March 30, 2020

California State Bar Office of Admissions 180 Howard Street San Francisco, CA 94105

CC:

Governor Gavin Newsom 1303 10th Street, Suite 1173 Sacramento, CA 95814

Dear California State Bar Admissions Board,

We are a collective of law students who have recently graduated law school or will graduate in May 2020 and who plan on practicing law in California, as well as professors of California law schools and practitioners in California. We urge the California State Bar Admissions Board to adapt to the current crisis brought on by the COVID-19 pandemic by revising the state licensing system in California to ensure that the legal needs of our communities are met during this uncertain time. Specifically, we respectfully request that the Admissions Board enact a diploma privilege for all recent graduates and 2020 graduates who plan on taking the July 2020 Bar Exam and practicing law in California.

COVID-19 has changed the way each and every one of us navigates the world, and will affect our lives for an indeterminable amount of time. In California, a statewide stay-at-home order took effect on March 20, 2020, shutting down nonessential businesses throughout the State.2 California Governor Gavin Newsom also began preparation for a 90-day surge in cases, a reality that would require thousands of new hospital beds.3 As the State adapts to a new normal, so must law students. We must acknowledge the disproportionate impact COVID-19 has on certain populations of law students: immunocompromised students, low-income students, students who have contracted the virus, and students with significant family obligations. Enactment of diploma privilege, or the automatic admission to the Bar, for recent graduates and the class of 2020 would ensure fairness and equity to all law students. The diploma privilege should include a mechanism that allows LL.M. students to have similar access to diploma privilege. Upon successful completion of the LL.M. degree, these students are eligible to take the State Bar exam in the same way as J.D.

¹ All professors and practitioners sign in their individual capacity, unless otherwise stated.

² Mario Koran, *California scrambles to avoid Covid-19's worst-case scenario: 'It will take a heroic effort,'* The Guardian, Mar. 24, 2020, https://www.theguardian.com/us-news/2020/mar/24/california-coronavirus-cases-hospital-beds-new-york.

students. More importantly, it will allow all of us—J.D. and LL.M. graduates—to meet the needs of the clients we purport to serve.

Given the uncertainty and precariousness of the COVID-19 pandemic, State Bar associations have realized the necessity of adapting the July 2020 bar examination. For instance, on March 27, 2020, the New York Court of Appeals announced that the state's July 2020 bar exam would be postponed to an undetermined date in Fall 2020. Yet, postponing the bar exam will have grave consequences for New York. With an undetermined administration date, students do not know when they will receive their bar results, and, consequently, cannot know if and when to start preparing to retake in February 2021. The unprecedented delay will harm clients, law school graduates, employers, and the state budget. For instance, the delay will reduce the availability of counsel, thereby harming those clients most in need of legal services. The uncertain examination date will also complicate employers' hiring and employment decisions and certainly lead to hiring freezes or rescinded offers. Law school graduates' careers will be halted, resulting in greater financial insecurity, increased unemployment, and reliance on unemployment benefits. Moreover, the delay will complicate logistics for the State Bar due to the difficulty of choosing a "safe" date and the potential to reschedule multiple times. California should not opt for this messy alternative. Diploma privilege is feasible. After all, California enacted diploma privilege after the 1906 California earthquake and during WWII.4 The emergency diploma privilege is a superior alternative to postponement because it provides greater certainty and job security for law school graduates and employers and greater choice for clients. In support of our request, we set forth the reasons below:

1. Our communities in California need us now more than ever.

On March 22, 2020, several scholars whose research focuses on licensing for legal practice circulated a white paper with numerous alternatives to the traditional bar exam.5 These scholars urged the state bars to forgo traditional methods in favor of a more open licensing system that allows for the continuing flow of trained advocates into the legal system. A shortage of lawyers in the midst of a crisis would be devastating. In 2018, the National Association for Law Placement reported that 24,398 graduates of ABA-accredited law schools entered jobs that required admission to the Bar. Of those jobs, 18.5% were in the public sector (government or public interest organizations), serving the needs of those most vulnerable.6 Almost half (48.6%) were either in

⁴ *Celebrating 75 Years*, California Bar Journal, Feb. 2003, http://www.calbarjournal.com/Portals/1/documents/75th-Anniversary.pdf.

