



September 10, 2020

Chief Justice Tani G. Cantil-Sakauye
The Honorable Ming W. Chin, Associate Justice
The Honorable Carole 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:
The Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Sent via Email

RE: Opposition to ExamSoft Use for California Bar Exam Remote Proctoring

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

We write to you on behalf of the Electronic Frontier Foundation, a San Francisco-based non-profit organization that works to protect civil liberties in the digital age. EFF represents over 30,000 members, including thousands of supporters in California. We strongly oppose the use of ExamSoft to remotely proctor the California Bar Examination because this program would significantly invade the privacy and threaten the security of Bar applicants. EFF respectfully asks the California Bar to devise an alternative option for the approximately 5000 expected test takers this October, and on any future date.

While we echo the sentiments of our colleagues at ACLU of California in their letter to the Court decrying the civil rights concerns with facial recognition software,¹ this letter focuses specifically on the privacy and security issues with ExamSoft.

Through ExamSoft's identification verification program ExamID, the company collects and retains biometric data of each individual test taker for an extended period of time, including face prints, a retina or iris scan, fingerprint, voiceprint, or scan of hand. While ExamSoft generally offers the ability of users to opt out of some of this biometric data collection,² the California Bar has neglected to do so, instead requiring a webcam and microphone for users to take the test, forcing Bar applicants to surrender the privacy and security of their personal

¹ ACLU of California, *Advocacy Letter Re Online Bar Exam* (July 16, 2020), https://www.aclunc.org/sites/default/files/ACLU_Advocacy_Letter_re_Online_Bar_Exam.pdf.

² "Before ExamSoft collects biometric information or biometric identifiers, it will notify you, and you will have the right to consent or refuse to provide this information or identifiers." ExamSoft Worldwide, Inc., *Privacy Policy* (May 15, 2020), <https://examsoft.com/privacy-policy>.

biometric information.³ Additionally, with ExamMonitor, the remote exam proctoring program, the company has access to a computer's webcam, including audio and video access, and screen, for the duration of the exam, and thereby may observe and record personal details about test takers.

Once it has collected this personal data, ExamSoft retains the right to disclose it to a wide variety of entities. The company reserves the right to disclose personal data to their "group companies," as well as their third-party marketing partners and other third-party service providers and partners. Additionally, it can disclose this data to government entities for law enforcement and national security purposes. Lastly, ExamSoft can use test takers' personal data for personalizing its websites, improving exam-related services, and developing new services for customers.⁴

Such third-party exposure opens up test takers to a variety of privacy and security risks. In addition to discrimination concerns, the potential for test takers' data to end up in the hands of law enforcement greatly endangers test takers' privacy. Law enforcement's use of facial recognition data in particular is prone to a high level of error and has been used to infringe on constitutionally protected speech.⁵ Further, using test takers' personal information for product development is an exploitative invasion of privacy. The California Bar should not allow ExamSoft to capitalize on the present unfortunate circumstances and exploit the personal data of graduates, who must take the Bar Exam to continue with their legal careers, to improve its own services.

ExamSoft's collection of personal data also creates security risks. The company states that it retains a users' private data "for so long as required to provide the service, but in any event only for so long as required by the institution that is using the applicable ExamSoft product."⁶ We have not seen a disclosure from the California Bar about how long it intends to direct the retention of biometric and other personal data by ExamSoft. It is well known that storing large collections of private or personally-identifiable information (PII) creates the risk of a security breach, and ExamSoft's retention of data is no different. Vast troves of personal data have already leaked from one proctoring company, ProctorU, affecting over 440,000 users.⁷ While the danger of any leaked PII is significant, the danger of leaked biometric data is even more concerning. Unlike a leaked credit card or Social Security number, one cannot simply replace their face if a company fails to effectively protect the sensitive data it has been entrusted to safeguard.

This type of software has also been shown to have technical issues that could cause students to have unexpected problems while taking the exam.⁸ Additionally, this software comes

³ State Bar of California, *October 2020 Bar Exam FAQs* at 3 (Sept. 2, 2020), <https://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/October-2020-Bar-Exam-FAQs.pdf>.

⁴ ExamSoft Privacy Policy, *supra* note 2.

⁵ EFF, *Street Level Surveillance: Face Recognition* (Oct. 24, 2017), <https://www.eff.org/pages/face-recognition>.

⁶ ExamSoft Privacy Policy, *supra* note 2.

