Associate Marriage and Family Therapist (AMFT) and Licensed Marriage and Family Therapist (LMFT) Applicants* (2019) at License Requirements: Accrue Supervised Experience <<https://www.bbs.ca.gov/applicants/lmft.html>> (as of Aug. 5, 2019) (requiring therapist applicants in California to complete 3,000 supervised hours, 1,750 of which must be direct client counseling, over a minimum of 104 weeks).

⁶⁷ For example, the University of New Hampshire offers an alternative licensing program for admission to the New Hampshire bar, which requires applicants to complete practice courses and assessments to develop and test fundamental skills of legal practice, without taking the traditional bar exam. N.H. Supreme Ct. Rules, rule 42(XII); N.H. Jud. Branch, *NH Bar Admissions—General Information* (Feb. 2019), at IV. Daniel Webster Scholar Honors Program. <<https://www.courts.state.nh.us/nhbar/>> (as of Aug. 5, 2019). Also, applicants to the bar in certain Canadian provinces can partake in post-graduate experiential training programs that teach students practical skills through various substantive law and professional responsibility subjects. See, e.g., Law Society of Ontario, *Law Practice Program* (March 2019) <<https://lso.ca/becoming-licensed/lawyer-licensing-process/law-practice-program>> (as of Aug. 5, 2019); Law Society of British Columbia, *Professional Legal Training Course* <<https://www.lawsociety.bc.ca/becoming-a-lawyer-in-bc/admission-program/professional-legal-training-course/>> (as of Aug. 5, 2019).