⁵ See generally, Claudio Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action* (Ohio State Univ., Moritz Coll. of Law, Ctr. for Interdisciplinary Law & Policy Studies, Legal Studies Working Paper Series No. 537, Mar. 22, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559060.

⁶ NALP, Class of 2018 National Summary Report,

https://www.nalp.org/uploads/NationalSummaryReport_Classof2018_FINAL.pdf.

the public sector or with firms under 25 lawyers. As scholars have noted, "we cannot afford to close the doors to the profession in these precarious times."

The times are precarious indeed, requiring more and not fewer legal advocates. Californians across the state have already begun to experience the toll of COVID-19 in numerous ways. For example, California is home to over 7 million small business employees which comprise nearly 50% of California employees. According to The Brookings Institution, small businesses are experiencing the brunt of COVID-19.10 Individuals are losing their jobs and associated benefits at a rapid rate. Lost income and savings coupled with new expenses for child and elder care will especially hit the working-class. Last week 3.3 million Americans applied for unemployment benefits.11 In California, the Legislative Analyst's Office recently warned that the Employment Development Department may be unable to disperse higher unemployment benefit payments for up to a year.12 With a grave economic recession on the horizon,13 families will require the assistance of sensitive legal advocates to navigate this difficult time. Further, California will need attorneys to ensure that our state's most essential workforce is not exploited. Farmworkers, medical personnel, and construction workers, among others, will need California attorneys to safeguard fundamental labor rights and advocate for appropriate remedies should our workforce experience wage theft, discrimination, and unsafe work conditions.

Individuals and families across California will likewise require housing advocates. Although Governor Newsom has enacted a moratorium on evictions, 14 the reality is that once the moratorium is lifted, thousands (if not hundreds of thousands) of families will be promptly evicted from their

7 *Id*.

- 8 Claudio Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action* (Ohio State Univ., Moritz Coll. of Law, Ctr. for Interdisciplinary Law & Policy Studies, Legal Studies Working Paper Series No. 537, Mar. 22, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559060.
- 9 U.S. Small Business Administration Office of Advocacy, 2018 Small Business Profile, https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-CA.pdf.
- 10 Sifan Lu & Joseph Parilla, What the Great Recession can tell us about the COVID-19 small business crisis, Brookings, Mar. 25, 2020, https://www.brookings.edu/blog/the-avenue/2020/03/25/what-the-great-recession-cantell-us-about-the-covid-19-small-business-crisis/ (stating "[b]ecause small businesses have greater credit constraints and are more sensitive to weak consumer demand, they are often hit the hardest in economic downturns. The COVID-19 recession is uniquely damaging to them...").
- 11 Heather Long and Alyssa Fowers, *A record 3.3 million Americans filed for unemployment benefits as the coronavirus slams economy*, The Washington Post, Mar. 26, 2020,

https://www.washingtonpost.com/business/2020/03/26/unemployment-claims-coronavirus-3-million/.

- 12 David Lightman, *California isn't ready to increase unemployment benefits in coronavirus crisis, analyst warns*, The Sacramento Bee, Mar. 25, 2020, https://www.sacbee.com/news/politics-government/the-state-worker/article241470456.html.
- 13 Ezra Klein, *How the Covid-19 recession could become a depression*, Vox, Mar. 23, 2020, https://www.vox.com/2020/3/23/21188900/coronavirus-stock-market-recession-depression-trump-jobs-unemployment (wherein Mark Zandi, chief economist at Moody's Analytics, calls the economic landscape an "economic tsunami").
- 14 Kaeleen Deese, *California Gov. Newsom declares statewide moratorium on evictions for renters hit by coronavirus*, The Hill, Mar. 27, 2020, https://thehill.com/homenews/state-watch/489910-california-gov-newsom-declares-statewide-moratorium-on-evictions-for.

housing if they are unable to provide an upfront payment of past due rent "in a timely manner." ¹⁵ The Governor's eviction moratorium merely creates an affirmative defense against nonpayment in an eviction proceeding, meaning that tenants will almost certainly need an attorney in order to benefit from this policy. This will disproportionately affect working-class persons with little to no disposable income or savings, communities of color, and other vulnerable groups.