⁷ Lawrence Abrams, *ProctorU confirms data breach after database leaked online*, Bleeping Computer (August 9, 2020), <https://www.bleepingcomputer.com/news/security/proctoru-confirms-data-breach-after-database-leaked-online/>.

⁸ Dan Sullivan, *Technical glitches postpone Florida Bar exams*, Tampa Bay Times (Aug. 17, 2020),

with requirements that could disadvantage users who cannot meet them, such as requiring a laptop that is relatively new⁹ and having an Internet connection capable of 2 mbps uploads¹⁰, which is just shy of broadband speeds.¹¹ According to a 2017 American Community Survey, 26% of California households do not have broadband connections,¹² and in particular broadband access varies significantly by family income, parental education, race/ethnicity, and geography—likely affecting already disadvantaged students. Other states have canceled the use of proctoring software for their bar exams due to the inability to ensure a “secure and reliable” experience.¹³ California should take these technical issues and requirements into account when considering its use of proctoring software.

Finally, ExamSoft implicates the California Consumer Privacy Act (CCPA). The ExamSoft privacy policy takes the position that it is merely a “service provider” to a “business,” which is the California Bar, and thus “[i]f you are a California resident wishing to exercise any of your rights under the California Consumer Privacy Act (CCPA), and we collected your personal information in the context of our services, [you must] direct your request to the individual educational or examination provider.”¹⁴ Thus, responsibility for CCPA compliance falls, at a minimum, on the California Bar. The CCPA provides protections for all manner of “personal information,” including biometric data.¹⁵

The California Bar should clearly inform test takers of their protections under the CCPA. Before test takers are asked to use such an invasive piece of software, the California Bar should confirm that, at an absolute minimum, it has in place a mechanism to allow test takers to access their ExamSoft data, to opt out of the “sale”¹⁶ of their data, and to request its deletion. Students should have all of these rights without facing threat of punishment. It is bad enough that the use of ExamSoft puts the state in the regrettable position of coercing students into compromising

<https://www.tampabay.com/news/florida/2020/08/17/technical-glitches-postpone-florida-bar-exams-set-for-wednesday>.

⁹ “It blocks access to non-Examplify files on your laptop computer during administration of the exam and can be used on virtually any modern laptop, i.e., purchased within the last three to four years.” State Bar of California, *California Bar Examination, Using Laptops* (September 2, 2020),

<https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Using-Laptops>.

¹⁰ Bar Exam FAQs at 3, *supra* note 3.

¹¹ The FCC set a speed benchmark for broadband of 25 mbps download and 3 mbps upload (25 mbps/3mbps). Federal Communications Commission, *2018 Broadband Deployment Report* (Feb. 2, 2018),

<https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report>.

¹² Public Policy Institute of California, *California’s Digital Divide* (March 2019), <https://www.ppic.org/wp-content/uploads/jtf-californias-digital-divide.pdf>.

¹³ Stephanie Francis Ward, *Software provider pulls out of remotely proctored bar exams because of technology concerns*, ABA Journal (August 18, 2020), <https://www.abajournal.com/web/article/due-to-technology-concerns-software-provider-pulls-out-of-remotely-proctored-bar-exams>.

¹⁴ ExamSoft Privacy Policy, *supra* note 2.

¹⁵ Cal. Civ. Code § 1798.140(b) & (o).

¹⁶ Cal. Civ. Code § 1798.140(t). Under the CCPA, disclosure can qualify as a “sale” of data when a consumer’s personal information is transferred “by the business to another business or a third party for monetary or other valuable consideration.” While not all of ExamSoft’s arrangements may rise to this level, the California Bar should consult with ExamSoft to see if any do.



their privacy and security in exchange for their sole chance to take the Bar Exam. It should not compound that by denying them their rights under state privacy law.

We are sympathetic to the unique and unprecedented circumstances the California Bar must contend with this year. Bar applicants must take the Bar Exam to become practicing lawyers, and thus must take it by whatever means are prescribed by the California Bar. Yet a solution that forces Bar applicants to surrender the privacy and security of their personal data, including sensitive biometric information, is no solution at all.

For the foregoing reasons, EFF must respectfully oppose the California Bar's use of the ExamSoft remote proctoring service. We ask the Supreme Court of California to take seriously the risks presented by ExamSoft and pursue alternatives that do not put exam takers in jeopardy.

Please do not hesitate to reach out to us if you have any questions. You may email Lindsay Oliver at lindsay@eff.org.

Sincerely,

Jason Kelley, Associate Director of Digital Strategy
Lindsay Oliver, Activism Project Manager
Sophia Cope, Senior Staff Attorney
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