

Hon. Janet DiFiore  
Chief Judge

July 13, 2020

Hon. Michael Garcia  
Associate Judge

The New York Court of Appeals  
20 Eagle Street  
Albany, New York 12207

CC: New York Board of Law Examiners

Dear Chief Judge DiFiore and Judge Garcia,

We are a coalition of recent law school graduates, practitioners, legal academics, and other interested members of the legal community who write to respectfully request a hearing before the Court to discuss its planned administration of the September bar exam. Recent developments suggest that the COVID-19 pandemic will pose a serious threat to the health of examinees, exam proctors, and the general public in September. The time is ripe for a collaborative discussion of reasonable alternatives to in-person examination. We ask that the Court act swiftly to grant our request for a hearing.

As the Court knows, COVID-19 has caused an unprecedented public health crisis, leaving no individual or institution unaffected. The State of New York has suffered greatly, and the need for newly licensed attorneys in our communities has only been compounded by the outbreak. In addition to the general suffering that COVID-19 has wreaked—illness, death, and overwhelming mental stress—law graduates face downstream consequences of the virus, including an economic downturn, high unemployment rates, lack of childcare, and uncertain living situations and access to health insurance.<sup>1</sup>

COVID-19 has disproportionately impacted Black and Latinx communities in New York<sup>2</sup> and throughout the country.<sup>3</sup> Further, a national movement for Black lives has led many examinees to devote time and energy to racial justice advocacy. Ongoing violence against Black people imposes a psychological burden

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<sup>1</sup> Vania M. Smith, *Diploma Privilege: What This Moment Demands*, JURIST (June 26, 2020), <https://www.jurist.org/commentary/2020/06/vania-smith-diploma-privilege-racial-economic-inequities/> [<https://perma.cc/N9WC-QU37>].

<sup>2</sup> *Findings from the COVID Impact Survey Relevant to Understand the Disproportionate Impact of COVID-19 on Communities of Color: Hearing Before the H. Comm. on Ways & Means*, 116th Cong. (2020) (statement of Nicholas R. Hart, President, Data Foundation), <https://static1.squarespace.com/static/5e8769b34812765cff8111f7/t/5ed92a620cfa72666c8dc2a1/1591290499024/Nick+Hart+Statement+on+COVID+Disproportionate+Impacts-6-3-2020.pdf> [<https://perma.cc/Z2V4-LN43>]; *see also Fatalities*, N.Y. ST. DEP'T HEALTH, <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes> [<https://perma.cc/WWH3-FVCR>] (last visited July 9, 2020).

<sup>3</sup> Richard A. Opiel, Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> [<https://perma.cc/5UPB-QULP>].

on Black examinees as they prepare for the bar exam.<sup>4</sup> The New York legal community already falls short of reflecting the diversity of our state;<sup>5</sup> the current plan to administer the exam in person on September 9–10 is likely to exacerbate this disparity.

With the exam a mere eight weeks away, examinees have begun studying in earnest. Preparing to take the bar is a full-time commitment, which often demands forty hours or more per week of study; even in non-pandemic conditions, this burden is a heavy one. It is time to revisit whether the exam, as the Court currently expects to administer it, is a reasonable and safe way to license a new class of attorneys during an ongoing, unprecedented health crisis.

The pandemic will not pause for bar study. COVID-19 cases and hospitalizations have climbed precipitously throughout the country, indicating a nationwide failure to contain the pandemic.<sup>6</sup> At the time of writing, the number of new cases nationally has increased by 68% in the past fourteen days.<sup>7</sup> The United States has reached over 3 million reported cases and at least 132,000 deaths.<sup>8</sup> It is likely that reported cases will continue to rise through the September exam date.<sup>9</sup> An exam like New York's, to which examinees typically travel from all over the nation,<sup>10</sup> calls for a sober analysis of its potential risks.

Public policies adopted in response to the public health emergency also merit consideration when determining how best to proceed with the bar exam. For example, Governor Andrew Cuomo's recent executive order requiring travelers from states with high volumes of COVID-19 cases to quarantine for fourteen days upon entering New York<sup>11</sup> raises logistical and financial obstacles for examinees traveling from out of state.<sup>12</sup> The near-certainty that new outbreaks will spread means that, as September nears,

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<sup>4</sup> See Alyssa Flowers & William Wan, *Depression and Anxiety Spiked Among Black Americans After George Floyd's Death*, WASH. POST (June 12, 2020), <https://www.washingtonpost.com/health/2020/06/12/mental-health-george-floyd-census/> [<https://perma.cc/Y7VL-ARSW>].

<sup>5</sup> A 2016 survey of New York City law firms found that only 20.6% of attorneys were people of color and only 2.3% of equity partners were women of color. DIVERSITY BENCHMARKING REPORT 2016, N.Y.C. BAR ASS'N 1,7 (2016), <http://documents.nycbar.org/files/BenchmarkingReport2016.pdf> [<https://perma.cc/2JW7-TZPT>].

<sup>6</sup> See *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> [<https://perma.cc/48LA-WBNA>] (last visited July 9, 2020).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; see also *Cases in the U.S.*, Centers for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> [<https://perma.cc/L3B5-74RW>] (last visited July 9, 2020).