California is also home to the second largest population of immigrants in detention. 16 As COVID-19 spreads even more into private detention centers, the need for attorneys to litigate immigration cases promptly will become even more crucial. Legal advocates and scholars have long-recognized the backlog in immigration court, 17 and this backlog will be even more burdensome on families and adjudicators alike as COVID-19 spreads. Immigration judges recently noted that COVID-19 is heavily impacting their caseload, pleading for guidance on how to act in the face of an unprecedented challenge.18 Immigration lawyers and judges recently called for a complete halt to immigration proceedings after immigration judges in San Diego openly defied the federal government's mandate to continue holding immigration proceedings.19 California Senators Kamala Harris and Dianne Feinstein, along with 22 other Senators, are deeply concerned about the potential effects of COVID-19 on immigrants in detention, and recently demanded to know what DHS procedures are in place to prevent the spread of COVID-19 in detention centers, 20 given the agency's troubling history of providing adequate healthcare for immigrant detainees.21 We will need practitioners to efficiently secure the release of detained immigrants and ensure that the backlog in cases does not result in violations under immigration laws. We will also need attorneys to continue to advocate for structural changes to the immigration detention system. We must continue to challenge the procedural and substantive actions of the heavy-handed executive agencies in charge of the safekeeping of immigrant detainees. We cannot ignore matters of due process and deprivations of individual liberty, even in times of novel national crises.

California will also need Public Defenders and District Attorneys to work together in facilitating the continued adjudication of criminal cases. We need attorneys present at arraignments,

 $^{15\} State\ of\ California,\ Executive\ Order\ N-37-20,\ https://www.gov.ca.gov/wp-content/uploads/2020/03/3.27.20-EO-N-37-20.pdf.$

¹⁶ Freedom for Immigrants, Detention by the Numbers, https://www.freedomforimmigrants.org/detention-statistics.

¹⁷ Immigration Court's Active Backlog Surpasses One Million, https://trac.syr.edu/immigration/reports/574/.

¹⁸ Cindy Carcamo et al., *Coronavirus is turning is turning an overloaded immigration system into a 'tinderbox'*, The Los Angeles Times, March 18, 2020, https://www.latimes.com/california/story/2020-03-18/coronavirus-strains-immigration-system

¹⁹ Julie Watson and Amy Taxin, *Lawyers, judges push to close immigration courts amid virus*, AP, March 26, 2020, https://apnews.com/45db0baf0a10382460d3ed87cc622965

²⁰ Kamala Harris, et al., *Letter to Acting DHS Secretary Wolf, Acting ICE Director Albence, and Acting CBP Commissioner Morgan*, United States Senate, March 18, 2020,

https://www.harris.senate.gov/imo/media/doc/Harris%20 Letter%20 re%20 Preparedness%20 in%20 DHS%20 Facilities.pdf

²¹ Blake Ellis and Melanie Hicken, *Medical care in immigrant detention centers under fire*, CNN, Oct. 14, 2019, https://www.cnn.com/2019/10/04/us/immigrant-medical-care-wellpath-invs/index.html

advocating on behalf of their clients at preliminary hearings, delivering pre-trial motions, negotiating plea deals, and preparing for trials. Lawyers will be needed at the appellate level too, to vindicate the rights of clients should any constitutional violations emerge. The Sixth Amendment mandate is clear: every criminal defendant has the right to the assistance of counsel free of charge. This mandate must be upheld, especially during these uncertain times, when our most vulnerable populations are particularly defenseless.

2. The alternatives to the diploma privilege licensing scheme are detrimental to public health at worst and inefficient at best.

The scholars who authored white paper referenced above noted that there are six potential alternative licensing schemes for states to consider: 1) postponement; 2) online exams; 3) exams administered to small groups; 4) emergency diploma privilege; 5) emergency-diploma privilegeplus; and 6) supervised practice.22 The authors of the white paper clearly stated that the first three options were likely to fail. Despite these recommendations, New York decided on March 27, 2020, to postpone the July 2020 Bar Exam.23

We understand that California may want to follow in the footsteps of New York in choosing to postpone the exam. However, this would be a grave public health mistake. As epidemiologists, virologists, and public health officials have noted, COVID-19 infections (like other outbreaks) will have a progression that consists of second and potentially third waves.²⁴ Given that vaccinations and preventative medical therapies will not open to the market for at least a year, the potential for another outbreak is simply a matter of time. Indeed, Wuhan is bracing itself for a second outbreak, as reports emerge of patients who had recovered from COVID-19 now testing positive once again.²⁵ A shortsighted decision to merely postpone the July exam, if met with the high probability of subsequent outbreak and a resulting further postponement, will deprive Californians of crucial legal assistance in the months ahead.

²² Claudio Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action* (Ohio State Univ., Moritz Coll. of Law, Ctr. for Interdisciplinary Law & Policy Studies, Legal Studies Working Paper Series No. 537, Mar. 22, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559060.

²³ Court of Appeals, State of New York News Advisory, https://www.nybarexam.org/Press/PressRelease_NY_BarExam.pdf?fbclid=IwAR1WsUauqMmbPk3ottNksJ5WItlO LtE-9larshRUTLeAgprRHlqxj-tkgcY.

²⁴ The effect of control strategies to reduce social mixing on outcomes of the COVID-19 epidemic in Wuhan, China: a modelling study,

https://www.thelancet.com/action/showPdf?pii=S2468-2667%2820%2930073-6.

²⁵ NPR, Mystery In Wuhan: Recovered Coronavirus Patients Test Negative ... Then Positive,

https://www.npr.org/sections/goats and soda/2020/03/27/822407626/mystery-in-wuhan-recovered-coronavirus-patients-test-negative-then-positive.

California holds the Bar Exam in massive venues, such as the Oakland Convention Center, the Anaheim Convention Center, and the Pasadena Convention Center. Some venues can accommodate up to 1,500 test takers at once, as noted on the California Bar registration application. Yet, on March 16, 2020, President Donald Trump issued guidance discouraging gatherings of 10 or more people. Insisting that students sit for a bar exam before a vaccination is developed places the public in significant danger and is contrary to all public health recommendations and many governmental mandates. Indeed, this approach, while offering "some initial appeal... is very likely to fail" because of the nature of outbreak resurgences. The only reasonable solution is diploma privilege. Diploma privilege, while unique, is not unheard of. Wisconsin has a long history of diploma privilege. Given the cyclical nature of COVID-19, and the likely resurgence in the fall, any postponement will likely result in a subsequent postponement.

3. Law students will be adversely impacted by a failure to adopt diploma privilege.

First and foremost, diploma privilege will allow the legal community to meet the needs of clients and the legal system. Postponement cannot and will not meet these needs. However, diploma privilege will also address the valid concerns and worries of law students throughout the nation who seek to practice in California.

Put simply, postponement risks the physical health of law students and test administrators. It is unclear when COVID-19 will subside, and, as mentioned above, there is research to suggest COVID-19 will come in waves. Postponement still calls for students to sit in large groups for two days, placing them at completely undue risk for COVID-19. Further, those students who are immunocompromised, or live with friends and family members at an increased risk, will be at a disproportionate risk of infection. Many students will feel uncomfortable exposing themselves to potential illness, and some may choose to forgo the exam completely out of a precaution for themselves and their loved ones. The question is not whether a postponed exam will lead to further infections but rather how many.

Postponement also opens the door for an incredible number of questions for law students and employers. Many law students planned to begin working with employers starting late Summer or Fall 2020. If the California Bar Exam were to be postponed, it is unclear if students will begin

²⁶ July 2020 California Bar Examination, http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/July-2020-California-Bar-Examination.

²⁷ Knvul Sheikh, *No More than 10 People in One Place, Trump Said. But Why? The New York Times*, Mar. 16, 2020, https://www.nytimes.com/2020/03/16/health/coronavirus-social-distancing-crowd-size.html.

²⁸ Supra note 3 at 3.

²⁹ WIS. SUP. CT. R. 40.03.