<sup>9</sup> Sheryl Gay Stolberg & Noah Weiland, *Fauci Says U.S. Could Reach 100,000 Virus Cases a Day as Warnings Grow Darker*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/us/politics/fauci-coronavirus.html> [<https://perma.cc/85MA-R4NY>].

<sup>10</sup> See *New York Bar Exam 2019 Statistics*, N.Y. ST. BOARD L. EXAMINERS, [https://www.nybarexam.org/ExamStats/2019\\_NY\\_Bar\\_Exam\\_PassRates.pdf](https://www.nybarexam.org/ExamStats/2019_NY_Bar_Exam_PassRates.pdf) [<https://perma.cc/7F76-FT45>] (last visited July 9, 2020) (showing that nearly ten thousand applicants from out-of-state and foreign law schools sat for the New York bar exam in 2019); see also *N.Y. Bar Exam Pass Rates 2004–2019*, N.Y. ST. BOARD L. EXAMINERS, [https://www.nybarexam.org/ExamStats/NYBarExam\\_AnnualPassRates\\_2004-2019.pdf](https://www.nybarexam.org/ExamStats/NYBarExam_AnnualPassRates_2004-2019.pdf) [<https://perma.cc/QMK4-VA4N>] (last visited July 9, 2020).

<sup>11</sup> Exec. Order No. 205 (June 24, 2020), <https://www.governor.ny.gov/news/no-205-quarantine-restrictions-travelers-arriving-new-york> [<https://perma.cc/U4MJ-QKAN>] (placing quarantine restrictions on travelers arriving in New York from states experiencing increased prevalence of COVID-19).

<sup>12</sup> Because the average cost of overnight accommodations in New York City is \$299, many out-of-state examinees wishing to comply with the fourteen-day quarantine requirement will be required to spend more than \$4000 to sit for the examination. See S. Lock, *Overnight Accommodation Costs in New York from 2013 to 2019, by Month*,

examinees may have to forgo the exam to comply with the governor's executive order. The financial pressure on applicants to ignore the quarantine directive in order to take the exam poses a threat to public health.

As many of us prepare to take the exam, the lack of transparency and clarity about the BOLE's plans is a source of frustration and anxiety. Though the BOLE faces understandable and significant challenges in adapting to the current situation, it is unclear to law school graduates whether the board is aware of the myriad ways in which the pandemic affects our ability to study and sit for the bar exam. For instance, the BOLE initially directed graduates to sign up for exams in other jurisdictions, and many graduates followed this advice. However, graduates who registered in states that have moved their exams online are now left with no clear pathway to New York licensure.<sup>13</sup> Further, graduates are unsure whether the BOLE has adequately considered suitable alternatives to the bar exam in response to these extraordinary circumstances.

To that end, we respectfully request that the Court schedule a virtual hearing. We ask that the Court affirmatively invite all examinees registered for the September bar exam to submit comments (either written or live) and allow interested parties, such as law schools and legal employers, to submit comments. We further ask that representatives from the BOLE be present at any such hearing. Other jurisdictions, such as Oregon,<sup>14</sup> Utah,<sup>15</sup> and California<sup>16</sup> granted hearings to potential bar examinees, and we believe New York can and should do the same.

A letter cannot capture the number or severity of the challenges that COVID-19 has placed in our collective path to licensure. As candidates eager to serve the people of New York, we ask that you give us the opportunity to tell you about the challenges ourselves. We hope to arrive at an outcome that allows us to join the New York legal profession in a safe and timely manner, so that we may provide outstanding service to our communities and promote a more just society.

With great respect,

United for Diploma Privilege New York, on behalf of over 1,500 undersigned

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STATISTA (May 29, 2020), <https://www.statista.com/statistics/308777/overnight-accommodation-costs-new-york-by-month/> [<https://perma.cc/THD9-JMSW>].

<sup>13</sup> The National Conference of Bar Examiners does not consider its remote exam to be equivalent to its "full" Uniform Bar Examination, which means that remote exam scores are not ordinarily portable. Chris Villani, *Mass. Cancels In-Person Bar Exam, Will Test Remotely*, LAW360 (July 1, 2020), <https://www.law360.com/articles/1288465/mass-cancels-in-person-bar-exam-will-test-remotely> [<https://perma.cc/R2G6-RTXT>].

<sup>14</sup> Karen Sloan, *National Momentum Builds for Diploma Privilege as Oregon Makes Bar Exam Optional*, LAW.COM (June 30, 2020), <https://www.law.com/2020/06/30/national-momentum-builds-for-diploma-privilege-as-oregon-makes-bar-exam-optional/> [<https://perma.cc/D3GZ-VGSU>].

<sup>15</sup> *Id.*

<sup>16</sup> Cheryl Miller, *Virtual Hearing Will Give Law Grads Voice About Plans for Fall Bar Exam*, LAW.COM (July 1, 2020), <https://www.law.com/therecorder/2020/07/01/virtual-hearing-will-give-law-grads-voice-about-plans-for-fall-bar-exam/> [<https://perma.cc/LWJ8-58VU>].

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