³⁰ Alexi Cohan, *Coronavirus in U.S. likely to resurge in the fall, virologist predicts*, Boston Herald, Mar. 25, 2020, https://www.bostonherald.com/2020/03/25/coronavirus-in-u-s-likely-to-resurge-in-the-fall-virologist-predicts/.

working, as planned. Will employers force students to defer the start of their employment to a later date? Job deferment was an unfortunate reality for students in the midst of the 2008 economic downturn. Deferment would have a devastating impact on LL.M students, whose immigration status may be affected as many jobs are contingent on Bar passage. Others, such as Public Defenders and District Attorneys, are largely litigators, representing clients daily in court. Postponement means they simply cannot start working, altogether, until they pass the Bar. For many international LL.M students returning to their home countries, employers require Bar admission to provide cross-jurisdictional legal services, and it is unlikely they will wait for LL.M students to study and complete the Bar exam at a later date. Such uncertainty around the job market will likely have an adverse impact on the number of applicants to law schools, as it did post-2008.

For those students with limited means, it is unclear how they will financially support themselves, and their families, if their employment starts at a later date. For all, it is unclear if students will be expected to begin making payments on their student loans this year. For those employers who have the resources to still hire students on-schedule, many job start-dates begin as early as August 2020. Will students be expected to work full-time while also studying for the California Bar Exam? This is an unreasonable expectation, as the Bar Exam is unlike most exams. In those years not plagued by a pandemic and economic downturn, students dedicated 2-3 months to studying for the Exam, full-time. Especially among those sectors with high caseloads and long hours, studying for the Exam while working full-time creates immense anxiety. Worse, many students who are the first in their families to attend college and now law school may feel the weight of such a new and unexpected hurdle, and forgo the exam.

Lastly, we cannot discount the toll COVID-19 has had on the mental health of law students across the country. Students are suffering educational, familial, and financial disruptions. Students have been suddenly booted from law school campuses, forcing students to scramble for housing.31 Many have lost full- or part-time jobs to support themselves and their families. Still others have been directly infected with COVID-19, or are caring for those infected or at-risk. Now, law students must grapple with the reality that they may become lawyers much later than anticipated, impacting life and employment plans. Many LL.M. students are foreign-trained but live locally with their families, and need to be able to take part in the legal market just like J.D. students. Those LL.M. students intending to practice internationally will be required to support local small businesses who depend on international trade to support them with their cross-jurisdictional capabilities.

In the midst of sudden chaos, law students are still expected to complete their graduation requirements, including attending virtual class. It is no secret that the legal profession has a mental health crisis, with close to a third of lawyers reporting depression and two-thirds reporting

³¹ Abigail Hess, *Harvard gives students 5 days to evacuate dorms over coronavirus fears--here's what students have to say*, CNBC, Mar. 10, 2020, https://www.cnbc.com/2020/03/10/harvard-gives-students-5-days-to-evacuate-dorms-over-coronavirus-fears.html.

anxiety.32 These data will only look increasingly grim post-pandemic. Diploma privilege is the humane alternative to postponement and, in light of current circumstances that evolve daily and are impossible to predict, is the only route that can offer clarity and certainty to the Bar.

For the aforementioned reasons, we the undersigned request that the California State Bar Admissions Board recognize the imminent need for legal advocates and take the most humane, public-health conscious, and ethical approach by enacting a diploma privilege licensing scheme.

Just as our colleagues in medical schools have been called upon to join the front lines fighting COVID-19,33 so too are attorneys needed to fight for the rights of individuals most affected by this pandemic. We implore California to display leadership during these trying times and pave the way for the timely delivery of legal services.

In solidarity with the communities we serve,

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³² Lizzy McLellan, *Lawyers Reveal True Depth of Mental Health Struggles*, Law.com, Feb. 19, 2020, https://www.law.com/2020/02/19/lawyers-reveal-true-depth-of-the-mental-health-struggles/.

³³ Emma Goldberg, *Early Graduation Could Send Medical Students to Virus Front Lines*, The New York Times, Mar. 26, 2020, https://www.nytimes.com/2020/03/26/health/coronavirus-medical-students-graduation.html.

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